

TO: Members of the House Committee on Education
FROM: Maya Tsukazaki, Vermont Poverty Law Fellow, Center for Justice Reform Clinic
Date: February 13, 2024
RE: Testimony in Support of H.817 Related to In-State Tuition and Financial Aid Eligibility

Dear Members of the House Committee on Education,

My name is Maya Tsukazaki, and I am currently the Vermont Poverty Law Fellow and immigration attorney at the Center for Justice Reform Clinic at Vermont Law and Graduate School, where I represent Vermonters in immigration petitions and proceedings, including many clients under the age of 21. I am sending this letter in support of House Bill 817, which would grant a marginalized population of Vermonters access to affordable higher education, building a better future for all Vermonters. Specifically, H. 817 would protect tuition equity for Vermonters who are not otherwise considered “qualifying immigrants” under federal law. Federal law currently requires states to affirmatively enact laws in order to grant public benefits, including education benefits, to individuals who are undocumented or otherwise do not have qualifying status.¹ In an election year where we may see another Trump presidency, it is in the best interest of Vermont to use its state authority to protect all Vermonters, regardless of their immigration status. This policy not only protects human rights in a tumultuous federal landscape, but also addresses under-enrollment in the Vermont State Colleges, unprecedented vacancies in the workforce, and an aging population. H. 817 seeks to enshrine this access in statute to comport with 8 U.S.C. § 1621 while still granting the maximum amount of discretion to Vermont Student

¹ See 8 U.S.C. § 1641 for a list of the specific statuses who are eligible for most public benefits, although some exceptions are provided in § 1621(b). Thus, those who do not have qualifying immigration status include not only undocumented persons, but persons with DACA or other Deferred Action programs, persons with Special Immigrant Juvenile Status, persons with Temporary Protected Status, persons awaiting decisions on asylum applications or other immigration petitions, and many others excluded from the federal statute. This encompasses a growing number of Vermont residents, exacerbated by the growing backlogs in immigration processes.

Assistance Corporation, the Vermont State Colleges, and if amended, the University of Vermont² so they may designate their own internal processes and policies.

Passing a law enshrining access to in-state tuition for all residents would make Vermont the twenty-fifth state to do so. Vermont would join a list of states that includes Kentucky, Florida, Texas, Oklahoma, Utah, Connecticut, Massachusetts, and many others.³ Vermont also has the opportunity to become the nineteenth state to grant access to some form of state financial aid or scholarship for these students. Vermont thus would not be at the forefront on this issue; on the contrary, Vermont currently is lagging behind. A statute would also ensure that the policy is universal across all institutions of higher education in Vermont, signaling to students who might otherwise avoid applying that they may in fact seek affordable higher education in Vermont.

Authorization Under Federal Law

With some exceptions, states are generally not permitted to grant public benefits to individuals who are not covered under “qualified alien”⁴ [hereinafter “qualified immigrants”] under 8 U.S.C. § 1641.⁵ This explicitly includes eligibility for post-secondary education benefits, thus excluding young people who are undocumented, who have DACA, who are awaiting asylum decisions, and others. However, 8 U.S.C. § 1621 provides an important exception when a state enacts a law *affirmatively* expanding eligibility for public benefits to other noncitizens. Numerous states have used this exception in section 1621 to affirmatively grant access to in-state tuition and state financial aid to those who do not have a qualifying immigration status under

² Although the current bill language only explicitly includes the Vermont State College system, I would encourage the Committee to consider amending the bill to ensure that University of Vermont is also included.

³ See “[Map: State Laws and Policies on Access to Higher Education for Immigrants](#),” National Immigration Law Center, August 2023.

⁴ “Alien” is a term used in the Immigration and Nationality Act but which is widely considered xenophobic and harmful. The federal government has moved away from using this term, *see* Lexi Lonas, “[Biden to use ‘more inclusive’ immigration terms](#),” The Hill, February 16, 2021.

⁵ See 8 U.S.C. § 1621(a).

federal law, but who otherwise could be considered a resident. In 2018, the Arizona Supreme Court decided that community colleges in the state could not grant in-state tuition to students with DACA without a state statute affirmatively granting them such benefits because of 8 U.S.C. § 1621.⁶ Although this is certainly is not a settled area of law, this case might serve as a warning of what could happen if the political tide changes and if Vermont does not enact a statute affirmatively granting access to higher education and financial aid to all.

