Higher Education for Unauthorized Students: The Continuing Debate

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Immigration Reform has pushed its way to the top of the list of issues the nation faces in the coming year and one that promises to intensify polarization in Congress and the country as few issues can. For undocumented young adults who are high school graduates, and whose ability to get a college education may depend upon passage of the so-called DREAM ACT, the Development, Relief and Education for Alien Minors Act, the actions of Congress to address the issue of immigration could determine if these young adults have a future in this country. This article discusses the significance of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and in particular, Section 505 of the Act, for the approach states have taken to the question of education benefits for undocumented students, and the need for the more comprehensive and uniform approach that the DREAM ACT proposes.

“I don’t belong there and I’ve always been here. This is the only place I know, but after being denied for military service… Where do I belong? I don’t belong there, because I can’t really speak Spanish… - and - then I don’t belong here because I don’t have my papers, so it’s kind of like I’m in limbo.”

- Lucila, Undocumented Student

I. Introduction

Nearly eight million students graduate from the nation’s high schools each year. They enter colleges or universities, join the military, or choose another path in life. In any case, they will get the opportunity to test their dreams and live the American success story. However, approximately 65,000 seniors from those graduating classes will simply be denied this opportunity because they bear the inherited title of an undocumented immigrant. Most of these
highly motivated individuals have been raised in this country, have lived the American lifestyle, have studied and have learned about this country, and feel like they belong here. Living on the margins of American society, today they want nothing more than to be given the opportunity to become Americans and to fulfill their personal aspirations of making a significant and meaningful contribution to the country they have long called home.

The issue of the constitutional right to a free public elementary and secondary education for undocumented students emerged in 1975, when the Texas Legislature passed a law limiting undocumented students’ access to public schools. Section 21.031 of the state code allowed public schools to demand that students seeking to enroll show proof of their legal admission into the United States and required the state to withhold funds from school districts that enrolled undocumented students, thereby denying undocumented children a public education.2

A series of cases challenged the constitutionality of this law. The question presented by these cases was whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are either citizens of the United States or are legally admitted to the United States. The United States Supreme Court, in Plyler v. Doe, struck down the Texas law and established the right of undocumented children to public education.3 The Court ruled that the Equal Protection Clause of the Fourteenth Amendment extended to anyone, citizen or stranger, who is subject to the laws of a State, and thus extended to undocumented immigrants as well.4 The court majority found that although the undocumented population could not be treated as a “suspect class,” nevertheless the Texas law imposed a discriminatory lifetime burden and hardship on a discrete class of children not accountable for their parents’ conduct or their own undocumented status.5 Moreover, the court majority observed that denying undocumented
children a proper education would likely contribute to "the creation of a subclass of illiterate adults within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime." The court noted that Texas' statutory classification cannot be sustained as furthering its interest in the "preservation of the state's limited resources for the education of its lawful residents." While the State might have an interest in mitigating potentially harsh economic effects from an influx of illegal immigrants, the Texas statute does not offer an effective method of dealing with the problem. Even assuming that the net impact of illegal immigrants on the economy is negative, charging tuition to undocumented children constitutes an ineffectual attempt to stem the tide of illegal immigration, at least when compared to the alternative of prohibiting employment of undocumented workers. Nor is there any merit to the suggestion that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. The record also does not show that exclusion of undocumented children is likely to improve the overall quality of education in the State.

Although the Plyler decision currently protects the educational rights of about one-sixth of the total undocumented population, which is approximately 1.8 million children under 18 years of age, those rights terminate as soon as the students find themselves beyond the compulsory school age. In other words, high school is the end of the road for many talented, ambitious, and hardworking students who are simply shut off from higher educational opportunities once the reality of their undocumented status sets in. For many of them the cost of tuition and books is simply out of reach in order for them to continue their education. Since unauthorized students cannot work legally in order to pay for their tuition, they are limited to accepting low-paying jobs and are usually forced to work for cash. Being resourceful, some of
them manage to find scholarships from local nonprofit organizations that help with part of their expenses, yet many of them abandon their American dream and give up hope.

