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Undocumented Students and Eligibility for Enrollment at U.S. Colleges and Universities

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THEY CAN'T GO HOME AGAIN: UNDOCUMENTED ALIENS AND ACCESS TO U.S. HIGHER EDUCATION

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Introduction

It seems that nearly every month, another article appears in the media regarding legislation or court cases in certain states to either permit or deny undocumented students access to that state's public higher education institutions, with the issue of in-state tuition eligibility for this population frequently taking center stage.

An undocumented student is a foreign national who: (1) entered the United States without inspection or with fraudulent documents; or (2) entered legally as a nonimmigrant but then violated the terms of his or her status and remained in the United States without authorization.

All of us know of or have read about academically-gifted undocumented students educated in their state's public school system, but who are denied access to that state's public higher education institutions due to federal and state tuition and financial aid policies. In 2001, new legislation introduced in Congress provided a glimmer of hope for undocumented students. At about the same time, Mexican President Vicente Fox began to pursue a Mexican "workers rights" agenda with both President Bush and state leaders that included giving undocumented children of migrant workers who graduate from U.S. high schools the same access as legal

residents to higher education. And discussions within the White House hinted at legislation that would “regularize” the status of certain undocumented individuals currently residing in the United States, including some students.

The tragic events of September 11 temporarily moved all pro-immigration legislation to the back burner. However, access to U.S. higher education for undocumented students is an issue that will not go away. The battle continues to be waged in some states, and students, parents, advisors, guidance counselors, and college admissions personnel still have questions: What is the current law in this area? Is an undocumented student eligible to attend a U.S. college or university? We found that most of what was true four years ago, when we last researched this topic, remains true today.

In trying to craft a responsible answer to the question of undocumented students’ eligibility to attend U.S. colleges, there are multiple perspectives, based on an understanding of immigration law, education law, state law, the federal Family Educational Rights and Privacy Act (FERPA), ethics, and campus institutional policies. The challenge is to balance all of these considerations in an area that has few real answers. For those of us employed by U.S. colleges and universities, a further challenge is to offer guidance on this subject while maintaining that delicate balance between the quasi-enforcement role required by federal regulations and the helping role that is basic to the relationship between educators and students.

To research this issue we examined pertinent immigration case law, the Immigration and Nationality Act (INA), written commentary by the U.S. Citizenship and Immigration Services (USCIS) (formerly the Immigration and Naturalization Service (INS)), and actual campus practices. We consulted the Code of Federal Regulations (C.F.R.), particularly 8 C.F.R. § 214.3(g) and 8 C.F.R. § 214.4; the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA) sections 505-507; case law, USCIS memoranda, and various newspaper and law review articles. See the bibliography at the end of this article.

The Plight of Undocumented Students

A 1999 study estimated the number of undocumented foreign nationals under 18 in the U.S. as one million. A *Los Angeles Times* article estimates that about 65,000 of these foreign nationals graduate from U.S. high schools each year.

Lawmakers and the public are divided about what to do about these students. On one side, Senator Orrin Hatch (R-Utah) has stated that “[m]ost [undocumented students] came to this country with their parents as small children and have been raised here just like their U.S. citizen classmates. Many of them view themselves as Americans and are loyal to our country. . . . As illegal immigrants they cannot work legally. They are also effectively barred from developing academically beyond high school because of the high cost of pursuing higher education. We have a choice either to keep these talented young people underground or give them a chance to contribute to the United States.”

On the other side, on October 20, 2004, National Public Radio reported on a Kansas lawsuit challenging legislation that would allow undocumented students to pay in-state tuition rates for state universities in Kansas. The report included the following comment from Kris Kobach, who spearheaded the lawsuit: “Many American citizens are mortgaging their future because they can’t afford to go to college. Meanwhile, we’re handing out a subsidy to illegal aliens, people who are not supposed to be in this country and whose presence here is a

violation of federal . . . law.”

As these articles show, the debate continues. We try to clarify some of the issues below.

Federal Law, State Law and the Right to Attend Public Colleges and Universities

No *federal* law prohibits undocumented aliens from attending public colleges or universities. *Plyler v. Doe*, 457 U.S. 202 (1982), held that it was illegal for a state to deny school-aged undocumented aliens the right to a free education. The Supreme Court relied on the equal protection doctrine, which prohibits a state or the federal government from denying equal protection of the laws to any “person” (not just U.S. citizens).

