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Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis

Abstract
Currently, federal law prohibits states from granting unauthorized aliens certain postsecondary educational benefits on the basis of state residence, unless equal benefits are made available to all U.S. citizens. This prohibition is commonly understood to apply to the granting of "in-state" residency status for tuition purposes. In the 110th Congress, several bills that would amend this federal law have been introduced (H.R. 1221, H.R. 1275, H.R. 1645, H.R. 4192, S. 774, S. 1348, S. 1639, and S. 2205). Meanwhile, some states have passed laws aimed at making unauthorized state residents eligible for in-state tuition without violating this provision. This report provides a legal overview of cases involving immigrant access to higher education, as well as an analysis of the legality of state laws that make in-state tuition rates available to illegal immigrants. For a policy analysis of this issue, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by Andorra Bruno.

Keywords
unauthorized aliens, students, tuition, higher education, Congressional Research Service, federal law

Comments

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Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis

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Summary

Currently, federal law prohibits states from granting unauthorized aliens certain postsecondary educational benefits on the basis of state residence, unless equal benefits are made available to all U.S. citizens. This prohibition is commonly understood to apply to the granting of "in-state" residency status for tuition purposes. In the 110th Congress, several bills that would amend this federal law have been introduced (H.R. 1221, H.R. 1275, H.R. 1645, H.R. 4192, S. 774, S. 1348, S. 1639, and S. 2205). Meanwhile, some states have passed laws aimed at making unauthorized state residents eligible for in-state tuition without violating this provision. This report provides a legal overview of cases involving immigrant access to higher education, as well as an analysis of the legality of state laws that make in-state tuition rates available to illegal immigrants. For a policy analysis of this issue, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by Andorra Bruno.

As noted above, federal law currently discourages states and localities from granting unauthorized aliens certain higher education benefits. Specifically, Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) mandates that unauthorized aliens "shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident."[1] Although there is neither report language nor agency regulations available to provide guidance, this provision appears to be designed to prevent states from offering illegal aliens in-state tuition at public institutions of higher education. While Section 505 does not explicitly prohibit states from doing so, the provision could potentially impose a costly penalty on those who do by requiring them to make cheaper in-state tuition rates available to nonresidents. Since the enactment of Section 505, there has been debate about whether

[1] 8 U.S.C. § 1623.

states and localities may offer in-state tuition to unauthorized alien students on some basis other than residency in order to avoid violating the law. This report provides a legal overview of cases involving immigrant access to higher education, as well as an analysis of the legality of state laws that make in-state tuition rates available to illegal immigrants.

Legal Overview

The Supreme Court has, on several occasions, confronted questions regarding access to education for individuals who are neither citizens or legal immigrants, but these cases do not directly address whether the government can restrict the access of unauthorized student aliens to in-state tuition or to higher education more broadly. Nevertheless, these cases are instructive for purposes of evaluating the legal issues involved in unauthorized student alien eligibility for higher education admission and/or in-state tuition rates.

Although the Supreme Court has not directly addressed the issue of unauthorized immigrant access to higher education, the Court has considered the issue of unauthorized immigrant access to elementary and secondary education. Indeed, in the 1982 *Plyler v. Doe* case, the Court held that a Texas statute that would have prohibited unauthorized student aliens from receiving a free public elementary and secondary education violated the Constitution.[2] In reaching this ruling, the Court determined that unauthorized immigrants are entitled to protection under the Equal Protection Clause of the Fourteenth Amendment, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[3] Because the Court ruled that unauthorized immigrants are not a "suspect class" and education is not a "fundamental right" — both findings would have triggered more intense judicial scrutiny of the Texas statute — the Court evaluated the Texas statute under a variant of the less stringent rational basis standard of review, requiring that the statute further a substantial state goal. The *Plyler* Court, however, ruled that the state's interests in enacting the statute — namely, to conserve the state's educational resources, to prevent an influx of illegal immigrants, and to maintain high-quality public education — were not legitimately furthered by the legislation. As a result, the Court struck down the Texas statute.[4]

