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J.B. Kelly, General Counsel
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Dear Mr. Kelly,

I have had an opportunity to review the May 6, 2008 letter you sent to Shante Martin, the General Counsel of the North Carolina Community College System concerning the admission of undocumented students into the NCCCS colleges. I have taught both immigration law and higher education law for more than twenty five years, helped draft the original Texas statute, have litigated or consulted on a number of these cases, and have served as expert witness for Kansas in its recent litigation. Therefore, I have followed these issues for a long period of time, and while I concede their complexity, I believe that North Carolina may enroll and admit these students. I say so for the following reasons, and with all due respect.

First, neither IRRIRA nor PRWORA, the two laws that produced 1621 and 1623, dealt with ADMISSIONS, but only with resident tuition. It is clear that even if a state chooses not to extend resident tuition to undocumented students (ten states have affirmatively given them this privilege since 2001), these students are allowed to enroll in colleges. I believe your letter elided the two steps, so that you cited the provisions allowing resident tuition as applying to the more basic admissions. You did so by reading the term "benefit" too restrictively. My reading of Section 505 follows this reasoning: state residency is a state benefit, to be determined by states; the one time that the Supreme Court acted in this area, in *Moreno v. Elkins*, it certified this issue as a state question and adopted the state's reasoning into its own decision-making; the word "unless" in Section 1623 can only mean that Congress enacted a condition precedent for states enacting rules



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in this area. More importantly, the word "benefit" is defined in Section 1621 in a way that makes it clear that Congress intended it as a "monetary benefit" and cash payment, whereas the determination of residency is a status benefit, not a "monetary" benefit: "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit **for which payments or assistance** are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government." (my emphasis added)

Section 1621 says explicitly that states may provide this status only if they act to do so after August 22, 1996. Taken together, these strands form an interlocking logic that points toward only one reasonable conclusion: that federal law, however badly written, allows states to confer (or not to confer) a residency benefit upon these students. There is simply no other reasonable or efficacious way to read the congressional language. In other words, the law does not say anything about, and has never been held to refer to admissions. Even *Merten* (which you cite as *Marten*) does not hold this. A recent SMU LAW REVIEW article on this case by Professor Nathan Cortez notes this, and I have enclosed it for your reference. Indeed, by holding that a State such as Virginia may preclude the undocumented from receiving resident tuition, the *Merten* court clearly held that these students may enroll, even if they are required to pay non-resident tuition. The California state court case *Martinez v. Regents of the University of California (No. CV-05-2064, 2006 WL 2974303 [Cal. Super. Ct., Oct. 4, 2006])* (Order on Demurrers, Motion to Strike, and Motions by Proposed Intervenors) dismissed the challenge to the State residency statute; this California action was the state equivalent of the *Day v. Sebelius* federal case in Kansas (*Day v. Bond* on the Tenth Circuit's affirmance).

No court has held that their admissions may be prevented, and federal law does not hold this. Moreover, my reading is also entirely consistent with North Carolina law, which speaks without elaboration to Admissions. At the least, the governing board would, by your own statute, have to ban their attendance. Whatever else it is, federal law clearly allows states to confer (or not confer) this status. A dozen have done so. And three different courts (two federal and one state) have held so. And my reading of North Carolina law says that you may do so as well, even if the state has chosen not to confer residency eligibility. You may wish to review recent AG Opinions by your counterparts in Nevada, Colorado, and Utah, all of whom have reached different conclusions from yours.

While this is a combined legal and political question, I believe that your analysis of the applicable federal laws concerning the issue is incorrect, and that with regard to admission of these students, you have misinterpreted the statutes. Based upon this analysis, I urge you to revise your letter. Your response concedes authority of the federal government over your state's admissions statutes.

You have my best wishes as you work your way through this complex issue. Please feel free to contact me if I may be of assistance. I also maintain a website that posts materials on these issues, but be sure and bring a pillow: www.law.uh.edu/ihehg .

Sincerely,



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(encl: SMU articles)

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