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# The Constitutionality of Resident/Non-Resident Tuition Differentials

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# NOTES

## THE CONSTITUTIONALITY OF RESIDENT/ NON-RESIDENT TUITION DIFFERENTIALS

### A. *Introduction*

A fact which must be faced by most persons who plan to attend a state institution of higher learning outside of their home state is that, as a non-resident of the state where the institution is located, they will have to pay higher tuition fees than will a resident of that state. Depending on the institution selected, the non-resident student will be required to pay from one and one quarter to more than three times the tuition charged a resident student attending the same institution.[1] This differential can and often does exceed $1,000 per academic year, and when coupled with the increasing awareness and demands of college age students for their constitutional rights, it is not surprising that the right of state institutions of higher learning to discriminate against non-resident students in this regard has come under increasing attack in the courts during the last twelve years.[2]

The majority of the attacks on the right of a state to charge non-resident students higher tuition fees have been based on general allegations of violations of the equal protection, due process, commerce, or privileges and immunities clauses of the federal constitution.[3] However, since the Supreme Court decision in *Shapiro v. Thompson*,[4] the attacks

1. *See,* e.g., Faculty of Law and Jurisprudence 1970-1971 Bulletin, State University of New York at Buffalo, p. 54; and College of Law Bulletin 1971-72, University of Kentucky, p. 15.

2. With the exception of the isolated case of *Bryan v. Regents of University of California,* 188 Cal. 559, 205 P. 1071 (1922), all cases in this area have arisen since 1960 commencing with the case of *Newman v. Graham,* 82 Ida. 90, 349 P.2d 716 (1960).

3. *See* Kirk v. Board of Regents of the University of California, 273 Cal. App. 2d 463, 78 Cal. Rptr. 260 (1969), *appeal dismissed,* 396 U.S. 554 (1970); Johns v. Redeker, 406 F.2d 878 (8th Cir. 1969), *cert. denied,* 396 U.S. 853 (1970); Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966); Landwehr v. Regents of Univ. of Colo., 156 Colo. 1, 396 P.2d 451 (1964).

4. 394 U.S. 618 (1969).

have focused on the specific allegation that *durational residency requirements* for qualification for classification as a resident for tuition purposes constitutes an invidious discrimination in violation of the equal protection clause.[5] This contention was first raised in the very first case to attack the resident/non-resident tuition differential, *Bryan v. Regents of University of California,*[6] although in that case the attack was based on the privileges and immunities clauses of the Constitution of the State of California[7] rather than on the United States Constitution.

To date, all attacks on the *right* of a state to prescribe higher tuition for a non-resident have failed. In fact the only reported success in this area occurred in the case of *Newman v. Graham.*[8] There, a regulation of the Idaho State Board of Education, which provided that any person properly classified as a non-resident student *retained that status throughout his continuous regular term attendance* at an institution of higher learning, was declared to be arbitrary, capricious, and unreasonable. The basis of this holding was that the regulation did not afford any opportunity to show a change of residential or domiciliary status, and therefore denied equality of opportunity to persons similarly situated.[9]

It is in this area of reasonableness of the classification or reclassification of students as residents for purposes of tuition that further litigation may be expected. This stems at least in part from the lack of standards or guidelines for determining residency at many institutions of higher learning and in part from the often arbitrary and conflicting standards at the several institutions of higher learning within the same state. South Carolina, until the commencement of the 1971-72 academic year when a statewide standard of residency for tuition purposes was established,[10] presented a prime example of the latter situation. Until that time, each of the state institu-

5. Starnes v. Malkerson, 326 F. Supp. 234 (1970), *aff'd* mem., 91 S. Ct. 1231 (1971); Kirk v. Bd. of Regents, 273 Cal. App. 2d 463, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970).

6. 188 Cal. 559, 205 P. 1071 (1922).

7. *Id.* at 560, 205 P. at 1071.

8. 82 Idaho 90, 349 P.2d 716 (1960).

9. *Id.* at 95, 349 P.2d 719.

10. 57 S.C. STAT. AT LG. 711 (1971).

tions of higher learning established their own procedures and guidelines.[11] The degree of specificity of these standards varied widely, ranging from several sentences[12] to three pages.[13] At the other extreme is the State of California which in the California Education Code provides minutely detailed standards for determining residence for purposes of tuition at state institutions of higher learning.[14]

As has been previously noted, to date the right of the states to charge a higher non-resident tuition fee has been regularly upheld by the courts, and the recent Supreme Court decision in *Starns v. Malkerson* upheld the validity of a durational residency requirement for establishing residency for purposes of tuition. The remainder of this note will be devoted to an examination of the development of case law in the resident/non-resident tuition area and the proposal of guidelines and procedures for the classification of students as residents or non-residents for tuition purposes.

B. *Examination of Cases*

The first case in which the right of a state to classify citizens as resident or non-resident for the purpose of determining tuition fees was the California case of *Bryan v. Regents of University of California*[15] in 1922. Challenged here was a state statute requiring non-resident students to pay a tuition fee, (not required of residents), and which defined a non-resident student as one who had not been a *bona fide* resident of California for more than one year preceding his entrance into the university.[16] The challenge was on the basis that it violated the privileges and immunities clauses of the California Constitution, in that there was *no reasonable basis* for the classification of students as non-resident for tuition purposes. Having noted that it has been conceded that the legislature had the power to enact laws classifying citizens where the classification was not unreasonable and arbitrary, the court analo-

11. *See, e.g.*, WINTHROP COLLEGE, BULL. 1968 at 27; CLEMSON U. ANNOUNCEMENT, 1970-71 at 60; THE CITADEL, CATALOGUE, 1970-71 at 67; U. OF S.C. BULL., at A.-31.

12. *See* THE CITADEL, CATALOGUE, 1970-71 at 67.

13. *See* CLEMSON U., ANNOUNCEMENT, 1970-71 at 60.

14. WEST'S ANN. CAL. EDUC. §§ 23051 to 23059 (West 1969).

15. 188 Cal. 559, 205 P. 1071 (1922).

