



KIPP Foundation



November 14, 2008

VIA FACSIMILE AND ELECTRONIC MAIL

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Re: RQ-0742-GA – Whether, under the federal Constitution, the State of Texas may permit undocumented persons to receive the benefit of in-state tuition at Texas state colleges and universities
Submission by Texas Appleseed, the KIPP Foundation and Center for Public Policy Priorities

Dear Ms. Fuller:

Thank you for permission to submit this letter on November 14, 2008. Texas Appleseed, a public interest law organization based in Austin, the KIPP Foundation (“KIPP”), which has 15 KIPP charter schools in Texas as part of its national school network, and the Center for Public Policy Priorities (“CPPP”) submit this letter in response to RQ-0742-GA, addressing “whether, under the federal Constitution, the State of Texas may permit undocumented persons to receive the benefit of in-state tuition at Texas state colleges and universities.” For the reasons discussed below, Texas Appleseed, KIPP, and CPPP believe that the U.S. Constitution, applicable federal law and public policy should lead the Attorney General to conclude that the Texas Legislature’s decision to apply the in-state tuition rate to qualified undocumented immigrants should be left undisturbed. This in-state tuition policy is an important tool for providing educational opportunity to students living in Texas and benefits the state by creating a higher quality work force. The Attorney General should not encourage federal intervention in this area by suggesting that the federal statutes at issue preclude the State of Texas from making these policy decisions when setting and establishing qualifications for in-state college tuition rates.

About Texas Appleseed, KIPP Foundation, and Center for Public Policy Priorities

Texas Appleseed is a public interest law organization that works to address the root causes of legal and social injustices in Texas. Texas Appleseed leverages the volunteer skills and resources of lawyers and other professionals to identify practical solutions that create systemic change in broad-based issues of social equity. Matching our in-house legal and policy teams with pro bono legal talent from some of the state's largest firms, corporations and law schools, maximizes resources, high-level contacts and experience to achieve justice gains on behalf of a wide range of constituents, affecting thousands of lives at the local, state and national level. Texas Appleseed has successfully worked for justice by addressing the root causes of important legal and social issues through research, advocacy, protection of rights and public awareness.

KIPP is a national network of free, open-enrollment, college-preparatory public schools with a track record of preparing students in underserved communities for success in college and in life. There are currently 15 KIPP Schools in Texas (in Austin, Dallas, Houston and San Antonio), educating 3,463 students from kindergarten through high school. From the KIPP schools in Houston alone, 29 undocumented students have qualified for in-state tuition and attended college in Texas. Every one of these 29 students was the first child in his or her family to attend college (and in most cases the first to have graduated high school.)

Described in a recent Washington Post article as “the most promising schools in America,”¹ there are 66 KIPP schools in 19 states and the District of Columbia serving more than 16,000 students. Providing opportunities for low-income students, including those who are not yet U.S. citizens, to attend college is part of KIPP's mission, and in-state tuition programs like the one passed by the Texas legislature are critical to making this promise a reality. Every day, KIPP students across the nation are proving that demography does not define destiny. Eighty percent of KIPP students are low-income, and 90 percent are African American or Latino. Nationally, more than 90 percent of KIPP middle school students have gone on to college-preparatory high schools, and more than 80 percent of KIPP alumni have gone on to college.

The Center for Public Policy Priorities is a nonpartisan, nonprofit policy institute committed to improving public policies to better the economic and social conditions of low- and moderate-income Texans.

Analysis

Rep. Leo Berman's assertion that federal law preempts Texas's statute defining in-state residency for the purpose of postsecondary tuition, is based on a recent California Court of Appeals decision, *Martinez v. Regents of Univ. of Cal.*, 166 Cal.App.4th 1121 (Cal. App. Sept. 15, 2008). *Martinez*, an intermediate appellate decision on appeal to the California Supreme Court, appears to be wrongly decided and has no precedential value in Texas courts. In *Martinez*, the state appellate court found that a California law granting in-state tuition to undocumented immigrants was preempted by federal statutes, 8 U.S.C. §§ 1621 and 1623. In some cases, these provisions purport to prohibit states from granting to undocumented aliens

¹ Jay Matthews, *The Most Promising Schools in America*, WASH. POST, November 8, 2008.

postsecondary education “benefits” that are not available to U.S. citizens. However, these statutes also provide that states may allow eligible undocumented immigrants to qualify for in-state tuition if the law is drafted explicitly to allow for such.