Some may express concerns regarding the implications of 8 U.S.C. § 1623 on this bill, a statute that states a post-secondary educational benefit cannot be granted to a non-qualifying immigrant if it is not also available to all U.S. citizens and permanent residents. In response, several states have enacted statutes which set forth some requirements unique to students who are not “qualifying immigrants” as a way of ensuring the statute could withstand legal challenges under section 1623.⁷ Other scholars have made legal arguments on how section 1623 should not be so narrowly construed.⁸ However, importantly, to our knowledge, no state’s tuition equity bill has been overturned on legal challenge. Thus, H. 817 is still the most expansive tuition equity policy possible that would also grant all institutions of higher education discretion to draft their own internal policies to both meet their priorities and comply with both state and federal law. However, the Committee may consider amendments to place some specific, but broad, terms on

⁶ *Arizona v. Maricopa County Community College District Board*, 416 P.3d 803 (Ariz. 2018); see also *E.M. v. Nebraska Dep’t of Health and Human Services*, 944 N.W.2d 25 (Neb. 2020) (finding that because a statute failed to affirmatively provide certain foster care benefits to undocumented persons, the agency was not legally permitted to provide benefits to them).

⁷ *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007) (turning on the fact that there is no private right of action to challenge in-state tuition policies for undocumented students under 8 U.S.C. 1623); *Martinez v. Regents of University of California*, 241 P.3d 855 (Cal. 2010) (finding that a tuition equity statute was lawful under federal law because the criteria in the statute was separate and distinct from other in-state residency criteria); but see *Young Conservatives of Texas Foundation v. Smatresk*, 73 F.4th 303 (5th Cir. 2023) (finding, in dicta, that the language in a Texas statute might be preempted by explicit language 8 USC 1623(a), but that the state owed no affirmative duty to grant in-state tuition to non-resident permanent resident and citizen students).

⁸ E.g., Michael A. Olivas, *IIRIRA, the Dream Act, and Undocumented College Student Residency*, 30 *Journal of College and University Law* 435, 453 (arguing that in-state tuition is not a “benefit” under 8 USC 1621 and 1623).

tuition and financial aid eligibility for students who are not qualifying immigrants if this is a concern for the institutions. I urge the Committee to take sufficient testimony from individuals who would directly benefit from this bill before considering any changes to the bill.

Financial Aid: Scholarship Versus Other Aid

Specifically, regarding financial aid, I encourage Vermont to join other states in making state-based financial aid accessible to students regardless of their status. This is of vital importance to make education accessible to Vermonters. However, a separate and distinct scholarship process that only undocumented or other non-qualifying immigrants may apply to is risky for several reasons. Most importantly, asking students to self-identify their precarious immigration legal status through a distinct scholarship may discourage participation. This also would presumably require collecting sensitive information about these individuals, a complex responsibility for VSAC or any educational institution. Finally, an application that only considers students who are undocumented or have a non-qualifying status may actually run afoul to 8 U.S.C. § 1623 if it is a state-funded benefit that is not eligible to permanent residents and citizens. Thus, while we recognize that there may be internal complexities to VSAC's aid processes that we do not fully understand, we hope that any bill can authorize VSAC to grant aid to students who do not have social security numbers and do not qualify for federal financial aid without setting up an entirely separate and distinct scholarship process.

Conclusion

As Migrant Justice, the Clinic, and Representatives Cole, Holcombe, and Dodge have done outreach with other community groups, we have heard more and more stories of noncitizen Vermonters facing barriers to education here in Vermont, whether it be from a request for a social security number on an application or a frustrating conversation with an admissions counselor. To

reiterate, although a stated policy of granting in-state tuition and financial aid to all students regardless of status is an important and appreciated step in the right direction, not only does it not enshrine tuition equity for future generations of students, but it also may not withstand legal challenge under federal law during a divisive election year. H. 817 is thus an important step to ensure that institutional policies are as inclusive as possible while preserving institutional discretion in setting internal policies. H. 817 would take important steps to combat Vermont's aging population and shrinking workforce, while most importantly, protecting access to affordable education for all Vermonters, regardless of their current immigration status.

Sincerely,

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