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May 9, 2011

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: Senate Bill 167

Dear Governor O'Malley:

We have reviewed and hereby approve Senate Bill 167, "Public Institutions of Higher Education - Tuition Rates - Exemptions," for constitutionality and legal sufficiency. In our review, we have considered whether the bill is preempted by federal law and have concluded that it is not. There may, however, be specific factual situations in which a certain exclusion from the provisions of the bill may be preempted by federal law or found to violate equal protection as applied. The possibility that the bill may be preempted or unconstitutional in certain limited instances does not, however, render it facially invalid. Finally, we note a possible drafting error that can be corrected in future legislation.

As amended, Senate Bill 167 defines the term "individual" as used in the education law to include an "undocumented immigrant individual," and to expressly exclude "a nonimmigrant alien within the meaning of 8 U.S.C. § 1101(a)(15)." It further provides that an individual is exempt from paying the out-of-state tuition rate at a community college in the State if the individual:

1. attended a public or nonpublic secondary school in the State for at least three years;

2. graduated from a public or nonpublic secondary school in this State or received the equivalent of a high school diploma in the State;

3. registers as an entering student in a community college in the State within four years after graduating from a public or nonpublic secondary school in the State or receiving the equivalent of a high school diploma in the State;

4. provides to the community college documentation that the individual, or the individual's parent or legal guardian has filed a Maryland income tax return annually for the three years that the individual attended a public or nonpublic secondary school in the State, annually during any years between graduation and registration, and annually during the period of attendance at the community college;

5. in the case of an individual who is not a permanent resident, provides to the community college an affidavit stating that the individual will file an application to become a permanent resident within 30 days after the individual becomes eligible to do so;

6. in the case of an individual who is required to register with the selective service system, provides to the community college documentation that the individual has complied with the registration requirements; and

7. registers at a community college in the State no later than four years after graduation or receiving the equivalent of a high school diploma in the State.

An individual attending a community college under this provision is also exempt from paying the out-of-county rate if the individual attends a community college supported by the county in which the secondary school the individual graduated is located, or, if the individual received the equivalent of a high school diploma, the county where the secondary school most recently attended by the individual is located.

The bill further provides that an individual is exempt from paying nonresident tuition at a public senior higher education institution[1] if the individual:

[1] The public senior higher education institutions are the constituent institutions of the University System of Maryland, Morgan State University, and St. Mary's College of Maryland.

1. attended a community college under the provisions of the bill;

2. was awarded an associate's degree or achieved 60 credits in community college;

3. provides the public senior higher education institution with a copy of the affidavit submitted to the community college;

4. provides to the public senior higher education institution documentation that the individual or the individual's parent or legal guardian has filed a Maryland income tax return annually while the individual attended community college, annually during any period between graduation from or achieving 60 credits at a community college and registration at the public senior higher education institution, and annually during attendance at the public senior higher education institution; and

5. registers at a public senior higher education institution in the State not later than four years after graduating from a community college in the State.

Other provisions of the bill provide that information provided by an individual to qualify for the exemptions from out-of-state or out-of-county tuition under the provisions of the bill is to remain confidential, require that community colleges and public senior higher education institutions keep certain information about the number of individuals paying lower tuition as a result of the provisions of the bill and submit reports on that information, and extend the time in which an honorably discharged veteran may qualify for an exemption for nonresident tuition at a public institution of higher education from one to four years after the veteran's discharge. Finally, the bill provides that students receiving reduced tuition at a public senior education institution are not to be counted as in-state students for the purpose of determining the number of Maryland undergraduate students enrolled at that institution.

FEDERAL PREEMPTION

The primary objection that has been raised to Senate Bill 167 is that it is preempted by federal law. These claims are based on 8 U.S.C. § 1623 and 8 U.S.C. § 1621. In addition, although the issue has not been raised in debate, it could be argued that the exclusion of "a nonimmigrant alien within the meaning of 8 U.S.C. § 1101(a)(15)" could be preempted by federal immigration law.

8 U.S.C. § 1623

Federal law provides, at 8 U.S.C. § 1623(a):

> 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 a 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.

This office has consistently taken the position that a bill that looks to factors such as time of attendance in Maryland schools and graduation from Maryland schools to define an exemption from nonresident tuition does not base eligibility on residence. *Letter to the Honorable Susan W. Krebs* dated April 1, 2011; *Letter to the Honorable Victor R. Ramirez* dated April 3, 2007; *Letter to Ms. Rachel H. Hise* dated April 18, 2007; *Letter to the Honorable Luiz R.S. Simmons* dated March 2, 2007; *Letter to the Honorable Sheila Ellis Hixson* dated March 8, 2002.