Although post-secondary education is left up to the states, it is possible that the *Plyler* decision can cover this type of education as well. One could argue that post-secondary education is necessary to get by in today’s world, over 20 years post-*Plyler*, and that the decision should therefore extend to cover undocumented students’ rights to education. And as of yet, no federal law has overruled *Plyler*. The closest provision is IIRIRA § 505, which prohibits states from providing a post-secondary education benefit to an alien not lawfully present in the United States on the basis of the alien’s residence in their state unless the state would also provide the same benefit to a citizen or national residing in another state. Translated into plain English, this provision attempts to bar public colleges from charging undocumented aliens an in-state tuition rate, since they would be treated more favorably than out-of-state residents who are U.S. citizens. We discuss section 505 in more detail below.

State law is more complicated. According to a 2003-04 survey by the Mexican American Legal Defense and Educational Fund (MALDEF), state legislatures have been “moving toward expanding in-state college opportunities to undocumented students.” Currently, at least nine states allow undocumented students to attend state college at reduced tuition rates: California, Delaware, Illinois, Kansas, New York, Oklahoma, Texas, Washington, and Utah. Similar legislation has been introduced in several other states. Several states decide tuition on a campus-by-campus basis. Only three states have taken steps to restrict college access to undocumented students: Alaska, Mississippi, and Virginia. All these state laws are mentioned in the article by Michael A. Olivas listed in the bibliography to this article.

California, now one of the more forward-looking states, originally tried to prohibit undocumented students from attending public colleges or universities. California’s attempt at barring undocumented students was named Proposition 187. Among other things, section 8 of the proposition would have denied post-secondary education to undocumented aliens. A federal court struck down Proposition 187, holding that the state law contradicted federal law and thus was “preempted” by federal law. The Supremacy Clause of the U.S. Constitution states that federal law is the supreme law of the land. If Congress has effectively regulated in an area, states cannot enact laws that deviate from the federal one.

California’s state education code now allows only the use of admissions requirements as criteria for enrolling students. It should be noted that the Family Educational Rights and Privacy Act (FERPA) requires that student’s educational records are kept private and social security numbers are not to be required, allowing it to go undiscovered that a student is undocumented. For more information on this, check: <http://www.dese.state.mo.us/schoollaw/freqaskques/undocumentedstudents.htm>.

We move next to considering whether public colleges or universities may institute a policy barring undocumented aliens from enrolling, even if no state law exists. Under the preemption doctrine as interpreted by the federal courts, we believe the answer is probably “no,” based on the Proposition 187 case mentioned above.

Public university officials frequently find themselves challenged by this issue. In some states, it is very difficult to get accurate information about such policies, or to find something in writing in a university publication or web-site. We attribute this to the volatile political nature of the issue. As an official told one of the authors off the record, “The public can accept the enrollment of foreign students when they learn that they pay high non-resident fees. However, the public cannot stomach the idea that the university is enrolling undocumented students, even at inflated fees.” No official contacted by the authors was able to share a count of the number of students enrolled on a particular campus who would be considered undocumented. And, there has probably been a deliberate (and probably wise) decision not to maintain records on undocumented students.

As far as we are aware, undocumented students continue to be treated as non-resident students by most states. Essentially, this has accomplished the goal of the proponents of Proposition 187 because the financial burden posed by non-resident fees makes it impossible for most undocumented students to afford attending a public college or university.

Private institutions may theoretically be able to legally prohibit undocumented aliens from enrolling. But most private institutions nevertheless are subject in some way to state or federal law because they receive state or federal funding, e.g., for financial aid purposes. The question is whether private institutions could become subject to a state or federal challenge if they prohibit undocumented students from enrolling.

We must also consider the equal protection provision of the fourteenth amendment, Title VI of the Civil Rights Act of 1964, and your state’s human rights law, which may also apply. It could be argued that even private institutions, if they receive federal funds for financial aid for example, must comply with the laws mentioned here. To comply with federal and state laws, public institutions must provide equal access in all programs and services without regard to race, color, sex, religion, age, disability, marital status, and in some cases sexual orientation or national origin. Employees of private institutions should ask legal counsel to determine whether their institution is subject to any of these laws. Moreover, even if it is, you should consider whether prohibiting undocumented aliens is discrimination on the basis of national origin.

