Higher Education and Employment Advancement Committee
Public Hearing, March 15, 2011

Testimony Submitted in Support of H.B. 6390: An Act Concerning Access to Postsecondary Education

Submitted by the Worker and Immigrant Rights Advocacy Clinic at Yale Law School, on behalf of the Connecticut Sponsoring Committee

Senator Bye and the Members of the Higher Education and Employment Advancement Committee:

We are members of the Worker and Immigrant Rights Advocacy Clinic at Yale Law, testifying today on behalf of the Connecticut Sponsoring Committee ("CSC"). The CSC has asked the Legal Services Organization at Yale to analyze the lawfulness of H.B. 6390, which would allow undocumented students who meet certain requirements to pay in-state tuition to attend Connecticut public colleges and universities. We conclude that this proposal is lawful, and that if passed, any legal challenge to the law would fail.

I. Legal challenges to similar bills in other states have failed

The issue of this bill's legality has already been litigated. The California Supreme Court ruled last year that an almost identical law was perfectly legal, and that law is in operation in California today.[1] In other states among the ten that have similar laws,[2] challenges to them have failed before any court has heard them on the merits.[3] We agree with the California Supreme Court and believe that if H.B. 6390 becomes law, any challenge to it would be rejected.

In the California Supreme Court case, that court addressed California's in-state tuition law, which is substantially the same as H.B. 6390. It requires that, in order to attend a public university at the in-state tuition rate, the student graduate from a high school in that state, and that the student have attended a high school there for a required time period—in California's case, three years, as opposed to H.B. 6390's proposed four.

In that case, the law's opponents claimed that the law was invalid because of preemption—the argument that the law illegally conflicted with a federal statute. Specifically, the opponents claimed that the California law violated a federal statute that prohibits unlawful aliens from receiving any postsecondary education benefits based on residence within a state unless citizens or nationals are also eligible for that benefit. They argued that most U.S. citizens who are not residents of the state have to pay out-of-state rates, and that allowing undocumented students who go to school in California to pay the in-state tuition rate created an illegal exemption to this rule. However, the California Supreme Court rejected this argument. The court pointed out that *anyone* who meets the requirements of the statute—not just undocumented immigrants—could benefit from in-state tuition, which means that the law did not create a special benefit just for undocumented students. Moreover, the court found that the bill's requirements were *different*

[1] Martinez v. Regents, 117 Cal. Rptr.3d 359 (Cal. 2010).
[2] States with similar laws include California, New Mexico, New York, Illinois, Kansas, Nebraska, Texas, Utah, Washington, and Wisconsin.
[3] *See, e.g.*, Day v. Bond, 500 F.3d 1127 (10th Cir. 2007) (rejecting challenge to Kansas bill for lack of standing).

from the more general requirements defining residency. Further, not all undocumented immigrants who would qualify for residency if not for their immigration status could receive the benefit. As such, this was not a benefit conferred based on residence, but rather an *exception* to the requirement that non-residents pay higher tuition fees. Therefore, the California law did not violate the federal statute.[4]

In its holding, the court strongly asserted that Congress has left room for a law that would give undocumented students access to in-state tuition rates. "If Congress had intended to prohibit states entirely from making unlawful aliens eligible for in-state tuition," the court noted, "it could have done so. … But it did not do so."[5]

II. H.B. 6390 is not in conflict with any federal law

For the same reasons articulated by the California Supreme Court, the Connecticut in-state tuition proposal would likely survive any legal challenge based on federal preemption. H.B. 6390 does not conflict with either federal provision cited by opponents of the California law. It does not conflict with chapter 8, section 1623 of the United States Code,[6] which prohibits a state from making unlawful aliens eligible "on the basis of residence within a State" for a postsecondary education benefit, primarily because residence in Connecticut is not the only criterion used for granting in-state tuition. It does not conflict with chapter 8, section 1621 of the United States Code,[7] which prohibits undocumented individuals from being eligible for a state or local benefit unless a state law affirmatively provides for such eligibility, precisely because the legislature *is* affirmatively providing for eligibility through this bill.