16. *Id.* at 560, 205 P. at 1071.

gized the residency requirement for free tuition to the residency requirement for voting. Stating that it could find no good reason why the legislature could not make a similar classification for attending a state university tuition free,[17] the court, in finding the statute not to be unreasonable or arbitrary concluded:

> Taxes are payable annually and the requirement that a student shall maintain a residence in the state of California during one taxation period as an evidence of the *bona fides* of his intention to remain a permanent resident of the state and that he is not temporarily residing within the state for the mere purpose of securing the advantages of the university, cannot be held to be an unreasonable exercise of discretion by the legislature or by the respondent.[18]

For the next thirty-eight years there were no further challenges to the resident/non-resident tuition differential. Then in 1960 the Idaho case of *Newman v. Graham*[19] reopened the attack.

The attack in *Newman* was a two pronged effort. The first challenge was directed at the right or power of the legislature to delegate to the Board of Trustees the right to establish residence requirements, and secondly, a direct attack on the regulation as being arbitrary, capricious, unreasonable, and unconstitutional.[20]

The code section challenged in the first part of the attack was I.C. § 33-3008 which provided:

> "Rules for admission of students.—The board of trustees shall ordain such rules and regulations for the admission of students to said Idaho State College as it shall deem necessary and proper. Students from other states, territories and countries may be admitted to all the privileges of said College upon paying such reasonable tuition fees as the trustees may prescribe."[21]

Although this issue was dropped by the plaintiff/respondent on oral argument, the court *held* that the legislature not having made provisions in this area, and having delegated such powers to the Board of Trustees, the ". . . rules and regulations [of the Board] are of the same force as would be a like enact-

17. *Id.* at 561, 205 P. at 1071.
18. *Id.* at 561-62, 205 P. at 1072.
19. 82 Idaho 90, 349 P.2d 716 (1960).
20. *Id.* at 93, 349 P.2d at 717.
21. *Id.* at 93, 94, 349 P.2d at 718.

ment of the Legislature, and its official interpretation placed upon the rule so enacted becomes a part of the rule."[22]

As a general rule, resident/non-resident tuition differentials are prescribed by statute. They may take the form of specific amounts prescribed by the legislative authorization for the board of trustees of the respective institutions to set tuition fees as in *Newman,* either with or without a further provision that non-resident students may or shall be charged higher fees. In South Carolina, a combination of these two approaches is followed. Section 22-22 of the South Carolina Code provides that tuition fees are to be prescribed by the boards of trustees of the various state institutions, *subject to the approval of the Budget and Control Board,* and specifically permits higher tuition fees for non-residents of South Carolina.[23] This provision is further limited in the grant of powers to the boards of trustees of the various institutions by the provision that the fees and other charges established by the trustees may not be ". . .inconsistent with statutes where the legislature undertakes to fix such fees and charges."[24] The South Carolina Legislature has in fact undertaken to fix such fees in the annual appropriations bills by either a specific statement of fees for resident and non-resident students[25] or by a provision that the fees shall be not less than the tuition for the prior academic year.[26]

The second and major part of the attack in *Newman* was on a regulation of the Board of Trustees which provided in part, "* * * Any person who is properly classified as a non-resident student *retains that status throughout continuous*

22. *Id.* at 95, 349 P.2d at 718 (citations omitted).

23. S. C. CODE ANN. § 22-22 (Supp. 1970) provides:

Tuition fees (as such term is defined in § 22-23) shall be required to be paid in such amount or amounts and under such conditions as the respective boards of trustees of such State institutions shall prescribe, with the approval of the State Budget and Control Board, hereafter in this chapter referred to as the *"State Board."* The provisions of this section shall not be construed as requiring uniformity of tuition fees at such State institutions nor shall they preclude a higher scale for nonresidents of South Carolina.

24. *See, e.g.,* S. C. CODE ANN. § 22-104(9) (Supp. 1970).

25. *See, e.g.,* 54 S. C. STAT. AT LG. 441 (1965); and 47 S. C. STAT. AT LG. 1837 (1952).

26. *See, e.g.,* 56 S.C. STAT. AT LG. 2253 (1970).

*regular term attendance* at any institution of higher learning in Idaho."[27] It was stipulated by both parties that the plaintiff/respondent had been properly classified as a non-resident student at the commencement of the 1957-58 school year, and that since September 1957 he had complied with all requirements for the establishment of residence in the state of Idaho for all purposes except to qualify as a resident student under the challenged regulations. It was further stipulated that the plaintiff had protested the assessment of non-resident tuition upon registering for his second school year and that the Board of trustees had disallowed his protest by reason of the regulation quoted above, and had ruled that he retained his non-resident status throughout continuous regular term attendance at Idaho State College.[28]

In considering the validity of this regulation, the court noted that under the interpretation of the regulation by the Board of Trustees, no opportunity was afforded the plaintiff to show a change of residential or domiciliary status, and that such denial in effect denied equality of opportunity to persons similarly situated, and for that reason the regulation was arbitrary, capricious, and unreasonable.[29] The court was careful to point out, however, that:

> The authority of the Board, through its authorized agency or representative, to inquire into and ascertain an applicant's residential or domiciliary status is unquestioned. *It is the denial to the applicant of an opportunity to be heard in the matter, within a reasonable time, that constitutes the objectionable feature of the regulation here considered.*[30]

It should be noted here that in neither the *Bryan* case nor the *Newman* case was the question of the equal protection clause of the federal Constitution even considered, much less relied on. This question was first raised in the case of *Landwehr v. Regents of University of Colorado*,[31] and while the question was raised, the opinion of the court does little to shed any light on the subject. From the facts as set forth in the report of the case, the basis of the plaintiff's claim to resident status is impossible to determine other than his allegation of

27. 82 Idaho 90, 92, 349 P.2d 716, 717 (1960).
28. *Id.* at 92, 93, 349 P.2d at 717.
29. *Id.* at 95, 349 P.2d at 719.
30. *Id.* (emphasis added).
31. 156 Colo. 1, 396 P.2d 451.

continuous residence in the state for approximately four years.[32] The heart of the complaint however was that the statute under which he was classified as an out-of-state student was unconstitutional in that it violated the equal protection and due process clauses of the fourteenth amendment, the commerce clause, and the privileges and immunities clause of the United States Constitution.[33]

