



U N I V E R S I T Y O F H O U S T O N
L A W C E N T E R

I N S T I T U T E F O R H I G H E R E D U C A T I O N L A W & G O V E R N A N C E

1 0 0 L A W C E N T E R

H O U S T O N , T E X A S 7 7 2 0 4 - 6 0 6 0

7 1 3 . 7 4 3 . 2 0 7 5 7 1 3 . 7 4 3 . 2 0 8 5 F A X

W W W . L A W . U H . E D U / L A W C E N T E R / P R O G R A M S / I H E L G

M I C H A E L A . O L I V A S
William B. Bates
Distinguished Chair in Law
Director, IHELG
molivas@uh.edu
713.743.2078

D E B O R A H Y . J O N E S
Program Manager
dyjones@uh.edu

30 May 2012

Hon. Sandra Cunningham, Chair,
NJ Senate Higher Education Committee
1738 Kennedy Blvd.
Jersey City, NJ 07305

sencunningham@njleg.org

Dear Senator Cunningham,

This brief letter summarizes recent developments on an odd feature of the immigration/higher education phenomenon of states denying resident tuition status or financial aid to US citizen college students whose parents are undocumented--including New Jersey. While this would seem an unusual (and unconstitutional) matter, it has arisen often enough that it is worth commenting upon, particularly as several cases have been brought to overturn the practice. Inasmuch as the objection to undocumented college students turns on their lack of lawful presence in the country, one would think that this practice of denying citizen students their rights would have been called forth both by accommodationists on one side and restrictionists on the other side. Rather, the loud silence that has occurred shows the worst of both worlds: progressives thinking that the issue is so absurd and wide of the mark that it will resolve itself once the light is shone upon the offending practice, while nativists are so determined to extirpate undocumented parents that they have tolerated these practices as the inevitable work of birthright citizenship being extended to their undeserving children. Whatever the reasoning, the issues have continued to arise, and have extended beyond the narrow issue of postsecondary education law. The practice has never been continued once it was engaged in a lawsuit, and virtually all legal actions (the suits, AGO's, and administrative actions) have either struck down the practices or led the states to believe that they would be, so they settled after changing the practice. In other words, no state has successfully defended this practice.

The first instance I have been able to find of this practice in the higher education context was a 2006 suit by the ACLU of Indiana, that contended the state's 21st Century Scholars program was unconstitutional because its eligibility requirements excluded otherwise-eligible US citizen and LPR students based on the undocumented status of their parents. The program had operated with essentially the same immigration-related eligibility since its establishment in 1990. After extensive discovery and negotiations, the ACLU obtained a favorable settlement in *E.C. v. Obergfell*, signed on March 2, 2007, allowing all academically-eligible Indiana LPR and citizen children to apply for the program, irrespective of their parents' immigration status. During this time, a similar case was brought in California, which had been excluding USC children from eligibility from the state's financial aid programs, including Cal Grants, if their parents were out of status. A number of immigrant organizations filed suit in November, 2006 to challenge California's postsecondary residency and financial aid provisions in *Student Advocates for*



Higher Education et al v Trustees, California State University et al. Citizen students with undocumented parents were being prevented from receiving the tuition and financial aid benefits due to them, at least in part because the California statute was not precisely drawn (or was being imperfectly administered). The challenge highlights several overlapping policies: immigration, financial aid independence/dependence upon parents, and the age of majority/domicile. The state agreed to discontinue the practice, and, as had happened in Indiana, entered into a consent decree, resolving the matter in the plaintiffs' favor. The order overturned CSU's odd take on undocumented college student residency—that a citizen, majority-age college student with undocumented parents, was not able to take advantage of the California statute, even if the student were otherwise eligible. (In a footnote on this practice, the state has since extended the financial aid program even to the undocumented, beginning in January, 2013.)

Similar issues arose in Virginia and Colorado on other immigration-related admissions and residency issues, but litigation was averted when AGO's were issued in both states, finding for the students: the Virginia attorney general and the Colorado attorney general both ruled that U.S. citizen children could establish tuition residency status on a case-by-case basis, even if their parents were undocumented. (Undocumented children in both the states' colleges are ineligible for resident tuition.) These AGO rulings made a virtue of necessity, inasmuch as citizen children who reach the age of majority by operation of law establish their own domicile, so that their parents' undocumented status is irrelevant to the ability of the children to establish residency. They are birthright citizens.

Despite these cases and the widespread public attention paid to them in the mainstream press and in the immigrants' rights community, additional examples arose where states were parceling resident tuition status and financial aid eligibility on the immigration status of the parents, rather than upon the US citizen-status of their children, otherwise eligible for the programs. On October 20, 2011, the Southern Poverty Law Center filed *Ruiz v. Robinson*, which would overturn the state statute and require Florida to extend its in-state tuition rates to citizen residents who qualify, even if their parents were undocumented. When it was discovered that existing New Jersey policy denied state financial aid to a student who is a U.S. citizen, but whose mother was undocumented, suit was filed by the NJ ACLU on this issue in October 24, 2011: *A.Z., a minor, by B.Z., her guardian v. Higher Education Student Assistance Authority of New Jersey*. A companion suit has also been filed in New Jersey on this issue, with another student in similar status. *Cortes v. Higher Education Student Assistance Authority of New Jersey*. Both New Jersey cases are making their way through the process, as of May, 2012, and I am confident that the State will either lose or concede.

Such benefits and status issues have arisen in a number of other non-educational contexts as well. For example, the Indiana ACLU, after winning the first of these financial aid challenges, five years later challenged the Indiana system of requiring Social Security numbers to validate the paternity of children born in Indiana hospitals. In *L/P et al. v. Commissioner*, the court held: "The Commissioner is permanently enjoined to accept paternity affidavits, filed pursuant to Indiana Code § 17-37-2-2.1, submitted by parents of children born in Indiana where one or both parents do not have a Social Security number and cannot obtain a Social Security number as a result of their immigration status."

Scorecard of postsecondary decisions, as of May, 2012—Holding that the status of parents makes no material difference to their USC children: Two AGO's (VA and CO), two settled cases (IN and CA); two cases making their way through the courts (FL on residency tuition and NJ on financial aid).

I have not had a chance to carefully consider the recent proposed S. 1760, but if it conforms to the 48 other states who do not attempt to punish birthright citizen children, I would be supportive. I write only to clarify the outlier position that New Jersey finds itself in, and am mystified that it is spending precious legal resources to defend this unconstitutional practice, when it is sure to lose. The rights of birthright

citizen children have been settled since the 19th Century, and only restrictionists and nativists (and birthers) question this.

There is also a small but growing literature on these issues, both scholarly and news-story resources, which I list and track at <http://www.law.uh.edu/ihelg/undocumentedparents/homepage.asp> . If I may help you or your Committee (or staff), please feel free to contact me by email. I am traveling, but will be glad to assist in any way.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Olivas". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping tail.

Michael A. Olivas
William B. Bates Distinguished Chair in Law and
Director, Institute for Higher Education Law and Governance