



COMMONWEALTH of VIRGINIA

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June 2, 2006

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The Honorable John S. Reid
Member, House of Delegates
P.O. Box 406
Richmond, Virginia 23218

Dear Delegate Reid:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the “Amendment in the Nature of a Substitute” for Senate Bill 677,¹ which would have permitted certain aliens who are not lawfully present in the United States to qualify under certain circumstances for in-state tuition status, would jeopardize the Commonwealth’s ability to charge out-of-state tuition rates to United States citizens who are not Virginia residents.

Response

It is my opinion that Senate Bill 677, specifically the proposed addition of § 23-9.2:3(D) if enacted into law, would require the Commonwealth to comply with 8 U.S.C. § 1623.² Further, it is my opinion that compliance could be achieved only by extending in-state tuition rates to all enrollees, regardless of residency status.

Background

In its original form, Senate Bill 677 essentially adopted the language of 8 U.S.C. § 1623 and sought to prohibit “*individuals who are not citizens or nationals of the United States or are unlawfully present in the United States or do not possess a valid visa issued by the Department of Homeland Security*” from being “*eligible for in-state tuition rates at any public institution of higher education in the Commonwealth.*”³ The Senate Committee on Education and Health amended the bill,⁴ which was

¹See 2006 S.B. 677, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+SB677S1> (Amendment in the Nature of a Substitute) (adding § 23-9.2:3(D)). Senate Bill 677 was left in the House Committee on Education. See *id.*, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=sb677> (status).

²Section 1623 provides that:
“Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.” 8 U.S.C.S. § 1623 (1997).

³See 2006 S.B. 677, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+SB677> (Introduced) (proposing amendment to § 23-9.2:3(A)(1)).

⁴See *supra* note 1.

subsequently passed by the Senate of Virginia, to enable such individuals to be eligible for in-state tuition if six conditions are satisfied. Senate Bill 677, as amended, provides that:

D. Notwithstanding the provisions of [§ 23-9.2:3(A)], any person meeting the following conditions shall be eligible for in-state tuition:

- 1. Has resided with his parent, guardian, or other person standing in loco parentis while attending public or private high school in this state; and*
- 2. Has graduated from a public or private high school in Virginia; and*
- 3. Has resided in the Commonwealth for at least three years as of the date the individual graduated from high school; and*
- 4. Has registered as an entering student in an institution of higher education; and*
- 5. Has provided an affidavit to the institution stating that he has filed an application to become a permanent resident of the United States and is actively pursuing such permanent residency or will do so as soon as he is eligible; and*
- 6. Has submitted evidence that he, or in the case of a dependent student, at least one parent, guardian, or person standing in loco parentis, has filed, unless exempted by state law, Virginia income tax returns for at least three years prior to the date of enrollment.^[5]*

Applicable Law and Discussion

The Supremacy Clause of the Constitution of the United States provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land.⁶ Under this clause, “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”⁷ Senate Bill 677 essentially creates *de facto* residency status for illegal aliens for tuition purposes. Thus, a review of federal immigration law and policy regarding state benefits for illegal aliens is required to determine if Senate Bill 677 “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸

Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,⁹ which amended the Immigration and Nationality Act and Social Security Act. Section 505 of the Illegal Immigration Act is codified at 8 U.S.C. § 1623. The House Conference Report documenting the legislative intent of § 1623 notes that “this section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education.”¹⁰ Congress, therefore, expressed the legislative

⁵ *Id.*

⁶ U.S. CONST. art VI, cl. 2.

⁷ *Free v. Bland*, 369 U.S. 663, 669 (1962), *quoted in Felder v. Casey*, 487 U.S. 131, 138 (1988), *quoted in Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992).

⁸ *De Canas v. Bica*, 424 U.S. 351, 363 (1976) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁹ See Pub. L. No. 104-208, 110 Stat. 3009 (1996).

¹⁰ H.R. REP. NO. 104-828, at 240 (1996) (Conf. Rep.). Representative Christopher Cox, one of the leading proponents of 8 U.S.C. § 1623, Senator Alan Simpson, principal sponsor of the Senate version of the bill, and Senator Paul Coverdell, all explained in unambiguous terms that the law was meant to preclude illegal aliens from receiving in-state tuition breaks. See 142 CONG. REC. 11,377 (1996) (remarks of Rep. Cox); *id.* at 11,508 (remarks of Senator Coverdell); *id.* at 11,713 (remarks of Senator Simpson).

intent underlying § 1623; specifically, to prevent states from granting any postsecondary education benefit to an alien not lawfully present in the United States unless all United States citizens are eligible for the same benefit.

