

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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MICHAEL LEE PHILIPS, et al., )

Plaintiffs )

v. )

Civil No. 342882

BOARD OF TRUSTEES OF )  
MONTGOMERY COLLEGE, )

Defendant. )  
\_\_\_\_\_)

**OPINION AND ORDER**

This matter comes before the Court on the Defendant's Motion to Dismiss Plaintiffs' Complaint. (D.E. #13). Defendant moves to dismiss the Complaint pursuant to Maryland Rule 2-332(b) for failure to state a claim upon which relief can be granted. Plaintiffs oppose Defendant's Motion. (D.E. #17). On May 19, 2011 the Defendant filed a Reply in further support of its Motion. (D.E. # 27). On May 25, 2011, the parties appeared, through counsel, before the Court for a hearing on the Defendant's Motion to Dismiss. At the conclusion of this hearing, the Court took the matter under advisement.

**BACKGROUND**

On January 20, 2011, Michael Lee Philips, Patricia Fenati and David Drake (hereinafter the "Plaintiffs") filed a two-count complaint against the Board of Trustees of Montgomery College (hereinafter the "Board"). In both Counts, Plaintiffs challenge the Board's tuition policy, which affords recent graduates of Montgomery County public high schools the right to attend Montgomery College at in-county tuition rates. Plaintiffs assert that the Board's tuition rate policy violates state law (Md. Code An. Educ. § 16-310, *et al.* (Count I)), as well as federal law (8 U.S.C. § 1621 (Count II)).

Montgomery College is a public college currently serving over 60,000 students. By statute, the Board exercises general control over the college. Pursuant to Md. Code Ann. Educ.

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§ 16-103(c), the Board has the power to “adopt reasonable rules, regulations, or bylaws to carry out the provisions of” § 16-103. Md. Code Ann. Educ. § 16-103(c). In regard to student tuition, the Board has the discretion to “charge students reasonable tuition and fees set by [them] with a view to making college education available to all qualified individuals at low cost.” Md Code Ann. Educ. § 16-103(j).

In November 2010, the Board adopted a resolution incorporating an in-county tuition policy into College Policy 45003. This policy establishes three categories of tuition rates: a County Rate (“C Rate”), a State Rate (“S Rate”), and an Out of State Rate (“OS Rate”). The Board determined to charge, among others, “graduate[s] from a Montgomery County Public School within the past three years” the “C Rate.”<sup>1</sup> The “C Rate” is the lowest tuition rate, followed by the “S Rate,” and then the “OS Rate.”

In their Complaint, Plaintiffs ask that this Court:

- (1) Declare unlawful Defendant Board’s long-standing policy of allowing students who enroll at Montgomery College within three years of graduating from a Montgomery County public high school to pay reduced, in-county tuition rates regardless of their place of residence or status as unlawfully present aliens, and
- (2) Enjoin Defendant Board from continuing to enforce or otherwise carry out its unlawful policy. Complaint, pp. 15-16.

On March 18, 2011, the Board filed a Motion to Dismiss the Plaintiffs’ Complaint. (D.E. # 13). The Board seeks dismissal of Plaintiffs’ Complaint on the following grounds:

- (1) Congress entrusted enforcement of 8 U.S.C. § 1621 to the Secretary of Homeland Security, not Plaintiffs, and created no private right of action in these individuals,
- (2) Md. Code Ann. Educ. § 16-310 and COMAR § 13B.07.02.03 have no associated private right of action, and
- (3) Plaintiffs have failed to allege the essential elements necessary for an award of injunctive relief. Board’s Memorandum of Points & Authorities in Support of Motion to Dismiss, p. 2.

On April 5, 2011, Plaintiffs filed their Opposition to the Board’s Motion to Dismiss. (D.E. # 17). On May 19, 2011, the Board filed a Response. (D.E. # 27). On May 25, 2011, the

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<sup>1</sup> The other categories of students eligible for the C Rate are Montgomery County residents, regional students, and current students in a Montgomery County public school.

parties appeared before the Court for a hearing on the Board's Motion to Dismiss. Following this hearing, the Court took the matter under advisement.

On May 31, 2011 the Plaintiffs filed a Motion for Leave to File a Supplemental Response (D.E. # 30), which the Board opposed (D.E. # 31). By Order dated August 15, 2011 the Court granted Plaintiffs' Motion for Leave to File a Supplemental Response.