The in-state tuition proposal will survive a challenge based on section 1623 primarily because it does not provide for in-state tuition merely "based on residence." In fact, just as in the case of the challenged California law, H.B. 6390 is both sufficiently over and under-inclusive to avoid conflicting with the language of section 1623. It is under-inclusive because not all undocumented students who reside in the state will be eligible for in-state tuition purposes. Unlike their documented peers who can establish domicile in this state after residing here for one year, undocumented students will still have to pass a number of additional hurdles, such as having completed at least four years of high school level education in this state, before being granted such in-state status. In this sense, the bill establishes that residing in Connecticut is necessary to gain in-state tuition status, but does not deem that to be a sufficient condition. As we have described, the California court found that a similar under-inclusiveness weighed in favor of the bill's validity under a section 1623 challenge[8]. Second, the bill is also slightly over-inclusive. It

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[4] *Martinez*, 117 Cal. Rptr.3d at 365 ("Because the exemption is given to all who have attended high school in California for at least three years (and meet the other requirements), and not all who have done so qualify as California residents for purposes of in-state tuition, and further because not all unlawful aliens who would qualify as residents but for their unlawful status are eligible for the exemption, we conclude the exemption is not based on residence in California. Rather, it is based on other criteria. Accordingly, section 68130.5 does not violate section 1623.").

[5] *Id.* at 370.

[6] 8 U.S.C. § 1623.

[7] 8 U.S.C. § 1621.

[8] *Id.* at 365.

provides a mechanism for some students with lawful immigration status to be classified as having in-state status despite not being able to establish domicile under Connecticut's existing law. For example, under Connecticut General Statutes section 10a-29(b), an unemancipated person will be deemed to have the domicile of his or her parent. Thus, for example, a boarding school student who resides in this state during her high school years but whose parents are domiciled outside of the state would not qualify for in-state tuition under existing law but could qualify if H.B. 6390 were passed. It is precisely this form of over- and under-inclusiveness that the California Supreme Court found fatal to the section 1623 challenge[9].

Furthermore, federal law does not otherwise preempt the in-state tuition proposal. In particular, chapter 8, section 1621 of the United States Code,[10] which requires a state to "affirmatively provide" for eligibility for a state or local public benefit granted to an undocumented individual. In this case, it is quite clear that if the legislature passes H.B. 6390, it will have affirmatively provided for an exception to the federal law's general prohibition on granting state and local benefits, and its intent will be reinforced through the bill's legislative history. Furthermore, the law's textual requirement of an affidavit, which specifically contemplates the enrollment of undocumented students at in-state tuition rates, provides additional evidence that the law "affirmatively provides" for such an exemption. The statute itself does not require state legislatures to reference the text of section 1621, although including such a textual reference would only add to the strength of the claim that this legislature is making use of section 1621's exemption.

The bill will also survive any challenge based on "field preemption"—the claim that Congress intended federal law to exclusively govern immigration, and that states therefore cannot regulate law in this area in any way. However, as the Supreme Court has clarified,[11] a state statute that touches on immigration issues is preempted only if it can be deemed a "regulation of immigration," i.e., "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." This bill clearly does not attempt to determine who should be admitted into the country. Therefore, like the potential challenges based on specific federal statutes, any challenge based on field preemption would similarly fail.

III. Conclusion

In sum, we are confident that H.B. 6390 will withstand legal challenges and encourage the legislature to pass this bill.

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[9] Moreover, Michael Olivas, a professor at the University of Houston Law Center and an expert who has advised numerous states on similar laws, has argued that in-state tuition bills should survive a section 1623 challenge because eligibility for in-state tuition should be considered a status, not a benefit, for the purposes of that federal statute. However, no court has yet directly addressed such an argument. *See* Michael Olivas. *IIRIRA, The DREAM Act, and Undocumented College Student Residency.* 30 J.C. & U.L. 435, 454 (2004).

[10] 8 U.S.C. § 1621.

11 De Canas v. Bicas, 424 U.S. 351 (1976).