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# Undocumented College Students, Taxation, and Financial Aid: A Technical Note

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In spring 2008, an issue over which I have been toiling away in obscurity for years became a matter of debate for the U.S. presidential candidates. On one side, the Democrats were promoting college access for undocumented students; on the other, Republicans were all for locking them out of higher education (except Governor Mike Huckabee, who in what I think was his finest hour said that we should not hold the sins of parents against their children). Although this issue appears obscure—and is—there is actually a large literature on the overlapping issues of taxation, the undocumented, and higher education. But there is very little to this point on the operationalization of these issues, which I hope that shining light upon will help. So, what was all the hullabaloo about?

In 1982, in *Plyler v. Doe*, the U.S. Supreme Court held that undocumented immigrant children could attend public schools, for which states and school districts could not charge them tuition. In the 25 years since, most school dis-

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tricts have accommodated themselves to this position. But the question that hasn't been resolved is what happens to those students when they graduate from high school and wish to attend college. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) set the federal rules in place. Undocumented students may attend colleges, private and public, but states that wish to enable these students to be eligible for in-state public college tuition must pass legislation allowing them to establish in-state residency. (See Table 1.)

Meanwhile, a number of states and their colleges and universities have been struggling with this issue. At the start of the spring 2007 semester, Arizona college and university officials, confused about what they were to do with their own restrictionist Proposition 300 ballot measure's new requirements, decided that they would not enroll undocumented students any longer as in-state residents; and by summer 2007, they were reporting that nearly 5,000 students had been removed from resident status in the state's colleges and adult basic-education classes. Arizona State University tried to compensate by awarding students private money to help with financial-aid needs, but that aid ended in early 2008.

In Georgia, a behind-the-scenes waiver system had for years allowed each public college to accord in-state status to undocumented students up to 2 percent of its headcount. But on July 1, 2007, SB529, a restrictionist statute, took effect; and by 2008, undocumented students were unable to establish in-state residency in Georgia.

In other states, more draconian legislation has been proposed. The Missouri Senate Committee on Pensions, Veterans' Affairs, and General Laws heard testimony on March 14, 2007, on five proposed bills, including one to ban all undocumented students from public institutions (HB 269). In August 2007, Virginia legislators introduced a similar bill. In 2008, South Carolina became the first state to enact a statute barring these students from attending state institutions, and Alabama's higher education board acted through regulation to do the same.

In some states, existing legislation has been contested. For instance, advocates for undocumented students went to court in Virginia in 2003 to challenge the state's refusal to accord those students in-state tuition. They lost when the court held, under *Merten v. Doe*, that the state was not required to accord them residency status. In early 2008, it became known that public colleges in Virginia had gone a step further by denying resident status to citizen applicants whose parents were undocumented. When this practice was exposed, however, the state's attorney general issued an opinion indicating that these children were not automatically ineligible for admission or residency status and should be treated on a case-by-case basis.

TABLE 1

**STATES WITH STATUTES ALLOWING UNDOCUMENTED STUDENTS TO GAIN RESIDENT TUITION STATUS SPRING 2009**

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1. Texas, H.B. 1403, 77th. Leg., Reg. Sess. (Tex. 2001), amended by S.B. 1528, (Tex. 2005)
  2. California, A.B. 540, 2001-02 Cal. Sess. (Cal. 2001)
  3. Utah, H.B. 144, 54th Leg., Gen. Sess. (Utah 2002)
  4. New York, S. B. 7784, 225th Leg., 2001 NY Sess. (NY 2002)
  5. Washington, H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003)
  6. Oklahoma, S.B. 596, 49th Leg., 1st Sess. (OK 2003), rescinded, 2007
  7. Illinois, H.B. 60, 93rd Leg., Reg. Sess. (Ill. 2003)
  8. Kansas, K.S.A.76-731a (KS 2004)
  9. New Mexico, N.M.S.A. 1978, Ch. 348, Sec.21-1-1.2 (47th Leg. Sess., 2005)
  10. Nebraska, LB 239 (enacted over veto, April 13, 2006)
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Then, in 2004 came the first challenge to a state statute that accorded in-state status to undocumented college students. In *Day v. Sibelius*, citizen students who had been denied in-state residency filed a suit to challenge the Kansas provision (under K.S.A. 76–731a) to give undocumented students the status the plaintiffs had been denied, as long as the former could establish that they had attended a Kansas public school for three years and graduated. The challenge was supported by the Federation for American Immigration Reform, a group that had made this issue one of its national priorities. In July 2004, District Judge Richard D. Rogers found for the state, determining that the plaintiff students, who had not been eligible for in-state residency, had no standing to bring the case, in that they had not been denied any benefit or received any harm by the state’s practice. In 2007, the 10th Circuit upheld this decision in *Day v. Bond*.