## DISCUSSION

### *A. Standard of Review on a Motion to Dismiss*

A motion to dismiss for failure to state a claim tests the sufficiency of the pleadings. Afamefune v. Suburban Hosp., Inc., 385 Md. 677, 682 (2005). When considering a motion to dismiss for failure to state a claim, the Court must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them. RRC Northeast, LLC v. BAA Md., Inc., 413 Md. 638, 643-44 (2010). The Court may order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff. Id.

The Court will first address Count II of Plaintiffs' two-count Complaint.

### *B. Plaintiffs Cannot Maintain a Private Right of Action under 8 U.S.C. § 1621 (Count II)*

#### 1. Maryland Courts Apply Federal Law to Attempts to Enforce Federal Statutes.

Plaintiffs assert that their status as Maryland taxpayers entitles them to sue to enforce a federal statute, and that as such they do not need a private right of action under 8 U.S.C. § 1621. Plaintiffs' assertion is incorrect. As the Maryland Court of Appeals has stated, "It has long been settled that when an action is brought in a state court to enforce rights or claims under federal law, the Supremacy Clause of the United States Constitution requires that federal law and policy be applied by the state court." County Executive of Prince George's County v. Doe, 300 Md. 445, 454 (1984). To determine whether a federal statute confers a private right of action,

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Maryland courts must apply federal law. Pace v. State, 195 Md. 32, 46-47 (Md. Ct. Spec. App. 2010) (finding that the plaintiff could not enforce any duties imposed by the National School Lunch Act, 42 U.S.C. § 1751 *et seq.* (2006) against State of Maryland defendants because Congress did not intend to confer a private cause of action on an individual with special dietary needs). Plaintiffs' contention that their status as Maryland taxpayers is sufficient to enforce federal law plainly violates the Supremacy Clause of the United States Constitution and the applicable case law holding that federal law must be applied to determine rights asserted under federal statutes. Thus, the Court must apply federal law to determine whether Plaintiffs can maintain a private right of action under 8 U.S.C. § 1621.

The Court notes that Plaintiffs cite Murray v. Comptroller of the Treasury, 241 Md. 383 (1966), in their Supplemental Response (D.E. # 30) as an example of a Maryland taxpayer challenging acts of state or local government officials on the grounds that the acts were illegal or *ultra vires* under federal law. However, the Murray case is irrelevant to the issues before this Court because Murray deals with self-executing *federal constitutional claims*, for which a private right of action will lie, and does not involve a *federal statutory claim*.

## 2. The Sandoval Test

In Alexander v. Sandoval, 532 U.S. 275 (2001), the U.S. Supreme Court found that “private rights of action to enforce federal law must be created by Congress.” Sandoval 532 U.S. at 286. In accordance with Sandoval, the judicial task is to “interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” Id. Under the Sandoval test, the text of the statute is the focus of the inquiry. In re Mutual Funds Inv. Litig., 384 F.Supp.2d 845, 870, (D. Md. 2005) (citing Sandoval, 532 U.S. at 287-288).

Following this focus, Maryland's federal courts have engaged in a two-step inquiry to determine whether Congress intended to create an implied private right of action. First, the courts must determine whether the language of the statute contains “rights-creating language.” Gabelli Global Multimedia Trust Inc. v. Western Inv. LLC, 700 F.Supp.2d 748, 754 (D. Md. 2010) (quoting Sandoval, 532 U.S. at 288). Next, if the “rights-creating” language is present, the

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court must then inspect whether “the statute’s remedial schemes entrust government agencies or private parties with the primary responsibility of statutory enforcement.” Gabelli, 700 F.Supp.2d at 754. As such, it is clear to the Court that there must be rights-creating language as well as a remedy for private party enforcement, or there is no private right of action.

Plaintiffs move, in Count II of their Complaint, to enforce 8 U.S.C. § 1621, which provides, in relevant part:

Notwithstanding any other provision of law and except as provided in subsections (b) and (d), an alien who is not:

- (1) a qualified alien (as defined in section 431 [8 USCS § 1641]),
- (2) a nonimmigrant under the Immigration and Nationality Act, or
- (3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 USCS § 1182(d)(5) for less than one year,

is not eligible for any State or local public benefit (as defined in subsection (c)).  
8 U.S.C. § 1621(a).

Subsection (c) includes payments or assistance for postsecondary education as a State or local public benefit. 8 U.S.C. § 1621(c)(1)(B).

