



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 7, 2013

Representative John E. Huffman
900 Court Street NE H476
Salem OR 97301

Re: Constitutionality of House Bill 2787

Dear Representative Huffman:

You asked the following two questions regarding House Bill 2787, which exempts students who are not United States citizens or legal residents from nonresident tuition rates at Oregon public universities if the students meet certain requirements:

- 1) Is the bill constitutional?
- 2) In which states that have passed similar tuition equality laws were the laws challenged in court, and what did the courts hold?

Short Answers

- 1) We believe a court would hold that HB 2787 is constitutional. The considerations are whether federal law preempts the state bill and whether the bill is unconstitutional under the Privileges and Immunities Clause or the Equal Protection Clause. HB 2787 likely would survive a challenge under each of these issues.
- 2) Twelve states have passed similar tuition equality bills. The courts in states where the laws have been challenged have upheld the laws as constitutional or have not addressed the laws' constitutionality.

Constitutionality

If federal law regulates an area, a state law that conflicts with the federal law is preempted. Article VI, clause 2, of the Constitution of the United States, provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The federal law at issue is 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 amount, duration, and scope) without regard to whether the citizen or national is such a resident.

The language is not clear and there are no court cases or federal regulations to provide guidance, but two interpretations have emerged. The first interpretation is that a state that offers in-state tuition rates to illegal immigrants is required to offer in-state tuition rates to all students, regardless of whether the students are residents of the state.¹ The second interpretation is that a state can offer in-state tuition rates to illegal immigrants if the rates are offered on a residency-neutral basis.² If the in-state tuition rates are offered for reasons other than the student's residency, the state law is not preempted.³ The second interpretation is most widely agreed upon. HB 2787 provides an exemption from nonresident tuition if a student who is not a citizen or legal resident of the United States attended elementary or secondary school in Oregon for a certain number of years prior to enrolling in a public university. HB 2787 does not require residency to qualify for the exemption. It is residency-neutral, and a court would therefore be unlikely to hold that it is preempted by 8 U.S.C. 1623(a).

The Privileges and Immunities Clause of the United States Constitution provides, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."⁴ The Privileges and Immunities Clause prohibits states from granting to some citizens greater privileges than to others. The clause, however, applies only to citizens and "[t]hus, aliens, lawful or unlawful, cannot claim benefits under the clause."⁵ Even so, HB 2787 does not "abridge privileges" for some students but instead extends an existing privilege to a larger group of students.⁶

The Equal Protection Clause of the United States Constitution provides that no state may deny "any person within its jurisdiction the equal protection of the laws."⁷ Courts have interpreted this to mean "that all persons similarly circumstanced shall be treated alike."⁸ Students who are not citizens or legal residents of the United States are not in circumstances similar to students who are citizens or legal residents of the United States. Because HB 2787 would not treat similarly circumstanced persons differently, it would likely survive a challenge under the Equal Protection Clause. Regardless of circumstance, however, HB 2787's expansion of the exemption from nonresident tuition rates does not create unlawful disparate treatment.

HB 2787 therefore is likely to be held constitutional under a preemption analysis and the Privileges and Immunities and Equal Protection Clauses of the United States Constitution.

Tuition Equality in Other States

As of July 2012, 12 states allow undocumented students who meet specific requirements to receive in-state tuition rates at public post-secondary institutions.⁹ The states are California, Texas, New York, Utah, Washington, Oklahoma, Illinois, Kansas, New Mexico, Nebraska, Maryland and Connecticut. Most states require students to have attended high school or received a General Educational Development (GED) certificate in the state, and to

¹ See, e.g., Opinion of Attorney General Robert F. McDowell of the Commonwealth of Virginia, No. 06-018 (June 2006).

² See, e.g., Opinion of Attorney General John W. Suthers of the State of Colorado, No. 06-01 (January 2006).

³ *Martinez v. Regents of University of California*, 50 Cal. 4th 1277, 1284 (2010).

⁴ Amendment XIV, section 1, United States Constitution.

⁵ *Martinez* at 1299.

⁶ Oregon University System Administrative Rules, OAR 580-010-0029, et seq.

⁷ Amendment XIV, section 1, United States Constitution.

⁸ *Plyler v. Doe*, 457 U.S. 202, 216 (1982), quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

⁹ National Conference of State Legislatures, Undocumented Student Tuition: State Action <<http://www.ncsl.org/issues-research/educ/undocumented-student-tuition-state-action.aspx>> (visited March 6, 2013).

sign an affidavit declaring their intention to become a citizen or lawful permanent resident. Oregon's HB 2787 carries the same requirements as other states.