Judge Rogers, while conceding that “the decision on what to do concerning the education of illegal aliens at the postsecondary level in our country is indeed significant,” also reaffirmed the states’ right to deny or accord them in-state status, under the two 1996 federal laws (IIRIRA and PRWORA). As he said, “That decision . . . is probably best left to the United States Congress and the Kansas legislature.” In other words, if *Merten* is upheld in Virginia, then *Day* must prevail in Kansas. If states such as Virginia are allowed to deny in-state status to undocumented students, then symmetrically, states such as Kansas and Texas should also be able to accord them that status and the lower tuition that comes with it, in accordance with the 1996 federal law.

But restrictionist challenges continue to stall state-level efforts to accord resident status to undocumented college students. While the 10th Circuit was considering the appeal in the Kansas case, the same attorneys filed

virtually the same case in California; this challenge in state court met the same fate as it had in *Day v. Sibelius*, at the trial level. In 2008, the appeals court remanded the matter back to the trial court (*Martinez v. Regents*, 2008). While this matter was pending, the students were grandfathered in and so have received resident status while the litigation was pending (UC, 2008). In 2008, Oklahoma, which had enacted a statute to accord resident tuition, reconsidered and rescinded the eligibility but grandfathered in the students who had been eligible prior to the rescission; Utah also enacted a statewide restrictionist statute, but carved out an exception for undocumented students, allowing them to continue eligibility to claim this status (McCormick, 2008).

The most improbable of these challenges was issued by the Washington Legal Foundation, which filed an administrative action with the Department of Homeland Security (DHS) seeking a vague form of relief concerning the permissive Texas state statute, which was signed into law in 2001. Texas's statute was the first of the state laws enacted subsequent to the 1996 federal law. By late 2008 the DHS had not answered, and there is no clearly defined legal means for it to do so. In response to a request from education officials in North Carolina, the Department of Homeland Security issued a letter advising colleges that determining state status and conferring state residency status (or not) was a state matter, not in the federal domain (DHS, 2008). In the meantime, thousands of Texas undocumented students have enrolled under the provision, as they have in other states with permissive policies.

Against this backdrop of state activity, the federal stage has also been bustling. The Development, Relief, and Education for Alien Minors (DREAM) Act was introduced in Congress in 2003, originally by conservative Republican Senator Orrin Hatch and actually passed the U.S. Senate, only to founder in 2007 on the cloture rules requiring 60 votes to bring legislation to the floor (Jaschik, 2007; Olivas, 2008; Redden, 2007a, 2007b). Comprehensive immigration reform efforts failed in late 2007. At the federal level, ironically, the DREAM Act provisions, are more generous than any of the state laws enacted to ameliorate this problem. If passed, this legislation would allow "alien minors" to start on the path toward permanent residency and, ultimately, citizenship. It would also address, among other issues, amnesties or legalization and work authorization. Finally, an important provision would render DREAM students eligible for all federal financial-aid programs except Pell. But after the presidential campaigns began in earnest, the legislation stalled.