Focusing on the text of 8 U.S.C. Section 1621, it is apparent that there is no rights-creating language conferring rights on, or even mentioning taxpayers such as Plaintiffs. Additionally, and most notably, 8 U.S.C. § 1103(a)(1) provides as follows:

The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers[.] 8 U.S.C. § 1103(a)(1).

As stated in Sandoval, “[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” Sandoval, 532 U.S. at 290. The language employed by Congress in 8 U.S.C. § 1103(a)(1) indicates that the Secretary of Homeland Security ~~is charged with the statutory~~ enforcement of 8 U.S.C. § 1621, not the

Plaintiffs. This provision clearly takes precedence over any argument of taxpayer standing. For these reasons, the Court finds that the Plaintiffs' cannot maintain a private right of action under 8 U.S.C. § 1621, and Count II of the Complaint is hereby dismissed.

The Court will next address Count I of Plaintiff's Complaint.

C. *Plaintiffs Cannot Maintain a Private Right of Action under Md. Code Ann. Educ. § 16-310 and COMAR § 13B.07.02.03*

1. A Plaintiff Must Have a Private Right of Action to Enforce an Alleged State Statutory Violation.

Similar to their federal argument, Plaintiffs contend that they do not need a private right of action under Md. Code Ann. Educ. § 16-310 and COMAR § 13B.07.02.03 in order to state a claim for taxpayer relief. Plaintiffs' contention is based on a number of Maryland cases dating back to 1869 that have permitted Maryland taxpayer-plaintiffs to bring suit to enjoin illegal and *ultra vires* acts of public officials where those acts are reasonably likely to result in pecuniary loss or an increase in taxes. Citizens Planning and Housing Ass'n v. County Exec., 273 Md. 333, 339 (1974); Castle Farms Dairy Stores, Inc. v. Lexington Market Auth., 193 Md. 472, 482 (1949); Baltimore v. Gill, 31 Md. 375, 395 (1869). Notably, none of the taxpayer-plaintiffs in the cases cited by Plaintiffs alleged a violation of a Maryland statute, let alone sought to enforce any portion of Maryland's Education Code.<sup>2</sup>

Additionally, Plaintiffs' contention conflicts with a recent pronouncement by the Maryland Court of Appeals that "[w]here the legislature has intended to create a private cause of

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<sup>2</sup> West Fayette Street, LLP v. Mayor of Baltimore, 407 Md. 253 (2009) (challenging a Land Disposition Agreement entered by the Mayor of Baltimore and City Council of Baltimore based on violation of the Baltimore City Charter); Inlet Assocs. v. Assateague House Condominium Ass'n, 313 Md. 413 (1988) (challenging the City Council of Ocean City's transfer of public property and riparian rights based on a violation of Ocean City's Charter); Citizens Planning and Housing Ass'n v. County Exec., 273 Md. 333 (1974) (challenging the Baltimore County Executive's government reorganization scheme based on a violation of the Baltimore County Charter); Thomas v. Howard County, 261 Md. 422 (1971) (seeking to restrain Howard County officials from failing to collect permitting fees based on a violation of the Howard County Plumbing Code); Castle Farm Dairy Stores, Inc. v. Lexington Market Auth., 193 Md. 472 (1949) (challenging the Lexington Market Authority Act based on a violation of the Maryland Constitution); Baltimore v. Gill, 31 Md. 375 (1869) (challenging a Baltimore City ordinance because it was passed in violation of Article XI, Section 7 of the Maryland Constitution).

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action for violation of a statute, it has done so explicitly.” Walmart Stores, Inc. v. Holmes, 416 Md. 346, 376 n.8 (2010). Finally, other Maryland appellate decisions have routinely denied requests to imply a private right of action where the statute at issue does not specifically provide for one. Walton v. Mariner Health of Maryland, Inc., 391 Md. 643, 672 (2006) (refusing to recognize a private right of action under the Maryland Health-General Article when the nursing home elects not to pursue the remedies provided under the Health-General Article); Worsham v. Ehrlich, 181 Md. App. 711, 728-31 (Md. Ct. Spec. App. 2008) (finding no private right of action implied under the Telephone Consumer Protection Act and Maryland counterpart); Thrasher v. Homecomings Financial Network, Inc., 154 Md. App. 77, 85 (Md. Ct. Spec. App. 2003) (finding that the Maryland Financial Institutions Article does not create a private cause of action against a licensed mortgage lender who allows a mortgage to be executed at a place for which the person does not have a license to conduct business).

