



# COMMONWEALTH of VIRGINIA

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## MEMORANDUM

By Fax

TO: Lee Andes  
State Council of Higher Education for Virginia

FROM: Ronald C. Forehand  
Senior Assistant Attorney General  
Chief, Education Section

RE: Domicile Matter

You have asked whether a student under the following fact situation is categorically barred from establishing domicile in Virginia and being afforded in-state tuition:

The student is and always has been a United States citizen. The student was born in Virginia and has always lived in Virginia. The student is dependent on his parents, who are immigrants and are not lawfully present in the United States, having either arrived in the United States illegally or having arrived legally and then at some point having become out-of-status.

First, it is clear that a person who is not lawfully present in the United States – the parents, in this case – may not be domiciled in Virginia. We need not go into further analysis of this point.

Ordinarily, persons who are “dependent students,” as that term is defined in Section 23-7.4, may be classified as in-state only if the parents<sup>1</sup> are Virginia domiciliaries. These students are often said to “stand in the shoes of their parents” with respect to domicile. This concept is set forth in the second paragraph of Section 23-7.4 B provides that:

“To become eligible for in-state tuition, a dependent student or unemancipated minor shall establish by clear and convincing evidence that for a period for at least one year prior to the alleged date of the alleged entitlement, the person through whom he claims

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<sup>1</sup> For the purposes of this memo, the term “parents” refers to the parent(s) or other person upon whom a student is dependent and through which the student claims, or would ordinarily claim, domicile.

eligibility was domiciled in Virginia and had abandoned any previous domicile, if any existed....”

This dependency test for domicile is not, however, absolute. The fourth paragraph of subsection C of the same section provides:

“The domicile of a dependent student shall be *rebuttably presumed* to be the domicile of the parent or legal guardian claiming him as an exemption on federal or state income tax returns currently and for the tax year prior to the date of the alleged entitlement or providing him substantial financial support.” (Emphasis added.)

In other words, a dependent student, by presenting clear and convincing evidence, may establish domicile in Virginia even if his parents are domiciled elsewhere.

Based on the above-quoted statutory provision, SCHEV Domicile Guidelines at 8 VAC 40-120-70 E(2) state:

“A dependent student 18 years of age or older may also rebut the presumption that the student has the domicile of the parent claiming the student as a dependent for income tax purposes by showing that Virginia domicile was established independent of the parents. The burden is on the student to show by clear and convincing evidence that he has established a Virginia domicile independent of the out-of-state parents despite the fact that the parents are claiming the student for income tax purposes or providing substantial financial support.”

I conclude that these long-standing SCHEV Guidelines accurately reflect the current law; that is, that a dependent whose parents are domiciled elsewhere is not categorically barred from establishing domicile in Virginia and being afforded in-state tuition. Virginia’s tuition statutes permit *any* student – not limited to the fact situation you describe – to offer evidence to attempt to establish Virginia domicile independent of his parent’s domicile. The student would still have to establish affirmatively that *his* domicile is Virginia. This presumption – that a dependent student has the parents’ domicile – has been treated as an extremely strong presumption in Virginia. Overcoming the presumption is a difficult burden to meet, and instances of overcoming it will be rare.

The facts you present – a United States citizen who was born in and who has always lived in Virginia – is, however, one in which the student, by offering clear and convincing evidence, might well be able to overcome the presumption.

Let me emphasize that the above analysis is not contrary to, and does not alter, advice previously given by this office that persons unlawfully present in the United States (“illegal aliens”) are themselves, under no circumstances, eligible for Virginia domicile and in-state tuition.

I hope this answers your question. Please let me know if you need further help on this or other matters.