

**Matter of Kulkarni v New York State Higher Educ.
Servs. Corp.**

2010 NY Slip Op 30386(U)

February 16, 2010

Supreme Court, Nassau County

Docket Number: 18474/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

In the Matter of the Application of

TRIAL/IAS PART 32
NASSAU COUNTY

TATJANA N. KULKARNI

Petitioner,

Index No.: 18474/09

Motion Seq. Nos.: 01, 02

- against -

Motion Dates: 10/13/09

11/05/09

NEW YORK STATE HIGHER EDUCATION
SERVICES CORPORATION,

XXX

Respondent,

for a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

The following papers have been read on this motion:

	<u>Papers Numbered</u>
<u>Notice of Petition, Memorandum of Law, Verified Petition and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion, Affidavit in Opposition to the Petition and in Support of Cross-Motion and Exhibits</u>	<u>2</u>
<u>Affirmation in Opposition to Cross-Motion and Memorandum of Law in Opposition to Cross-Motion and Reply to Affidavit in Opposition</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioner seeks an order pursuant to CPLR Article 78, mandamus to compel, compelling defendant to make a final determination of plaintiff's eligibility for her 2006-2007 freshman year New York State Tuition Assistance Program ("TAP") awards. Respondent opposes the petition and cross-moves for an order dismissing the petition or, alternatively, to stay the present proceeding.

The Court notes that there is an extenuated history with respect to petitioner and her 2006-2007 TAP application for her freshman year at Long Island University-C.W. Post Campus ("LIU-C.W. Post"). In fact, petitioner is now in her senior year at LIU-CW Post and has received TAP awards for sophomore, junior and senior years at the University.

Petitioner had brought a prior Article 78 petition before this Court in 2007, under Index Number 23267/07. Said petition was of the nature of a mandamus to review. Specifically, in that petition, petitioner was asking the court to review respondent's determination that she was not a New York State resident and therefore did not meet the criteria for her TAP award to be certified. It was during the pendency of that petition that, on or about February 26, 2008, respondent notified the TAP certifying officer of LIU-C.W. Post, Jeneane Claps, that they had changed their previous determination that petitioner had not met the New York State legal residency requirement for eligibility to certify her 2006-2007 TAP awards. Said change made petitioner's first petition moot. However, it was at that same time that Ms. Claps advised respondent that petitioner was allegedly not TAP eligible because petitioner, not a graduate of a United States high school, had failed to take an ability-to-benefit ("ATB") test prior to June 2007. It is petitioner's position, however, that she falls under an exception requiring her to take the ability-to-benefit test which states "[i]f the student has obtained the State Education Department required twenty-four core credits, they do not have to obtain a GED to fulfill the ATB (ability-to-benefit) requirement...For this academic year only, 2006-2007, students have until the end of the term to take and pass an ATB test in order to receive State aid." Nevertheless, petitioner claims that respondent failed to make a final determination with respect to her alleged inability to be certified for her 2006-2007 TAP awards due to her failure to take the ATB test. In fact, it appears that the only way petitioner was notified that she was not certified for her 2006-2007 TAP awards was during the prior petition proceedings. She first learned this information through a March 27, 2008 letter from Dorothy Oehler Nese, Assistant Attorney General and counsel for respondent, to the Supreme Court Justice handling the prior petition, Justice Angela G. Iannacci, which stated " [s]pecifically, upon information and belief, it appears that Petitioner was notified by the college that in order to qualify for a TAP award, Petitioner was required to achieve a passing score as determined by the U.S. Secretary of

Education, on a federally-approved ability to benefit (ATB) test, one of the prerequisites for a TAP award that is embodied in New York State Education Law and applicable regulations. Upon information and belief, Petitioner has failed and/or refused to take the test to date, and as a result, LIU/C.W. Post will not certify to NYSHESC that Petitioner has satisfied this mandate, and therefore, Petitioner remains ineligible to receive a TAP award- notwithstanding her status as a New York state resident.” Petitioner also allegedly learned that she was not certified for her 2006-2007 TAP awards through the April 24, 2008 affidavit of Cindy Mischitelli, Supervisor of the Tuition Assistance Program Residence Review Unit at the New York State Higher Education Services Corporation, which stated “[o]n or about February 26, 2008, I called Ms. Claps for a verbal answer to approve or deny certification; I advised Ms. Claps again that New York State residency was approved for Petitioner and that I had submitted an update transaction on the system. Ms. Claps advised that Petitioner did not meet all TAP requirements for certification; therefore, I submitted a transaction to decertify Petition for both the Fall and Spring semester of the 2006-07 academic year.”

