



**COMMONWEALTH OF KENTUCKY  
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July 10, 2025

*Via Electronic Mail*

Honorable Dr. Aaron Thompson  
President  
Kentucky Council on Postsecondary Education  
100 Airport Road, Second Floor  
Frankfort, Kentucky 40601

Re: Federal preemption of the Council's regulation

Dear Dr. Thompson:

I write to inform you of my conclusion as Kentucky's chief law officer that the Council on Postsecondary Education's regulation providing in-state college tuition to undocumented aliens who have graduated from a Kentucky high school, 13 KAR 2:045 § 8(4)(a), is preempted by federal law. As you know, the Trump administration has sued regarding that regulation in *United States v. Beshear*, No. 3:25-cv-028 (E.D. Ky. 2025). My hope is that sharing my conclusion here will help you and the Council work towards quickly resolving the regulation's conflict with federal immigration law.

Kentucky law gives the Council the responsibility to determine which students qualify as Kentucky residents entitled to pay in-state tuition at our postsecondary schools. KRS 164.020(8). That task is part and parcel of the Council's mission to ensure that the Commonwealth reaps the benefits of a well-educated citizenry. *See, e.g.*, KRS 164.0203(2). But the General Assembly cannot give the Council authority to grant residency status, and thus the benefit of in-state tuition, to undocumented aliens.

The immigration policy set by Congress demands that conclusion. Under the Supremacy Clause, federal law is "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. That means that when Congress sets immigration policy, it "may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Arizona v. United States*, 567 U.S. 387, 399 (2012). And it has done just that here.

Federal law bars “an alien who is not lawfully present in the United States” from eligibility “on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit.” 8 U.S.C. § 1623(a). And it does so “[n]otwithstanding any other provision of law.” *Id.* That “notwithstanding” clause expressly preempts state laws and regulations on the subjects that Section 1623 governs. So the Court here will “simply focus on the plain wording of the [express preemption] clause, which necessarily contains the best evidence of Congress’ preemptive intent.” *Ass’n of Am. RR v. Hatfield*, 435 F. Supp. 3d 769, 777 (E.D. Ky. 2020) (Van Tatenhove, J.) (citation omitted).

That analysis is straightforward here. The Council’s regulation provides residency status—and the follow-on benefit of in-state tuition—to any “undocumented alien” that “graduated from a Kentucky high school.” 13 KAR 2:045 § 8(4)(a). Yet citizens or nationals must have their residency determined according to the detailed criteria set out elsewhere in the regulation before receiving the same benefit. Simply put, the Council’s regulation provides undocumented aliens a benefit unavailable to students lawfully present in other States. Section 1623 plainly prohibits state regulations that benefit undocumented aliens and not citizens or nationals, so it expressly preempts 13 KAR 2:045 § 8(4)(a).

The federal government has set its immigration policy, and the Council must regulate in accordance with it. To that end, I urge the Council to withdraw its regulation rather than litigate what I believe will be, and should be, a losing fight. I note that Texas has already settled a similar suit to bring its laws into conformity with federal law. *United States v. Texas*, No. 7:25-cv-055 (N.D. Tex. June 4, 2025). If I can be of any help as you consider this important issue, please do not hesitate to let me know.

Very respectfully,



Russell Coleman  
Attorney General of Kentucky

cc: Travis Powell, Vice President and General Counsel to the Council on  
Postsecondary Education (via email)  
S. Travis Mayo, General Counsel to the Governor (via email)