Undocumented Students and Resident Tuition Benefits at Public Colleges and Universities

As mentioned earlier, IIRIRA section 505 provides that no state shall provide a post-secondary education benefit (including in-state tuition) to an alien not lawfully present in the United States on the basis of the alien’s residence in their state unless the state would also provide the same benefit to a citizen or national residing in another state. This provision applies to benefits provided on or after July 1, 1998.

There are no regulations implementing this provision, even though it technically took effect July 1, 1998. Thus, almost ten years after it was written into law, we still do not know whether the term “an alien not lawfully present” is the same, for example, as “unlawful presence” under INA § 212(a)(9)(B). Or it could mean anyone out of status. We will also have to wait until regulations are published to know whether the USCIS will first determine whether someone is not lawfully present, or whether school financial aid administrators are supposed

to make that determination on their own.

Most public institutions make their tuition policies available for ready reference. For example, for colleges in the State University of New York (SUNY) system, the SUNY Policy and Procedures Library's "Financial" section sets forth the SUNY policy on establishing residency for tuition purposes. This policy is probably like many state university policies. It provides that a person whose domicile has been in New York state for 12 months or longer may qualify for in-state tuition as a New York resident. The policy distinguishes between residency and domicile. A person may have many residences, but only one domicile. A domicile is a fixed permanent home to which a person intends to return. Nonimmigrants admitted to the United States in categories that prohibit them from establishing U.S. residence are not eligible for in-state tuition at SUNY. This includes most nonimmigrants, but SUNY makes exceptions for students in the A, E, G, H, I, K, L and V nonimmigrant visa categories who can prove domicile in New York.

Section VI of the SUNY policy "Establishment of Residency for Tuition Purposes" was updated in June 1998 to reflect IIRIRA section 505. Until that time undocumented aliens could qualify for in-state tuition, although many SUNY campuses did not permit it. Section VI states that "students who are unable to present valid documentation of their alien status are not eligible for in-state tuition rates." The section basically paraphrases IIRIRA section 505. However, in June 2002, the New York State legislature further amended this policy, enumerating certain conditions under which undocumented students could establish residence. Under this amendment students who cannot prove their immigration status can establish residency if they either have: (1) attended an approved New York State high school for more than two years and have applied for admission to a SUNY school within five years of receiving a diploma; or (2) received a General Equivalency Diploma and applied for admission to a SUNY school within five years of receiving a diploma. In addition, the student must file a notarized affidavit stating that he or she will apply for legal immigration status as soon as possible. This revision is found in Section III C 2 of the SUNY policy statement.

Federal and State Legislation that Might Help Undocumented Students

There have been two main federal legislative efforts to alleviate some of the legal ambiguity facing universities about how to treat undocumented students. First, in spring 2001, three members of the House of Representatives (Chris Cannon (R-Utah), Howard Berman (D-California) and Lucille Roybal-Allard (D-California)) introduced a federal bill on this issue. Entitled "The Student Adjustment Act," the bill attempted to return control of state residency for tuition purposes to the states. It also addressed the financial aid issue by permitting certain undocumented students to adjust their status to lawful permanent residents, thereby allowing them to qualify for financial aid. The bill never passed, and has not yet been re-introduced in the current Congressional session.

Second, in 2003 Senators Orrin Hatch (R-UT) and Richard Durbin (D-IL) introduced the Development, Relief, and Education for Alien Minors (DREAM) Act. This act would grant conditional permanent residence to undocumented students who came to the United States before the age of 16; can prove good moral character, have been in the country five years at the time of enactment, and have graduated from high school in the U.S. To lift the conditional status of the legal permanent residence, within six years the undocumented foreign national would have to: (1) graduate from a two-year college or have studied for two years toward a bachelor's degree; (2) have served in the U.S. armed forces for two years; or (3) have performed a certain amount of volunteer community service. Like the House bill, the Senate bill would do away with the financial aid obstacles facing undocumented foreign national students. Both bills would grant permanent resident status and

allow states to determine residency requirements for in-state tuition rates.