Petitioner argues that respondent has failed to perform a duty enjoined upon it by its own regulation to make a final determination of award eligibility once petitioner’s University reported information to respondent that petitioner was not eligible for the 2006-2007 TAP awards. Petitioner cites 8 NYCRR 2205.3(e)(1)(iv) in support of her argument. 8 NYCRR 2205.3(e)(1)(iv) states that “[n]o college or vocational institution providing approved programs as defined in Education Law, section 601(4) may participate in the general, academic performance or other award programs described in this Chapter unless it has entered into written awards participation agreement with the corporation....This agreement shall set forth the college or vocational institution’s obligation to comply with all laws and regulations governing the award programs and, in addition, shall set forth such school obligation to: not certify any award recipient in the event the college or vocational institution has information indicating that the award recipient is not eligible for an award. In such event such school shall report the information to the corporation and the corporation shall commence an investigation to determine the recipient’s eligibility.” Petitioner states that, according to the November 14, 2008 affidavit of Dorothy Oehler Nese, Assistant Attorney General and counsel for respondent,

“HESC did ‘investigate’ the matter, by reaching out to LIU and inquiring into the reasons behind LIU’s refusal to certify Petitioner as TAP-eligible.” However, what petitioner contends is that after the referred to “investigation” there was never a final determination of said investigation issued by respondent. That is therefore why petitioner brings this second Article 78 proceeding.

In respondent’s Affidavit in Opposition to the Petition and in Support of Respondent’s Cross-Motion to Dismiss said Petition, respondent raises five points upon which it makes its argument to dismiss said petition. The first argument is that the court lacks subject matter jurisdiction over this proceeding requiring dismissal of the petition. Respondent cites Justice Iannacci’s decision on petitioner’s prior Article 78 petition in support of its argument that “Petitioner has received all the relief to which she was entitled that NYSHESC was able to provide, she can no longer be considered to be aggrieved as against NYSHESC, and the Petition should be dismissed, accordingly, for lack of subject matter jurisdiction.” While this Court certainly is not an appellate court, it is being called upon to interpret the language of Justice Iannacci’s decision in as far as it related to the new petition now before this Court. It is this Court’s finding that Justice Iannacci’s decision dealt with the relief requested in the petition before it, specifically a mandamus to review respondent’s final determination concerning the issue of whether petitioner fit the requisite criteria of New York State residency and did not address the new relief requested in the petition before this Court. Justice Iannacci’s decision stated “[t]he determination under review is the respondent’s initial determination that the petitioner did not meet the residency requirements for certification of eligibility for the Tuition Assistance Program (TAP) award for the Fall 2007 and Spring 2008 semesters at Long Island University-CW Post Campus (LIU). While the proceeding was pending, the respondent reevaluated the petitioner’s residency claim and withdrew the determination of ineligibility and re-certified to LIU that the petitioner met the state’s residency requirement. Thereafter, it was for LIU to determine whether the petitioner met all of the other requirements for a TAP award. This determination gave the petitioner all of the relief requested in the petition and rendered the petition academic....Finally, the petitioner’s motion to amend is also denied. The only determination made by the respondent was regarding the petitioner’s residency. The amended petition seeks review and annulment of a determination that was never made by the respondent.” First, the Court would note that the school year for which the TAP awards are at issue are the

Fall 2006 and Spring 2007 semesters, not the Fall 2007 and Spring 2008 semesters erroneously mentioned in Justice Iannacci's decision. Secondly, the decision specifically states that "[t]he only determination made by the respondent was regarding petitioner's residency." It is evident therefore, that the relief requested in the present petition before this Court was not ruled upon by Justice Iannacci as it was not before her. Therefore, respondent's argument that petitioner can no longer be considered to be aggrieved as against respondent and that the petition should be dismissed for lack of subject matter jurisdiction is without merit.

Respondent next argues that collateral estoppel and *res judicata* prevent petitioner from obtaining the relief sought herein. In support of this argument, respondent submits that the issues raised and the arguments unsuccessfully advanced by petitioner in the prior proceedings brought before Justice Iannacci are identical to those raised in the instant proceeding and therefore petitioner should be barred from re-litigating them in this forum. However, as indicated in Justice Iannacci's decision, the only issue before that court was the determination made by the respondent regarding petitioner's residency. Since petitioner's motion to amend her initial petition was denied, Justice Iannacci never ruled on the relief sought in the present petition. Consequently, respondent's argument of collateral estoppel and *res judicata* is also without merit.