Although the *Plyler* decision did not explicitly create an entitlement for unauthorized student aliens to attend public elementary and secondary schools, the case has, in practice, had the effect of establishing such access to public education, in part because the decision appears to preclude states from justifying legislation similar to the Texas statute that was struck down. The logic of the *Plyler* case, however, does not necessarily extend to unauthorized immigrant access to higher education. Because *Plyler* heavily emphasized the importance of a basic elementary and secondary education, a state could readily distinguish legislation restricting unauthorized immigrant access to higher education on the grounds that higher education, unlike elementary and secondary education, is not essential to "maintaining the fabric of our society."[5] Although the Supreme Court has not ruled on this question, the distinction between higher education and elementary and public

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[2] 457 U.S. 202 (1982).

[3] U.S. Const., amend. XIV.

[4] Plyler v. Doe, 457 U.S. at 227-31 (1982).

[5] *Id*. at 221.

education make it appear unlikely that the Court would strike down legislation that restricted the access of unauthorized student aliens to higher education.

Meanwhile, in *Toll v. Moreno*,[6] the Court considered a challenge to a Maryland state policy to deny in-state status to non-immigrant aliens holding G-4 visas even if such aliens were state residents who would have otherwise qualified for in-state tuition rates at state colleges and universities. Ultimately, the Court held that the state policy was invalid under the Supremacy Clause of the Constitution, which provides that the laws of the United States "shall be the supreme law of the land," and state laws to the contrary are preempted by federal law.[7] Since immigration regulation is an exclusive power of the federal government, "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress."[8] Because federal law allowed G-4 aliens to establish residency in the U.S., the Court found that the Maryland policy to deny residency status for purposes of qualifying for in-state tuition rates conflicted with federal law and therefore violated the Supremacy Clause.

It is important to note that *Toll v. Moreno* involved aliens who were lawfully present in the U.S. and thus may not extend to protect unauthorized student aliens who are denied state educational benefits such as admission to state colleges and universities or eligibility for in-state tuition rates. Indeed, as long as a state policy to deny such educational benefits to unauthorized student aliens is not found to conflict with federal immigration standards, it is likely to be upheld by the courts, as demonstrated in the *Equal Access Education v. Merten* case described below.

Thus far, it appears that only one federal court has addressed the question of whether it is constitutionally permissible for a state to prohibit unauthorized immigrants from attending state colleges and universities, let alone from receiving in-state tuition. In *Equal Access Education v. Merten*, the plaintiffs claimed that several Virginia public institutions of higher education had violated the Supremacy, Commerce, and Due Process Clauses of the Constitution by denying admission to unauthorized student aliens.[9] The institutions adopted this policy in response to a 2002 memorandum from the Virginia Attorney General that asserted that unauthorized aliens should not be admitted to Virginia's public colleges and universities. Although the Court dismissed the Commerce Clause and Due Process Clause claims,[10] it did allow the Supremacy Clause claim to proceed, at least in part. Since immigration regulation is an exclusive power of the federal government, the court ruled that the Supremacy Clause would not be violated unless the plaintiffs could show that the Virginia institutions were using state, not federal, immigration standards in order to deny admission to unauthorized aliens.[11] Although the court ultimately dismissed

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[6] 458 U.S. 1 (1982).

[7] U.S. Const. art. VI, cl. 2.

[8] Toll v. Moreno, 458 U.S. at 12-13 (citing DeCanas v. Bica, 424 U.S. 351, 358 (1976)).

[9] 305 F. Supp. 2d. 585 (E.D. Va. 2004).

[10] *Id*. at 608-14.

[11] *Id*. at 608.

the plaintiffs' Supremacy Clause claims for procedural reasons in a later proceeding,[12] the *Equal Access Education* case indicates that unauthorized student aliens might have difficulty in establishing constitutional violations on the part of public institutions that deny either admission or in-state tuition to unauthorized immigrants.