Although the DREAM Act has received bipartisan support, several senators have vehemently opposed it, expressing concern that the act would “reward lawbreakers” and encourage illegal immigration. It has not yet been re-introduced in the current Congressional session.

State legislation to grant certain undocumented students eligibility for in-state tuition rates has either been discussed or introduced in several states. See the Olivas article in the bibliography of this article. However, concern has been expressed in some states that any state-approved legislation granting in-state tuition to undocumented students may violate IIRIRA section 505. Texas officials claim that its law effectively bypasses the matter by using enrollment in and graduation from a Texas high school and years spent living in the state as the basis for in-state tuition, rather than residency.

However, even if granting in-state tuition is determined not to violate IIRIRA section 505, access to higher education remains an issue because the matter of eligibility for state and federal financial aid is not addressed. In 2001 California enacted a law granting in-state tuition rates to undocumented immigrants. Like the Texas law, the California law permits undocumented students to pay in-state rates at California’s state universities and colleges (but not the University of California campuses) if they have attended California high schools for three years. The students also must sign an affidavit stating their intent to apply for permanent resident status as soon as possible.

The difference between the Texas and California laws, although seemingly small, may decide which states survive a legal challenge. California’s in-state tuition criteria may circumvent any challenges that its law would benefit undocumented students to a greater extent than out-of-state citizens or permanent residents. Thus, just as California schools can grant in-state tuition to a student from another state based on in-state credit hours, an undocumented student can be considered for in-state tuition based on having spent three years in secondary school. In this model the undocumented student becomes an exception to out-of-state tuition, rather than a “resident,” a term that carries considerable legal baggage. A recent law review article notes that “laws modeled after California would likely pass judicial scrutiny in the face of a challenge that they violate Section 505 of IIRIRA.” Utah, New York, and Oklahoma have followed this example, while Illinois and Washington have followed Texas’s lead.

A recent article in the Chronicle of Higher Education notes that although several states have adopted laws to ease the financial burden on undocumented students, relatively few students have exercised this law. The article lists several reasons for this: “In some cases, immigrant students lack academic preparation needed for college. In others, even the in-state tuition rate is too high for such students and financial aid programs are still largely closed off to them. What’s more, many illegal immigrants are simply unaware of the programs.” Of the states that have passed in-state tuition laws to help undocumented students, only two, Texas and Oklahoma, offer state financial aid. Oklahoma collects data on undocumented students participating under the law, which may contribute to the program’s slow start.

Texas is perhaps the only state currently enrolling large numbers of undocumented students. Approximately 6,500 undocumented students have enrolled in Texas institutions of higher learning under that state’s law.

Some academic administrators are unconcerned by this slow start to the state programs. Tim Washburn,

assistant vice-president for enrollment services at the University of Washington, told the Seattle Times: “The real impact, I think, will be in the future. What this measure does is it affects the way students think of education possibilities. Students who are beginning the eighth and ninth grades now know it’s possible for them. They begin now taking all the right preparatory courses.” Several states are also initiating outreach programs to explain the new undocumented student laws to high school and college officials.

On the non-legislative front, a group of Boston colleges is attempting to provide scholarship money to undocumented students. They see this as a “stopgap measure” to provide the necessary funding until legislation can be passed. It is also their way of speaking out against the Massachusetts governor, who is threatening to veto a pending bill to aid undocumented students. Other immigration support groups such as the Mexican American Legal Defense and Educational Fund (MALDEF) also provide scholarships to undocumented students attending college.

While these efforts may be laudable, the sad irony is that without federal legislation such as the DREAM Act becoming law, undocumented students now able to enroll in public universities in certain states face a bleak future upon graduation. They are not eligible for employment, so they cannot put their degrees to work in the U. S.