Whatever the decision or reasoning underlying the California appellate court decision, the Texas statute at issue here is not preempted. The Texas statute falls within the savings provisions in the federal law, and should not be considered a “benefit” as that term is used in the federal statute. Moreover, the application of this statute to a state’s decision to establish qualifications for in-state tuition rates raises serious questions concerning federalism and constitutionality under the Tenth Amendment. Finally, public policy reasons underlying the Texas statute support the continued extension of in-state tuition to undocumented immigrants who meet the requirements of the law.

A. The Texas Statute Is Not Preempted By Federal Law

1. *Federal Law Expressly Authorizes States to Provide Postsecondary Education Benefits to Undocumented Immigrants*

In 2001, the Texas Legislature passed, and Governor Rick Perry signed into law, Texas Education Code 54.052, which outlines eligibility for the in-state tuition rate at Texas' institutions of higher education. Under the statute, in-state tuition eligibility not only includes students who have established a domicile in Texas, but also students who may not have established domicile, but had been living in Texas for several years prior to graduating from Texas high schools. Section 54.53 requires a student who is not a citizen, but qualified for in-state tuition based on 54.052 criteria, to submit an affidavit stating that he or she will become a resident of the United States as soon as eligible. Both sections were amended by the Texas legislature in 2005 to bring them into strict compliance with federal law.² This statute has been interpreted in practice to allow qualified undocumented immigrant students who have graduated from Texas high schools to pay in-state tuition.³ During the 2007 legislative session, Governor Perry opposed efforts to repeal this law, noting that it "serves a good purpose."⁴

A federal law passed by Congress as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 8 U.S.C. § 1621(a) forbids states from providing "state or local public benefits," including postsecondary education benefits, to undocumented immigrants. However, § 1621(d) expressly gives a state the option of overriding this prohibition on eligibility of undocumented immigrants for "public benefits" if the state enacts a "law after August 22, 1996, which affirmatively provides for such eligibility." There can be no doubt that the Texas law, enacted five years after Congress passed IIRIRA, meets this standard, and thus falls within the savings clause in § 1621(d). The Texas statutes providing for in-state tuition to undocumented immigrants were passed in 2001, and require an affidavit from all students that are not "citizens or permanent residents," thus affirmatively allowing undocumented immigrants to obtain in-state tuition if they meet the statutory requirements. Furthermore, Sections 54.052 and 54.053 have consistently been applied to extend in-state tuition to immigrants regardless of their immigration status.⁵ Although the Texas statute does not specifically refer to the federal statute, no such reference is required by § 1621(d). The unambiguous language of § 1621(d) simply requires that the state law "affirmatively provide[]" for benefits to undocumented immigrants. Therefore, the Texas law is not preempted by § 1621.

The mid-level California appellate court's decision *Martinez* found that a California statute was not protected by the savings clause in § 1621(d), because that court read a single congressional statement in the legislative history to hold that a state law purporting to provide

² SB 1528, Bill Analysis 1(June 13, 2005).

³ The United States Supreme Court has ruled that states must provide public education to undocumented children. *Plyler v. Doe*, 457 U.S. 202 (1982).

⁴ Clay Robison and R.G. Ratcliffe, *Perry to Protect Undocumented Immigrant Tuition*, HOUS. CHRON., January 11, 2007.

