

ISSUE BRIEF

Access to Higher Education for Undocumented Students

Over the past several years, there has been a concerted effort to attack the access of undocumented students to public colleges and universities, both through litigation and policy advocacy. Currently, nine states have laws on the books providing in-state tuition rates to all students who meet certain requirements, regardless of immigration status. The requirements generally include a minimum period of attendance in and graduation from a high school in the state, among other things. These laws make college more affordable (and therefore accessible) not only to undocumented students, but also to U.S. citizen and non-citizen students who may have moved out of the state after high school graduation.

Legal challenges by anti-immigrant groups have been brought against such tuition equality laws in Kansas and California. The IRP and ACLU affiliates have been involved in defending the laws in federal and state courts. A federal district court and the Tenth Circuit [dismissed](#) a challenge to the Kansas law on procedural grounds. Earlier this month, the California Supreme Court [agreed](#) to review an appellate court ruling overturning that state's in-state tuition law on the ground that it conflicts with federal law. A decision in that case, *Martinez, et al. v. Regents of the University of California, et al.*, will have a ripple effect across the nation, whichever way it comes down.

State lawmakers and officials around the country have also introduced bills and instituted policies that seek to eliminate in-state tuition for undocumented students. In some places, even admission and enrollment in public colleges and universities has come under attack.

- **Which states have laws providing in-state tuition rates for certain state high school graduates, regardless of immigration status?**

Nine states currently have these types of in-state tuition laws on the books: [California](#), [Illinois](#), [Kansas](#), [Nebraska](#), [New Mexico](#), [Texas](#), [Washington](#), [Utah](#), and [New York](#). Oklahoma [repealed](#) its in-state tuition law in 2007. Each law varies somewhat from the others. Legal and policy arguments may not be applicable across the board.

- **What are the substantive legal issues at stake in *Martinez vs. Board of Regents of the University of California* ?**

In *Martinez, et al. v. Regents of the University of California et al.*, out-of-state students challenged California laws providing in-state-tuition rates to certain California high school graduates, including undocumented individuals. Section [68130.5](#) of the California Education Code (codifying [AB 540](#)), provides that students who attend at least three years of high school in California and who graduate from a California high school are eligible for in-state tuition rates at California public colleges and universities. In addition, Section 68130.5 explicitly covers "a person without lawful immigration status," so long as that person submits an affidavit explaining that she either has filed an application to regularize her immigration status, or will file it once she is eligible.

The core inquiry in this case hinges on the meaning of two federal statutes, 8 U.S.C. §§ [1621](#) and [1623](#).¹ Specifically, do these provisions preempt states from allowing in-state tuition rates for undocumented students? Threshold questions include whether reduced tuition is considered a “benefit” and whether the availability of in-state tuition to undocumented students under the state law is based on “residence,” as understood in federal law.²

The California Supreme Court will also consider whether the California tuition laws violate the Fourteenth Amendment’s Privileges or Immunities Clause.

In October 2008, an intermediate state appellate court reversed the lower court’s decision dismissing all claims. The state university and community college systems asked the California Supreme Court to review that ruling. In December 2008, ACLU IRP, the three California ACLU affiliates, and the National Immigration Law Center (NILC) sent a joint letter to the California Supreme Court in support of the requests for review. On December 23, 2008, the Court agreed to hear the case with briefing pending and argument not likely to take place before the summer of 2009.

- **Where else has a state’s in-state tuition law been challenged in the courts?**

In *Day v. Sebelius*, several out-of-state, U.S. citizen students attending Kansas universities challenged a Kansas law allowing in-state tuition for Kansas high school graduates, including undocumented students. ACLU IRP and a number of other organizations intervened on behalf of students and organizations in support of the Kansas laws. The Tenth Circuit [dismissed](#) the case on procedural grounds, holding that plaintiffs lacked (1) standing to challenge the constitutionality of the Kansas law and (2) a private right of action to enforce preemption under 8 U.S.C. § 1623. The U.S. Supreme Court [denied](#) a petition for *certiorari*.

- **Have other state officials opined on the legality of in-state tuition for undocumented students?**

In September 2008, a Texas state legislator sent a [request](#) to the Texas Attorney General for an Opinion Memorandum on the legality of that state’s in-state tuition laws. Citing the California appellate court’s decision in *Martinez*, the letter requested review of whether Texas laws allowing undocumented immigrants “the benefit of in-state tuition in state colleges and universities” violate federal constitutional or statutory law.

In November 2008, ACLU IRP, the ACLU of Texas, and NILC sent a letter to the state AG, urging him to decline to issue an Opinion Memorandum on this subject, as review of the Texas in-state tuition laws would be premature in light of the appeal of *Martinez* to the California Supreme

¹ Section 1623 forbids states from providing “an alien who is not lawfully present in the United States” any postsecondary education benefit “on the basis of residence” unless the same benefit is available to out-of-state American citizens or nationals. 8 U.S.C. § 1623. Section 1621 prohibits states from conferring certain benefits to undocumented individuals, unless the legislature “affirmatively provides” that an alien who is not lawfully present in the United States is eligible for those benefits. 8 U.S.C. § 1621.

² Even if the Court were to find that the state law conferred a “public benefit” to undocumented individuals, federal law authorizes states to confer certain benefits to undocumented immigrants as long as the state legislature expressly indicates its intent to provide such benefits in legislation post-dating August 22, 1996, the date Congress enacted the federal welfare reform law. 8 U.S.C. § 1621(d).

Court. In addition, the ACLU letter argued that the Texas in-state tuition laws do not conflict with federal law. The Texas AG has not yet issued an opinion.