As stated, 8 U.S.C. § 1623 prohibits a state from treating nonresident citizens, nationals, or legal aliens less favorably than illegal aliens in terms of in-state tuition.¹¹ The intent and practical effect of Senate Bill 677 is to declare certain illegal aliens living and being educated in Virginia to be residents of the Commonwealth and thereby eligible for reduced tuition rates at Virginia's postsecondary institutions of higher education. Concurrently, Virginia law continues to make it difficult for citizens and nationals living outside the Commonwealth to qualify as "residents" of Virginia and thus to qualify for these reduced in-state tuition rates.¹² The language of § 23-9.2:3(D)(1)-(6) of Senate Bill 677 in effect affords illegal aliens a status akin to legal residents. Because the durational residency, high school graduation, and taxpaying provisions of subsection (D)(1)-(3) constitute mere proxies by which to measure residency, the amendment cannot meet the requirements of federal law.¹³ Congress chose the phrase "on the basis of residence" in § 1623 as a means of defining the benefit, not as a means to define a mechanism through which the benefit could not be offered. Therefore, should Senate Bill 677 be enacted into law, the Commonwealth may be directed to comply with 8 U.S.C. § 1623. The only way in which the Commonwealth could comply and ensure that the postsecondary education benefit provided to an alien not lawfully present was extended to all United States citizens would be to extend in-state tuition rates to all enrollees, regardless of residency status. Thus, the Commonwealth's ability to charge out-of-state tuition rates to United States citizens who are not Virginia residents would be jeopardized.¹⁴

¹¹The prohibited discrimination against nonresident citizens and nationals in 8 U.S.C. § 1623 is limited to discrimination undertaken "on the basis of residence." Section 1623 would not prohibit a university from offering a football scholarship to an illegal alien without offering similar scholarships to less athletically talented nonresident citizens and nationals. States, however, may not favor an illegal alien in the award of benefits if such favoritism is in any way related to that illegal alien's presence within the state.

¹²See, for instance, § 23-7.4 (A) and (B) of the *Virginia Code*, laws that impose formidable evidentiary hurdles to domicile applicants, including a requirement that they demonstrate domicile by clear and convincing evidence.

¹³Advocates for granting reduced tuition rates to illegal aliens have advanced various arguments as to how states may circumvent § 1623. See, e.g., Jessica Salsbury, Comment, *Evading Residence: Undocumented Students, Higher Education, and the States*, 53 AM U. L. REV. 459, 478-79 (2003). Some advocates have focused, unsuccessfully, on efforts to repeal § 1623, a tacit concession that § 1623 does prohibit states from extending in-state tuition benefits to illegal aliens (unless such benefits are also extended to nonresident citizens and nationals).

¹⁴In August 2005, the Washington Legal Foundation filed such a complaint with the Office of Civil Rights and Civil Liberties in the Department of Homeland Security against the State of Texas. See Press Release, Washington Legal Foundation, WLF Files Civil Rights Complaint Against State of Texas Regarding Benefits for Illegal Aliens (Aug. 9, 2005), available at <http://www.wlf.org/upload/080905RS.pdf> (last visited Feb. 24, 2004). That complaint contends that a Texas alien tuition law, very similar to Senate Bill 677, discriminates against nonresident citizens and nationals and therefore violates 8 U.S.C. § 1623. See *id.* A class action suit making similar contentions and raising additional constitutional issues was recently filed in California by non-California residents compelled by California law to pay higher tuition rates than illegal aliens. See *Martinez v. Regents*, No. CV-05-2064 (Yolo County Super. Ct. filed Dec. 15, 2005). In July 2005, a district court in Kansas, dismissed, on jurisdictional grounds, a challenge to a Kansas law affording illegal aliens preferred tuition rates to non-Kansas, resident citizens. See *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D.C. Kan. 2005). *Sebelius* currently is on appeal to the United States Court of Appeals for the Tenth Circuit.

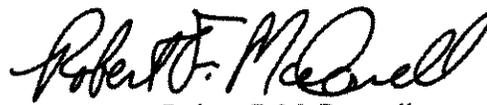
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Conclusion

Accordingly, it is my opinion that that Senate Bill 677, specifically the proposed addition of § 23-9.2:3(D) if enacted into law, would require the Commonwealth to comply with 8 U.S.C. § 1623.¹⁵ Further, it is my opinion that compliance could be achieved only by extending in-state tuition rates to all enrollees, regardless of residency status.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink that reads "Robert F. McDonnell". The signature is written in a cursive, flowing style.

Robert F. McDonnell

6:42; 1:310/06-018

¹⁵ See *supra* note 2.