“Second semester all these great opportunities opened up for people, and you suddenly feel like your door is closed because of being undocumented. They come in showing the Power Points about federal aid and Cal Grants and it says, “Undocumented students cannot apply,” and you feel horrible. Everyone has this great opportunity, and you feel like you don’t have anything.’’

- Jeronimo, Undocumented Student  

II. In-State Tuition and Unauthorized Immigrant Students

Fourteen years later after the Plyler decision, Congress included postsecondary school education in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) by restricting states’ residency requirements and in-state tuition benefits for higher education. Specifically, Section 505 of IIRIRA mandates that:

Notwithstanding any other provisions 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 for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit without regard to whether the citizen or national is such a resident.11

Although Section 505 does not explicitly prohibit states from offering unauthorized students in-state tuition, the vast majority of states deny in-state resident tuition status to undocumented students. Only 10 states have chosen not to apply the IIRIRA provision regarding tuition rates at public colleges and universities. In June 2001, Texas was the first state to pass legislation allowing in-state tuition for unauthorized students, followed by California, Utah, New York (2001-2002); Washington, Oklahoma, Illinois (2003); Kansas (2004); New Mexico (2005); Nebraska (2006); and Wisconsin (2009).12 The states’ laws generally permit these students to become eligible for in-state tuition if they graduate from a high school in that state, have two to
four years residence in the state by attending a local high school, and apply to a state college or university. In all states except New Mexico, the students also must sign an affidavit promising to seek legal immigration at the earliest opportunity. Several other states have recently considered or are considering bills to grant in-state tuition to unauthorized students who meet certain criteria, while others would bar unauthorized immigrants from receiving such tuition. In 2007 Virginia legislators introduced a bill that would prohibit Virginia’s public colleges and universities from admitting unauthorized immigrants altogether, even if they attended a public high school in that state. In 2008, Oklahoma also ended its in-state tuition benefit, including financial aid, for students without lawful presence in the United States. Other states that bar illegal students from in-state tuition benefits are Arizona, Colorado, Georgia, and South Carolina.

Some analysts see Section 505 as quite problematic because it sets a federal mandate for the states’ residency requirements, a determination which is typically a matter for the states, not the federal government. They view Section 505 as an infringement on states’ rights, arguing that the states’ authority over tuition policy must be preserved and respected. Moreover, public colleges and universities generally do not determine residency based on a student’s immigration status, but rather use graduation from an in-state high school as the main criterion for residency. The ten states that do grant in-state tuition benefits support their policies to grant admission and in-state tuition to unauthorized students based on that generally accepted criterion for residency. They further argue that consistent with Section 505, they do not treat undocumented students more favorably than U.S citizens who are not residents of the state. To the contrary, the former are subjected to numerous restrictions, namely, proof of established residence in a state for up to four consecutive years by attending and graduating from that state’s high school and a promise to
adjust to lawful status as soon as possible. Moreover, Section 505 says only that an undocumented student may not, under certain circumstances, “be eligible on the basis of residence within a State”. Therefore, by basing eligibility not on residence but on graduation from a high school in a state, attendance at a high school for a specific duration, and signing of an affidavit, the “granting” states respect the limitations of Section 505. Professor Michael Olivas, a long time proponent of these policies, argues that the terms of IIRIRA Section 505 restrict, at most, the granting of “post secondary education benefits” (emphasis added). Based on other provisions of the IIRIRA, he concludes that that Congress intended the word “benefits” to mean monetary benefits, not a state decision to classify a person as a resident.

Other proponents, favoring in-state tuition for undocumented immigrants, strongly believe that high school graduates, who meet residency requirements, should have access to public education, regardless of their immigration status. They argue that it is inconsistent to educate unauthorized students through high school, only to deny them access to a higher education later. They also fear that such students may be less motivated to complete high school if they believe that postsecondary education is simply not a feasible option. Without a high school diploma they will face even more dire employment prospects than those who graduate from high schools. Yet, even graduation from high school does not open doors for employment. In addition, it is commonly understood that earnings significantly depend on the level of education, and that people with a bachelor’s degree earn significantly more than those with a high school diploma. For undocumented students, however, the main obstacle to an advanced degree and better employment is the cost. Unauthorized students who have neither financial resources of their own nor in-state tuition benefits have to face very narrow career opportunities and are likely eventually to join the unauthorized workforce.
On the opposite side of this issue, the states that do not allow in-state tuition argue that, under federal law, unauthorized students are residents of another country and should not be eligible to receive postsecondary education benefits based on state residence. Those states require students to show proof of their U.S. citizenship or legal immigration status to be eligible for in-state tuition. If the students cannot verify their eligibility, they are classified as nonresidents for tuition purposes.

