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Board of Bannock County Commissioners  
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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Mandatory Foreign Student Health Insurance

Dear Bannock County Commissioners:

You recently asked our office the question, "whether or not the colleges and universities in the state of Idaho could, without violating any laws, compel all foreign students to maintain health insurance on themselves and their families while they attend school?"

As you may be aware, none of the institutions of higher education under the jurisdiction of the State Board of Education currently imposes different requirements for foreign students than for other students with respect to student health insurance. Each institution is permitted to contract with individual health insurance carriers and the respective insurance policies have varying requirements. None of the institutions has absolutely mandatory health insurance for all students. The University of Idaho and Lewis-Clark State College have health insurance which is completely optional, but do require accident insurance for all students. Boise State University and Idaho State collect a fee for health insurance from all students upon registration, but students may thereafter cancel the insurance and receive a refund. There is no mandatory accident insurance.

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The policy you have suggested singles out foreign students and does raise the issue whether such a policy would be consistent with the Equal Protection Clause of the fourteenth amendment to the United States Constitution. In analyzing state legislation or regulations under the Equal Protection Clause, the first and most obvious step is determining "whether the regulations in fact discriminate" against a particular class. Watkins v. U.S. Army, 875 F.2d 699, 712 (9th Cir. 1989). In this case, the suggested policy no doubt discriminates against foreign students and their dependents.

The next, and often the most critical step in the analysis, is determining which level of judicial scrutiny will be applied to the policy. The United States Supreme Court has recognized three levels of scrutiny, depending upon the nature of the classifications and the interests involved. At the upper or "stricter" end of the spectrum is the "strict judicial scrutiny" test, and at the other end is the "rational basis" test.

"In order to withstand strict judicial scrutiny, the law must advance a compelling state interest by the least restrictive means available." Bernal v. Fainter, 467 U.S. 216, 219 (1984). A law or regulation which is subject to "strict scrutiny" is seldom sustained. As has been noted, "strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact." Id., 467 U.S. at 219, n. 6 citing Gunther, The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L.Rev. 1, 8 (1972). Generally, "a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny." Bernal, supra, 467 U.S. at 219; see also, Nyquist v. Mauclet, 432 U.S. 1, 7 (1977); Graham v. Richardson, 403 U.S. 365, 372 (1971) (state classifications based upon alienage are "inherently suspect and subject to close judicial scrutiny"). A class consisting of "all foreign students" would certainly be a suspect class, and the suggested policy would be subject to this most exacting test.

The U.S. Supreme Court has also derived an "intermediate" test, Plyler v. Doe, 454 U.S. 223 (1982), for examining discrimination against "quasi-suspect" classes. Nowak, Rotunda & Young, Constitutional Law, Ch. 16, § 1, at 593 (2d ed. 1983). Under this test, the classification must be substantially related to an important government interest. This test has been applied to groups not otherwise protected by the strict scrutiny standard, where a "history of past discrimination" against such groups is demonstrated. Watkins, supra, 875 F.2d at 712, n. 4. For example, the Supreme Court scrutinized under this standard a Texas statute which withheld from local school districts state funds for the education of children of undocumented aliens. Plyler v. Doe, 457 U.S. 203 (1982). The Court found that the

statute did not further a substantial state interest, and therefore struck it down.

If neither of the "heightened scrutiny" tests referred to above is applicable, the state policy in question must only meet the "rational basis" test. The test here is simply whether "the classification is rationally related to a legitimate government interest." Watkins, supra, 875 F.2d at 712.

In determining which level of scrutiny would apply to the suggested policy, we have attempted to find judicial precedents involving a similar mandatory foreign student health insurance rule. Only one case, from another jurisdiction, deals directly with this issue.

In Ahmed v. University of Toledo, 664 F.Supp. at 282 (N.D. Ohio 1986), appeal dismissed, 882 F.2d 26 (5th Cir. 1987), the district court had occasion to review the following policy of the Board of Trustees of the University of Toledo:

[A]ll entering foreign students of the University of Toledo [are required] to carry health insurance equal to the Blue Cross-Blue Shield plan offered University students or a comparable health insurance policy. . . The Office of the Foreign Student Advisor shall be charged with enforcing this regulation even to the extent that it may cancel a student's registration after due notice.

Id., 664 F. Supp. at 282. Significantly, the court pointed out that, "[i]n implementing the policy . . . the University defines the terms 'foreign student' and 'international student' synonymously and to include only students who are in the country on nonimmigrant student visas, such as F-1s." Id. (Emphasis added.) The limitation of the class to nonimmigrant students resulted in the following conclusions by the court:

The policy . . . is not in conflict with the Equal Protection Clause. Resident aliens are not subject to the policy. Therefore, the University's classification is not based upon "alienage" or other suspect classification.

International students (nonimmigrant alien students) are not a suspect classification. See Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). In cases in which the Supreme Court has applied the strict scrutiny standard of review to a state classification affecting aliens, the challenged statute or practice discriminated against permanent resident aliens. [Citations omitted.] The Supreme

Court has not suggested that nonimmigrant aliens are within the class protected under the suspect classification doctrine.

Id., 664 F.Supp. at 286-87 (emphasis added).

