

November 14, 2008

The Honorable Greg Abbott
Attorney General of the State of Texas
Price Daniel, Sr. Building, 8th Floor
209 West 14th Street
Austin, TX 78701-8701

Re: RQ-0742-GA

Dear Attorney General Abbott:

The Mexican American Legal Defense and Educational Fund (MALDEF), the Texas Association of Chicanos in Higher Education (TACHE) and the Texas League of United Latin American Citizens (Texas LULAC) submit this letter brief regarding Attorney General Opinion RQ-0742, requested by Representative Leo Berman and related to the availability of in-state tuition in state colleges and universities for students who graduated from Texas high schools, including those students who are undocumented immigrants.¹ Because we have substantial expertise and experience in the area of state and local efforts to enact immigration-related legislation, we provide for your consideration a brief overview of the limited authority states retain to enact immigration bills in general and, more specifically, an analysis of the authority of states to provide in-state tuition for students who graduate from Texas high schools, including students who are undocumented immigrants. However, before addressing the legality and constitutionality of such a measure, we address the validity of the question presented to Attorney General Abbott.

I. The Opinion Request is Based Upon a Case Pending in Litigation, and Therefore, an Opinion is Inadvisable

Ultimate determination of a law's applicability, meaning or constitutionality is left to the courts. For this reason, the Attorney General generally does not write opinions on issues that are in pending litigation.² The opinion requested is made solely on the basis that California's Third District Court of Appeals reversed a dismissal in *Martinez v. Regents of the University of California*, a challenge to California's in-state tuition law.³ However, that decision is now on

¹ For purposes of this letter brief, the term "undocumented immigrant" connotes the same meaning as "illegal alien" under the Illegal Immigration Reform and Responsibility Act of 1996.

² <http://www.oag.state.tx.us/opin/>

³ In his opinion request, Berman asserts that the California Court of Appeals ruled that the California in-state tuition law violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This assertion is erroneous; the appellate court merely allowed the plaintiffs in that case leave to amend their complaint regarding their cause of action brought under the Equal Protection Clause. *Martinez v. Regents of University of California*, 166 Cal. App. 4th 1121, 1158-59 (Cal. App. 3d Dist. 2008). The court offered no opinion on the merits of the claim.

appeal before the California Supreme Court. Because the opinion is not final, it holds the potential to render moot or even contradict an Attorney General Opinion that addresses some of the same issues.

The *Martinez* case was filed in a California state Superior Court by a group of out-of-state students who complained that California's in-state tuition law (CALIF. EDUC. CODE § 68.130) was preempted under federal law and that the law violated their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.⁴ The Superior Court judge determined, on *demurrer*, that California's law was not preempted under federal law and did not unlawfully discriminate against the plaintiffs under the Equal Protection Clause and thus dismissed the case. On appeal, the Third District Court of Appeals reversed the dismissal, in part, concluding that § 68.130 was preempted and remanded the equal protection claim with leave for the plaintiffs to amend their complaint. However, on September 27, 2008, the university defendants filed a petition for review with the California Supreme Court.

Because the issue of federal law raised by the pending Request is currently in litigation, and has not been addressed by either the Fifth Circuit or the U.S. Supreme Court, we urge you to refrain from rendering an Opinion. In Opinion GA-0278, the Attorney General of Texas was confronted with a similar situation in which the question of federal law was unsettled. The Attorney General was asked to provide an interpretation of a federal statute, the Indian Gaming Regulatory Act ("IGRA" or "Act"), 25 U.S.C. §§ 2701-21 (2000). However, General Abbott refused to issue an opinion stating:

The question before us involves an interpretation of IGRA, a federal statute. Neither the United States Supreme Court nor the Fifth Circuit has decided the scope of Class III gaming activities while other federal courts of appeals have reached different decisions on this question. Under these circumstances, we conclude that this question is an open question of federal law in this state, and as such, cannot be given a definitive answer in an attorney general opinion.

Id. at 10-11 (citations omitted). Just as in this opinion request, the federal question is unsettled and has not been decided by the Fifth Circuit or the U.S. Supreme Court. Consequently, there is no reason why the Texas Attorney General should expend its resources in researching and developing an opinion on the issue.