⁵ Texas Residency – Frequently Asked Questions, <http://www.utexas.edu/student/admissions/residency/resfaq.html#q9> (last visited November 7, 2008).

benefits to undocumented immigrants must specifically mention § 1621 in order to take advantage of the savings clause. This interpretation is inconsistent with the plain language of the statute, and the California court's holding appears to be driven by a desired result rather than any coherent analysis. The California court's holding is also inconsistent with the clear instructions of both federal and Texas courts that legislative history should be considered only when there are ambiguities in the text of the statute. *See, e.g., Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002); *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997) (“When a statute is clear and unambiguous, courts need not resort to rules of construction or extrinsic aids to construe it, but should give the statute its common meaning.”).

B. Texas's In-State Tuition Rate is Not a “Benefit” under Federal Law

Even if the Texas law did not fall under the savings clause of § 1621(d), federal law nonetheless does not preempt the Texas statute because its decision concerning who qualifies for in-state tuition rates is not a “state or local public benefit.” Section 1621(c)(1)(B) makes clear that a “public benefit” involves “payments or assistance ... provided to an individual.” While the statute includes “postsecondary education benefits” in its list of items that fall under the definition of “public benefit,” the only federal court to review this term has held that a “postsecondary education benefit” does not include an in-state tuition rate, but is limited to situations “where monetary assistance [is] *paid to* students or their households.” *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 605 (E.D. Va. 2004) (emphasis supplied).⁶ Accordingly, § 1621 applies only to postsecondary education benefits involving direct monetary assistance and *not* to the determination of which students are eligible for an in-state tuition rate. This interpretation of § 1621(c)(1)(B) is most consistent with the statutory language, and indicates that the Texas law is not subject to the statute's restrictions.

Likewise, the term “benefits” in §1623, which forbids states from providing postsecondary educational “benefits” to undocumented immigrants unless certain criteria are met, cannot be read to apply to in-state tuition rates. The Supreme Court has explained that where Congress uses the same language in the same substantive area of the law, courts should assume that the terms of art mean the same thing in both statutes. *Sullivan v. Stroup*, 496 U.S. 478, 484 (1990). Thus, Congress's use of the term “postsecondary educational benefits” should be read identically in both § 1621 and § 1623, particularly since the sections in question were passed within weeks of each other.⁷ Therefore, § 1623, like § 1621, applies only to postsecondary education benefits that are actually paid to students and not to the determination that qualified undocumented immigrants are eligible for in-state tuition rates.

⁶ Texas courts defer to the federal courts' construction of federal statutes and regulations. *See Olson v. Holmes*, 571 S.W.2d 211, 213 (Tex. Civ. App. 1978, writ ref'd n.r.e.) (noting that “our determination of the appeal should be governed by the federal courts' construction of the statute and regulation” when discussing conflicting interpretations of federal law between Texas state courts and federal courts).

⁷ 8 U.S.C. § 1621 was originally passed as Pub. L. No. 104-193, Title IV § 411 (August 22, 1996). 8 U.S.C. § 1623 was originally passed as Pub. L. No. 104-208, Title V § 505 (September 30, 1996).

C. **The Constitution and Principles of Federalism Do Not Permit Congress to Preempt State Tuition Determinations**

Not only do the relevant federal statutes fail to preempt the Texas in-state tuition law, but the application of those federal statutes to Texas's in-state tuition rates would violate principles of federalism and the Tenth Amendment to the United States Constitution. The Supreme Court has vigilantly checked the encroachment of federal law into areas traditionally left to state control. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000) (both vindicating state sovereignty and blocking expansive legislation of Congress encroaching on issues left to the states). In *Lopez*, the Supreme Court limited the authority of Congress to legislate under the Commerce Clause, striking down a law that regulated the possession of handguns in school zones after concluding the law did not regulate an activity that substantially affected interstate commerce. 514 U.S. at 551. The Court noted a concern over maintaining the "distinction between what is truly national and what is truly local." *Id.* at 567-68.

