

In-State-Tuition for Unauthorized Residents: Teaching a Person to Fish

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Abstract

Illegal immigration has become one of the most important issues we face as a nation, and as greater attention is focused on the sociological and economic impact of illegal immigration, policies related to in-state-tuition for unauthorized residents are in a state of flux. Since 2005, the number of states offering in-state-tuition for unauthorized residents has more than doubled. Using the rationale from *Plyler v. Doe* and economic data from the Heritage Foundation and the Pew Research Institute, the authors argue for increased access to in-state-tuition for unauthorized residents. Increased access will improve economic productivity, reduce crime and reduce dependence on governmental services. If it is true that giving a person a fish means they will eat for today, but teaching a person to fish means they will eat for a lifetime, then why choose the former especially when their catch can feed others as well?

Introduction

Issues related to illegal immigration have produced volumes of positional papers analyzing the merits of various policies which either provide or withhold educational benefits and services unauthorized residents. The eJournal of Education Policy has published two such papers since 2010 both of which were thought provoking and well written (Ibarra & Sherman, 2012; McNair, Driscoll, & D'Amico, 2010). Ibarra and Sherman (2012) discussed demographic trends over the previous 40 years; they examined state and federal laws impacting post-secondary access; and they put forth a concise moral analysis culminating in an argument for the implementation of the DREAM Act. Ibarra and Sherman (2012) asserted that “the issue of undocumented students attending institutions of higher education and receiving in state tuition is a sub plot to the bigger issue of how the country should address illegal immigration and border security” (p. 4). While we agree with this assertion, we also believe the issue of in-state-tuition coverage for unauthorized residents who meet non-discriminatory state residency requirements stands alone and can be debated and addressed even without considering border security or other sociological issues related to illegal immigration.

McNair, Driscoll, and D'Amico (2010), in their policy discussion, cite the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) as examples of legislative barriers to post-secondary opportunities for unauthorized residents. They also discuss state laws in South Carolina, Alabama, North Carolina and Georgia which were designed to prevent unauthorized residents from enrolling in state colleges at any tuition rate. After analyzing court cases which

challenged higher educational access policies in California and Virginia, McNair Driscoll and D'Amico (2010) speculate as to how the passage of the DREAM Act might impact existing state and federal policies as they relate to in-state-tuition for unauthorized residents.

Despite these recent publications, issues related to illegal immigration are in a state of flux. In the last few years, considerable changes have taken place including the implementation of the Deferred Action against Childhood Arrivals Act (DACA), the actions of many state legislatures which modified in-state-tuition policies for unauthorized residents, and a series of constitutionally questionable executive orders designed to provide legal protection for millions of unauthorized residents. The purpose of this paper is to analyze how these recent developments have changed the landscape of higher educational access and to argue for broader protections for unauthorized residents who wish to continue their education beyond high school. It is time to end what Padron described as a “[f]ree education . . . followed by free deportation” (2007, p. 49).

The DREAM Act and DACA

The DREAM Act is exactly that, a dream. It has been bandied about as a political tool for more than two decades, during which time multiple versions have languished in Congress and most proponents blame Republicans (Apsan, 2010; Schumacher-Matos; 2010). However, from 2008 through 2010, Democrats had super majorities in both the House and Senate and, if so desired, could have passed the DREAM Act or comprehensive immigration reform without any political opposition. During the 2008 presidential campaign, then Senator Obama, promised to reform immigration during his first year in office (York, 2014). Instead the issue was placed back on the shelf to be dusted off for the next election cycle. Six years later, we are still debating comprehensive immigration reform.

As the 2012 elections were approaching, President Obama used his executive authority to initiate changes to immigration policy in an effort to garner a greater percentage of the Hispanic vote (Navarrette, 2012). He directed Janet Napolitano, Secretary of Homeland Security, to implement a directive titled Deferred Action for Childhood Arrivals (DACA) which sets forth criteria in which prosecutorial discretion is deferred if the undocumented resident meets the following criteria:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for at least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offense, multiple misdemeanor offenses or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty (Napolitano, 2012).

DACA also provides protection in the form of employment authorization which enables qualifying unauthorized residents to apply for a social security number. This, in turn, opens the

door for a myriad of benefits which many citizens take for granted such as having a bank account, a driver's license, a credit card or being able to apply for a student loan (Fathali, 2013).

