

Redefining the ‘SUNY Cap’

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FAMILY LAW

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Many matrimonial practitioners are familiar with the term “SUNY Cap” wherein the parties limit their financial responsibilities to contribute towards their child’s college expenses to those costs that would be associated had their child attended New York State University (“SUNY School”) as an in-state resident. Typical language utilized for these provisions in Stipulations of Settlement / Separation Agreements would be that the parties agree to contribute on a pro-rata basis towards the costs associated with their child’s college education, after exhausting any marital college accounts (i.e. 529 Plans) and all avenues of grants, scholarships and/or financial aid, with a parent’s share of contributing towards these costs “capped” at those expenses associated with attending a SUNY School.

Absent an agreement between the parties addressing their respective contributions towards their child’s college expenses, “[w]hether to impose a SUNY cap is determined on a case-by-case basis, considering the parties’ means and the child[ren]’s educational needs.” (*Walker v. Walker*, 130 A.D.3d 805, 14 N.Y.S.3d 87 (2nd Dept. 2015); *Tishman v. Bogatin*, 94 A.D.3d 621, 622, 942 N.Y.S.2d 516 (1st Dept. 2012); see *Berliner v. Berliner*, 33 A.D.3d 745, 748, 823 N.Y.S.2d 189 (2nd Dept. 2006)).

Throwing a wrinkle into how the courts will now interpret these provisions, some of which may have been agreed upon 10 to 15 years ago while the child was of tender years, is New York’s recent implementation of the Excelsior Scholarship Program (“the Program”). The Program is being touted as a “first of its kind in the nation program” that will provide a tuition-free college education at New York’s public colleges and universities to families making up to \$125,000 a year in combined income. Specifically, the Program will be phased in over three (3) years, beginning for New Yorkers making up to \$100,000 annually in the Fall of 2017, increasing to \$110,000 in 2018 and reaching its peak of \$125,000 in 2019. Students must be enrolled in college full-time and average 30 credits per year (including summer and January semesters) in order to receive the funding. The Program has some built in flexibility, which allows any student facing hardship to pause and restart the Program or take fewer credits one semester than the other. However, there are strict requirements that the student maintain a grade point average to

successfully complete their course work and must live and work in-state for the same number of years after graduation as they received this scholarship for while in school. If a student fails to meet the requirement of living and working in-state for the same number of years after graduation as he/she received the scholarship, the scholarship is then converted into a loan which must be repaid. Significantly, the enhanced scholarship will only provide funds for tuition, not the room and board expenses, which will otherwise be the responsibility of the student / parent. Correspondingly, the *(Continued on page 23)*

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Correspondingly, the non-custodial parent who provides direct support and will be paying his/her pro-rata share of the child’s room and board college expenses will still be entitled to receive a credit for same against his/her direct child support payments. *(See, Rohrs v. Rohrs, 297 A.D.2d 317, 746 N.Y.S.2d 305 (2nd Dept. 2002); Wood v. Wood, 105 A.D.3d 637, 963 N.Y.S.2d 649 (1st Dept. 2013)).*

Prior to the implementation of the Excelsior Scholarship Program, the Courts have interpreted a SUNY Cap obligation as the parties having a responsibility to contribute to the costs associated with a SUNY school consisting of tuition, room and board regardless of whether the child was attending a SUNY school or another private institution with a higher expense. *(See, Holliday v. Holliday, 35 A.D.3d 468, 828 N.Y.S.2d 96 (2nd Dept. 2011)).* For example, if a child was attending Penn State University with an annual tuition room and board expense of \$60,000 and the expenses associated with attending SUNY Stony Brook was \$22,000, the parent’s obligations would be capped at his/her pro-rata share of the \$22,000 SUNY expense. However, now with the availability of the Program, if that same child chose to attend Penn State University, and was eligible to receive the scholarship, would the parents have any tuition obligation to contribute towards the Penn State expenses? Clearly, the room and board expenses would still be applicable given that the scholarship cannot be applied towards same.

Another issue presented by the Program is the scenario where the student accepts the scholarship and actually attends a SUNY school completing a four (4) year program and thereby having a “tuition free” college experience. However, after being one (1) year removed from college graduation no longer works in New York State or relocates outside of New York State thereby converting three (3) years of the tuition to a loan that must now be repaid. Is that the child’s obligation or does that resurrect the parent’s obligation to cover a SUNY cap contribution towards the child’s college expenses? One could argue that the Program is no different than any other scholarship provided to a child and then the child has an obligation to comply with the terms and requirements to receive the full benefits of that scholarship.

Given that the Program took effect for the first time this Fall 2017, there have been no reported cases yet addressing same but I would expect it to rear its ugly head as the Courts start applying the Excelsior Scholarship Program to the SUNY cap agreements from years ago.

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