II. Because no Potential Plaintiff Could Satisfy Standing Requirements, the Attorney General Should Refrain From Issuing an Opinion

In addition, we respectfully urge the Attorney General not to issue an opinion because no plaintiff would be able to sustain a lawsuit to overturn the Texas law that is the subject of the Request. In *Day v. Sebellius*, out-of-state plaintiffs (represented by the same counsel as that in the California case) challenged a Kansas in-state tuition law on the grounds asserted in the *Martinez* case. 376 F. Supp. 2d 1022 (Kan. July 5, 2005). In response, the state defendants and

⁴ The plaintiffs in *Martinez* included additional claims but the opinion request was limited to "whether the State of Texas is in violation of federal law and the Equal Protection Clause of the Fourteenth Amendment" and thus, this letter brief is limited to those two claims.

defendant-intervenors filed motions to dismiss arguing that, among other things, the plaintiffs lacked standing because they were not injured as a result of the law and there existed no private right of action under the federal statutes. The court in *Day* agreed with the defendants and dismissed the case. *Id.*

The plaintiffs then appealed to the Tenth Circuit Court of Appeals, and the appellate court affirmed the dismissal. *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007). In rejecting the plaintiffs' equal protection claim on standing, the Tenth Circuit concluded that their theories of injury were too speculative and that the alleged injury (having to pay out-of-state tuition) would not be redressed by a decision in the plaintiffs' favor because they still would not qualify for in-state tuition. *Id.* at 1139. In affirming the dismissal of the plaintiffs' preemption claims, the court found that the plaintiffs lacked standing because "[t]he text and structure of § 1623 do not manifest a congressional intent to create private rights, and the Plaintiffs thus have not claimed any cognizable and individualized injury stemming from the implementation of K.S.A. § 76-731a." *Id.* at 1139-40 (referring to 8 U.S.C. § 1623).

The plaintiffs claimed that the Tenth Circuit panel erred and filed a petition for rehearing of the opinion *en banc* but that petition was denied, as was the plaintiffs' petition for certiorari with the United States Supreme Court. *Day v. Sebellius*, 511 F.3d 1030 (10th Cir. 2007) *cert. den.* 128 S. Ct. 2987 (2008). As evidenced by the final disposition of the *Day* case, there is no need for the Attorney General to expend its resources in formulating an opinion because such a lawsuit could not be sustained against the State of Texas under the federal and constitutional claims raised in this opinion Request.

III. The Provision of In-state Tuition to Certain Students, Including Undocumented Immigrant Students, Under SB 1528 Does not Violate Federal Law or the Constitution

A. Background of the Texas In-state Tuition Law

The United States Supreme Court has ruled that a child's immigration status cannot prevent access to primary and secondary schools. *Plyler v. Doe* 457 U.S. 202 (1982). However, prior to the passage of HB 1403 many children born outside of the United States who graduated from Texas high schools were required under state law to pay tuition at a Texas public college or university at the higher rate charged to out-of-state or international students. Without question, the State of Texas has a right to afford its residents lower in-state tuition rates. *See Vlandis v. Kline*, 412 U.S. 441, 453 (U.S. 1973) (state has "a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its . . . residents to attend such institutions on a preferential tuition basis."). Hence, in 2001, the Texas Legislature passed HB 1403, which provided that persons who attended high school for three years in Texas and graduated from a public or private high school in Texas or passed a high school equivalency exam, could qualify for in-state tuition. The legislation allows an undocumented immigrant student to receive in-state tuition rates after the student submits a sworn affidavit stating that the student will apply to become a legal permanent resident as soon as the student becomes eligible. In practical terms, this process is workable for the student and universities, capitalizes on our state investment to educate young people who will remain in the US regardless of their ability to attend college, and contributes to the State's efforts to close the gaps in educational attainment.

Under current federal law, undocumented immigrants may have various future avenues to obtain legal residency or permission to reside in the United States. For example, some undocumented immigrant students have immigrant visa petitions that are pending and may take months or years to be adjudicated. Federal immigration law provides other statutory grounds by which undocumented immigrants may adjust their status, including the Violence Against Women's Act; asylum, 8 U.S.C. § 1158; and cancellation of removal, 8 U.S.C. § 1229a, to name a few. Furthermore, if comprehensive immigration reform or other legislation, such as the DREAM ACT or AGJOBS, passes in Congress, a new menu of options will become available to undocumented children who are present in the U.S. Restricting these students' access to higher education would prevent future residents and citizens of Texas from improving their lives through education and would represent a failure of the State's investment in their primary and secondary education. The Texas legislation became a model for nine other states including California, Utah, New York, New Mexico, Kansas, Washington, Oklahoma, Illinois, and Nebraska.