Recently, the Supreme Court of California has taken the same position. *Martinez v. Regents of University of California*, 241 P.3d 855 (Cal. 2010), involved a statute very much like Senate Bill 167.[2] The court concluded that the statute did not provide the tuition exemption based on residence, but other criteria, "specifically, that persons possess a California high school degree or equivalent; that if they are unlawful aliens, they file an affidavit stating that they will try to legalize their immigration status; and, especially important here, that they have attended high school ... in California for three or more years." *Id.* at 863-864. The court further noted that many unlawful aliens who would qualify as residents if it were not for their unlawful immigration status would still

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[2] This decision is available at http://www.courtinfo.ca.gov/opinions/documents/S167791.PDF. Other cases have been filed challenging immigrant tuition measures, but they have been rejected either on standing grounds, or because the federal law did not provide a private cause of action. *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007) (Kansas); *Immigration Reform Coalition of Texas v. Texas*, 796 F.Supp.2d (S.D. Tex. 2010). A case challenging the Nebraska law, *Mannschreck v. Board of Regents*, was also dismissed on standing grounds, but there is apparently no published opinion. *See* Letter from Kris W. Kobach to Eric Holder dated February 7, 2011 requesting that the Justice Department file suit to enforce federal law with respect to the Nebraska provision. http://irli.org/system/files/Demand Letter to DOJ_FINAL.pdf.

have to pay nonresident tuition, while many nonresidents would qualify for the exemption. *Id.* at 864. As a result, the court concluded that the California law was not preempted by 8 U.S.C. § 1623(a). *Id.* at 866. A petition for certiorari to the United States Supreme Court was filed in the *Martinez* case on February 14, 2011.

The only significant differences between the third reader version of Senate Bill 167 and the California law upheld in *Martinez* are the specific provisions for exemptions from out-of-county tuition at community college, and the requirements that the individual show that the individual or the individual's parents or legal guardian has filed income tax returns in the State during specific time periods and that the individual has complied with the selective service law. It is my view that the out-of-county exemption is not based on residence for the same reason that the out-of-state exemption is not, as both look to the location of the school that was last attended, rather than to the residence of the individual. The requirement of tax documentation also does not change the analysis, as Maryland imposes income taxes on nonresidents who earn income in Maryland. Tax - General Article, § 10-210.

8 U.S.C. § 1621

Section 1621(a) provides that aliens who are not lawfully in the country are "not eligible for any State or local public benefit." Section 1621(c)(1)(B) defines the term "State or local public benefit" to include postsecondary education "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." Section 1621(d) provides an exemption from the restriction imposed by subsection (a). It provides:

> 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.

It is my view that an exemption from out-of-state or out-of-county tuition is a benefit within the meaning of this statute. *Letter to Ms. Rachel H. Hise* dated April 18, 2007. The California courts have reached the same conclusion. In *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 531-533 (Cal. App. 2008), a state court of appeals held that eligibility for in-state tuition was a benefit under § 1621. In doing so, they

rejected the argument that the catchall reference to "any other similar benefits for which payments or assistance are provided" did not modify "postsecondary education," and even if it did, the term "assistance" would not be limited to direct financial assistance. This decision was reversed by the California Supreme Court on appeal, but the Supreme Court also clearly believed that the statute provided a benefit, though it did not discuss the issue, because it went on to discuss the application of the law. *Martinez v. Regents of University of California*, 241 P.3d 855 (Cal. 2010).

In *Martinez,* the California Supreme Court determined that the California statute did not violate § 1621 because the statute expressly referred to "the case of a person without lawful immigration status," and the legislative findings accompanying the bill stated that it "allows all persons, including undocumented immigrant students who meet the requirements ... to be exempt from nonresident tuition in California." *Id.* at 866-867. In the view of the court, these provisions affirmatively provided for eligibility of aliens not lawfully present in the United States, and thus brought the statute within the requirements of § 1621(d). *Id.* at 868.

