

# State of North Carolina

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ROY COOPER  
ATTORNEY GENERAL

May 6, 2008

Ms. Shante Martin, Esquire  
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North Carolina Community College System  
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Raleigh, NC 27699-5001

Dear Ms. Martin:

David Sullivan requested advice on the legality of the North Carolina Community College System's Guidance Memorandum CC 07-275. In that guidance, the System advises each local Community College that "notwithstanding any policy of a local board, colleges should immediately begin admitting undocumented individuals."<sup>1</sup> CC 07-275 essentially rejects earlier guidance set forth in Memorandum CC 01-271 restricting the admission of undocumented aliens.

The State Board of Community Colleges has the authority to establish admission criteria. N.C. Gen. Stat. § 115D-5(a). The State Board enacted 23 N.C.A.C 2C .0301 which states, in pertinent part: "Each college shall maintain an open door admission to all applicants who are high school graduates or who are at least 18 years of age." Community College trustees are to apply these admission criteria. N.C. Gen. Stat. § 115-20.

The admission criteria and its application should be interpreted in a manner consistent with other applicable state and federal laws on college admissions.

"The power to regulate immigration is unquestionably exclusively a federal power." De Canas v. Bica, 424 U.S. 351, 354, 47 L. Ed. 2d 43, 96 S. Ct. 933 (1976). State action regarding immigration can not conflict with federal law. Michigan Canners & Freezers v. Agricultural Marketing & Bargaining Bd., 467 U.S. 461, 469, 81 L. Ed. 2d. 399, 104 S. Ct. 2518 (1984).

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<sup>1</sup> The Guidance memorandum bases this conclusion, in part, on "a 1997 advisory opinion of the Attorney General". It appears this reference is to a May 9, 1997 advisory letter to Patricia Montgomery. That advisory letter did not address the issue of admissions for "undocumented individuals" and as such should not be relied on for that purpose.

Federal law makes certain non-citizens<sup>2</sup> ineligible for State and local public benefits. 8 U.S.C. § 1621. State and local public benefits are defined under federal law for purposes of this prohibition. 8 U.S.C. § 1621(c). That definition includes “postsecondary education”. 8 U.S.C. § 1621(c)(1)(B). Non-postsecondary education is not considered a public benefit under this statute.

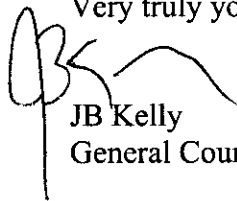
Prohibited State and local public benefits can be provided “only through the enactment of a State law . . . which affirmatively provides for such eligibility.” 8 U.S.C. § 1621(d). To be effective the law must be enacted after August 22, 1996. *Id.* State law may provide eligibility for postsecondary education benefits to an alien who is not lawfully present in the United States only to the extent any citizen or national of the United States receives the same eligibility regardless of State residence. 8 U.S.C. § 1623. North Carolina has not enacted such laws.

The scope and applicability of the Federal prohibition on State and local benefits as it relates to postsecondary education admission criteria developed absent the enactment of State law is unsettled. *Compare, e.g., League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997)(postsecondary admission criteria pre-empted by federal law) *with Equal Access Education v. Marten*, 305 F. Supp. 2d 585 (E.D. Va. 2004)(postsecondary admission policy not pre-empted by federal law). Enforcement and administration of the public benefits prohibition rests with the Secretary of Homeland Security. 8 U.S.C. § 1103(a)(1), *see also Day v. Bond*, 500 F. 3d 1127, 1139 (10<sup>th</sup> Cir. 2007)(only Secretary of Homeland Security has standing to bring legal action to enforce 8 U.S.C. § 1621 *et. seq.*).

The Office of the Secretary of Homeland Security has not provided any guidance regarding their assessment of CC 07-275 in relation to 8 U.S.C. § 1621. Reliance on such advice would be appropriate unless and until a valid State law regarding postsecondary admission standards is enacted.<sup>3</sup> Until such advice is provided or State law enacted, a return to Guidance CC 01-271 would more likely withstand judicial scrutiny.

This is an advisory letter; it has not been reviewed and approved in accordance with procedures for issuing an Attorney General’s opinion.

Very truly yours,



JB Kelly  
General Counsel

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<sup>2</sup> This includes all aliens unless they are a qualified alien as defined in 8 U.S.C. § 1641; a nonimmigrant under the Immigration and Nationality Act; or, paroled into the United States pursuant to 8 U.S.C. § 1182(d)(5) for less than one year. 8 U.S.C. § 1621(a).

<sup>3</sup> This Office can draft a letter to the Secretary of Homeland Security on the System’s behalf should one be desired.