

January 31, 2006

Richard E. Kendell
Commissioner of Higher Education
The Gateway / Board of Regents
60 South 400 West
Salt Lake City UT 84101-1284

Re: Validity of Tuition Statute - U.C.A. § 53B-8-106

Dear Commissioner Kendell:

This letter is in response to your request for additional research to update our earlier letter to University of Utah President Bernie Machen (October 9, 2002) relative to the validity of what was then a new Utah statute [H.B. 144 (2002); enacting U.C.A. § 53B-8-106]. Essentially, it exempts Utah high school graduates (including undocumented aliens) from having to pay the non-resident portion of college tuition. In our letter to President Machen we concluded that the statute was valid and effective.

Based on the following analysis, we affirm our previous conclusion that the Utah statute is valid.

FACTUAL BACKGROUND

At the time of the passage of H.B.144 in 2002 there was discussion in Congress about the passage of the DREAM Act which would have provided opportunities for some undocumented aliens to legalize their immigration status. H.B.144 was passed in anticipation of that federal legislation, though the DREAM Act was never passed. We understand that Utah is one of seven states that have similar legislation.

Since H.B.144 was enacted, there has been ongoing debate on the wisdom and legality of the statute, specifically with respect to the eligibility of some undocumented alien students to take advantage of its tuition benefits. A comparable statute in Kansas was recently challenged in the case of Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005). The Kansas statute, while similar to Utah's is not identical. For example, while the Kansas statute classifies these high school graduates as "residents", Utah's statute only grants them an exemption from the non-resident portion of tuition. Also, the Kansas tuition benefit is not available to students

who can qualify for resident tuition in any other state, while Utah's tuition exemption is available without regard to a student's residence status elsewhere. These distinctions make Utah's statute even more defensible if it were ever challenged.

But the Kansas federal court did not directly address the merits of whether the statute was valid. The case was decided at the District Court level on the preliminary grounds that the plaintiffs lacked standing to bring the case under federal statutes that limit states from offering benefits to illegal aliens. The judge decided, essentially, that the plaintiffs were not directly injured by the public policy involved, and would not benefit even with a favorable ruling. The court also ruled against the plaintiffs on the closely related issue of whether the applicable statutes granted them a private right of action. A private right of action in a statute must be expressly or impliedly created by Congress, and there was no such indication.

This dismissal on procedural grounds leaves us without a definitive court ruling on the validity of the Kansas tuition statute. Judge Rogers suggested these issues are probably best left to the legislative branch rather than the courts. The judge said:

In reaching the decisions in this case, the court did not reach the issues of most of the claims asserted by the plaintiffs. This is both regrettable and fortunate. The issues raised by this litigation are important ones. The decision on what to do concerning the education of illegal aliens at the postsecondary level in our county is indeed significant. That decision, however, is probably best left to the United States Congress and the Kansas legislature.

However, the opinion does give important insight into some of the substantive issues faced by Kansas and other states with such statutes, including the alleged possibility of huge damages having to be paid to plaintiffs by the states with such legislation if it is found invalid. In discussing the element of "standing" that requires that the plaintiffs would benefit from a judgment in their favor, the opinion states that the plaintiffs would not be entitled to such damages:

Finally, plaintiffs have failed to show that a favorable decision on Counts 1, 3, 4, 5 and 6 will redress the injury to them. If the court were to find K.S.A. 76-731a is preempted by federal law or in violation of federal law as suggested in Counts 1, 3, 4, 5 and 6, plaintiffs will not receive any benefit. A favorable decision for the plaintiffs would require those who have received the benefit of K.S.A. 76-731a to pay more, but plaintiffs' tuition bills would not change. Since the relief that could be granted to plaintiffs by the court will provide them with no personal benefit, they lack standing.

This case has been appealed to the Tenth Circuit Court of Appeals. We anticipate that the Court of Appeals will sustain this ruling on all points.

Finally, you should be aware that another lawsuit, challenging a comparable statute in California, was filed in California state court in Woodland, Yolo County, on December 14, 2005, Martinez et al. v. Regents of the University of California, et al., Case No. CV-05-2064. Lead counsel in the Kansas case is co-counsel in the California case.

ANALYSIS

I. H.B.144 IS VALID ON ITS FACE AND DOES NOT REQUIRE ANY SEPARATE AUTHORIZING FEDERAL LEGISLATION

The Utah statute in question, Utah Code Ann. § 53B-8-106, provides:

(1) If allowed under federal law, a student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, shall be exempt from paying the nonresident portion of total tuition if the student:

- (a) attended high school in this state for three or more years;
- (b) graduated from a high school in this state or received the equivalent of a high school diploma in this state; and
- (c) registers as an entering student at an institution of higher education not earlier than the fall of the 2002-03 academic year.

(2) In addition to the requirements under Subsection (1), a student without lawful immigration status shall file an affidavit with the institution of higher education stating that the student has filed an application to legalize his immigration status, or will file an application as soon as he is eligible to do so.

(3) The State Board of Regents shall make rules for the implementation of this section.

(4) Nothing in this section limits the ability of institutions of higher education to assess nonresident tuition on students who do not meet the requirements under this section

Though the anticipated federal legislation has never materialized, the Utah law's validity is not dependent on the passage of some future federal legislation. The State of Utah does not need permission to enact legislation dealing with the financing of state supported education. The statute's reference to "if allowed under federal law" must be interpreted as meaning, "not prohibited" by any contrary federal law.

Generally, education of its own citizens is one of those powers that is not specifically delegated to the federal government, and not denied to the states, and is thus one of the powers "reserved to the States" by the Tenth Amendment of the United States Constitution. See San Antonio School District et al. v. Rodriguez et al., 411 US 1 (1973). In that case the Supreme Court left in place the Texas school finance system which was tied to local property taxes and resulted in disparities in school funding statewide. The Texas Constitution provided for a free public education. The Court reversed a lower court ruling in favor of the original plaintiffs, who were Mexican-American parents whose children attended schools in a poorer school district. In doing so the court stated that, "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution." but rather "is perhaps the most important function of state and local governments." This case was primarily brought under the Equal Protection clause, claiming the plaintiffs were a "protected class" and that education was a "fundamental right" under the U.S. Constitution (both of which claims were rejected by the court). Though it did not arise out of an alleged conflict between state and federal statutes, the reasoning of the case is uniquely applicable to the issue before us with respect to Utah's tuition statute. The court emphasized the presumption of validity of a state statute and the important balance between federal and state power in our system of government, especially in matters of financing public education:

Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While '(t)he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,' it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

Utah likewise has a state constitutional mandate and authority to control its own public and higher education. In Utah's Enabling Act, 28 Stat. 107 (July 16, 1894), Congress made certain land grants for the support of the public schools and certain higher education institutions (Sections 6 and 8) and emphasized that there should be no sectarian control of the schools and that "[t]he schools, colleges, and university provided for in this Act shall forever

remain under the exclusive control of said State” (Section 11). Utah’s Constitution, Article X, confirms this duty, and an extensive statutory scheme, including Titles 53A and 53B of the Utah Code (including the statute in question) implement this mandate. Therefore, Utah does not need federal authorization to establish its own educational policy. The only limitation would be if a federal statute expressly prohibited such a benefit, which it does not.

II. H.B.144 DOES NOT VIOLATE ANY FEDERAL LEGISLATION

There are two federal statutes at the heart of this controversy, 8 U.S.C. § 1621 and 1623, which by their terms limit or place conditions on the nature and amount of public benefits a state may give undocumented aliens.

A. H.B.144 DOES NOT VIOLATE 8 U.S.C. § 1621

The code section codified as 8 U.S.C. § 1621 was passed on August 22, 1996 as part of the Personal Responsibility and Work Opportunity and Reconciliation Act of 1996 (PRWORA), and places limitations on a state allowing higher educational benefits to aliens who are not lawfully present in the United States. It provides, in part:

(a) in general

Notwithstanding any other provision of law and except as provided in subsections (b) [life and safety exceptions] and (d) of this section, an alien who is not -

(1) a qualified alien ... [8 U.S.C. 1641] ...

(2) a nonimmigrant ... [8 U.S.C. 1101] ... or

(3) an alien who is paroled into the United States ... [8 U.S.C. 1182(d)(5)]

...

is not eligible for any State or local public benefit

•••

(c) ”State or local public benefit” defined

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term “State or local public benefit” means -

•••

(B) 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.