As amended, Senate Bill 167 included an "undocumented immigrant individual" in the definition of individual. The Fiscal and Policy Note for the bill also makes repeated reference to coverage of undocumented immigrants under the bill. It is my view that the term "undocumented" is ordinarily understood to refer to persons who are unable to provide documentation of their lawful presence in this country. *See In-State Tuition for Undocumented Immigrants - State's Rights and Educational Opportunity,* American Association of State Colleges and Universities, Higher Education Policy Brief (August 2007); *Undocumented immigrants in JROTC programs wait for the next battle over the DREAM Act*, The Washington Post (February 8, 2011). As a result, it is my view that Senate Bill 167, as amended, is in compliance with 8 U.S.C. § 1621 and is not preempted.

Nonresident Aliens

In *Toll v. Moreno*, 458 U.S. 1 (1982), the Supreme Court considered whether the then-current policy of the University of Maryland, which categorically barred nonimmigrant aliens from establishing domicile for purposes of qualifying for in-state tuition, was preempted by federal law as applied to "domiciled nonimmigrant aliens who hold G-4 visas." The Court concluded that it was. Specifically, the Court held that where federal law expressly permitted a class of nonimmigrant aliens to establish

domicile, and exempted them from the payment of many otherwise applicable taxes, Maryland could not seek to collect the unpaid taxes by denying holders of G-4 visas the ability to establish domicile for purposes of paying instate tuition.

The holding of *Toll v. Moreno* would not apply to many categories of nonimmigrant aliens described in § 1101(a)(15). For many of these categories the visas are expressly made dependent on the person having a residence in a foreign country that the person has no intention of abandoning. 8 U.S.C. § 1101(a)(15)(B), (F), (H)(ii) and (iii), (J), (M), (O)(ii)(IV), (P), and (Q). Others permit only very temporary stays. 8 U.S.C. § 1101(a)(15)(C), (D). Some require that the purpose of the visit be limited "solely" to a particular activity. 8 U.S.C. § 1101(a)(15)(E), (I), (R). Any person who invalidates his or her visa by staying past the allotted time or activity becomes an undocumented immigrant and could qualify for the exemption offered by Senate Bill 167. Other visa statuses involve persons who await resident status. 8 U.S.C. § 1101(a)(15)(K), (N), (U), and (V). If granted, those persons also would qualify for the exemption provided by Senate Bill 167. Of the remaining categories of nonimmigrant aliens, it is not clear how many might have federal policy issues of the type that led to the holding of the Supreme Court with respect to G-4 visas. Even with respect to holders of G-4 visas, the fact that they are now permitted to establish domicile for the purpose of in-state tuition would reduce the number that might otherwise be adversely affected by the exclusion of nonimmigrant aliens under the provisions of the bill. Nevertheless, it is possible that some applications of the exclusion could be found to be preempted by federal immigration law. It is my view that this possibility does not render the bill facially preempted.

EQUAL PROTECTION

The differential treatment of nonimmigrant aliens in comparison to citizens, immigrant aliens, and undocumented immigrants also raises the possibility of a challenge under the Equal Protection Clause of the Fourteenth Amendment or under Article 24 of the Maryland Declaration of Rights. Although the District Court in *Moreno v. Toll*, 489 F. Supp. 658, 660-661 (D. Md. 1980), applied strict scrutiny to the exclusion of G-4 visa holders from payment of instate tuition, and that finding was upheld by the Fourth Circuit for the "reasons sufficiently stated in this opinion of the district court," 645 F.2d 217 (4th Cir. 1981), the Supreme Court did not reach the Equal Protection issue, but decided the case solely on preemption grounds. More recently federal circuit courts have taken the position that a classification based on nonimmigrant alien status is subject only to rational basis scrutiny. *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523 (6th

Cir. 2007); *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005), *see also Carlson v. Reed*, 249 F.3d 876 (9th Cir. 2001) (applying rational basis to classification between types of nonimmigrant visas), and Brief of the Solicitor General in opposition to *certiorari* in *Wallace v. Calogero* (arguing that rational basis is the proper standard).[3] While some district courts have not agreed with this approach, *Adusumelli v. Steiner*, 740 F. Supp. 2d 582 (S.D.N.Y. 2010); *Kirk v. New York State Dept. of Educ.*, 562 F. Supp. 2d 405 (W.D.N.Y. 2008), I believe that the better view is that a classification based on nonimmigrant alien status is subject to rational basis scrutiny.