Respondent argues that this proceeding is barred by the statute of limitations. However, Petitioner responds that she first demanded that respondent perform its duty and make its final determination regarding the ATB test issue by letter from her counsel dated May 12, 2009 and that respondent's refusal to do so was conveyed in a letter from their counsel dated May 26, 2009. The instant proceeding was commenced on September 10, 2009 which petitioner argues is within the four months required by the statute of limitations. The Court thereby finds that respondent's argument that this proceeding is barred by the statute of limitations is without merit.

Respondent's next argument is that this proceeding must be dismissed for failure to state a cause of action. Respondent contends that it is not required "to 'investigate' the academic credentials of the foreign high school Petitioner attended to overcome LIU's refusal to certify Petitioner for a TAP award for academic year 2006-2007....NYSHESC is neither authorized by statute to conduct an 'investigation' of the type demanded by Petitioner, nor is it equipped with the manpower to do so."

The Court notes that 8 NYCRR 2205.3(e)(1)(iv) specifically states that “[t]his agreement shall set forth the college or vocational institution’s obligation to comply with all laws and regulations governing the award programs and, in addition, shall set forth such school obligation to: not certify any award recipient in the event the college or vocational institution has information indicating that the award recipient is not eligible for an award. In such event such school shall report the information to the corporation and the corporation shall commence an investigation to determine the recipient’s eligibility.” The language in the statute states that the corporation, respondent herein, shall commence an investigation to determine the recipient’s eligibility. It does not say “may commence” and it does not state that it will only commence an investigation if it is not “in-depth” or if respondent has enough “manpower to do so.” In fact, as argued by petitioner, respondent did indeed conduct its own investigation into the issue of petitioner’s New York State residency when that was the initial reason for the non-certification of her 2006-2007 TAP awards. Furthermore, the investigation into whether or not petitioner had the recognized equivalent of a United States high school diploma is not restricted to an investigation into the academic credentials of a foreign secondary school. Petitioner claims that she has provided respondent with ample documentary proof that she has satisfied the aforementioned requirement in three different ways “based upon the Education Law, written regulations and respondent’s website-posted policy.” She is therefore asking in the petition presently before this Court that respondent investigate the proof she provided to demonstrate that she has satisfied the TAP award requirement that she has the “recognized equivalent” of a United States high school diploma. The Court thereby finds that petitioner has set forth a cause of action in the present petition.

Respondent’s final argument is that petitioner’s failure to join a necessary party precludes a grant of the relief that she seeks. Respondent claims that petitioner should be ordered to bring LIU-C.W. Post before the Court. However, the Court finds that the petition is seeking a final determination from respondent not from LIU-C.W. Post. LIU-C.W. Post reported to respondent that it would not certify petitioner’s 2006-2007 TAP awards due to her alleged failure to meet the requirement that she has the “recognized equivalent” of a United States high school diploma. The present petition seeks respondent to issue a final determination with respect that finding as set forth in the duties imposed upon it in 8 NYCRR 2205.3(e)(1)(iv). The Court thereby finds that LIU-C.W. Post is not a necessary party in the petition presently before it and

respondent's final argument is without merit.

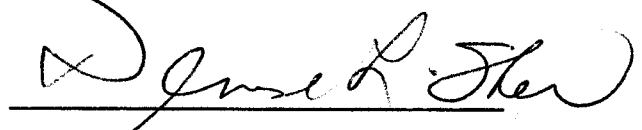
Respondent's application to stay the proceeding is moot as said application was based upon an appeal brought by petitioner with respect to Justice Iannacci's decision and that unperfected appeal was withdrawn.

Therefore, after a thorough review of the petition and the documentary evidence provided in support of same, as well as a rejection of the arguments set forth by respondent in support of its motion to dismiss said petition, the Court grants petitioner the relief sought in her petition. Respondent is hereby ordered to make a final determination of eligibility for payment of petitioner's 2006-2007 TAP awards specifically with respect to the issue of whether or not petitioner meets the requirement that she has the "recognized equivalent" of a United States high school diploma. The Court orders that said determination by respondent be with sufficient detailed findings so as to possibly avoid further judicial review.

With respect to petitioner's argument to be permitted to bring an application pursuant to CPLR Article 86 for counsel fees and other expenses incurred by petitioner as a prevailing party against the state, said argument is premature and not appropriate as part of the present petition. The procedures for filing said request are set for in CPLR §8601(b).

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

XXX

Dated: Mineola, New York
February 16, 2010

ENTERED
FEB 18 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE