

17 April 2007
Chancellor Erroll B. Davis, Jr.
Office of the Chancellor
Board of Regents of the University System of Georgia
Suite 7025
270 Washington Street, SW
Atlanta, GA 30334

Dear Chancellor Davis and Board Members,

Thank you for the invitation to present this testimony on SB 529, the new Georgia law that undertakes immigration reform at the state level, and which requires your body to draft a policy that would comport with federal law. Fortunately, state and federal law can be harmonized, and in my view, and that of the courts, can also allow institutions to grant in-state tuition status to undocumented students who meet all the durational requirements of time in the state.

I concede that this topic can be complex, but the complexity has led two of your staffers to mistaken conclusions, in my view, and I say this with all the respect due them. In the Atlanta Journal-Constitution (December 16, 2006), Burns Newsome was quoted as saying,

“[Burns] Newsome, the regents' attorney, said SB 529 prompted the regents to review its waiver policy, which allows universities to grant in-state tuition to about 2 percent of the student body. Waivers can go to international students, military personnel and other special cases. Newsome concluded that people in the country illegally should no longer qualify. "There is so much immigration law that is not enforced by the federal government," Newsome said. "One thing [SB 529] did was ... tell state agencies to enforce federal law. Newsome said there's a growing consensus that in-

state tuition constitutes the kind of "assistance" banned for illegal immigrants under federal law. But some states, such as California and New York, maintain the lower tuition rates are legal. "This question has never gone to a federal court," Newsome said. "... It's left to people like me to read the tea leaves."

Another staffer has said, in the February 28, 2007 Inside Higher Education: *"Meanwhile, in Georgia, where college presidents are granted flexibility to offer waivers for in-state tuition for up to 2 percent of their freshman enrollment, the state's Board of Regents has recently advised institutional leaders not to grant such waivers to undocumented students. "Our legal office is advising our presidents that there is a significant group of organizations and states that are viewing in-state tuition as a benefit prohibited under federal law," says John Millsaps, spokesman for the Board of Regents. While there are no clear answers, he says, the question prompting the board's action centers on a technical understanding of what counts under the definition of "benefits" restricted under the 1996 federal immigration law." Mr. Millsaps was also quoted in the Chattanooga Times Free Press on January 29, 2007, as saying, "'The interpretation that we have received from our legal office seems to be in terms of complying with SB529 — the presidents cannot grant a tuition waiver (to illegal immigrants) for in-state tuition," Mr. Millsaps said. He said the board's legal staff has reviewed a state law that goes into effect in July and a 1996 federal law, and has advised state college and university presidents to deny instate tuition waivers to students who are undocumented."*

With all due respect, I would conclude that both of these staffers are incorrect. The "growing consensus" suggested by Mr. Newsome is actually in the other direction, and there are federal cases to guide us, and they say that states may do as I have said and they will be upheld. There is also a state case on the matter,

which upheld the resident tuition. And these “benefits” are not those that are ostensibly-precluded by IIRIRA.

When Mr. Newsome spoke last December, there had already been several federal cases on precisely this point, and while they are highly-technical, it is clear that in *Merten*, Virginia was allowed to refuse residency tuition to its undocumented students, while in *Day*, Kansas was allowed to do so. But in both cases, it was clear that federal law allowed the states to choose a path, either extend the status or not to. A companion California case (*Martinez*) brought by the same attorneys in state court held the same, upholding the California statute extending resident tuition to undocumented college students. Indeed, since Texas first took Congress up on its 1996 invitation to extend resident status to this population, nine other states have done so, including all the major receiver states except Florida. If he is swayed by consensus, then I believe he should find it here, in those states that deal with far more immigrants than does your own.

Invitation? That is the only way to characterize federal law. I have attached the relevant federal statutes, which, as you see with a careful reading, allow states to extend residency, if they do so after the statute’s two effective dates, as all these statutes have done.

The language that I believe has confused your staff is “benefits” and “assistance.” However, 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 in this area; 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; 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 IRRIRA, 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.

Whatever else it is, federal law clearly allows states to confer this status. A dozen have done so. And three different courts (two federal and one state) have held so. And my reading of Georgia law says that you may do so as well. I urge you to use the successful examples in Texas and Kansas as models, and would be pleased to work with your staff to improve upon those exemplars.

Here is the exact language enacted last year by your Legislature:

Section 9. Title 50 of the Official Code of Georgia Annotated, relating to state government, is amended by adding a new chapter at the end thereof, to be designated Chapter 36, to read as follows: [CHAPTER 36 : 50-36-1.

(a) Except as provided in subsection (c) of this Code section or where exempted by federal law, on or after July 1, 2007, every agency or a political subdivision of this state shall verify the lawful presence in the United States of any natural person 18 years of age or older who has applied for state or local public benefits, as defined in 8 U.S.C. Section 1621, or for federal public benefits, as defined in 8 U.S.C. Section 1611, that is administered by an agency or a political subdivision of this state.

. . .

(c) Verification of lawful presence under this Code section shall not be required: . . .

(7) For postsecondary education, whereby the Board of Regents of the University System of Georgia or the State Board of Technical and Adult Education shall set forth, or cause to be set forth,

policies regarding postsecondary benefits that comply with all federal law including but not limited to public benefits as described in 8 U.S.C. Section 1611, 1621, or 1623.]