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(d) State authority to provide for eligibility of illegal aliens for State and local public benefits

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility. (Emphasis added)

Assuming, without conceding, for the purposes of this analysis, that an exemption from the non-resident portion of tuition for Utah high school graduates is a “payment[] or assistance ... provided to an individual”, it is obvious that the safe harbor provision of subsection (d) applies because Utah’s H.B.144 [U.C.A. § 53B-8-106], which passed in 2002, constitutes “the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.”

The opponents of this kind of legislation who brought the Sebelius case in Kansas have argued that legislative history expresses an intent to require such state statutes to contain some special, explicit reference to this particular federal statute. In the Kansas case Amended Complaint, ¶ 57, it is asserted that “...to avoid the general prohibition of such benefits under 8 U.S.C. § 1621(d) [a statute] must specify that “illegal aliens” are eligible for such benefits and must reference 8 U.S.C. § 1621(d). The complaint refers to the Conference Report No. 104-725 on H.R. 3734 (July 31, 1996) of the 104th Cong., 2nd Session, which is quoted as stating at p. 383:

“No current State law, State constitutional provision, State executive order or decision of any State or Federal court shall provide a sufficient basis for a State to be relieved of the requirement to deny benefits to illegal aliens. Laws, ordinances, or executive orders passed by county, city or other local officials will not allow those entities to provide benefits to illegal aliens. *Only the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act, that references this provision, will meet the requirements of this section.* The phrase “affirmatively provides for such eligibility” means that the State law enacted must specify that illegal aliens are eligible for State or local benefits. Persons residing under color of law shall be considered to be aliens unlawfully present in the United States and are prohibited from receiving State or local benefits, as defined, regardless of the enactment of any State law.” [Emphasis added.]

The Conference Report, prepared by a small committee from members of both the House and Senate, coordinates differences in language between House and Senate versions of a proposed law. This statement is obviously intended as rhetoric for persuasive effect. Unlike the precision of wording and syntax required of a statutory provision, the loose use of terminology and the internal inconsistencies of this passage emphasize the folly of looking to such legislative history instead of the plain words of the statute itself. For example, it states that even a federal court decision (presumably including the United States Supreme Court) cannot permit the states to give benefits to illegal aliens. This is simply not true as stated. See, for example Plyler v. Doe, 457 U.S. 202 (1982) allowing free public education to alien children. Likewise, the statement that only a legislative bill “signed by the Governor” can suffice, is a very loose generalization, since such bills could also pass by a legislative override of a Governor’s veto, or go into effect after passage of time without a governor’s signature. See Utah Constitution Art. 7, Sec. 6. Finally, note that in defining the phrase “affirmatively provides for such eligibility”, the statement does not even include the allegedly necessary “reference to this provision (the federal statute)”. Reference to that concept is earlier in the paragraph, and in the syntax of the paragraph, even this statement does not say what opponents of tuition statutes say it does. These small but important details help illustrate the fundamental differences between such a general comment and precise statutory language.

But regardless of the internal inconsistencies within this statement, and its inconsistency with the statutory language on its face, the Conference Report, as legislative history, is simply irrelevant to interpret a statute that is plain on its face. The basic rule of statutory construction is that the plain language of the statute itself is the paramount indicator of its meaning. “The ‘strong presumption’ that the plain language of the statute expresses congressional intent is rebutted only in ‘rare and exceptional circumstances’ (citations omitted) when a contrary legislative intent is clearly expressed.” Ardestani v. Immigration and Naturalization Services, 502 US 129 (1991). And one should not ever look first to the legislative history to try to find something inconsistent or ambiguous. That is just backwards from the most basic rule that one looks first to the plain words of the statute. If they are clear, the inquiry stops there. See Metropolitan Stevedore Company v. Rambo, 515 US 291 (1995), where the Court said:

Neither Rambo nor the Ninth Circuit has attempted to base their position on the language of the statute, where analysis in a statutory construction case ought to begin, for “when a statute speaks with clarity to an issue, judicial inquiry into the statute’s meaning, in all but the most extraordinary circumstance, is finished.” (Citations omitted)

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Given that the language of §22 and the structure of the Act itself leave little doubt as to Congress’ intent, any argument based on legislative history is of minimal, if any, relevance. (Citations omitted)

The legislative history refers to statements by individual members of Congress or small congressional subcommittees, but it is the statutory language itself that all 535 members of the Senate and House vote on. That is the reason that resorting to such legislative history is rare and avoided by the courts in trying to second guess what the clear wording of a statute provides. Nothing else can be said to express the collective intent of Congress. These statements from the conference report demonstrate that Congress knew how to provide such a strict requirement in statutory language if it had intended to do so, but it did not.