In short, there has been a surprising amount of litigation (and, recently, legislation) on an issue that affects only a few students, but extremely vulnerable ones. In the states, advocates on both sides have engaged in efforts to get new provisions signed into law and, on the other hand, to prevent them from becoming law. There is likely to be federal comprehensive immigra-

tion reform at some point, which will include provisions for undocumented college students to regularize their immigration status.

Although most of the major immigrant-receiver states allow the undocumented to enroll and receive resident tuition after establishing prolonged periods of presence in the state, this issue has been contested in a number of court cases and statutes (Cortez, 2008; Hebel, 2001; Olivas, 2008; Salsbury, 2003). However, as with the admission of undocumented school children generally, educators have made substantial accommodations to accept and educate both children and college students, whose parents may have transgressed immigration laws (Olivas, 1995; Romero, 2002, 2003).

In a related field, that of financial aid, some technical issues affect undocumented college applicants and citizen children whose parents may be undocumented. As a general rule, the undocumented are ineligible for federal financial aid and, in virtually all states, for state financial aid as well. Moreover, even citizen college applicants face several technical and administrative problems in negotiating the complex financial aid application process. The U.S. Department of Education has issued verification guidance on “discrepant tax data” and “conflicting information” that has relevance to the treatment of undocumented college applicants or citizen applicants whose parents are undocumented (FAFSA, 2008a, 2008b). Studies indicate that many undocumented taxpayers pay taxes and file their tax returns, using individual taxpayer identification numbers (ITINs); and if they do so, their citizen children may use those tax returns to establish financial aid eligibility through the required Free Application for Federal Student Aid (FAFSA) (Immigration Policy Center, 2007; Lipman, 2006). The actual technical assistance enables parents to make use of an ITIN or zeroes as placeholder numbers on the FAFSA forms.

VITA sites (volunteer income tax assistance) sponsored by the Internal Revenue Service (IRS) are able to prepare and electronically file ITIN tax returns with inconsistent W-2s—that is, the W2(s) use an invalid SSN (social security number) rather than the ITIN because one cannot use an ITIN on a W-2 (Bernstein, 2007; IRS, 2008). While this procedure seems counter-intuitive, it is a function of the IRS’s aggressive campaign to get tax filers, no matter their immigration status, to file and to do so electronically (Bernstein, 2007). The IRS will not process either electronically or manually (that is, accept as filed) any tax returns that use zeros as placeholders for ITINs (IRS, 2008a, 2008b). Therefore, any undocumented immigrants must file their returns using their ITINs—with SSNs for any citizen dependents or ITINs for undocumented dependents. With respect to their first tax filing, if undocumented immigrants do not have an ITIN, they must apply for the ITIN using a Form W-7 and file the first tax return with the W-7, according to the TIN/ITIN application (IRS, 2008a).

Under IRS standards revised in January 2007, an ITIN application must include a tax return. There are a number of exceptions to this general rule, none of which seems likely to apply to the undocumented immigrant population (IRS, 2008a–b, Table 5) Undocumented immigrant students, who have no filing requirement because they either are not working and/or are minors, would likely get their ITINs through their parents' tax filing. Parents would file ITIN applications for themselves and their dependent undocumented children, so one tax filing could have numerous ITIN applications with their first tax filing.

However, any parent, undocumented or citizen, who is required to file a tax return under federal tax law but chooses not to creates a situation in which his or her dependent child will be ineligible to receive federal financial aid. In this sense, the citizen children of undocumented parents are not being singled out for the status of their undocumented parents; but the practical effect is the same. Not being able to produce a completed tax return to verify the FAFSA data will preclude their receiving federal aid for which they may actually be eligible. In addition, not having a completed FAFSA prevents them from receiving state or institutional aid, as many institutions use either the College Board's CSS (College Scholarship Service) Profile Form or the FAFSA to make their own aid determinations (FAFSA, 2008a, pp. AVG-101-102).