In *Morrison*, the Court went a step further, striking down provisions of the Violence Against Women Act of 1994 as unconstitutional on dormant Commerce Clause and Fourteenth Amendment grounds, even in the face of evidence suggesting crimes against women *did* affect interstate commerce. 529 U.S. at 601. Referring to *Lopez*, the Court reiterated that "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *Id.* at 611 (quoting *Lopez*, 514 U.S. at 577). The *Morrison* majority further stated that "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement *or education* where States historically have been sovereign." *Id.* at 612 (emphasis supplied). Justice Thomas's concurring opinion also expressed the concern that "Congress [was] appropriating state police powers under the guise of regulating commerce." *Id.* at 627.

While Congress has broad powers to govern in a myriad of circumstances, issues like state residency and in-state educational benefits are traditionally reserved for the states. While of course Congress may regulate immigration, it cannot regulate state classifications under the guise of immigration regulation. See, e.g., *Toll v. Moreno*, 458 U.S. 1 (1982) (in discussing the federal immigration power in relation to granting G-4 visas to employees of international organizations, the Supreme Court deferred to a Maryland state court's determination of state residency). Even the court in *Martinez*, while ultimately arriving at the wrong result, recognized that the California in-state tuition statute in question "does not regulate immigration and therefore is not expressly preempted as a regulation of immigration." 166 Cal.App.4th at 1152. Texas, in setting in-state tuition rates to include qualified undocumented students, is not interfering with the federal immigration power, but rather is legislating in an area traditionally under state, not federal, control.

Even with an affirmative grant of legislative authority to regulate immigration, there are aspects of state sovereignty that should not be impaired by Congress, at least not in the manner suggested by the California Court of Appeals in *Martinez*. Residency determination and tuition administration, as they relate to secondary education, are left to the States. For instance, the California Supreme Court recently determined that under the Tenth Amendment the states may

regulate certain activities of Indian tribes, despite Congress's exclusive authority to regulate Indian tribes themselves. *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126 (Cal. 2006). This same principle applies here in the immigration context. The Texas legislature has definitively spoken on this issue of in-state college tuition, and the Constitution protects the sound judgment of the states where Congress oversteps its authority.

D. Strong Public Policy Reasons Support the Texas Legislature's Determination to Allow Qualified Undocumented Students to Pay In-State Tuition Rates

Not only do federal law, the Constitution, and principles of federalism leave undisturbed the Texas Legislature's decision to adopt Education Code section 54.052, but there are also a number of strong policy reasons that support the Legislature's determination to allow qualified undocumented immigrants to pay in-state tuition rates. As discussed below, increasing educational opportunities for eligible undocumented immigrants by allowing them to access in-state tuition provides Texas with a more educated labor force and results in broad community benefits. It is consistent with the Texas Higher Education Coordinating Board's goal of "Closing the Gap" in higher education for the states' youth by increasing the overall higher education participation rate, and the state's desire to increase access to education for Hispanic students.⁸ It is also consistent with the United States Supreme Court's determination that no substantial interest is served by denying education to undocumented children.⁹ Texas complies with federal constitutional guarantees by providing undocumented immigrants with access to free public education through high school; to deny children who graduate from Texas schools the opportunity to continue their education fails to recognize and capitalize on the investment the state has already made in the education of these children.

1. An Educated Labor Force is Vital for the Future of Texas

The current in-state tuition law in Texas supports the goal of building the state's educated workforce, which is essential to the future economic success of Texas. It allows thousands of Texas children who previously had no hope of pursuing a higher education to dream of a better future—for themselves, their families, and their state. State demographer Dr. Steve Murdock and economist Dr. Ray Perryman predict a pending crisis in the Texas labor market if there is no improvement in the education attainment of the labor force. A 2007 report by Dr. Perryman, for the Texas Higher Education Coordinating Board, found that the State of Texas would reap \$194.5 billion in additional annual gross product by 2030 if it is able to achieve a more educated workforce.¹⁰ According to the Texas Guaranteed Student Loan Corporation, higher levels of education correlate to higher median earnings, lower unemployment, and lower poverty rates.¹¹

⁸ See TEXAS HIGHER EDUCATION COORDINATING BOARD, CLOSING THE GAPS REVISION (2005)(includes increasing the higher education participation rate of the state's Hispanic population as a target); TEXAS HOUSE OF REPRESENTATIVES, COMMITTEE ON HIGHER EDUCATION, INTERIM REPORT TO THE 78TH TEXAS LEGISLATURE 55 (2002)(includes discussion of the success of the South Texas/Border Initiative which increased funding to develop a \$460 million initiative to state universities in the Texas border region).