The statute in question, after setting forth the legislative intent and defining "in-state student" and "domicile,"[34] sets forth the following presumptions to be used in the determination of status:

> Section 3.—Presumptions and rules for determination of status. * * * (2) (a) To aid the institutions in deciding whether a student, or parent, or guardian of the person of a student, is domiciled in Colorado the following rules shall be applied: * * *
>
> (3) An unemancipated minor shall qualify for a change in status only if his parents or legal guardian or person having legal custody shall have completed the requirements for establishing domicile as defined in this article. An emancipated minor or adult student who has registered for more than five hours per term shall not qualify for a change in his classification for tuition purposes *unless he shall have completed twelve continuous months of residence while not attending an institution of higher learning in the state or while serving in the armed forces.*[35]

The court in considering the plaintiff's constitutional arguments, which are merely catalogued in the report of the case, stated that these arguments could be sustained only if the distinction between in-state and out-of-state students,

> . . . amounts to an unreasonable and arbitrary classification of residents of Colorado, for which there is no substantial difference and which has no reasonable relation to the object with which the statute deals nor to the public purpose sought to be achieved by the legislative enactment.[36]

After citing several cases in support of this statement, the court, in upholding the statute as constitutional, merely held that the classification was not arbitrary or unreasonable and was not so lacking in a foundation as to contravene the

32. *Id.*
33. 156 Colo. at 4, 5, 396 P.2d at 452.
34. *Id.* at 3, 396 P.2d at 452.
35. *Id.*
36. *Id.* at 5, 396 P.2d. at 453.

constitutional principals upon which the plaintiff had relied.[37] Unfortunately, the court failed to set forth any of the reasons for its holding.

The case of *Clarke v. Redeker*[38] presents the first detailed consideration of equal protection arguments in this line of cases. While the broad question considered by the court was whether the classification of students as residents or non-residents for the purpose of paying tuition was violative of the command of the fourteenth amendment that a state may not deny to any person within its jurisdiction the equal protection of the law, the focus of the arguments in this case was on the following provision of the regulations of the State University of Iowa:

> A student from another state who has enrolled for a full program, or substantially a full program, in any type of educational institution will be presumed to be in Iowa primarily for educational purposes, and will be considered not to have established residence in Iowa. Continued residence in Iowa during vacation periods or occasional periods of interruption to the course of study does not of itself overcome the presumption.[39]

In his argument to the court the plaintiff relied heavily on the United State Supreme Court decision in *Carrington v. Rash*.[40] In that case, the Court had held that while the State of Texas had unquestioned power to impose reasonable residence restrictions on the right to vote, a provision of the Texas Constitution which amounted to an *absolute* denial to military personnel of the right to vote in Texas, if they first established their residence in Texas while a member of the Armed Services, constituted an invidious discrimination in violation of the equal protection clause in that they were denied the opportunity of *ever* controverting the presumption of non-residence. The court distinguished the Iowa tuition regulation from *Carrington* on the basis of the great emphasis which the Supreme Court had placed on the absoluteness of the Texas rule.[41] The court here noted that while a student from another state was presumed to be in Iowa primarily for

37. *Id.*
38. 259 F. Supp. 117 (S.D. Iowa 1966).
39. *Id.* at 122.
40. 380 U.S. 89 (1965).
41. 259 F. Supp. at 122.

educational purposes, *there was nothing in the regulations which would prevent his reclassification as a resident in appropriate circumstances.* An examination of the regulations set forth by the court in this case discloses the following pertinent provisions which support this finding:

> A resident student 21 years of age or over is (1) one whose parents were residents of the state at the time he reached his majority and who has not acquired a domicile in another state or (2) who, *while an adult, has established a bona fide residence in the state of Iowa by residing in the state for at least 12 consecutive months immediately preceding registration. Bona fide residence in Iowa means that the student is not in the state primarily to attend college; that he is in the state for purposes other than to attempt to qualify for residence status.*
>
> * * * * * * * * * * * *
>
> Any nonresident student who reaches the age of 21 years while a student at any school or college does not by virtue of such fact attain residence in this state for admission or tuition payment purposes.
>
> * * * * * * * * * * * *
>
> Ownership of property in Iowa or the payment of Iowa taxes, does not in itself establish residence.
>
> * * * * * * * * * * * *
>
> Continued residence in Iowa during vacation period or occasional periods of interruption to the course of study does not of itself overcome the presumption.
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> * * * * * * * * * * * *
>
> *The decision of the Registrar* on the residence of a student for admission, fee, and tuition purposes *may be appealed* to a Review Committee. The finding of the Review Committee shall be final.[42]

During the trial, the Registrar of the University testified to the effect that, as far as his office was concerned, a full time student classified as a non-resident retained that classification throughout his enrollment. The court noted that the Registrar's interpretation, standing alone would probably constitute a constitutional violation on the basis of the holding in *Carrington.* However, the existence of a procedure for the review of the Registrar's decisions and the Review Committee's interpretation of the rules as permitting a change of classification under appropriate circumstances persuaded the court that the presumption of non-residency was a rebuttable one.[43]

42. *Id.* at 121-22 (emphasis added)
43. *Id.* at 121.

Having determined that the regulations in question were not palpably arbitrary or unreasonable, the court next considered the question of whether the regulations had a rational relation to a valid state interest. The court in a brief opinion accepted the defendant's justification of the discrimination between resident and non-resident students which was primarily based on the fact that resident students or their parents paid taxes to the state of Iowa. The court in its holding stated:

> The higher tuition charged nonresident students tends to distribute more evenly the cost of operating and supporting SUI between residents and nonresidents attending the University. Although there is no way for this Court to determine the degree to which the higher tuition charge equalized the educational cost of residents and nonresidents, it appears to be a reasonable attempt to achieve a partial cost equalization. The regulation classifying students as residents or nonresidents for tuition payment purposes is not arbitrary or unreasonable and bears a rational relation to Iowa's object and purpose of financing, operating and maintaining its educational institutions.[44]

In addition to the attack on the basic validity of the resident/non-resident classification for tuition purposes, the plaintiff also alleged that the regulations of State University of Iowa constituted an unconstitutional discrimination on the basis of his sex.[45] It was the plaintiff's contention that the regulations[46] permitted a non-resident female student to change her classification by marrying a resident of Iowa, but that a non-resident male student did not have the same opportunity. In holding that the pertinent regulation did not constitute a constitutional violation, the court observed that while the regulation was an obvious attempt to adhere to the well established legal concept that the domicile of the wife is the same as that

44. *Id.* at 123, *cited with approval* in Johns v. Redeker, 406 F.2d 878, 883 (8th Cir., 1969), *cert. denied,* 396 U.S. 853 (1970). This statement was also closely paraphrased in *Kirk v. Bd. of Regents of Univ. of Calif.,* 273 Cal. App. 2d 463, 78 Cal. Rptr. 260 (1969), *appeal dismissed for want of a substantial federal question,* 396 U.S. 554 (1970).