In 2005, the Texas Legislature passed Senate Bill 1528, which amended HB 1403. SB 1528 established common definitions and replaced the prior classifications of which students are considered residents for tuition purposes.⁵ For instance, SB 1528, among other things, allowed US Citizen and other students whose parents left the state to qualify for in-state tuition. TEX. EDUC. CODE § 54.052(b).

B. The Texas Legislature Drafted a Constitutional Law

Generally speaking, laws must be construed as constitutional if possible. See Opinion No. JC-0243 ("in accordance with the Texas Supreme Court's declaration . . . 'we should, if possible, interpret statutes in a manner to avoid constitutional infirmities,'" (citing *Osterberg v. Peca*, 12 S.W.3d. 31, 51 (Tex. 2000); TEX. GOV'T CODE ANN. § 311.021(1) (Vernon 1998) (it is presumed that the Legislature intended the statute to comply with state and federal constitutions). In 2001, the Texas Legislature carefully drafted HB 1403 so as not to run afoul of the Constitution's Supremacy Clause and federal law. As further explained below, the Legislature did so by not including monetary benefits restricted by 8 U.S.C. §§ 1623 and 1621, and by not providing special treatment for eligible undocumented immigrant students based on their residency over otherwise qualified U.S. citizens. In fact, the Legislature placed an additional obligation on undocumented immigrant students by requiring those students to declare under oath that they would apply to adjust their status at the earliest time possible. Furthermore, as stated above, in 2005 the Legislature amended the law by allowing U.S. citizen students, whose parents left the state, to remain eligible for in-state tuition. The language of the Texas statute, coupled with the actions of the Texas Legislature, support an interpretation of SB 1528 that does not run afoul of the Constitution or federal law.

⁵ See House Research Organization Bill Analysis available at <http://www.hro.house.state.tx.us/pdf/ba79r/sb1528.pdf#navpanes=0>

C. SB 1528 is not Preempted Under Federal Law

The Supremacy Clause of the Constitution provides, in part, that “the Laws of the United States [are] the supreme Law of the land.” U.S. CONST. art. VI, cl.2. As the Supreme Court has noted, the United States Constitution grants Congress the exclusive power “[t]o establish [a] uniform Rule of Naturalization” and “[t]o regulate Commerce with foreign Nations.” *Toll v. Moreno*, 458 U.S. 1, 10 (1982); U.S. CONST., Art. I, § 8, cl. 4 and cl.3. The Supreme Court has recognized that the regulation of immigration is a power granted exclusively to the federal government (*see, e.g., Elkins v. Moreno*, 435 U.S. 647, 664 (1978)), and a state or local law is preempted if it attempts to regulate immigration. *See De Canas v. Bica*, 424 U.S. 351, 354 (1976). The regulation of immigration primarily concerns itself with a determination of “who should or should not be admitted into the country, and the conditions under which the legal entrant may remain.” *Id.* at 355.

Not every state action related to immigration is preempted. Although state action related to immigration may be preempted where the state law attempts to operate in an area already occupied by federal law (field preemption) or where implementation of the local law is an obstacle or “burdens or conflicts in any manner with any federal laws or treaties” (conflict preemption), the state law itself must be examined in order to determine whether field or conflict preemption apply. *See id.* For example, in *Le Clerq v. Webb*, the Fifth Circuit found that although Congress has primacy over immigration law, a Louisiana statute that prohibited nonimmigrant aliens from taking the Bar exam did not run afoul of the Supremacy Clause and the federal statutes in question. 419 F.3d 405, 423-26 (5th Cir. 2005). Similarly, SB 1528 falls within the narrow exception of state laws that do not attempt to regulate immigration, and therefore, does not violate the Supremacy Clause.

1. In-state tuition is not a “Postsecondary Education Benefit” Prohibited by Federal Law

In addition, the Texas in-state tuition law is not preempted by 8 U.S.C. § 1621 or §1623. Sections 1621 and 1623 address undocumented immigrants and postsecondary education “benefits.” However, the Texas statute does not provide undocumented immigrants a postsecondary “benefit” prohibited under the federal statute. Section 1621(a) states that, with the exception of specified health care, emergency disaster relief and other exceptions identified in Section 1621(b), undocumented immigrants are not eligible for any State or local benefit (as defined in subsection (c) of this section). Section 1621(c) defines a “State or local benefit” as:

“any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government. . .”