The plain wording of 8 U.S.C. § 1621(d) contains no such requirement for an explicit reference to a specific federal law. The word “affirm” is defined as “to declare or maintain to be true” (Webster’s II New Riverside Dictionary, Houghton Mifflin Company 1988). The statute does not require that there be an affirmative reference to a federal statute. It requires that it “affirmatively provides for such eligibility”. It does not require that it “affirmatively provides an intent to be exempt under a specific federal statute, 8 U.S.C. § 1621(d)”. In other words, the statutory reference to “affirmatively provides for such eligibility”, means that the eligibility for the benefit cannot be merely inferred or implied, but clearly stated. That is clearly what H.B.144 does. It affirmatively provides that “students without lawful immigration status” are also eligible for the benefit on signing an appropriate affidavit.

Utah’s tuition statute satisfies the “safe harbor” requirements of 8 U.S.C. §1621(d) by affirmatively providing for the benefit in a law passed after August 22, 1996, and is therefore valid.

B. H.B.144 DOES NOT VIOLATE 8 U.S.C. § 1623

The other federal statute involved in this issue is 8 U.S.C. §1623 which was enacted about six weeks after the passage of PRWORA, on September 30, 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). It provides as follows:

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 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.

The Utah statutory criteria for being exempt from the nonresident portion of tuition, namely (a) attending a Utah high school for three or more years and (b) receiving a high school diploma or an equivalent, is not based on residence, and furthermore, it can be met by “a

citizen or national of the United States” regardless of whether he or she is a resident of Utah. Utah’s Public Education Code provides that students who reside in one school district may, to the extent reasonably feasible, attend school in another school district (Utah Code Ann. § 53A-2-207). Likewise, a school district may permit a child residing outside of the state to attend school within the district on the payment of tuition at least equal to the per capita cost of the school program in which the child enrolls, though the tuition may be waived by the school board (Utah Code Ann. § 53A-2-205). In general, a child’s residence for purposes of obtaining a free public education in Utah is based on whether the child resides in the district, apparently without regard to citizenship or immigrant status (Utah Code Ann. § 53A-2-201). This is the case even if the child is not living with its parents but with a responsible adult designated by affidavit by the child’s parents as a legal guardian. Utah’s compulsory education law, U.C.A. § 53A-11-101 et seq., requires all children to attend school, with narrow exceptions not relevant to this issue. This is all consistent with the basic constitutional requirement stated in the United States Supreme Court case of Plyler v. Doe, 457 U.S. 202(1982) which held that a Texas statute that denied free education to alien children violates the Equal Protection Clause of the United States Constitution.

Therefore, for two separate reasons, either one of which represents a valid exception to the federal statute, Utah’s tuition law does not violate 8 U.S.C. § 1623(d). First, high school attendance and graduation are not tied to “residency” requirements, so the eligibility for the exemption from resident tuition under H.B.144 is not “on the basis of residence”. Second, even a Utah high school student who graduates, and who, with or without his or her family, continues to maintain an out of state residence, or moves from the state and establishes residence elsewhere, is still eligible for this benefit if they otherwise meet the statutory criteria. Therefore, as required by the federal statute, this benefit is available also to other citizens or nationals of the United States without regard to residency.

Opponents of the legislation have asserted that isolated statements in the conference report or by individual representatives or senators during congressional floor statements establish that allowing undocumented aliens to pay resident tuition, under any circumstances, is prohibited by 8 U.S.C. § 1623. As referenced above with respect to 8 U.S.C. § 1621(d), such legislative history is almost always irrelevant and unpersuasive to a court, and the first and primary inquiry is always to consider the plain words of the statute. Such is the clear case in this instance. The unambiguous words of the statute allow the tuition exemption for citizens or undocumented aliens alike.