Undocumented Students and USCIS Authorization to Issue I-20s

Enrolling undocumented students at an institution authorized by U.S. Citizenship and Immigration Services (USCIS) to enroll F-1 or M-1 students does not jeopardize that authority. USCIS regulations at 8 C.F.R. § 214.3 (g)(1) require an approved school to keep records containing specific information and documents relating to each F-1 and M-1 student to whom it has issued an I-20 form. No such reporting requirement exists for undocumented students. USCIS regulations at 8 C.F.R. § 214.4(a) allow the USCIS to withdraw a school’s approval to issue I-20s for a variety of reasons. But none of those reasons relates to having undocumented students on campus.

IIRIRA section 507 requires states and higher education institutions to transmit to USCIS copies of documents they accept from individuals verifying the individuals’ citizenship or immigration status, or information from such documents. But this is only for applicants for post-secondary financial assistance. It does not concern enrollment issues, so it is not relevant to the matter of undocumented students. Even so, FERPA protects students from having to give out documentation that they do not wish to give and protects the privacy of the educational records that they do make available to the school. Moreover, like section 505, there are no regulations implementing section 507 yet.

Undocumented Students and Intensive English Programs

If an English as a second language (ESL) program is part of a public institution, state and federal constitutional law principles apply. See our discussion above. If the intensive English program is at a private school, we would be concerned of a possible state or federal legal challenge if the school prohibited undocumented aliens from enrolling if the school receives any form of state or federal funds.

The Right of an Undocumented Student to Attend School

Some would say that denying admission, access to scholarships, or access to an intensive English program denies a moral right to another human being. On the legal side, the public/private distinction may be important here. A public school may be subject to federal and state constitutional and statutory law considerations, such as equal protection. A private school may declare itself exempt from those, although we would question whether that effort would be successful.

On the policy aspect of this issue, if the applicant meets the academic requirements for your institution, you should admit the student. Other than a school's reporting obligations to F and J status individuals, the student's immigration status is a matter between the student and the USCIS. To quote from an immigration agency cable of January 14, 1994:

“The effect of *Plyler v. Doe* on post-secondary education is not clear; however, Congress has not adopted legislation which would permit states and state-owned institutions to refuse admission to undocumented aliens or to disclose their records to the Immigration and Naturalization Service.”

That statement is still true today.

Some would say that by not permitting an undocumented alien to register for classes, we are denying that person his or her civil right to study. Legally, the question is whether people have a legal right to a university education. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), clearly states that education is not a fundamental right. But *Plyler v. Doe* held that Texas could not deny undocumented school children an opportunity to attend public elementary and secondary schools. Although *Plyler* dealt with children and teenagers, not college students, the Court's reasoning for imposing an intermediate scrutiny test in that case could be applied to a public college barring admission to undocumented aliens. First, you could argue that in today's high-tech world, where people need an advanced degree for most good jobs, undocumented aliens would be similarly disadvantaged to the school-aged children in *Plyler* if they cannot attend college. Second, many undocumented college-aged students arrived in the United States when they were small children. Thus, like the children in *Plyler*, they are here through no fault of their own.

On the other hand, a court could also say that there is a difference between depriving a child a basic education that teaches reading and writing and denying an adult an opportunity to obtain a college degree. So the law on this issue is unclear.

At many institutions, to deny the student admission would be a violation of the school's equal access policy.

Undocumented Students and Criminal Penalties for Those Who Assist Them

There are criminal penalties for harboring fugitives, for aiding and abetting persons in violation of laws, and so forth. Admitting an undocumented alien to your school or letting an undocumented alien live on campus is *not* harboring. INA section 274(a) makes it a crime to bring aliens into the United States and to harbor or shield them from detection. The section also applies to people who aid, abet and encourage aliens in gaining unlawful entry to the United States. We have found no cases involving the harboring of undocumented aliens on a college campus. Colleges are neutral places of learning. Allowing undocumented aliens to become students is not the same as taking affirmative steps to conceal their presence.

Conclusion

As this article demonstrates, it is not easy to understand when and how undocumented students may attend U.S. colleges and universities. The matter of undocumented students at U.S. colleges and universities is an important policy question. As the number of undocumented students wanting to attend U.S. post-secondary educational institutions grows, the issue has become more acute. Increased attention in the media and possible legislative changes at the state and federal levels may have a positive impact on access to U.S. higher education for these students in the future. In the meantime, if an institution has a policy barring admission based on immigration status or lack thereof, the institution's legal counsel should review that policy.

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