45. 259 F. Supp. at 120.

46. The regulation upon which the court relied reads as follows:
The residence of a wife is that of her husband. A nonresident female student *may attain residence* through marriage and correspondingly, a resident female student *may lose residence* by marrying a nonresident. Proof of marriage should be furnished to the Registrar at the time change of status is requested. 259 F. Supp. at 124. (emphasis added).

of her husband, classification under this regulation was not automatic and the regulation was *merely a guideline* for purposes of classification. Finding it reasonable to classify the husband and wife as residents of the same state, the court stated that it did not necessarily follow that they had to be classified as residents of the state where the husband was a resident prior to the marriage.[47] The court apparently placed considerable weight on the fact that the regulation was not expressed in absolute terms.[48] Noting that the regulations did not contain similar guidelines for male students, the court observed that this *did not prevent* the appropriate university officials from considering such a marriage as a factor when the student was attempting to overcome the *rebuttable presumption* of non-residency.

The plaintiff in this case further contended that he was a resident of Iowa for tuition purposes and had been improperly classified as a non-resident.[49] Noting that "[i]n reviewing a determination of an administrative body a court is normally limited to ascertaining whether the administrative action was arbitrary, unreasonable, or capricious, or unlawful,"[50] the court observed that while the regulations were not unlawful, and the interpretation of them by the Review Committee was correct, *its application of them appeared unduly rigid.* Stating that the plaintiff, in the view of the court, had established a substantial basis for being reclassified as a resident for purposes of tuition, the court remanded the case to the Review Committee for reconsideration.[51]

In a second action, the plaintiff in the above action[52] brought suit seeking damages for being charged non-resident tuition from August, 1964 to 1967. The trial court dismissed in a memorandum decision on the grounds that the cause of action was barred on the grounds of *res judicata.*[53] On appeal,[54] the circuit court affirmed the dismissal and stated:

47. 259 F. Supp. at 124.

48. *See* note 47 *supra.*

49. 259 F. Supp. at 124.

50. *Id.* (citations omitted).

51. 259 F. Supp. at 125.

52. Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966) (hereinafter referred to as the first *Clarke* case).

53. Clarke v. Redeker, 406 F.2d 878 (8th Cir. 1969).

54. *Id.*

> The trial court in its well reasoned opinion has convincingly demonstrated that plaintiff's present cause of action is barred by res judicata. In Clarke v. Redeker, 259 F. Supp. 117, an action by the same Regents, the court determined that charging Clarke the higher nonresident tuition rate prior to his acquisition of residence in Iowa violated none of plaintiff's constitutional rights and that plaintiff acquired residence status for tuition purposes as of September 1966.
>
> As previously stated, federal jurisdiction is based solely on 28 U.S.C.A. § 1343. The first *Clarke* case conclusively determines that *no substantial federal question is presented by plaintiff's attack on the constitutionality of the Regents' nonresident tuition regulations.* See Johns v. Redeker, 8 Cir., 406 F.2d 878, filed this day.[55]

The *Johns* case[56] referred to in the above quote, arose on appeal from an order of the trial court refusing to convene a three-judge court on the ground that no substantial federal question was presented and dismissing the case for want of jurisdiction, jurisdiction being based exclusively on 28 U.S.C.A. §1343.[57] The circuit court observed that the ultimate issue presented here was "whether any federal guaranteed constitutional rights of the plaintiffs are violated by charging nonresident students a higher tuition than is charged residents of Iowa",[58] and that precisely this issue was raised and decided in the first *Clarke* case. The court further observed that while the plaintiff in this case was different, all of the other parties and the plaintiff's counsel were the same.[59] In affirming the action of the lower court, the court elaborated somewhat on the holding in the first *Clarke* case that the resident/non-resident tuition differential had a *rational relation to a valid state interest when* it stated:

> Moreover, it is the view of this court that reliance by the trial court on its decision in the first *Clarke* case was not misplaced. A substantial portion of the funds needed to operate the Regents' schools are provided by legislative appropriation of funds raised by taxation of Iowa residents and property. Nonresidents and their families generally make no similar contribution to the support of the schools. A reasonable additional tuition charge against nonresident students which

55. *Id.* at 885 (emphasis added).

56. Johns v. Redeker, 406 F.2d 878 (8th Cir. 1969), *cert. denied,* 396 U.S. 853 (1970).

57. *Id.* at 879.

58. *Id.* at 880.

59. *Id.* at 881. The District Judge who heard and dismissed the *Johns* case had been one of three judges who heard the first *Clarke* case, and has in fact written the opinion in that case.

> tends to make the tuition charged more nearly approximate the cost per pupil of the operation of the schools does not constitute an unreasonable and arbitrary classification violative of the equal protection [clause] [*sic*].[60]

The *Johns* case was decided on February 14, 1969.[61] On April 21, 1969, the United States Supreme Court handed down its decision in the landmark case of *Shapiro v. Thompson*[62] in which it declared unconstitutional state and District of Columbia statutory provisions which denied welfare assistance to residents who had not resided within their jurisdiction for at least one year immediately preceding their application for assistance. The court held, *inter alia*, that such statutory provisions created a classification which constituted an invidious discrimination which denied the equal protection of the laws to persons who had been residents for less than one year,[63] and that

> [s]ince the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.[64]

This holding opened a new route to attack the constitutionality of the resident/non-resident tuition differential,[65] and such attacks were not long in coming. Just over one month later the California Court of Appeals, First District, handed down its decision in the case of *Kirk v. Board of Regents of the Uni-*

60. 406 F.2d at 883.