8 U.S.C. § 1621(c).

Without question, the unambiguous language of the statute describes a postsecondary education benefit as a monetary benefit “for which payments or assistance are provided. . .” In contrast, the Texas statute makes no payment or assistance to undocumented immigrant students.

In Section 1623, Congress also made it clear that the prohibited benefits were monetary in nature, expressly stating that the benefit must be provided “in no less amount, duration or scope.” This unambiguous, qualifying language can mean only that a prohibited postsecondary “benefit” is a “monetary” benefit. When unambiguous language is used in a statute, courts must look at that language alone in order to interpret the meaning of the statute. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *see also* Opin. GA-0445, 3 (July 21, 2006) (“The surest method of ascertaining the legislature’s intent with respect to a particular statute is to rely on the statute’s unambiguous plain language) (citing *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999) (a court that strays from the plain language risks “encroaching on the Legislature’s function to determine what the law should be.”) (other citations omitted). The term “benefit” under Sections 1621 and 1623 does not prohibit the State of Texas from extending in-state tuition to undocumented immigrants in the limited manner it has under SB 1528 and HB 1403.

Furthermore, although Section 1623 does not provide a definition of a “postsecondary education benefit,” when two analogous statutes use the same term but the term is defined in only one of the statutes, that definition may be used to define the term in the analogous statute. *See Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986). Thus, for the same reason that in-state tuition is not a prohibited monetary benefit under Section 1621, in-state tuition is not prohibited under Section 1623 and therefore, no conflict exists between the Texas statute and federal law.

2. Texas’s In-state Tuition Law is not Preempted by the “Residency” Provision of Section 1623

SB 1528 also does not conflict with Section 1623 because it does not qualify undocumented immigrants for benefits on the basis of their residence and at the expense of U.S. citizens or nationals. Section 1623 provides:

“(a) In general, notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.”

8 U.S.C. § 1623.

By its express terms, Section 1623 prohibits states from affording resident status to undocumented students for postsecondary benefits purposes in a manner more favorable to U.S. citizens or nationals. However, the Texas law does no such thing. In fact, as stated previously, the Texas law treats undocumented immigrant students in a manner less favorable than other

students by requiring three years of attending a high school in Texas and an affidavit from the student declaring that the student will apply to adjust his status at the soonest time possible.

Furthermore, under Texas law, an out-of-state national or U.S. citizen student may qualify for in-state tuition under a number of other provisions. For example an amendment to SB 1528 ensured that U.S. citizen students who graduated from a Texas high school, but whose parents leave the state, are eligible to pay the in-state tuition rate, thereby ensuring that U.S. citizen student is permitted to pay the same tuition reduction that a similarly situated undocumented immigrant is eligible to pay. TEX. EDUC. CODE § 54.052(b). Texas also provides tuition to other U.S. citizen out-of-state students attending border states, including residents of Arkansas, Louisiana, New Mexico, or Oklahoma. TEX. EDUC. CODE § 54.060. In addition, out-of-state U.S. citizen students may establish domicile in Texas and then qualify for in-state tuition.⁶ See TEX. EDUC. CODE § 54.052(a)(1) - (2).

3. Congress Expressly Authorized States to Enact laws Such as SB 1528 Under the Savings Clause of Section 1621 (PRWORA)

The Texas in-state tuition law also does not violate Section 1621, because the statute expressly authorizes states to provide undocumented immigrants with “any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law . . . which affirmatively provides for such eligibility.” 8 U.S.C. § 1621(d). The Texas law affirmatively provides that otherwise eligible undocumented immigrant students may qualify for in-state tuition but they must sign and submit a sworn affidavit that they will apply to become a U.S. citizen at the earliest time possible. The Texas Legislature also discussed this point in drafting the legislation in 2001 stating, “an alien who is living in this count[r]y ...who has filed a declaration of intention to become a citizen with the proper federal immigration authorities” is eligible for the in-state tuition rate.⁷ Indeed, the Texas Higher Education Coordinating Board, which oversees the in-state tuition laws under TEX. EDUC. CODE § 54.0015, publicly announces the availability of in-state tuition to undocumented immigrants under the Texas statute on its website. Texas Higher Education Coordinating Board Overview of Residency and In-State Tuition available at <http://www.thecb.state.tx.us/reports/PDF/1528.PDF>.