Therefore, this Court concludes that Plaintiffs must demonstrate that the legislature has intended to create a private cause of action for a violation of Md. Code Ann. Educ. § 16-310.

2. Plaintiffs Cannot Establish a Private Right of Action with Respect to Their State Law Claims.

The Board argues that Plaintiffs’ Md. Code Ann. Educ. § 16-310 and COMAR 13B.07.02.03 claim (Count I) must be dismissed because the Maryland legislature conferred no private right of action in connection with that statute or regulation. The Board is correct.

Section Md. Code Ann. Educ. 16-310(a)(1) provides in relevant part:

Subject to paragraphs (2), (3), (4), (5), and (6) of this subsection and subsection (f) of this section, any student who attends a community college in this State and is not a resident of this State shall pay, in addition to the student tuition and fees payable by a county resident, an out-of-state fee [...]. Md. Code Ann. Educ. 16-310(a)(1).

In addition, Section 16-310(b)(1) provides that, subject to certain exceptions, “any student who attends a community college not supported by the county in which the student resides shall pay [...], an out-of-county or out-of-region fee [...].” Md. Code Ann. Educ. 16-310(b)(1).

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COMAR § 13.B.07.02.03(c)(1) provides that out-of-state students shall pay tuition in accordance with § 16-310(a) of the Education Article. Subsection (c)(1) provides that out-of-county or out-of-region students shall pay tuition in accordance with § 16-310(b) of the Education Article.

Plaintiffs move to enforce Md. Code Ann. Educ. § 16-310 and COMAR 13B.07.02.03, arguing that:

Montgomery College is required to charge out-of-state tuition to any student who attends a community college in the State of Maryland and is not a resident of the State, and is required to charge out-of-county tuition to any student who, although a resident of the State, attends a community college not supported by the county in which the student resides. Complaint ¶ 39.

However, the Court agrees with the Board's position that even if this Court had the power to recognize a common law taxpayer-plaintiff claim for a violation of a state statute, the Maryland legislature's existing statutory scheme entrusting enforcement of Md. Code Ann. Educ. Section 16-310 and COMAR Section 13. B.07.02.03 to the Maryland Higher Education Commission (MHEC) precludes the recognition of any common law individual's right to bring such a claim. It is clear that the Maryland Legislature entrusted government agencies, in this case the MHEC, with the responsibility for statutory enforcement of the provisions relating to financial aid. Gabelli, 700 F. Supp. 2d at 754; *See* Md. Code Ann. Educ. § 11-105(c) (charging MHEC with the responsibility "to assure that State funds for community colleges are spent prudently and in accordance with State guidelines"). Further, Md. Code Ann. Educ. § 11-107 gives MHEC the express authority to seek an injunction or other judicial remedy for violations. The Court finds that it would be inconsistent with this legislative scheme for the Plaintiffs to be able to proceed with a private right of action. Silkworth v. Ryder Truck Rental, Inc., 70 Md. App. 264, 270-271 (Md. Ct. Spec. App. 2009). Additionally, neither the statute nor the regulation has any "rights-creating" language, and thus they "create no implication of an intent to confer rights on a particular class of person." Gabelli, 700 F.Supp.2d at 758.

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Thus, it appears that the Maryland legislature did not intend to create a private cause for a violation of Md. Code Ann. Educ. § 16-310.

As such, Count I of the Plaintiffs' Complaint is dismissed for failure to state a claim. Since this Court dismisses both counts of Plaintiffs' Complaint for failure to state a claim upon which relief can be granted, the Court does not address the issue of whether Plaintiffs have failed to allege the elements necessary for an award of injunctive relief. However, the Court does note that the Complaint did not identify the requisite elements for an award of injunctive relief.

### CONCLUSION

Upon consideration of the Defendant's Motion to Dismiss (D.E. # 13), the Plaintiffs' Opposition thereto (D.E. # 17), Defendant's Reply (D.E. # 27), Plaintiffs' Supplemental Response (D.E. # 30), Defendant's Opposition to the Supplemental Response (D.E. #31), Plaintiffs' Reply (D.E. # 32), and for the reasons set forth herein and on the Record at the Hearing on May 25, 2011, it is this 15<sup>th</sup> day of August, 2011, by the Circuit Court for Montgomery County, Maryland,

**ORDERED**, that the Defendant's Motion to Dismiss is GRANTED, with prejudice.



MARIELSA A. BERNARD, Judge

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