The “denying” states claim that, compared to out-of-state students, those students who are granted in-state tuition do not pay the full cost of their education, which the taxpayers in the state must then subsidize. The general arguments advanced by the opponents are that tax dollars should not be spent to support those who are in this country illegally. They contend that it is U.S. citizens who should receive taxpayer subsidies, not illegal students who are violating the federal law. They also claim that allowing in-state tuition for unauthorized students encourages illegal immigration and takes enrollment slots away from U.S. citizens and legal residents. The opponents also estimate that in-state tuition benefits for unauthorized students enormously increase costs to individual states. In addition, they assert that unauthorized populations should be denied access to public benefits altogether. Professor Kris Kobach disagrees that the “granting” states’ laws conform to the federal law. He believes that Congress specifically intended in Section 505 of IIRIRA to bar states from extending in-state resident tuition rates to their undocumented residents unless they did the same for out-of-state U.S citizens. He argues that the term “educational benefits” is broad enough to include eligibility for in-state resident tuition, and that Congress would not have wanted to treat undocumented state residents more favorably than citizen non-residents. A contrary interpretation treats undocumented residents of the state more favorably than foreign students coming with student visas from overseas.
In summary, on the issue of in-state tuition laws for the undocumented students, the “granting” states support their policies based on the state’s residency requirements, whereas the “denying” states apply Section 505 to enact a total bar on enrollment of undocumented students at state colleges and universities. Such divergent interpretations of Section 505 among states have also given rise to conflicts between state and federal laws. The legality of in-state tuition laws for unauthorized students has already been challenged before courts in Kansas and California, both “granting” states.

III. Overview of the Cases

In the California case *Martinez v. Regent*,25 students paying out-of-state tuition and attending California public universities and colleges filed a lawsuit attacking a state statute which allowed certain illegal students to pay resident tuition to attend California’s public universities and colleges. The plaintiffs claimed that the state violated the IIRIRA by offering certain unauthorized immigrant students in-state tuition.26 The superior court upheld the decision of public universities and colleges to grant eligibility to unauthorized immigrant students for in-state tuition, sustained defendants’ demurrer without leave to amend and dismissed plaintiffs’ complaint.27 On appeal, the higher court noted that three tests are used in determining whether a state statute related to immigration is preempted. First, the court must determine whether the state statute is 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). If the state statute regulates immigration, it is preempted because the power to regulate immigration is exclusively a federal power. Second, even if the state statute does not regulate immigration, it is preempted if Congress manifested a clear purpose to affect a complete ouster of state power, including state power to promulgate laws not in conflict with federal laws, with respect to the
subject matter which the statute attempts to regulate. An intent to preclude state action may be inferred where the system of federal regulation is so pervasive that no opportunity for state activity remains. Third, a state law is preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. A statute is preempted under this third test if it conflicts with federal law, making compliance with both state and federal law impossible. Finally, the state law is preempted to the extent that it actually conflicts with federal law. Although the court of appeals found that a finding of preemption is appropriate where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, the court did not, however, on those grounds enjoin or block the in-state tuition law for unauthorized students. The court reversed the judgment of dismissal as to plaintiffs’ preemption claims and returned the case for proceedings in the trial court. The decision is now on appeal to the California Supreme Court. Meanwhile, the law remains in effect and similar laws in other states have not been affected by the ruling.