61. *Id.* at 878.

62. 394 U.S. 618 (1969).

63. *Id.* at 627.

64. *Id.* at 638. The court however attached the following footnote to its pronouncement:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

65. For an article on resident/non-resident tuition differentials, more notable for its crusading fervor than for its accuracy or rational treatment of the subject, see Comment, *Nonresident Tuition Charged By State Universities in review*, 38 UMKC L. REV. 341 (1970).

*versity of California*[66] whereby it continued the line of cases upholding the rights of the states to differentiate between resident and non-resident students for tuition purposes, but this time in full light of the *Shapiro* case.

The *Kirk* case was a direct attack on the validity of the California twelve (12) month durational residency requirement.[67] The plaintiff, Deborah D. Kirk, was the wife of a California resident whom she married in July of 1967. In September, 1967, she enrolled as a student at the University of California where she was classified as a non-resident student and required to pay the non-resident tuition rate which was $324 per quarter higher than was the tuition charged "resident" students.[68] After first disposing of the plaintiff's contention that as the wife of a California resident, she, like a minor child whose residence is derivative, should be allowed for purposes of tuition to take advantage of her husband's period of residence prior to her marriage,[69] the court turned to the main issue of the case; *i.e.* the constitutionality of the one year durational residence requirement.

The main contention here was that the one year durational residency requirement was an unconstitutional infringment of the plaintiff's fundamental constitutional right of travel, and that this was a clear violation of the equal protection clause *not justified by a compelling governmental interest.* It was also contended that the requirement was unconstitutionally vague and uncertain.[70] The plaintiff argued

66. 273 Cal. App. 2d 463, 78 Cal. Rptr. 260 (1969), *app. dismissed for want of a substantial federal question,* 396 U.S. 554 (1970).

67. The California code defines a resident student as ". . . any person who has been a bona fide resident of the State for more than one year immediately preceding the opening day of a semester during which he proposes to attend the university." WEST'S ANN. CAL. EDUC. CODE § 23054 (West 1969).

68. 78 Cal. Rptr. at 262.

69. The court, while agreeing that the plaintiff became a resident of California on the date of her marriage despite the fact that she was not physically present in the state at the time, concluded that it did not logically follow that for tuition purposes she should be allowed to retroactively take advantage of her husband's residency. Noting that it could find no authority that permitted retroactive "tacking" of the husband's period of residence prior to the marriage, the court held that she had not met the one year bona fide residence requirement at the time she enrolled. *Id.* at 263-64.

70. 78 Cal. Rptr. at 265.

that all of the above contentions had been conclusively determined in her favor in the *Shapiro* case and apparently relied heavily on the following passage from that decision:

> We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.[71]

Observing that were this the only language in the opinion, it would have to agree that the one year durational requirement constituted an unconstitutional interference with the plaintiff's right to travel,[72] the court attached great significance to footnote 21 which the Court appended to the above quoted language.[73] Believing this footnote not to be an "idle act", but an indication that the Court did not necessarily intend to apply the same standards to other residence requirements such as tuition differentials in institutions of higher learning,[74] the court next examined the potential "chilling effect" of the regulations on the fundamental constitutional right of interstate travel. Finding it absurd to contend that a person contemplating marriage and interstate change of residence would take into consideration the fact that they would have to pay a higher non-resident tuition fee of one year if they intended to continue their higher education at a state supported institution, the court concluded that the regulation did not deter any appreciable number of people from marrying California residents or moving into the state.[75] In concluding that the California residence requirement did not infringe on

71. *Id., quoting from* 394 U.S. at 638.

72. 78 Cal. Rptr. at 265.

73. *See* note 65 *supra.*

74. 78 Cal. Rptr. at 266.

75. *Id.* at 266, where the court stated:

*"A restatement of this argument in another way indicates how farfetched and unreasonable it is.* Thus, *it seems absurd to contend that a person would marry a resident of this state in order to obtain one year of higher education at a lower cost.* (emphasis added).

the plaintiff's fundamental right to travel, *and that it should therefore be judged by ordinary equal protection standards,*[76] the court distinguished *Shapiro* as follows:

> While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. *Shapiro involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children.* Thus, the residence requirements in Shapiro could cause great suffering and even loss of life. *The durational residence requirement for attendance at publicly financed institutions of higher learning do not involve similar risks.* Nor was petitioner (unlike the families in Shapiro) precluded from the benefit of obtaining higher education. *Charging higher tuition fees to nonresident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents.*[77]

Having concluded that the traditional equal protection standards should be applied in judging the constitutionality of the duration residency requirement, the court distinguished *Newman v. Graham*[78] and *Carrington v. Rash*[79] as being applicable to irrebuttable presumptions of non-residency.[80] In its discussion of the holding in the *Carrington* case the court, taking note of the statement in *Carrington* that Texas had unquestioned power to impose "reasonable" residency restrictions on the availability of the ballot, stated:

> Similarly it can be argued that the benefit of attending a publicly financed institution of higher education in this state, is within the jurisdiction of the state, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Constitution.[81]

In its consideration of the reasonableness of the regulation, the court noted that the California durational residency requirement was similar to that considered in the first *Clarke* case which it found to be most persuasive.[82] Observing that while a student from another state was presumed to be in

76. 78 Cal. Rptr. at 267.
77. *Id.* at 266-67 (emphasis added).
78. *See* note 19 *supra* and the discussion of this case following note 19.
79. 380 U.S. 89.
80. 78 Cal. Rptr. at 267-68.
81. *Id.* at 268 (emphasis added).
82. *Id.*

California primarily for educational purposes, the court found that there was nothing in the regulation which would prevent reclassification if appropriate facts arose subsequent to the classification, and concluded that the durational residence requirement, here as in *Clarke,* was reasonable.[83]