The equal protection guarantee embodied in Article 24 of the Maryland Declaration of Rights has generally been interpreted as being *in pari materia* with the Equal Protection Clause of the Fourteenth Amendment, and been applied in like manner and to the same extent. *Ehrlich v. Perez*, 394 Md. 691, 715 (2006). Although "the two are capable of divergent application," the Court of Appeals has:

> long recognized that decisions of the [U.S.] Supreme Court, interpreting the equal protection clause of the federal constitution are persuasive authority in cases involving the equal treatment provisions of Article 24.

Id. As a result, in considering whether discontinuance of funding for a program offering health care to permanent resident aliens who did not qualify for Medicaid under changes made by the federal Personal Responsibility and Work Opportunity Reconciliation Act, ("PRWORA"), the Court considered the equal protection argument in light of cases under both the Equal Protection Clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights. *Ehrlich v. Perez*, 394 Md. at 716.

In the *Perez* case, the Court of Appeals ultimately concluded that cutting the program in question, thus denying the plaintiffs, who were lawful permanent residents of Maryland, from the benefits of the health care program, violated equal protection.[4] In doing so, the Court explained the standard of review applicable to classifications

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[3] http://www.justice.gov/osg/briefs/2006/2pet/6invit/2005-1645.pet.ami.inv.html.

[4] This decision has been the subject of criticism. In *Hong Pham v. Starkowski*, 2011 Conn. LEXIS 102 (Conn. April 5, 2011), the Supreme Court of Connecticut noted that the Court of Appeals was the only appellate court that had held "that a state may not reduce or eliminate state funded assistance to aliens in an alien-only program while continuing to cover citizens through a federal-state cooperative program," and found the case to be "unpersuasive" on that issue. *Id.* at 47-48.

involving aliens, stating not only that "[c]lassifications based on alienage" are "inherently suspect and are therefore subject to strict scrutiny," but also that "[s]tatutory discrimination within the larger class of legal resident aliens, providing benefits to some aliens, but not to others, is nonetheless a classification based on alienage," and subject to strict scrutiny. *Id.* at 718-719.[5]

In reaching this conclusion, the Court of Appeals relied, for the most part, on United States Supreme Court cases. Thus, this is not a case where the Court gave an interpretation independent of federal equal protection analysis to Article 24 of the Declaration of Rights. Moreover, the case dealt only with a classification among lawful permanent residents. As a result, its conclusion should not be read to extend beyond discrimination among members of that class. For this reason, it is my view that the Court of Appeals, faced with a classification involving nonimmigrant aliens, many of whom cannot establish residency under federal law, would apply rational basis analysis, as the majority of federal courts now do.

Under Senate Bill 167, the rational basis for the classification is clear. The entire purpose of the bill is to design a law that will enable the State to continue to provide services to young undocumented aliens, many of whom came here as children, have attended Maryland schools, and have an attachment to the State. It is not irrational to assume that nonimmigrant aliens here on a temporary basis have less of an attachment. *See LeClerc v. Webb*, 419 F.3d 405, 417 (5th Cir. 2005). It is possible that some types of visa holders could show that they have a similar attachment to the State and that their exclusion does not even meet rational basis. As is the case with the *Toll v. Moreno* preemption above, this possibility does not render the bill, or the exclusion of nonimmigrant aliens, facially invalid.

DRAFTING ISSUE

While the bill exempts an individual from payment of out-of-state tuition if they either graduated from a public or nonpublic secondary school in the State or received the equivalent of a high school diploma in the State, the tax return requirement applies for the period between graduation from secondary school and registration at a community

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[5] The Connecticut court in *Hong Pham* also disagreed with this conclusion, stating that *Nyquist v. Mauclet*, 432 U. S. 1 (1977) and *Graham v. Richardson*, 403 U. S. 365 (1971), relied upon by the Court of Appeals, did not support the conclusion that classifications among sub-classes of resident aliens remains a suspect classification subject to strict scrutiny review. *Hong Pham* at 50-51.

college. This is the only place where the option of the equivalent of a high school diploma is omitted where graduation from a secondary school in the State is mentioned. Similarly, the portions of the bill relating to attendance at a public senior higher education institution have been expressly amended to include the option of achieving 60 credits at a community college as an alternative to the award of an associate's degree in each place that the award of an associate's degree is mentioned. As a result, it is our view that the failure to add receipt of a high school diploma in the provision relating to filing tax returns in the years between graduation from secondary school and registration at a community college is an oversight that can be corrected next session.

Very truly yours,

Douglas F. Gansler
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DFG/KMR/kk

cc: The Honorable Victor R. Ramirez
The Honorable John P. McDonough
Joseph Bryce
Karl Aro