As to the appropriate test to be applied and its analysis under that test, the court stated that:

The University's health policy must be judged by the rational basis test. Under that test, it is the plaintiff's burden to demonstrate that the University's health insurance policy is wholly unrelated to a legitimate end . . . The rationale for the policy is the protection of foreign [nonresident alien students] in the face of medical needs which, absent insurance, could be a potential medical crisis. International students do not have a constitutional right to attend American universities without complying with the institutions' reasonable regulations.

Id., at 287. The case was appealed to the Sixth Circuit Court of Appeals but dismissed as moot. Accordingly, we have no appellate review of the substantive issues decided by the lower court, and it is not possible to guarantee that the courts of this state, the federal district court, or the Ninth Circuit Court of Appeals will follow the Ahmed ruling. Even if they did, the policy suggested for Idaho universities, being addressed to "all foreign students," would be based upon "alienage" and subject to strict scrutiny. Ahmed, supra, 664 F.Supp. at 286. Of course, if the classification were more narrowly limited to nonresident [nonimmigrant] alien students, as described above, the policy would stand a greater chance of being sustained. However, it is still not clear that the courts of this jurisdiction would completely agree with the Ahmed court's reasoning.

The Ninth Circuit Court of Appeals, in particular, has indicated in dicta in at least one decision that it might not accept the distinction between resident aliens and nonresident aliens suggested by the district court in Ahmed. In United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988), the court stated:

The Supreme Court has extended significant constitutional benefits to aliens within the United States, without distinguishing between those who are here legally or illegally, or between residents and visitors. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed.2d 220 (1886) ("The Fourteenth Amendment . . . is not confined to the protection of citizens . . . [Its] provisions are

universal in their application, to all persons within the territorial jurisdiction [of the United States].") . . . From these cases, we learn that aliens within the United States enjoy the benefits of the first, fifth, sixth and fourteenth amendments.

Id., at 1222. See also, Olaques v. Russoniello, 797 F.2d 1511, 1520-21 (9th Cir. 1986) (citing Bernal v. Fainter, supra, and Graham v. Richardson, supra, for proposition that immutability of characteristics is not "sole determining factor" in decision to find suspect class and that "the Supreme Court has held that aliens form a suspect class").

On the other hand, the Ninth Circuit has indicated greater tolerance for state classifications consistent with federal classifications or policies. In Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985), the court upheld California's denial of AFDC benefits to aliens whose presence was illegal and whose only claim of entitlement was their filing of applications for political asylum. The court found that because the state had employed "both a federal classification and a uniform federal policy regarding the appropriate treatment of a particular subclass of aliens," id. at 1466, the district court "correctly applied the relaxed scrutiny standard." Id. See also, Mow Sun Wong v. Campbell, 626 F.2d 739, 744 n. 10 (9th Cir. 1980), cert. den. 450 U.S. 959 ("Recent Supreme Court cases have treated classifications by a state based on alienage to be 'inherently suspect and subject to close judicial scrutiny.' (Citations omitted.) In comparison, the Court has applied a more relaxed scrutiny in cases involving federal classifications based on alienage." (emphasis in original)).

In distinguishing Plyler v. Doe, supra, the court stated:

Had there been an articulated federal policy [in Plyler], the Court makes clear the situation would have been different:

With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No state may independently exercise a like power. But if the Federal government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien

subclass, the states may, of course, follow  
the federal direction.

Sudomir v. McMahon, supra, 767 F.2d at 1466, quoting Plyler v. Doe, supra, 457 U.S. at 219 n. 19 (emphasis by Ninth Circuit).

It may be possible to discern a "federal direction" consistent with a policy, such as that described in Ahmed, which mandates health insurance for nonimmigrant student aliens. 8 C.F.R. § 214.2(f)(1) (A) requires such student applicants for visas to submit "documentary evidence of the student's financial ability required by [Form I-20A-B]." It can be argued, and it was implicit in the Ahmed court's rationale, that an insurance requirement would be entirely consistent with federal policy in this regard. However, it might also be asked why the federal government, by "uniform rule," in the Code of Federal Regulations or on the I-20A-B form itself, does not explicitly mandate insurance as one of the "appropriate standards for the treatment of an alien subclass." Indeed, given the deferential standard applied to federal classifications based upon alienage for purposes of the immigration laws, (Mow Sun Wong v. Campbell, supra; Mathews v. Diaz, 426 U.S. 67 (1976)), the better approach here might be to ask the federal government, rather than a state agency, to adopt a mandatory health insurance rule.

In summary, a requirement that "all foreign students" be required to maintain health insurance would be judged by the strict judicial scrutiny standard and would probably be found in violation of the Equal Protection clause of the fourteenth amendment. If the requirement applied only to nonimmigrant alien students, as suggested in the Ahmed decision, it is more likely the requirement would be analyzed under the rational basis test and meet with judicial approval. However, it is not entirely clear that the Ninth Circuit would follow the Ahmed court's approach to this issue. Given the pervasive role of the federal government in immigration and naturalization matters, and considering the judicial deference to federal classifications based upon alienage noted previously, the federal government may be in a better position to address your concern than the State Board of Education.

Sincerely,

BRADLEY H. HALL  
Chief Legal Officer,  
State Board of Education and  
Deputy Attorney General