Having concluded that the regulation was reasonable, the court next considered the question of whether the classification of the plaintiff as a non-resident was rationally related to a legitimate state objective. The court adopted verbatim the conclusions found in the first *Clarke* case that the higher tuition charged non-residents tended to more evenly distribute the cost of operating the university between resident and non-resident students.[84] Then expanding somewhat on the rationale of the *Clarke* holding the court stated:

> Although there is no way for this court to determine the degree to which the higher tuition charge equalizes the educational cost of residents and nonresidents, it appears to be a reasonable attempt to achieve a partial cost equalization by collecting lower tuition from those persons who, directly or indirectly, have recently made some contribution to the economy of the state through having been employed, having paid taxes, or having spent money in the state for the brief period of one year prior to their attendance at a publicly financed institution of higher education.[85]

While recognizing that *Shapiro* specifically rejected the payment of taxes, fiscal integrity and budgetary planning as either "traditional equal protection tests" or "compelling state interests", the court concluded that this rejection was limited to cases like *Shapiro* involving benefits essential to life and health as opposed to attendance at a state institution of higher learning.[86] Finding that California had a valid interest in providing tuition-free education "to those who have demonstrated by a year's residence a bona fide intention of remaining here and who, by reason of that education, will be prepared to make a greater contribution to the state's economy and future",[87] and that the one year residency requirement was not constitutionally vague or uncertain, this court, as had the others be-

83. *Id.* at 269.
84. *Id.* See the quote at note 45 *supra.*
85. *Id.*
86. *Id.*
87. *Id.*

fore it, upheld the right of a state to differentiate between resident and non-resident students for purposes of tuition.

In March of 1971, the United States Supreme Court gave its blessings to the right of a state to charge non-resident students higher tuition than resident students, and to use durational residence requirements, when it *affirmed* the judgment of a three-judge federal court[88] in the case of *Starns v. Malkerson.*[89] The *Starns* case arose out of the classification of the plaintiffs as non-residents for the 1969-70 school year pursuant to a regulation of the Board of Regents of the University of Minnesota which provided in part:

> *No student is eligible for resident classification* in the University, in college thereof, *unless he has been a bona fide domiciliary of the state for at least a year immediately prior thereto.* This requirement *does not prejudice the right of a student admitted on a nonresident basis to be placed thereafter on a resident basis provided he has acquired a bona fide domicile of a year's duration within the state.* Attendance at the University neither constitutes nor necessarily precludes the acquisition of such domicile. For University purposes, a student does not acquire a domicile in Minnesota until he has been here for at least a year primarily as a permanent resident and not merely as a student; this involves the probability of his remaining in Minnesota beyond his completion of school.[90]

The plaintiffs had moved to Minnesota in June of 1969 with their husbands who had taken employment there. The plaintiffs appealed their classification to the Board of Regents and were reclassified as resident students, but the effectiveness of their reclassification was postponed until June, 1970, one year after their becoming residents of the state. This action was then commenced, the plaintiffs asserting that their classification as non-residents on the basis of the one year durational residency requirement was unreasonable and violated the equal protection clause. They further asserted that the one year waiting period discriminated among persons whose situation was otherwise identical, solely on the basis of their constitutionally protected right to travel.[91]

88. Starns v. Malkerson, 326 F. Supp. 234 (1970).

89. 91 S. Ct. 1231 (1971) "Mem."

90. 326 F. Supp. at 235-36 (emphasis added). From the wording of this regulation it would appear that it had been carefully drawn in an attempt to avoid the possibility of being held to be arbitrary, unreasonable, or capricious in light of *Newman v. Graham.*

91. *Id.* at 236.

In its consideration of the plaintiffs' allegations, the court first noted that the plaintiffs did not challenge the right of the University to charge non-resident students higher tuition than that paid by residents, nor did they challenge the right of the University to use the durational residency test as a *rebuttable presumption* of non-residency.[92] Rather, the court found the sole issue to be ". . . whether it is constitutionally permissible for a state to create an *irrebuttable presumption* that any person who has not continuously resided in Minnesota for one year immediately before his entrance to [sic] the University is a nonresident for tuition purposes."[93]

The plaintiffs here relied on *Shapiro* in asserting that the regulations were an infringement upon their fundamental right of interstate movement, and that the "compelling state interest" test should therefore be used to determine whether the equal protection clause had been violated. However the court found that *Shapiro* was distinguishable from the present case in two important respects. *First,* that while the waiting period in *Shapiro* was found to have had ". . . as a specific objective the exclusion from the jurisdiction of the poor who needed or may need relief,"[94] the court could find no state of facts upon which it could find that the durational residence requirement for resident tuition purposes had as a specific objective the exclusion or even the deterrence of out-of-state students from attending the University. The court based its opinion on the fact that over ten percent (10%) of the students attending the University in 1968 were non-residents, and concluded that the regulation therefore could not be held to have an unconstitutional "chilling effect" on the assertion of the constitutional right to travel.[95] *Second,* that while in *Shapiro* the waiting period had the effect of denying the basic necessities of life to needy residents, there was no evidence in the present case that the one year waiting period had any dire effects on non-resident students which could be equated to

92. *Id.* at 236. The court found that these issues had been raised and decided in *Johns v. Redeker, supra.* note 57, and *Clarke v. Redeker, supra.* note 54.

93. *Id.* at 236-37.

94. *Id.* at 237.

95. *Id.*

those in *Shapiro*.[96] Finding that the challenged durational residence requirement did not constitute a penalty imposed upon the exercise of the constitutional right to travel and that there was no infringement of a fundamental right, the court concluded that the "compelling state interest" test was not applicable here, and that the "traditional" equal protection standards should be applied in testing the constitutionality of the regulation.

In considering the challenged regulation in light of the "traditional" equal protection test the three judge court first noted that it was undisputed that the regulation economically discriminated against a class of residents or that it created an irrebuttable presumption that a resident who had been in the state for less than one year was a non-resident for tuition purposes.[97] After briefly considering various facets of the "traditional" equal protection test, the court concluded that, in resolving the equal protection clause challenge to the regulation, it should apply the following test set down by the Supreme Court:[98]

> In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S. Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S. Ct. 441, 443, 57 L.Ed. 730. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L.Ed.2d 393.[99]

In considering the regulation under the above standard the court, as had the court in the *Kirk* case, distinguished *Carrington* as involving an absolute classification which could not be rebutted under any circumstances whereas in the present case,

96. *Id.* at 238. The court stated that it concurred with the reasoning of the California Court of Appeals in the *Kirk* case on this point.