Legal Analysis of State Laws That Make In-State Tuition Available to Illegal Immigrants

Other federal litigation regarding unauthorized student aliens has revolved around the separate question of whether state laws that make unauthorized aliens eligible for in-state tuition violate Section 505 of the IIRIRA's prohibition against conferring educational benefits on the basis of state residency. Indeed, several states have enacted laws with respect to providing in-state tuition rates for unauthorized alien students.[13] For example, California enacted a law in 2001 that makes unauthorized aliens eligible for in-state tuition rates at certain state community colleges and universities, but the state statute bases eligibility on criteria that do not explicitly include state residency. To qualify for in-state rates, a student must have attended high school in California for at least three years and graduated from high school. In addition, unauthorized alien students are required to file an affidavit stating that they have either filed an application to legalize status or will file such an application as soon as they become eligible.[14] California officials argue that by using eligibility criteria other than state residency, their law does not violate the Section 505 restriction on conferring educational benefits on the basis of state residency.

In what appeared to be the first decision of its kind, a federal court in Kansas considered whether state laws that make unauthorized immigrants eligible for in-state tuition violate Section 505 of IIRIRA. The case, *Day v. Sebelius*,[15] involved a challenge to the legality of a Kansas state law that makes unauthorized aliens eligible for in-state tuition if they attended a Kansas high school for three years, received a high school diploma or equivalent from a Kansas school, were not a resident of another state, and signed an agreement to seek legal immigration status.[16] Specifically, the suit, which was filed by non-resident students (or parents who support them) who attended Kansas state institutions but paid out-of-state tuition, alleged that the Kansas law violated, among other things, Section 505 of the IIRIRA and the Equal Protection Clause of the Constitution.

The court ultimately dismissed six of the seven claims that were asserted in the case, including the equal protection claim, on the grounds that the plaintiffs lacked the standing to bring suit. Standing requirements, which are concerned with who is a proper party to raise a particular issue in the federal courts, are derived from Article III of the Constitution, which confines the jurisdiction of federal courts to actual "Cases" and

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[12] Equal Access Educ. v. Merten, 325 F. Supp. 2d 655 (D. Va. 2004).

[13] For more information on state legislation, see National Conference of State Legislatures, *In-State Tuition and Unauthorized Student Immigrants*, August 26, 2008, [http://www.ncsl.org/programs/immig/immig_InStateTuition0808.htm].

[14] Cal Ed Code § 68130.5.

[15] 376 F. Supp. 2d. 1022 (D. Kan. 2005).

[16] K.S.A. § 76-731a(b)(2).

"Controversies."[17] The case-or-controversy requirement has long been construed to restrict Article III courts to the adjudication of real, live disputes involving plaintiffs who have "a personal stake in the outcome of the controversy...."[18] Under the Supreme Court's jurisprudence, plaintiffs appearing before an Article III court must show three things in order to meet constitutional standing requirements: (1) he/she has suffered an "injury in fact" that is concrete and particularized (not common to the entire public), and actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision.[19]

According to the *Day v. Sebelius* court, the plaintiffs failed to establish standing with respect to most of their claims because the plaintiffs could not demonstrate that they were injured in fact by the Kansas statute, which did not actually apply to the plaintiffs, who had paid out-of-state tuition rates both before and after enactment of the statute.[20] Furthermore, the court noted that even if the plaintiffs had been found to have suffered an injury in fact, they had still failed to demonstrate that a favorable court decision with respect to most of their claims would have redressed that injury. For example, if the court had found that the Kansas statute violated the Equal Protection Clause of the Constitution, the plaintiffs would not receive any benefit because the invalidation of the Kansas legislation would not change the fact that the plaintiffs would still be required to pay out-of-state tuition rates.[21]

