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The State of South Carolina

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August 5, 1986

The Honorable Mickey Burriss
Member, House of Representatives
Post Office Box 9186
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Dear Representative Burriss:

By your letter of June 17, 1896, you have indicated that you would like to introduce legislation that would require any foreign student to pay the full costs of obtaining his education while attending any institution of higher learning in South Carolina. One proposal might be to require any student having residence in a foreign country, which residence he has no intention of abandoning, to pay a tuition equal to the full cost of that education as established by the Budget and Control Board. You have inquired as to the constitutionality of this concept.

To a great extent, Opinion No. 80-7, dated January 21, 1980, sets forth the pertinent law as to constitutional problems which arise when foreign students should be required to pay the full cost of education at a State-supported educational institution. A few more decisions have been made by the United States Supreme Court since the opinion was written, but the law as stated in the opinion as to resident aliens has remained the same. Thus, any requirement that discriminates against aliens who have established residency, who would be subject to the terms of Section 59-112-10 et seq. of the Code of Laws of South Carolina (1976), would be constitutionally suspect.

Your proposal that aliens who have no intention of abandoning their foreign residence or to otherwise become immigrant aliens be charged for the full cost of tuition was not completely addressed within Opinion No. 80-7, as court decisions in existence at that time had not provided guidance on all of the related issues. The conclusion in that opinion that nonresident aliens

could be required by statute to bear the full cost of education if such aliens are legally incapable of establishing a domicile in South Carolina is suspect in light of several court decisions rendered subsequent to that opinion.

A University of Maryland policy required that nonimmigrant aliens, even if residents of Maryland, not be eligible for in-state status for the purpose of determining tuition at the University. A group of aliens classified as G-4 (nonimmigrant aliens who are officers or employees of certain international organizations as determined under federal law, or members of their immediate families) challenged this policy in Toll v. Moreno, 458 U.S. 1, 102 S.Ct. 2977, 73 L.Ed.2d 563 (1982). The United States Supreme Court held that this policy, as applied to G-4 aliens and their dependents, violated the Supremacy Clause of the United States Constitution (discussed in Opinion No. 80-7) since it imposed greater burdens on these aliens than was contemplated by the Immigration and Nationality Act of 1952 as amended. An argument that the increased tuition made up for the taxes not being paid by parents of the students failed, since these aliens were exempt from the relevant taxes by federal law.

Similarly, nonimmigrant aliens holding B, F-1, F-2, H, I, J, and L visas were required, in the past, to pay tuition to attend the public schools of Atlanta, Georgia. Holders of A and G visas were not required to pay tuition; classifications C, D, E, K, M, and illegal aliens were not considered in the policy. Holders of F-2 visas (children of an F-1 visa holder who was a college student in the city) challenged the policy in Pena v. Board of Education of the City of Atlanta, 620 F.Supp. 293 (N. D. Ga. 1985), as violative of the Equal Protection Clause of the United States Constitution, Fourteenth Amendment. The court agreed and found that, under the city's policy, identically situated persons would be treated differently based on alienage and further that two aliens, in the city for the same period of time, would be treated differently for tuition purposes depending upon the type of visa each held.

Under the city's policy, an Alabama resident could attend Georgia Tech for four years and could thus demonstrate residence within the city to send his children to school tuition-free. The plaintiff, a Venezuelan citizen, could undergo the same studies for the same amount of time and never be able to establish residency for his children; if the plaintiff had held an A or G visa, however, his children could have attended city schools tuition-free. Thus, the policy was struck down. While an elementary school tuition was being challenged, it is still instructive as to the issue you have raised.

Considering these and other cases decided after Opinion No. 80-7 was issued, it is doubtful that any policy or statute which would impose the full cost of tuition upon nonimmigrant or immigrant aliens would be upheld if such were challenged on the basis of the Supremacy Clause or the Fourteenth Amendment (Equal Protection Clause) of the United States Constitution.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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Assistant Attorney General

PDP/an

Enclosure: Opinion No. 80-7

REVIEWED AND APPROVED BY:

Robert D. Cook

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