DACA is not a pathway to citizenship. It is a temporary solution that was designed to last for two years. According to Passel and Lopez (2012) "at the expiration of the two-year deferred action period, program beneficiaries can apply for a two-year renewal, pending a review of their case" (p. 4). This two year renewal period may have been intentionally set to coincide with the subsequent 2014 election cycle, but the immigration crisis of 2014 changed the political landscape. In response, President Obama decided to delay his version of comprehensive immigration reform over concerns expressed by democrats embroiled in tight congressional races (Meckler, 2014). Two weeks after significant democratic loses in the 2014 mid-term elections, President Obama announced a series of broad executive actions on immigration some of which expanded the pool of unauthorized residents covered by DACA by reducing the requirement for continuous presence in the United States from five to two years and by removing the upper age limit. It also expanded protection to include the parents of unauthorized residents covered by the original DACA order. With one stroke of the pen, the number of people covered by DACA increased by a factor of 10 (U.S. Citizenship and Immigration Services, 2014).

In-State-Tuition Policy

Most states do not provide in-state tuition status to unauthorized residents but these policies are being reconsidered partially as the result of DACA. (NCSL, 2014) The debate over whether or not unauthorized residents should be provided the opportunity to pay in-state tuition has produced a network of inconsistent state laws. According to the American Association of State Colleges and Universities Policy Matters (2005), between 2000 and 2005, nine states enacted legislation allowing undocumented residents to receive in-state tuition. Since 2005, thirteen additional states have decided to provide in-state-tuition benefits for unauthorized residents who meet certain residency criteria either through legislation or through actions of the state's board of regents. Currently, of the 22 states that offer in-state tuition to unauthorized residents, only five, California, Minnesota, Texas, New Mexico, and Washington provide access to state financial aid programs (NCSL, 2014). On the other end of the spectrum, five states currently bar in-state-tuition for unauthorized residents: Alabama, Arizona, Georgia, Indiana, and South Carolina (NCSL, 2014; Nelson, Robinson & Glaubitz, 2014)

Not everyone is in favor of offering in-state tuition to undocumented residents. Opponents argue that to do so is unfair to citizens from out of state who are not allowed the same benefits (Connerly, 2005). It also appears to contradict the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (Pub. L. 104-208), which, in part, limits the distribution of government aid to non-citizens in the form of preferential tuition treatment over students applying from out of state who are U.S. citizens. Due to the controversial nature of the issue, some state legislatures are hesitant to implement in-state tuition policies for unauthorized residents. For example, Oklahoma reversed support for lower in-state tuition for unauthorized residents and left the decision up to the state's University Board of Regents (Mangan, 2011). The Board of Regents in three additional states, Rhode Island, Hawaii and Michigan followed suit and enacted similar measures which provide in-state tuition for unauthorized residents that meet specific residency requirements. (Nelson, Robinson, & Glaubitz, 2014). While DACA does not

have a direct impact on in-state tuition, the directive has already influenced state policy. The Attorney General of Virginia recently issued a directive that Virginia will offer in-state tuition for unauthorized residents that meet the requirements of DACA (Vozzella & Constable, 2014). Massachusetts also changed their in-state-tuition policies as the result of DACA and now provides in-state-tuition for unauthorized residents that meet state residency requirements. (Nelson, Robinson, & Glaubitz, 2014).

Legal Justification for In-State-Tuition

In *Plyler v. Doe* (1982), Texas Education Code §21.031 was challenged by the parents of undocumented school children because it authorized the state to withhold funds for the education of students who were not legal citizens. As a result, school districts across the state were refusing to enroll undocumented school children by claiming economic hardship. The United States Supreme Court held that §21.031 was a violation of the Fourteenth Amendment of the United States Constitution, specifically, the Equal Protection Clause. Justice Brennan, writing for the 5-4 majority stated: “[t]he Fourteenth Amendment is not confined to the protection of citizens . . . These provisions are universal in their application to all persons within the territorial jurisdiction without regard to [differences] of race, of color or of nationality” (p.212).

To permit the State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose [of] the Equal Protection Clause (p.213).