⁹ *Plyler v. Dow*, 457 U.S. at 228-30 (1982).

¹⁰ RAY PERRYMAN GROUP, A TALE OF TWO CITIES—AND ONE MILLION JOBS!!!: AN ANALYSIS OF THE ECONOMIC BENEFITS OF ACHIEVING THE FUTURE GOALS OF THE "CLOSING THE GAP" INITIATIVE OF THE TEXAS

2. *Allowing Qualified Undocumented Students the Opportunity to Attend College Keeps Kids in School and Motivates them to Excel*

The experience of KIPP students in Texas shows that the decision of the Texas Legislature to allow qualified undocumented students to pay in-state tuition rates for colleges and universities is a valuable tool to enhancing educational opportunities. KIPP opened its first school in Houston in 1994, and has grown into a successful national network of 66 schools because it insists on accountability, hard work and excellence from its students. In return, KIPP promises to its students that if they succeed, they will attend college, even if no one in their family has ever graduated from high school.

For 29 students from the KIPP schools in Houston, the decision by the State of Texas to allow qualified undocumented immigrants to pay in-state tuition has helped KIPP keep its promise that hard work and successful results would result in admission and matriculation to college. Without KIPP and the availability of in-state tuition, these first-rate students likely would not have entered some of the best universities in Texas: every one of these 29 students was the first child in his or her family to attend college and, in most cases, the first to have graduated from high school. The State's decision last year to continue to allow qualified undocumented students in Texas to pay in-state tuition is a critical component of KIPP's ability to keep its students motivated and to help them succeed in college, their professional careers, and life.

3. *Education for Qualified Undocumented Texans Reaps Broad Community Benefits*

Many of the students who benefit from section 54.052(a)(3) are undocumented and noncitizen immigrant children who were brought to Texas by their parents as infants or young children. These children, their citizen-siblings and other citizen-children of immigrants form an important demographic that will help determine the economic future of Texas. They make up 27 percent of all children in Texas K-12 based on the 2000 Census, amounting to over 1.2 million students.¹² Of that number, approximately 247,000 are noncitizens and 752,000 live in mixed-status families.¹³

There are many mixed-status families where the older siblings are noncitizens and the younger siblings are citizens.¹⁴ This dynamic in Texas schools emphasizes the importance of

HIGHER EDUCATION COORDINATING BOARD 6 (2007) *available at* <http://www.theccb.state.tx.us/reports/PDF/1345.PDF>.

¹¹ HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS HB 1403 4 (2001).

¹² RANDY KAPPS ET AL, URBAN INSTITUTE, THE NEW DEMOGRAPHY OF AMERICA'S SCHOOLS: IMMIGRATION AND NO CHILD LEFT BEHIND 19 (2005) *available at* http://www.urban.org/UploadedPDF/311230_new_demography.pdf.

¹³ "Mixed Status" refers to families where one or more children are US citizens and one or more parents are noncitizens. These tabulations assume that Texas statistics are similar to national statistics for the proportion of immigrant children who are citizens and who live in mixed status families. Nationally, four fifths of children of immigrants are native born US citizens. 61 percent of those children live in mixed status families.

¹⁴ KAPPS, *supra* note 12, at 2.

providing access to higher education to noncitizen children, as they are role models for their younger citizen siblings. When one family member attends college, others know that it is possible for them to follow the same path.