D. SB 1528 Survives Constitutional Scrutiny Under Rational Basis Review

In reviewing the constitutionality of a state law under the equal protection clause, courts must first determine whether a fundamental interest is at stake and whether the state law subjects persons to unequal treatment on the basis of their membership in a suspect, or protected, class. If the law impedes a fundamental right or subjects a member of a protected class to differing treatment, then the court applies strict scrutiny.

⁶ Texas provides in-state tuition to certain individuals without having established resident status in this state for economic development and diversification. 54.051; see also *id.* § 54.074 (providing in-state tuition to certain nonimmigrant aliens and the spouse or children of that alien who are considered to be residents for tuition and fee purpose under NATO)

⁷ Senate Research Center Bill Analysis SB 1526 available at <http://www.capitol.state.tx.us/tlodocs/77R/analysis/html/SB01526L.htm> (Senate Companion Bill to HB 1403).

In the case of an out-of-state student claiming that his/her right to equal protection of the law is violated, there can be no dispute that the right to in-state tuition is not a fundamental right under the U.S. Constitution. *See e.g., San Antonio ISD v. Rodriguez*, 411 U.S. 1, 18, 25 nn.60, 37. (1973) (Supreme Court holding that education is not a fundamental right, but reserving opinion on whether complete denial of education would encroach upon a fundamental interest). However, merely because a fundamental interest is not at risk does not end the inquiry because state statutes that discriminate against a person on the basis of their alienage or national origin are typically subject to strict scrutiny analysis. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1 (1977) (striking down a state law as unconstitutional because the law prevented legal permanent resident immigrants from receiving state financial assistance); *Bernal v. Fainter*, 467 U.S. 216, 220 (1984) (striking down a Texas statute that prevented legal permanent resident immigrants from becoming notaries public because it did not fall within the narrow “political function exception”).

Although alienage and national origin can be a suspect class for equal protection purposes, the differing treatment must be based on that person’s alienage or national origin. *See id.* However, under Texas law, an out-of-state individual, citizen or otherwise, who does not qualify for in-state tuition is not treated differently because of his/her citizenship status or national origin. Rather, an out-of-state U.S. citizen may be treated differently if he/she does not meet the qualifications for in-state tuition, i.e., did not graduate or receive a high school equivalency from a Texas high school. In fact, the only group that is treated differently under the Texas in-state tuition law is undocumented immigrants who must submit an affidavit stating their intentions to adjust their immigration status at the earliest time possible. Because the in-state tuition law does not treat students differently based on suspect classifications, rational basis review applies.

“Under traditional rational basis analysis, a state law classification that ‘neither burdens a fundamental right nor targets a suspect class’ will be upheld ‘so long as it bears a rational relation to some legitimate end.’” *Le Clerq* 419 F.3d 405 (quoting *Vacco v. Quill*, 521 U.S. 793, 799 (1997)). In the case of the Texas in-state tuition law, the law is rationally related to the State’s interest in providing an education to all students graduating from Texas high schools, regardless of their immigration status. *See Le Clerq*, 419 F.3d at 421. The Texas law also provides an incentive to all its students to perform well in primary and secondary schools and helps prevent students from dropping out of high school. In turn, this allows the State to comply with the No Child Left Behind Act, which holds schools, districts and states accountable for the progress and achievement of all students, including undocumented immigrant students. Furthermore, the Texas law’s provision requiring undocumented immigrant students to submit an affidavit stating that they “will apply to become a permanent resident of the United States as soon as the person becomes eligible to apply” furthers the State’s interest in having a well-educated workforce that contributes to the state’s economy and well being. *See generally Plyler v. Doe*, 457 U.S. 202 (1982).

As mentioned in Section III(C)(2) above, the Texas Legislature extended in-state tuition to many students who would not otherwise qualify for in-state tuition for a number of reasons and offering in-state tuition to undocumented students is no different. Higher education tuition

regulation choices are better left to the states to further their objectives, whether those objectives are recruiting diverse student populations, economic development, reducing drop-outs, or encouraging the value of education as an end in itself. Accordingly, the Texas in-state statute is rationally related to the legitimate interests of the State.

Conclusion

MALDEF and the undersigned urge the Attorney General to withhold an opinion until the issue is resolved in the Fifth Circuit or the United States Supreme Court. At a minimum, the Attorney General should not issue an opinion until the *Martinez* case is resolved in the federal courts. If the Attorney General decides to offer an opinion on the Texas in-state tuition statute, we respectfully urge the Attorney General to examine the arguments raised in this brief and conclude that the Texas statute is neither preempted nor unconstitutional.

Very truly yours,

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