

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

March 17, 2011

Higher Education and Employment Advancement Committee
Room 1800, Legislative Office Building
Hartford, CT 06106

Re: Preemption of H.B. 6390

Dear Senator Boucher and Members of the Higher Education and Employment Advancement Committee,

You asked us to submit additional written testimony describing the authority supporting the claim that H.B. 6390 is not preempted by 8 U.S.C. § 1621 because in-state tuition is not be a “benefit” within the meaning of that statute.

As a preliminary matter, we emphasize that the plain language of the federal statute permits Connecticut to provide to undocumented immigrants even those forms of aid deemed a “benefit” within the meaning of § 1621(c). This is because while § 1621(a) generally prohibits a state from providing a “benefit” to undocumented immigrants, the same section itself creates an exemption for state laws such as H.B. 6390. *See* 8 U.S.C. § 1621(a) (“*except as provided in subsection[] (d) of this section, an alien who is not [among designated categories] . . . is not eligible for any State or local public benefit*”) (emphasis added). Subsection (d), in turn, fully authorizes a state to provide a “public benefit” to undocumented immigrants, provided that it does so by affirmative enactment after August 22, 1996. *Id.* § 1621(d) (“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”). By passing H.B. 6390, Connecticut is following the path explicitly created by Congress in §§ 1621(a), (d), in complete conformity with federal law.¹

Even had Congress not explicitly established that Connecticut may provide aid to undocumented immigrants so long as it does so by express legislative enactment such as H.B. 6390, the prohibition on aid set forth in § 1621(a) would not apply to in-state tuition. Section 1621(c)(1)(B) defines a “state or local public benefit” to include “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

¹ Although not necessary to the above analysis, we also note that the requirement of § 1621(d) that Connecticut affirmatively legislate its preferences would itself appear to violate the Tenth Amendment. *See* *Printz v. United States*, 521 U.S. 898 (1997) (Congress may not “commandeer” state executive officials to implement federal mandate); *New York v. United States*, 505 U.S. 144 (1992) (Congress may not compel states to enact or administer a federal regulatory program); Erwin Chemerinsky, Memorandum on the Constitutionality of Section 411(d) of H.R. 3734 (Sept. 1996) (concluding that provision that became § 1621(d) may violate Tenth Amendment).

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government.” By the plain language of the federal statute, therefore, a state or local program involves a “benefit” only where the agency, or other government unit using appropriated funds of a state or local government, provides for actual “payments or assistance” to an “individual, household or family eligibility unit.” Because the in-state tuition program set forth in H.B. 6390 involves no “payments or assistance” to those Connecticut high school graduates covered by its terms, it does not provide any “benefit” as defined in § 1621(c)(1)(B), and the prohibition of § 1621(a) does not even apply.

This straight-forward application of the plain language of the federal law is confirmed by multiple sources. First, the U.S. Department of Health and Human Services has determined that the term “federal benefit,” used in another section of the same statute, applies only to those programs which both fall in the enumerated list *and* in which (a) payment or assistance is provided and (b) it is provided to an individual, household or family eligibility unit by an agency of the United States or by appropriated funds of the United States.² It would be anomalous to construe the term “benefit” in § 1621 as having a different meaning than the identical term in 8 U.S.C. § 1611(c)(1)(B) of the same federal act. Second, in a letter from U.S. Immigration and Customs Enforcement (“ICE”) to North Carolina Special Deputy Assistant Attorney General (July 9, 2008), ICE itself recognized that “Section 411(c)(1)(B) of PRWORA, codified at 8 U.S.C. § 1621(c)(1)(B), addresses benefits 'for which payments or assistance are provided.'”³ While at that time, ICE only asserted that college admissions could not be considered a “benefit,” it affirmed a reading of the statute which makes payment or assistance a necessary component of any benefit. Third, as Professor Michael Olivas notes, the plain language of § 1621 “clearly indicates that what is proscribed is money or appropriated funds (arguably financial aid or grants), but not the ‘status benefits’ confirmed by the right to declare state residence.”⁴

Because no funds are appropriated and no agency acts to give an individual a monetary payment or assistance when a student is classified for in-state tuition purposes, mere eligibility for in-state tuition cannot be deemed a benefit within the meaning of the law. Therefore, the requirements of § 1621 which require a state to affirmatively provide for a benefit when they wish to grant one does not even apply to in-state tuition status that would be established by H.B. 6390, and there is no inconsistency between the proposed bill and the federal statute.

Sincerely,

/s/

Michael J. Wishnie, Supervising Attorney
Amanda Gutierrez, Law Student Intern
Katherine Chamblee, Law Student Intern
Travis Silva, Law Student Intern

² Interpretation of “Federal Public Benefit,” 63 Fed. Reg. 41658, 14659 (Aug. 4, 1998).

³ Available at http://www.ncccs.cc.nc.us/News_Releases/Immigrationletters072008.pdf.

⁴ Michael A. Olivas. *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*. 61 SMU L. Rev. 99, 122 (2008).