But even taking a closer look at the few instances the congressional record makes reference to this subject is not favorable to the opponents of H.B. 144. It only demonstrates the fallacy of trying to draw congressional intent from an incidental statement in a conference report or a floor speech by one senator or congressman. In literally thousands of pages of floor debate and the conference report, all about a bill that was itself approximately 200 pages long in printed form, we have been able to identify only the following references to this subject:

09-24-96

ILLEGAL IMMIGRATION REFORM AND IMMIGRANT
RESPONSIBILITY ACT OF 1996
Conference Report

House recedes to Senate amendment section 201(a)(2) with modifications. This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education.

H.R. Conf. Rep. No. 104-828, 240.

09-27-96

Senator Alan Simpson

Without the prohibition on States treating illegal aliens more favorably than U.S. citizens, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges.

142 Cong. Rec. S11508 (September 27, 1996).

09-28-96

Senator Alan Simpson

Illegal aliens will no longer be eligible for reduced in-State college tuition. It is in there. The GAO will study the use of Pell grants and federally funded student aid of college students who are illegal, or nonresident aliens. That is in there.

142 Cong. Rec. S11713 (September 28, 1996).

09-26-96

Congressman Christopher Cox

What else does title V do? What else does he want dropped from the bill after it was passed by a historic bipartisan margin in this House of 305 to 123? The President wants to drop the provision that says that-now listen carefully to this because it is a shocker, that the President would be in favor of this kind of public benefit to illegal aliens, people who have broken the law here in this country. He wants to drop the part of the bill that says that when somebody

comes from Thailand, when somebody comes from Russia, when somebody comes from, you name it, it is a big world, into your State, they will not get in-State tuition benefits at your State college.

Now if I move from California to Indiana, I am not going to get in-State benefits because I am from California, but illegal aliens, unless we pass this bill, are going to get in-State tuition at public colleges, universities, technical and vocational schools.

Well, my friends, the President wants this dropped from the bill. In other words, he wants them to get it.

142 Cong. Rec. H11377 (September 26, 1996).

09-26-96

Congressman Rohrabacher, California (speaking about President Clinton)

He promised us he would help us solve this problem. Tonight he is telling us that he will shut down the government unless we agree to give welfare payments to illegal immigrants into our State. He will shut down the Government unless we agree to let people who have never paid into the system receive Social Security benefits, that he is going to shut down the government unless illegal aliens get same tuition as local residents.

142 Cong. Rec. H11379 (September 26, 1996).

This demonstrates the fact that this legislation, like essentially all such complex, politically charged legislation, was subject to significant pressure on all sides, including Presidential pressure. It involved intense bargaining that included the extreme threat of the President vetoing the budget and shutting down the federal government. Note that the bill was passed on September 30, 1996, the last day of the federal fiscal year! Whatever happened in this negotiation process, the language of the bill became what it is today. Not surprisingly, the final words of the statute on which the Congress voted, and which it ultimately passed, do not say exactly what individual members of the legislative branch were advocating as their preferred position. It was, as almost always is the case, a compromise by all sides. Not even the entire congressional record could possibly reflect all the proposals and counter-proposals, bargaining and haggling that occurred. In the end, no single senator or representative, or even select group, has the right or power to interpret what the statute means. Now the statute speaks for itself, in its own plain words.

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The federal statute, 8 U.S.C. § 1623, essentially provides that merely residing in a state should not qualify an undocumented alien for any special postsecondary education benefit unless any other citizen or national can be eligible for the same benefit without regard to their residence. That is consistent in every way with what Utah law provides and therefore, H.B.144 is in all respect valid and consistent with 8 U.S.C. § 1623.

CONCLUSION

H.B. 144, passed in 2002, affirmatively provides for this tuition benefit to be available also to undocumented aliens on certain conditions, the benefit is not based on residence, and the same opportunities are equally available to citizens or lawful residents of any other state. Utah's law allowing Utah high school graduates to pay resident tuition does not violate either the letter or spirit of the federal limitation and appears valid. Thus, this education benefit is "allowed under federal law", or is "not prohibited", and is valid and enforceable.

Sincerely,

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Chief, Education Division

WTE/bk