4. *Texas Profits Many Times Over from its Investment in Higher Education*

The state's investment in in-state tuition for qualified undocumented students is small compared to the benefits. As of the fall of 2007, only 9,062 undocumented students enrolled in Texas public institutions of higher education under section 54.052(a)(3), *one-eighth of one percent of the total number of students enrolled in public institutions of higher education*.¹⁵ The number of students, and therefore the relative cost to the State of this law, is quite small; but the positive impact on our State is much larger, as these students encourage siblings and others in their communities to follow in their footsteps and become part of the educated workforce. Families benefit through improved economic stability and the State receives approximately \$8 in receipts for every \$1 in funding to support higher education.¹⁶

5. *The State's Decision to Allow Qualified Undocumented Immigrants to Pay In-State Tuition Rates is Supported by a Broad Coalition*

The State of Texas is a leader and model both for other states and the federal government in recognizing that broad availability of in-state tuition rates for qualified undocumented immigrants has broad benefits. Efforts in Congress, sponsored by Republican Senator Orrin Hatch of Utah, to offer post-secondary educational benefits to undocumented children graduating from United States high schools, have gained a broad base of support, but became mired in the failed federal immigration reform efforts. Since Congress has been unable to pass the federal DREAM Act, the states have been left to act on their own to meet the need to provide opportunities to qualified undocumented immigrants who graduate from U.S. high schools.

The Texas law to allow in-state tuition for qualified undocumented students who graduate from a Texas high school was one of the first such laws to pass at the state level. Currently, nine states have similar provisions. When the law was passed in 2001, it passed with almost unanimous support in the Texas Legislature. A broad range of organizations testified in favor of the measure: Texas Association of Business and Chambers of Commerce; Houston ISD; Harris County Tax Assessor/Collection; City of Houston; Texas Catholic Conference; Texas Federation of Teachers; Association of Texas Professional Educators; The Greater Houston Partnership; Texas LULAC; as well as a number of other nonprofit organizations.¹⁷

¹⁵ TEXAS HIGHER EDUCATION COORDINATING BOARD, OVERVIEW RESIDENCY AND IN-STATE TUITION 2 (2008) available at <http://www.thecb.state.tx.us/Reports/PDF/1528.PDF>

¹⁶ RAY PERRYMAN GROUP, *supra* note 10, at 7.

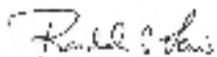
¹⁷ Witness list for public hearing on HB 1403, Texas Senate Education Committee, 77th Legislative Session, May 7, 2001 available at <http://www.legis.state.tx.us/tlodocs/77R/witlistmtg/html/C5302001050710301.HTM>.

When the statute was amended in 2005 to ensure compliance with federal laws, it again had broad support in the Texas Legislature.¹⁸ It was revisited once more, during the 2007 Texas Legislative Session, when more than 100 individuals and organizations registered or testified in support of maintaining in-state tuition for qualified undocumented students, including the Texas Association of Business, Texas Association of Mexican American Chambers of Commerce, MALDEF and LULAC. In contrast, only three organizations testified in support of changing the Texas in-state tuition law.¹⁹

E. Conclusion

The Attorney General should leave undisturbed the Texas Legislature's decision to apply in-state tuition rates to qualified undocumented immigrant students. The California court's decision is on appeal and subject to being overturned, and the analysis of its decision is contrary to the weight of authority and has no binding effect on Texas courts. The Texas statute is not preempted by federal law; rather, the prohibitions under §§ 1621 and 1623 are a constitutionally questionable invasion of the State's right to regulate its colleges and universities. Moreover, there are strong public policy reasons for Texas to continue to allow qualified undocumented immigrants access higher education by paying in-state tuition rates at colleges and universities in the state.

Sincerely,



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¹⁸ See Texas House and Senate vote for SB 1528, 79th Legislative Session *available at* <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=79R&Bill=SB1528>.

¹⁹ Witness list for public hearing on HB 39, HB 141, HB 159, and HB 3829. 80th Legislative Session. April 19, 2007 *available at* <http://www.capitol.state.tx.us/tlodocs/80R/witlistmtg/html/C4502007041908001.HTM>.

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