Dictum from *Plyler* provides insight into several related issues associated with the in-state-tuition debate. For example, the Court refused to punish children for the malfeasance of their parents. If the children of unauthorized residents were not held to account for the actions of their parents (entering the United States illegally) when the Court considered opportunities to attend k-12 public schools, why would we hold these same people accountable when considering higher educational access through in-state-tuition? This would be an illusory distinction leading to illogical conclusions. In the context of access to in-state tuition for unauthorized residents, age should not magnify culpability?

The Court in *Plyler* also recognized the multi-faceted values of an education as well as the individual and collective damage that is the result of its abolition. Justice Brennan, citing *Abington v. Schempp* (1963) and *Ambach v. Norwick* (1979), wrote: “public schools [are the] most vital civic institution for the preservation of a democratic system of government and . . . the primary vehicle for transmitting the values on which our society rests” (p.223). Given the challenges of acculturation (Castro, 2003) and the need for collective unity (Cassar, 2006) erecting additional financial barrier to higher educational opportunities for millions of unauthorized residents seems contradictory to the transmission of these fundamental values.

In *Plyler*, the state of Texas argued that the financial burden was too much to absorb and would result in a deprivation of services to authorized residents. The Court responded with two observations: the state’s economic concerns did not rise to the level of a compelling state interest, and the true economic impact of such an exclusionary practice would be far greater with

millions of illiterate people inhabiting the state. The first observation is subject to substantial debate, but the second is supported by unequivocal data showing that the prison population in the United States is largely comprised of illiterate inmates who were incapable of securing and holding a job, and therefore, resorted to criminal activity to survive (National Center for Educational Statistics, 1994). The National Center for Educational Statistics (NCES) estimates that the annual cost per student in 2014-2015 will be \$12,281 (NCES, 2014). The average cost for housing an inmate is over 31,000 per inmate per year (Vera, 2012) and these figures do not include the cost associated with the arrest and prosecutions of the criminal or the cost to the victim associated with the underlying crime. If cost is the major concern, then policies which foreclose educational opportunities make little economic sense.

Opponents of in-state tuition for unauthorized resident may be quick to note that the Court in *Plyer* was adjudicating a policy that resulted in an absolute deprivation of educational opportunities while policies which deny unauthorized residents access to in-state-tuition rates only indirectly result in a partial deprivation. While this is true, depriving a high school graduate the opportunity to enroll in institutions of higher education will substantially reduce occupational opportunities. Thirty years ago, a high school diploma was essential for occupational opportunities and advancement, but today, “the opportunity to attend college might very well be the educational floor” (Romero, 2002, p 411).

In-State-Tuition Litigation

In *Day v. Sebelius* (2005), the plaintiffs, U.S. citizens but non-state residents, sued the state of Kansas and the Kansas Board of Regents to enjoin the enforcement of a policy that would allow unauthorized residents who had attended a Kansas High school for at least three years and had graduated or earned a GED, to pay in-state-tuition rates. The United States District Court for the District of Kansas granted the state’s motion to dismiss ruling because the plaintiffs were unable to demonstrate any connected interest that could be redressed. In other words, the plaintiffs could not demonstrate that the in-state-tuition plan for unauthorized residents had any impact on whether the plaintiffs were classified as residents or non-residents for tuition purposes. They lacked standing.

In a similar case, the Immigration Reform Coalition of Texas (IRCOT) filed suit seeking a declaratory judgment that the Lone Star College System (LSCS), and its Chancellor, were illegally expending state funds through grant programs in order to equalize tuition for unauthorized residents. The IRCOT argued that these acts were preempted by the IIRIRA and PRWORW which makes it illegal for states to provide post-secondary benefits to unauthorized residents. Before the merits of the case could be adjudicated, the defendants filed a motion to dismiss for lack of jurisdiction. Unlike the plaintiffs in *Day*, the Court of Appeals of Texas, Fourteenth District denied the defendants motion to dismiss by ruling that the IRCOT had standing as and that the LSCS and its Chancellor did not have governmental immunity (*Lone Star College Sys. v. Immigration Reform Coalition of Tex.* 2013). The Texas Supreme Court subsequently denied a motion to review *Lone Star College Sys. v. Immigration Reform Coalition of Tex.*, 2014) clearing the way for the original suit to proceed. As of the date of publication, the actual merits of this case have yet to be adjudicated.