97. 236 F. Supp. at 238-39.

98. *Id.* at 239.

99. 397 U.S. at 485.

the presumption of non-residence could be overcome, ". . . if the student provides sufficient evidence to show bona fide domiciliary [sic] within the State, *one element of which is proof that he had resided within the state for a period of one year.*"[100] Finding the classification not to be arbitrary or permanent, the court concluded:

> We believe it is reasonable to presume that a person who has not resided within the State for a year is a nonresident student, and that it is reasonable to require that to rebut this presumption the student must be a bona fide domiciliary of the State for one year. We find nothing in *Carrington v. Rash, supra,* which is inconsistent with this conclusion.[101]

Turning next to the final question of whether the classification was reasonably related to a legitimate state objective, the court noted that while the defendants advanced several grounds argued to be valid state objectives, it was enough if any one of the grounds set forth provided a reasonable justification for the regulation.[102] The court, noting that the primary ground advanced by the defendants was the same as that advanced in *Kirk* and in the first *Clarke* case, and that charging non-resident students a higher tuition had been held constitutional in the first *Clarke* case, stated:

> We believe that once the law affords recognition to the right of a state to discriminate in tuition charges between a resident and nonresident, *that right to discriminate may be applied reasonably to the end that a person retains a nonresident classification for tuition purposes until he has completed a twelve-month period of domicile within the State.* We believe that the State of Minnesota has the right to say that those new residents of the State shall make some contribution, tangible or intangible, towards the State's welfare for a period of twelve months before becoming entitled to enjoy the same privileges as long-term residents possess to attend the University at a reduced resident's fee. Accordingly, we hold that the regulation requiring a one-year domicile within the State to acquire resident classification for tuition purposes at the University is constitutionally valid.[103]

### C. *Examination of Cases—Some Conclusions*

From the foregoing examination of cases, the right of a state to charge higher non-resident tuition fees and to use a

100. 326 F. Supp. at 240 (emphasis added).
101. *Id.*
102. *Id.* at 240, *citing* McGowan v. Maryland, 366 U.S. 420, 426 (1961).
103. 326 F. Supp. at 241 (emphasis added).

durational residence requirement as a part of its test of residency appears to be clearly established as being constitutional. However, as previously indicated, the regulations themselves would still appear to be open to attack on the grounds that they are arbitrary, capricious, and unreasonable if they are found to present an *irrebuttable* presumption of non-residency for purposes of tuition. An example of such a regulation is found in the 1971-1972 School of Law Bulletin of the University of Maryland where it is provided:

> Definition of Residence and Non-Residence
>
> Students who are minors are considered to be resident students if at the time of their registration their parents have been domiciled in this State for at least six months.
>
> *The status of the residence of a student is determined at the time of his first registration in the University, and may not thereafter be changed by him unless, in the case of a minor, his parents move to and become legal residents of this State by maintaining such residence for at least six months.* However, the right of the minor student to change from a non-resident to a resident status must be established by him prior to the registration period set for any semester.
>
> Adult students are considered to be residents if at the time of their registration they have been domiciled in this state for at least six months *provided such residence has not been acquired while attending any school or college in Maryland or elsewhere.*
>
> Time spent on active duty in the armed services while stationed in Maryland will not be considered as satisfying the six-month period referred to above except in those cases in which the student was domiciled in Maryland for at least six months prior to his entrance into the armed service and was not enrolled in any school during that period.
>
> The word domicile as used in this regulation shall mean the permanent place of abode. For the purpose of this rule only one domicile may be maintained.[104]

Just such a regulation was overthrown in *Newman v. Graham,*[105] and in the first *Clarke* case all that saved a similar regulation was a provision for the review of the decisions of the Registrar and the fact that the Review Committee interpreted the regulations as permitting reclassification.[106] A point worthy of noting in the above regulation is the provision

104. School of Law, 1971/1972, University of Maryland Bulletin, p. 21 (emphasis added).

105. *See* text at n. 28-31, *supra.*

106. *See* text at n. 44, *supra.*

that for purposes of the six months durational residence test, time spent in attendance at a state institution of higher learning or while on active duty in the armed services may not be counted toward satisfying the requirement. While a similar regulation was upheld in *Landwehr*, it is doubtful that such a regulation would stand up under attack today. This statement is predicated on the view that the Maryland regulation, as written, establishes an *irrebuttable* presumption that a student, once classified as a non-resident, can never be classified as a resident *so long as he remains a student*, even though he fulfills any and all other requirements for establishing his domicile in Maryland. The regulation construed in the *Starns* case contained no such irrebuttable presumption, and in fact specifically provided that, "[a]ttendance at the University neither constitutes nor necessarily precludes the acquisition of such a domicile."[107] Clearly, if further litigation is to be avoided in this area, it is imperative that the boards of regents of the various state institutions of higher learning or the state legislatures as the case may be, carefully review their regulations on resident/non-resident tuition and modify them if and as necessary.

While it is beyond the scope of this note to attempt to set forth a model regulation concerning resident/non-resident tuition differentials, the model legislation[108] prepared by the Education Commission of the States, is an extremely well prepared proposal which should stand up against any constitutional attack. The adoption of this model legislation is strongly recommended, and short of adoption by state legislatures, its adoption in slightly modified form by the various state institutions of higher learning is urged as an effective interim measure.

### D. *Suggested Classification Guidelines*

Assuming that a valid set of regulations are in fact in existence, what are some appropriate tests which may be applied in the borderline case to determine whether a student qualifies for resident tuition? This borderline case is basically

107. *326* F. Supp. at *236.*

108. MODEL LEGISLATION ON STUDENT RESIDENCY (Revised 8/25/71), *prepared by* Education Commission of the States, 1860 Lincoln Street, Denver, Colorado 80203.

confined to the "emancipated person" defined in the proposed model legislation as ". . . a person who has attained the age of 18 years, and whose parents have entirely surrendered the right to the care, custody, and earnings of such person and who no longer are under any legal obligation to support or maintain such person."[109]

Before considering the possible tests, a preliminary point which must be disposed of is the meaning of the term "residence" which is commonly used in regulations relating to tuition differentials. Unfortunately, laymen, and all too often even some of the courts, tend to use the terms "residence" and "domicile" interchangeably, although the two terms have distinct and quite different meanings. Thus, while even the title of this note uses the term "resident", it is in fact the "domicile" of the student which is critical to the proper determination of what rate of tuition the student will be charged.