The complexity of the tax code can disguise the real issues, both for the undocumented parents, their children (either citizens or undocumented), policy and state officials, and financial aid/admissions officers. An interesting and vexing example from Texas involves providing scholarships and financial assistance to the documented. It must be remembered that Texas is among the more generous states toward undocumented students, with the first statute according resident tuition and a subsequent revision that was intended to clarify and improve the system. Scholarships for room and board are *not* tax exempt—but this provision is not new. However, scholarships for tuition, fees, books, supplies, and equipment required for courses are tax exempt. If a student is a "nonresident alien," there is a federal withholding requirement—to ensure that nonresidents file U.S. tax returns. The withholding requirement forces these students to file, even though they will likely get their withholding back because the amount of taxable scholarship will not exceed the allowable deductions. But under this Texas provision, undocumented students are treated as "resident aliens." The students should be able to prove this status to the financial aid/scholarship officials with a copy of a tax return that, under penalties of perjury, evidences that they are "resident aliens" under the Internal Revenue Code. But even if they had these monies withheld, they should be able to file a tax return and get it back if there is no tax liability. The amount of the scholarship not used for tuition/fees (e.g., used for housing) is not tax-exempt and, therefore, must be

included in *gross income*. However, if the dollar amount is “not significant” (e.g., less than \$9,000) then there is no tax liability.

The problem (among the many identified here) is that the undocumented are neither non-resident aliens nor resident aliens. In immigration law, a non-resident is in the United States temporarily (and legally), for a temporary purpose. Examples would include fiancées (K-1 status), exchange visitors (J-1), and international students (F-1), among the many. A “resident” alien, on the other hand is an immigrant or a permanent resident (a “green card” holder), with permission to remain in the United States permanently and with eventual eligibility for citizenship. The undocumented, in this sense, are neither fish nor fowl, and are trapped by these imprecise uses and applications of immigration categories, which understandably have confused Texas Coordinating Board officials and college administrators. The interactions among financial aid regulation, statutory immigration terms, and Internal Revenue Code provisions are not clear, and the exact same terms mean different things under the three different legal regimes.

These are very technical and complex issues, and undocumented or mixed-status families will understandably be reluctant to share confidential information, even when it would assist their children in receiving aid for which they are eligible. States have made very few efforts to simplify this process, although Texas allows the undocumented to use a special form (TASFA) for this purpose (TASFA, 2008–2009; Texas Guaranteed, 2007, p. 20); and New Mexico public colleges allow the undocumented to use the same forms as do all other students (New Mexico governor, 2005; NMSU, 2008, p. 7).

Financial aid and admissions professionals should designate a staff member, preferably one who is bilingual in the appropriate language, in their campus office to review these issues and to provide technical assistance to the applicants and parents. All applicable privacy and confidentiality laws apply to this population, as they do to all applicants and their families (Loonin & Wu, 2002, chap. 14, Loonin & Rao, 2006; Khatcherissian, 2003).

## CONCLUSION

There has been a surprising amount of litigation and recently, legislation on this arcane matter, a subject that affects only a few—but extremely vulnerable—students. Both immigration advocates and opponents have targeted this issue as an important line in the sand (Aldana, 2007; Kobach, 2006–2007; Russell, 2007; Stein, 2002) Ironically, the DREAM Act provisions, originally introduced by a conservative Republican Senator, are more generous than any of the state laws enacted to ameliorate this problem; and, of course, the amnesty provisions to allow the undocumented students to legalize their status would be relatively generous. In other states, advocates

on both sides have engaged in efforts both to get new provisions signed into law and also to prevent them from becoming law. At the federal level, the DREAM Act is stalled, a victim of many bruises and the larger failure of immigration reform, kicked to the curb after 9/11 (Huber & Malagon, 2007; Jaschik, 2007; Olivas, 2004, 2008; Redden, 2007a, 2007b). The 2008 presidential campaign turned its attention to undocumented college tuition issues, with candidates trading accusations against each other about who was tougher on immigration (Berger, 2007; Hebel, 2007; Redden, 2007). When this issue is ultimately resolved, it will be by a combination of state and federal laws, even with the specter of September 11 casting its long shadow.

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