Tuition laws similar to Oregon's HB 2787 have been challenged in California and Kansas, and the laws were upheld in both states. A state regulation denying resident tuition to resident students of Florida because the students' parents are illegal immigrants was recently challenged and the court held the regulation unconstitutional.

The California law was challenged in 2010 and the Supreme Court of California addressed whether the law was in conflict with and preempted by 8 U.S.C. 1623.¹⁰ California exempts from the nonresident tuition rate students "who meet certain requirements, primarily that they have attended high school in California for at least three years."¹¹ The court held that the California law is not preempted by federal law because the California law bases resident tuition eligibility on criteria other than residency and the federal law prohibition is against eligibility based on residency.¹² The court upheld the California law. Unlike HB 2787, however, the California law applied to all students who met the high school attendance requirements and not just to students who are not citizens or legal residents of the United States. It appears that this inclusiveness was a key reason the court upheld the law. Thus, modifying HB 2787 to be inclusive of all students likely would enhance its constitutionality.

The Kansas law¹³ was challenged in 2007 on claims of federal preemption and unlawful discrimination under the Equal Protection Clause of the United States Constitution.¹⁴ The court dismissed both challenges because the plaintiffs, who were United States citizens and nonresident students at Kansas universities, were unable to show they met the three elements of standing: injury, causation and redressability.¹⁵ The law did not "injure" the plaintiffs who would not "be eligible to pay resident tuition" because they did not meet the requirements of the law and would not meet those requirements even if the resident tuition rate were not offered to illegal immigrants. Regarding preemption by federal law, the court held that the plaintiffs did not have standing to bring the claim because the federal law, 8 U.S.C. 1623, does not allow a private citizen to bring a claim to enforce the law.¹⁶ The court held "that federal, not private, enforcement of § 1623 was contemplated by Congress"¹⁷ and, therefore, the plaintiffs did not have a legal right to bring the enforcement claim against the Kansas law. The court did not, however, directly address the law's constitutionality, because it dismissed the plaintiff's claims.

In 2012, plaintiffs brought suit against the Florida Commissioner of Education and the Chancellor of the State University System to challenge the definition of "resident" for higher education tuition purposes because the definition required that a dependent student's "parent or parents must have established legal residence in [Florida]."¹⁸ Based on this definition, Florida public universities denied resident tuition to students like the plaintiffs who were born in the United States and who resided in the state for the year preceding enrollment but whose parents were not legal residents of the United States. The court held the "regulations violate the Equal Protection Clause" because the regulations "deny a benefit and create unique obstacles to

¹⁰ *Martinez*.

¹¹ *Martinez* at 1284.

¹² *Martinez* at 1294, 1298.

¹³ Kan. Stat. Ann. 76-731a.

¹⁴ *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007).

¹⁵ *Day* at 1135.

¹⁶ *Day* at 1139.

¹⁷ *Id.*

¹⁸ *Ruiz v. Robinson*, 2012 U.S. Dist. LEXIS 124209 (S.D. Fla. 2012), quoting Fla. Stat. 1009.21 (2012).

attain public post-secondary education for U.S. citizen children who would otherwise qualify for in-state tuition but for their parents' undocumented immigration status."¹⁹

Although only two courts have dealt with challenges to tuition laws similar to HB 2787, neither court held the laws unconstitutional. The Florida court held the denial of in-state tuition to certain students unconstitutional.

Conclusion

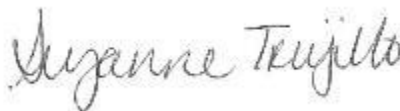
It is our opinion that HB 2787 is not unconstitutional under a preemption analysis because it does not exempt a student from nonresident tuition based on the student's residency but rather on the student's high school attendance and intention to become a citizen or legal resident of the United States. It therefore does not conflict with 8 U.S.C. 1623(a). Further, the Privileges and Immunities Clause does not apply to students who are not citizens or legal residents of the United States. HB 2787 does not violate the Equal Protection Clause because it does not treat students who are similarly circumstanced differently. Finally, the only court that has addressed the constitutionality of a similar law upheld that law, although that law differs in a key way because it applies to a much wider group of students. For these reasons, it is our opinion that a court likely would hold that HB 2787 is constitutional.

Please do not hesitate to let us know if we can be of further assistance with this issue.

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Very truly yours,

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¹⁹ *Ruiz* at 24, 34.