In a related development, last year, the North Carolina Attorney General advised that state's community college system that federal law required them to verify the lawful immigration status of all students enrolled in its colleges. However, the federal Department of Homeland Security clarified in a [letter](#) to the state AG that federal law (8 U.S.C. § 1621) did not impose such a requirement as *admission* is not considered a "benefit" under the law. The community colleges then backed off on a policy to bar undocumented students, until further study.

- **Who is behind the concerted effort to challenge these laws?**

The principal player behind these challenges is the [Immigration Reform Law Institute \(IRLI\)](#), the legal arm of the Washington, DC-based, national anti-immigrant organization Federation for American Immigration Reform (FAIR). IRLI and its affiliated lawyers represented out-of-state student plaintiffs in both the Kansas and California lawsuits. Beyond litigation, IRLI advises lawmakers around the country on developing anti-immigrant laws at the state and local levels, and has prepared model legislation on a host of issues, well beyond access to public higher education.

- **What is the current state of legislation in other states?**

Of the ten states that have enacted laws affording in-state tuition regardless of immigration status, only Oklahoma has [repealed](#) it, in 2007. However, bills to repeal these laws in the other states appear perennially. In Utah, advocates were successful in stripping a provision to repeal in-state tuition for undocumented students out of an omnibus anti-immigrant bill that ultimately passed last year (SB 81). A similar battle looms in Texas this year (HB 266). At least three states have affirmatively restricted the eligibility of undocumented students for in-state tuition; they are [Arizona](#), [Colorado](#), and [Georgia](#).

In an alarming development, last year, South Carolina became the first state in the country to pass a law to bar undocumented students from gaining *admission* or enrolling in public colleges and universities ([HB 4400](#)). Advocates successfully stripped a similarly harsh provision out an omnibus bill enacted in Missouri last year (HB 1549).

- **What are the principal policy arguments in defending access to higher education for undocumented students?**

Policy arguments in favor of preserving or promoting access to public higher education for undocumented students center on the economic and societal interests of the state, and on fundamental fairness. The best spokespersons and messengers tend to be representatives of the state, including elected officials and public college and university administrators, as well as the affected students, who have compelling stories to share. The principal arguments include the following:

- *Denying these students access to affordable college education is short-sighted because they are likely to remain in the State and may well regularize their immigration status under*

current or future federal laws. Through either existing federal immigration law or future federal legislation providing undocumented students and others the ability to adjust their immigration status, many of those students who are presently undocumented may one day be legal residents and citizens.

- *Affordable college education for undocumented students who graduate from high schools in the State furthers principles of fundamental fairness.* Undocumented students who benefit from the bill are, by and large, talented high achievers who arrived in the State as children because of the choices of their parents. They grew up in the State and persevered against the odds to graduate from high school and secure admission to State college or university.

- *Reducing the cost of education at public colleges and universities for the State's high school graduates promotes economic growth and increases opportunities.* College graduates who are likely to remain in the state earn higher wages, and therefore generate significantly more in income, sales, and property taxes. Their increased earning power and disposable income stimulate growth in the state economy. A better educated population also increases competitiveness in the global economy.

- *Denying higher education access to the State's undocumented students means failing to capitalize on the State's investment in their K-12 education.* Many of the undocumented students already educated in the State's K-12 public school system come from impoverished backgrounds and would not otherwise be able to attend college or university without in-state tuition.

For strategic advice and analysis on a particular bill or policy proposal, please contact IRP State Strategist, Vik Malhotra, at vmalhotra@aclu.org.

- **Why is the ACLU defending in-state tuition laws?**

As a general matter, the ACLU has a long tradition of protecting the rights of immigrants, who are politically disenfranchised by definition and among the most vulnerable members of our society. Particularly in times of economic difficulty or fear about national security, immigrants are blamed for societal problems and viewed with anger, suspicion and fear. Racial and cultural prejudice also fuel hostility toward immigrants, resulting in discriminatory actions and policies.

These overarching concerns animate the ACLU's constitutional interests in defending the educational access of undocumented children and young people. In the landmark case of *Plyler v. Doe*, 457 U.S. 202 (1982), the U.S. Supreme Court held that undocumented students have a fundamental right to basic public education as a matter of due process and equal protection. The Court observed that denying undocumented children access to K-12 primary education "raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents." *Id.* at 207. This rationale applies with equal force to higher education, increasingly essential to an individual's potential and opportunity.

Moreover, the participation of immigrants' rights advocates in defending these laws is often critical because states and elected officials may not be in a position to vigorously defend the interests of undocumented students or grapple with the complexities of federal immigration law. The state's chief interest is by definition the state, subject at times to the direction of political winds; the ACLU's is the equal treatment and civic integration of this most vulnerable population.

IRP has also defended these state laws as a legitimate policy choice by state legislatures that is permissible under federal law. The anti-immigrant groups who challenge these laws seek to diminish the legal protections of undocumented immigrants, misapply federal preemption doctrine, and scapegoat worthy students, offending principles of fundamental fairness and equal protection.

It is worth noting that defending state laws providing undocumented students with in-state tuition rates is distinct from affirmatively advocating for enactment of such laws, given the political and policy considerations they may present. There are a host of good reasons, many of which have already been articulated in this brief, to support affordable access to higher education for undocumented students. Some ACLU affiliates have actively promoted such efforts, depending in part on their resources and priorities, and other affiliates may choose not to engage in this effort. IRP's focus has been on ensuring a vigorous defense of in-state tuition laws if states choose to enact them, and protecting educational access for undocumented students when policymakers seek to deny it.