A Kansas case, Day v. Sibelius, was filed in federal district court by the same attorney who filed the California case. As in California, the plaintiffs were U.S. citizens who were not residents of the state. Although the Kansas court denied all of the claims advanced by the plaintiffs, it did so without reaching the merits of their argument that the Kansas statute violated federal law. The court denied several of the plaintiffs’ claims because plaintiffs could not show that they were “injured-in-fact” by the Kansas law. Under Article III of the U.S Constitution, individuals do not have standing to sue in federal court unless they can show that they have been concretely and actually or imminently harmed by the defendant’s actions. The court denied the remainder of the plaintiffs’ claims because the federal law does not provide nonresidents of the
state with a “private right of action” — that is, the federal law in question does not grant them any individual rights that they can vindicate in court. Because the plaintiffs were not concretely injured and did not have a right to sue, the court did not need to address whether there was a conflict with federal law. The decision was upheld in the U.S Court of Appeals for the Tenth Circuit. On June 23, 2008, the United States Supreme Court declined to hear the case.

At the heart of this long and contentious debate between states rights and the federal law, is the issue of fairness for those who have been law abiding residents and good students and who want to continue to be contributing members of society but who have no legal status in this country. Even if access to public education beyond high school for unauthorized students is available in some states, without proof of legal immigration students in those states still find themselves closed out of opportunities because they cannot legally drive or obtain a social security card.

“The biggest disappointment is knowing that there’s no light at the end of the tunnel. Knowing that it doesn’t matter how many degrees you get, it doesn’t matter. At the end of my degree, there was no job for me. There was no job for my family. There was no way of me putting all this education to use that I had paid for by cleaning houses and taking care of people’s kids. That has definitely been the most challenging part... I wasn’t asked to be brought here. I didn’t choose to come here. I didn’t ask for my situation. I feel like it’s a punishment. I did everything I was told to do. I stayed out of trouble. I stayed out of gangs...I’m a great member of society... So why am I being punished?”

- Lucia, Undocumented Student

IV. The DREAM ACT

The Development, Relief and Education for Alien Minors Act (the DREAM Act) is proposed federal legislation in the United States that would repeal Section 505 of the IIRIRA, restoring the rights of states to determine residency for public education benefits and allowing
states to decide whether to offer resident tuition rates to unauthorized students. It would allow certain unauthorized students to receive the opportunity to pursue higher education and fix their current immigration status. It would provide immigration relief by permitting the adjustment of status to those long-term residents, who entered the United States as children, provided they meet certain criteria.\textsuperscript{36}

Several different versions of the current Dream Act were introduced in Congress in 2001, 2005 and 2007, but never made it to passage. The Act was first introduced in 2001 in the House and the Senate respectively.\textsuperscript{37} The bill was placed on the Senate legislative calendar but never received a floor vote. The DREAM Act was introduced again in the U.S. Senate in November 2005, followed by the 2006 New American Dream Act introduced in the U.S. House of Representatives.\textsuperscript{38} On May 25, 2006, the U.S. Senate reached a bipartisan compromise on comprehensive immigration reform and passed a landmark immigration bill that incorporated the DREAM Act.\textsuperscript{39} However, on October 24, 2007 the Senate rejected an attempt to begin a debate on the DREAM Act, and the bill did not receive the necessary votes to be sent to President George W. Bush.

With some modifications, the DREAM Act was again re-introduced in both chambers of Congress on March 26, 2009.\textsuperscript{40} The bill was introduced by Senators Dick Durbin (D-IL), and co-sponsored by both Republicans and Democrats, including Richard Lugar (R-IN), Harry Reid (D-NV), Mel Martinez (R-FL), Patrick J. Leahy (D-VT), Joseph Lieberman (I-CT), Edward M. Kennedy (D-MA), and Russell D. Feingold (D-WI) and U.S. Representative Howard Berman (D-CA). To date, 106 representatives and 33 senators have co-sponsored the bill. The bill failed again in the Senate in 2010 as a provision of the Defense Authorization Act.
If the bill eventually becomes law, millions of immigrant children meeting certain criteria will essentially have the opportunity to “earn” permanent residency status. In other words, unauthorized students will be able to obtain temporary residency for a period of six years, which is conditioned upon meeting certain educational or military requirements. This means that during the six-year period of temporary residency, a qualified student must attend college and earn at least a two-year degree, or serve in the U.S. military for two years, in order to maintain immigration benefits. If at the end of the six-year conditional residency period the immigrant meets all of the conditions, he or she will be granted permanent residency status, which may lead to U.S. citizenship. However, if the student does not comply with either college or military service requirement, he or she will lose the temporary residency status and will be subject to deportation.\textsuperscript{41} Under the new DREAM Act, the immigrants may qualify by meeting the following requirements to be finalized by Congress:

- They must be between the ages of 12 and 35 at the time the law is enacted.
- They must have arrived in the United States before the age of 16.
- They must have resided continuously in the United States for a least five (5) consecutive years since the date of their arrival.
- They must have graduated from a U.S. high school, or obtained a General Education Diploma (GED).
- They must have "good moral character".

In addition to the temporary residency status, certain qualifying immigrant students would also be entitled to apply for student loans and work study, but would not be eligible for Pell educational grants.\textsuperscript{42}

In certain circumstances, the immigrant may lose temporary immigration residency status. As mentioned above, this may occur if the immigrant does not meet the educational or
military service requirement within the six-year time period. The immigration status will also be taken away if the immigrant commits any crime (except non-drug related misdemeanors), regardless of whether such an immigrant has already been approved for permanent status at the end of the six-year period. If an immigrant is convicted of a major crime, or drug-related violation (except for a single offense of simple possession of 30 grams or less of marijuana), he or she would automatically lose the six-year temporary residence status and be immediately subject to deportation.43

Opponents of the DREAM Act generally argue that it rewards illegality, encourages further illegal immigration, and unfairly requires U.S citizens and lawfully resident noncitizens to subsidize the education of the unauthorized students.44 Proponents of the DREAM Act once again emphasize that the students are typically brought to the United States at an early age, that they cannot be held responsible for their parents’ violations of the immigration laws, that a college education is important to many of them, that their ineligibility for almost all federal and state financial aid puts the cost of college beyond their reach. Furthermore, they point out that the slim hopes of attending college destroys their incentive to succeed in high school, that the country and the nation lose out when talented high school graduates who are likely to remain here are unable to develop and contribute their talents, and that their parents are required to pay the same state and federal taxes as all other residents.45

V. Conclusion

The United States has long been the cradle of opportunity for immigrants as well as one of the world’s leaders in promoting human rights and equality. America needs meaningful and comprehensive immigration reform based on fairness to those who did not choose to come here
illegally by themselves. The time has come to significantly change immigration laws and bring millions of immigrant children “out of the shadows,” allowing them to pursue higher education and start living their American dream with dignity, because in many ways they are already good citizens of the United States – the country they call home. If asked to address federal and state legislators who are trying to figure out the immigration reform, this is what one undocumented young person would say to them:

“A lot of undocumented students embrace higher education. We just want an opportunity to show that we feel that this is our home. This is the only home we know. We are ready to contribute. We are ready to be a part of American society. We want the chance to be future doctors, police officers. We want that opportunity. We want to contribute, but we need your help. I need you to see how much a part of the United States we are, how much we identify as Americans because this is our home.”

- Sasha, Undocumented Student
Endnotes

1 William Perez, We Are Americans: Undocumented Students Pursuing the American Dream 46 (2009).


4 Id. at 210-216.

5 Id. at 202-203.

6 Id. at 216-224.

7 Id. at 227

8 Id. at 227-230.

9 Id.

10 Perez, supra note 1 at 20.


13 Id.

14 Id.


16 NATIONAL IMMIGRATION LAW CTR., supra note1.

17 Konet, supra note 2.

18 Michael A.Olivas, A Rebuttal to FAIR: States Can Enact Residency Statutes for the Undocumented, 7 BIB 652 (June 1, 2002).

19 Konet, supra note 3.

20 Konet, supra note 4.

21 Konet, supra note 5.

23 Id.

24 Id.


26 Id.

27 Id.

28 Id. at 1139.

29 Id.


32 Id.

33 Id.

34 Id.

35 Perez, *supra* note 2 at 91.


42 Id.

43 Id.


45 Id.

46 Perez, *supra* note 3 at 70.