Domicile is defined as the place where a man has his true, fixed, and permanent home to which he intends to return whenever he is absent, as distinguished from his temporary and transient, though actual, place of residence.[110] More to the point in issue here is the following definition adopted by the court in *Newman*:

> A residence is different from a domicile, although it is a matter of great importance in determining the place of domicile. The essential distinction between residence and domicile is that the first involves the intent to leave when the purpose for which one has taken up his abode ceases. The other has no such intent; the abiding is animus manendi. One may seek a place for the purpose of pleasure, of business or of health. *If his intent be to remain, it becomes his domicile; if his intent be to leave as soon as his purpose is accomplished, it is his residence.*[111]

From the foregoing then, it becomes clear that the key to determining whether a student qualifies as a resident student for purposes of reduced tuition is whether it is his *intent* to become a domiciliary of the state. While *intent* is a purely subjective matter, there are clearly certain objective criteria which are indicative of intent, and while it is a simple matter

109. MODEL LEGISLATION ON STUDENT RESIDENCY § 2 (4) (Revised 8/25/71).

110. BLACKS LAW DICTIONARY, 572 (Revised 4th ed. 1968).

111. 82 Idaho at 94, 349 P.2d at 718 (citations omitted) (emphasis added).

to state, "I intend to make this my permanent home," this statement standing alone is valueless for the purpose of establishing the necessary intent. There must be something more, some tangible showing to back up the declared intent.

Among those factors which should be considered in determining whether the requisite intent is established are: (a) employment; (b) whether and where a state income tax return has been filed; (c) where the student is registered to vote; (d) where the student's car, if any, is registered; (e) where the student's driver's license was issued; (f) ownership of a home; (g) degree of participation in community affairs; (h) location of religious affiliation if any; and (i) return to the parental home during periods when classes are not in session. It must be emphasized, however, that the doing or failure to do one or more of these tangible acts should not of and by itself be considered to be controlling. Any one of them, of itself, may be equally consistent with either domiciliary or out of state residence status. What must be shown is a *pattern of activity* or *inactivity* which would be consistent with but one conclusion.

A brief examination of these factors and their significance is perhaps in order.

(1) *Employment.* While it is clear that full time or even part time employment is not in itself decisive, and in fact is not necessarily compatible with obtaining a higher education, it is indicative of the person's emancipation and of a contribution to the state and to the local community. Not only should the employment of the student be considered, but that of the student's spouse as well, for today it is not uncommon for a married student to be put through school by the efforts of his or her spouse.

(2) *Filing of State Tax Return.* This factor is perhaps one of the more important of the nine listed. While the failure to file a return in the state where the student is attending an institution of higher learning is not inconsistent with domiciliary status if the student is not working, the filing of such a return in another state would be clearly contraindicative of domiciliary status.

(3) *Where Registed to Vote.* Here again, while failure to register to vote in the state where the institution is located is

not in itself significant, the fact of registration in another state would be of considerable significance. This criteria is subject to some very circular reasoning however, for in some communities students have not been permitted to register to vote on the grounds that they were not classified as resident students at the institution they were attending, while the institution in turn refused to classify them as resident students because they were not registered to vote in the state.

(4) *Place of Registration of Automobile.*

(5) *Place of Issuance of Driver's License.* Both the registration of a car and the possession of a valid state drivers license are relatively good indicators of an intent to be a domiciliary of a state, particularly if the state is one with high fees for one or both of these activities. Conversely, where a state's fees are low in relation to other states, this factor tends to lose importance. Possession of a drivers license issued by another state and/or registration of a car in another state, however, might well be considered to be strong indications of an out of state domicile.

(6) *Ownership of Residential Property Within State.* While there are undoubtably few students who own or are buying their own homes, such ownership would lend weight to the student's claim to domiciliary status. Conversely, the fact of non-ownership would carry little or no weight for this determination. Residence in dormitories provided by the state institution, which must be vacated when classes are not in session, would be a strong indicator of non-resident status. The occupancy of an apartment, whether or not provided by the institution, should not be considered to lend weight to either position, especially in view of the fact that it is only natural to seek adequate accommodation at the lowest possible rent.

(7) *Participation in Community Affairs.* Although active participation in community affairs is by no means the exclusive domain of a domiciliary of the state, it is still a factor which might be considered. Keeping in mind that we are looking for a pattern indicative of intent, a strong showing in this area would fit such a pattern.

(8) *Location of Religious Affiliation.* This factor, like that of active participation in community affairs, is really no-

thing more than supportive of the previous factors, but for a person with strong religious convictions, the transfer of church membership would be clearly consistent with an intent to become a domiciliary of the community where he lives.

(9) *Return to the Parental Home.* While periodic return to the parental home is undoubtably the norm in most cases, what must be considered here is the duration of the stay and the purpose if determinable. A pattern of return whenever classes are not in session, and for the full duration of the break between sessions, would tend to show the retention of the parental domicile as that of the student and would likewise be inconsistent with such other factors as employment. While it might be argued that such activity is merely in the interest of economy through reduction of living costs, it still remains that this is not consistent with an intent to establish domicile.

While the above guidelines should prove helpful in determining whether the requisite intent for establishing domicile is present, it cannot be overemphasized that they cannot be applied as a blind, mechanical formula. Each case must be carefully considered in light of *all* of the facts and surrounding circumstances. While the burden of proof should be upon the applicant to show that he has in fact become a domiciliary of the state in which the institution is located, this burden must not be so great that a court could find the standards to be arbitrary. A formal review board empowered to make a final determination is absolutely necessary, and so long as it is not merely a rubber stamp for the decisions of the registrar, the probability of a finding of arbitrariness will be greatly reduced.

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