Although the court rejected six of seven claims on the grounds that the plaintiffs lacked standing, the court found that the plaintiffs did have standing to sue with regard to their claim that the Kansas statute violated Section 505 of IIRIRA. The court, however, dismissed this claim because it found that the plaintiffs did not have a private right of action, which is a right that authorizes an individual to sue in court. In the statutory context, administrative agencies, rather than individuals, are typically the only party that is authorized to bring a lawsuit against entities that violate the law, unless the statute expressly or impliedly grants a private right of action to individuals to sue to enforce the statute. Because the *Day v. Sebelius* court found that IIRIRA neither explicitly nor implicitly gives individuals a remedy to enforce immigration laws,[22] the plaintiffs did not have a private right of action, and the court dismissed their Section 505 claim. The district court's dismissal of the claim was affirmed by a federal appeals court,[23] and the Supreme Court recently declined to consider an appeal.[24]

Lawsuits that challenge state laws that grant in-state tuition to unauthorized student aliens may be brought in other states. For example, a California appeals court recently

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[17] U.S. CONST. art. III, § 2, cl. 1.

[18] Baker v. Carr, 369 U.S. 186, 204 (1962).

[19] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[20] Day v. Sebelius, 376 F. Supp. 2d. at 1033, 1039-40.

[21] *Id*. at 1034.

[22] *Id*. at 1039-40.

[23] Day v. Bond, 500 F.3d 1127 (10th Cir. 2007).

[24] Day v. Bond, 128 S. Ct. 2987 (2008).

reinstated a challenge to the California law, overturning a trial judge's dismissal of the suit.[25] Although this decision appears to be the first in which a court has found that a state tuition statute violates Section 505 of IIRIRA, litigation in the case is not yet over, and plaintiffs in similar lawsuits nevertheless remain likely to face difficulties similar to those of the Kansas plaintiffs in establishing standing or a private right of action to sue. Given these difficulties, individual plaintiffs must overcome significant procedural hurdles in order to successfully challenge such state laws.

In recognition of this problem, a legal advocacy group filed several complaints with the Department of Homeland Security (DHS) in 2005. In these complaints, the group argued that certain state tuition laws violate Section 505 of IIRIRA and called on DHS to enforce the statute against states that offer in-state tuition rates to unauthorized student aliens since it appears that individuals cannot.[26] Thus far, DHS does not appear to have responded to these complaints. If, however, the agency were to interpret the states' actions to be a violation of Section 505, its options could include withholding federal funds from the states in question or issuing an order that directs the states to comply with the law. Such action by DHS, if forthcoming, could result in legal challenges by the affected states. If that were to occur, then it would be up to the federal courts to determine whether state programs that authorize in-state tuition for unauthorized alien students are a violation of federal law.

In considering such a question, a court would likely begin by examining the statutory language at issue. The Supreme Court often recites the "plain meaning rule," that, if the language of the statute is clear, there is no need to look outside the statute to its legislative history in order to ascertain the statute's meaning,[27] and more often than not, statutory text is the ending point as well as the starting point for interpretation. On its face, the plain meaning of Section 505 appears clear: unless identical rates are offered to out-of-state residents, unauthorized aliens are not eligible for in-state tuition rates "on the basis of residence within a State." Thus, the statutory language implies that in-state tuition eligibility may be based on factors other than residency, including factors that are currently the basis for eligibility under many state statutes. Under this reasoning, a court might determine that state programs that authorize in-state tuition for unauthorized aliens are legal as long as eligibility for those programs is based on factors other than residency. Opponents of this interpretation, however, are likely to argue that certain state eligibility factors, such as high school attendance within the state, essentially serve as a proxy for state residency in violation of the congressional intent reflected in Section 505.

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[25] Martinez v. Regents of Univ. of California, 2008 Cal. App. LEXIS 1425 (Cal. App. 3d Dist. September 15, 2008).

[26] Press Release, Washington Legal Foundation, WLF Files Civil Rights Complaint Against State of New York Regarding Benefits for Illegal Aliens (September 7, 2005) [http://www.wlf.org/upload/090705RS.pdf]; Press Release, Washington Legal Foundation, WLF Files Civil Rights Complaint Against State of Texas Regarding Benefits for Illegal Aliens (August 9, 2005) [http://www.wlf.org/upload/080905RS.pdf].

[27] *See, e.g.*, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002); Caminetti v. United States, 242 U.S. 470 (1917).