I urge Georgia to do so, as Section 9 requires, in order fully to “comply with all federal law including but not limited to public benefits as described in 8 U.S.C. Section 1611, 1621, or 1623.” In other words, Georgia law, by directing the Board to comply with federal law, would enable public colleges affirmatively to enable the undocumented to establish residency. Had the Legislature wished to eliminate this option, it could have explicitly done so, as it did in a number of state benefits. (I was not invited to comment upon the entirety of SB 529, and I do not do so here; I only refer to Section 9, the Postsecondary Tuition section.)

Based upon this analysis, I urge you to take up the Congressional invitation to extend residency status, which would fully comply with SB 529 and federal law. I have taught both immigration law and higher education law for a quarter century, 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. I would be pleased to respond to any questions or queries that the Board or staff might have. Thank you for this invitation to address this body. You have my best wishes as you work your way through this complex issue.

Sincerely,

Michael A. Olivas
William B. Bates Distinguished Chair in Law
University of Houston Law Center

CC: Betsey Neeley [Betsey.Neely@usg.edu];
chancellor@usg.edu

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...

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(7) For postsecondary education, whereby the Board of Regents of the University System of Georgia or the State Board of Technical and Adult Education shall set forth, or cause to be set forth, policies regarding postsecondary benefits that comply with all federal law including but not limited to public benefits as described in 8 U.S.C. Section 1611, 1621, or 1623.]

SECTION 9.

Title 50 of the Official Code of Georgia Annotated, relating to state government, is amended by adding a new chapter at the end thereof, to be designated Chapter 36, to read as follows:

"CHAPTER 36

50-36-1.

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(b) This Code section shall be enforced without regard to race, religion, gender, ethnicity, or national origin.

(c) Verification of lawful presence under this Code section shall not be required:

(1) For any purpose for which lawful presence in the United States is not required by law, ordinance, or regulation;

(2) For assistance for health care items and services that are necessary for the treatment of an emergency medical condition, as defined in 42 U.S.C. Section 1396b(v)(3), of the alien involved and are not related to an organ transplant procedure;

(3) For short-term, noncash, in-kind emergency disaster relief;

(4) For public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease; or

(5) For programs, services, or assistance such as soup kitchens, crisis counseling and intervention, and short-term shelter specified by the United States Attorney General, in the United States Attorney General's sole and unreviewable discretion after consultation with appropriate federal agencies and departments, which:

(A) Deliver in-kind services at the community level, including through public or private nonprofit agencies;

(B) Do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and

(C) Are necessary for the protection of life or safety.

(6) For prenatal care; or

(7) For postsecondary education, whereby the Board of Regents of the University System of Georgia or the State Board of Technical and Adult Education shall set forth, or cause to be set forth, policies regarding postsecondary benefits that comply with all federal law including but not limited to public benefits as described in 8 U.S.C. Section 1611, 1621, or 1623.

(d) Verification of lawful presence in the United States by the agency or political subdivision required to make such verification shall occur as follows:

- (1) The applicant must execute an affidavit that he or she is a United States citizen or legal permanent resident 18 years of age or older; or
 - (2) The applicant must execute an affidavit that he or she is a qualified alien or nonimmigrant under the federal Immigration and Nationality Act 18 years of age or older lawfully present in the United States.
- (e) For any applicant who has executed an affidavit that he or she is an alien lawfully present in the United States, eligibility for benefits shall be made through the Systematic Alien Verification of Entitlement (SAVE) program operated by the United States Department of Homeland Security or a successor program designated by the United States Department of Homeland Security. Until such eligibility verification is made, the affidavit may be presumed to be proof of lawful presence for the purposes of this Code section.
- (f) Any person who knowingly and willfully makes a false, fictitious, or fraudulent statement of representation in an affidavit executed pursuant to subsection (d) of this Code section shall be guilty of a violation of Code Section 16-10-20.
- (g) Agencies or political subdivisions of this state may adopt variations to the requirements of this Code section to improve efficiency or reduce delay in the verification process or to provide for adjudication of unique individual circumstances where the verification procedures in this Code section would impose unusual hardship on a legal resident of Georgia.
- (h) It shall be unlawful for any agency or a political subdivision of this state to provide any state, local, or federal benefit, as defined in 8 U.S.C. Section 1621 or 8 U.S.C. Section 1611, in violation of this Code section. Each state agency or department which administers any program of state or local public benefits shall provide an annual report with respect to its compliance with this Code section.
- (i) Any and all errors and significant delays by SAVE shall be reported to the United States Department of Security and to the Secretary of State which will monitor SAVE and its verification application errors and significant delays and report yearly on such errors and significant delays to ensure that the application of SAVE is not wrongfully denying benefits to legal residents of Georgia.
- (j) Notwithstanding subsection (f) of this Code section any applicant for federal benefits as defined in 8 U.S.C. Section 1611 or state or local benefits as defined in 8 U.S.C. Section 1621 shall not be guilty of any crime for executing an affidavit attesting to lawful presence in the United States that contains a false statement if said affidavit is not required by this Code section."