Martinez v. Regents of University of California (2010) provided another opportunity to decide whether state laws such as California's section 68130.5, which allows unauthorized residents to pay in-state tuition, violate federal law. According to Feder (2008), §68130.5 specifically violates Section 505 of the IIRIRA, which mandates that a non-citizen should not be eligible for postsecondary benefits unless the same benefits are available to a U.S. citizen. §68130.5 allows illegal immigrants to pay in-state tuition under the following criteria:

- attended high school in California for three or more years,
- graduated from a California high school or attain the equivalent of a high school education,
- and filed an affidavit stating that he or she has filed an application pursuing legal immigration status.

The California State Supreme Court held that §68130.5 did not violate federal law because the exemption was based upon attendance at a California high school for at least three years and not on residence.

Demographic Trends with In-State Tuition

There is widespread consensus that between 11 and 12 million unauthorized residents currently live and work in the United States (Pew Hispanic Research Center, 2014). By the year 2050, 20% of all U.S. residents will be foreign-born and almost one third will be foreign-born or the children of immigrant parents ((Teranishi, Suárez-Orozco, C., & Suárez-Orozco, 2011). However, only 5% of unauthorized residents that graduate from high school ever attend higher educational institutions (Vargas, 2011). Lack of access to in-state tuition rates contributes substantially to this alarming low percentage.

According to Vargas (2011) a state's fiscal health, poverty rates, spending on education, and demographics impacts the decision whether to provide or ban in-state tuition for unauthorized residents. Statistical analysis reveals that the states which allow in-state tuition for unauthorized residents are healthier financially than states that do not. States with a higher percentage of citizens living in poverty are more likely to ban in-state-tuition and "states that ban in-state tuition also tend to appropriate less money per college-age student" (Vargas, p. 57).

With the exception of Arizona, most states that deny in-state tuition for unauthorized residents have not historically been destinations for immigrants. With the exception of Nevada, it appears that the higher the percentage of the population and state legislators who are Hispanic, the more likely the state is to offer in-state-tuition for unauthorized residents (Nelson, Robinson, & Glaubitz, 2014). The trends are in no way surprising.

According to Kaushal (2008), a college education can significantly improve labor market opportunities for unauthorized residents. "A significant proportion of [unauthorized residents] convert to legal permanent residents every year via family unification or employment categories" (Kaushal, 2008, p.9) making them more likely to pursue a college education which contributes to enhanced economic and social opportunities. In 2001, Texas passed House Bill 1403, and in so doing, became the first state to allow unauthorized residents access to in-state tuition rates

provided they attended high school within Texas for at least three years. Dickson and Pender (2010) evaluated enrollment rates of unauthorized residents in 6 Texas universities after the enactment of House Bill 1403. Five out of the six universities experienced an increase in enrollment of unauthorized residents (Dickson & Pender, 2010).

Financial Impact of Illegal Immigration

According to the Center for Immigration Studies, legal and illegal immigration has a substantial redistributive impact which reduces wages for U.S. citizens by an estimated \$118 billion per year while increasing business profits by an estimated \$128 billion per year (Borjas, 2013). Even more troubling, is that a vast majority of the increased economic productivity (97.8%) goes directly to the illegal immigrant in the form of wages and benefits. The Heritage Foundation reported that “the average unlawful immigrant household received around \$24,721 in government benefits and services while paying some \$10,334 in taxes. This generated an average annual fiscal deficit (benefits received minus taxes paid) of \$14,387 per household” (Rector and Richwine, 2013, para.12). Steven Camarota, who has been studying the fiscal impact of illegal immigration for more than two decades, made the following bold statement.

In the modern American economy, those with relatively little education (immigrant or native) earn modest wages on average and make modest tax contributions. Their low average incomes mean that they or their children can often access welfare and other means-tested programs. As a group, the less educated use more in services than they pay in taxes. Anyone who argues otherwise is either lying or grossly uninformed (Carmota, 2012, para. 3).

This position begs the question that lies at the heart of this policy paper: Should we provide in-state-tuition for unauthorized residents that meet specific residency and high school graduation requirements? If Camarota, Borjas, Rector and Richwine are correct, then why would we erect substantial financial barriers to enhanced educational opportunities by denying unauthorized residents the same opportunity to pay in-state-tuition as other state residents? Researchers at the Pew Research Institute (2014) found that college graduates on average earn \$17,500 more per year than their peers with only a high school diploma. Given this fact, in-state tuition rates for unauthorized residents would create greater economic mobility, an increased tax base and a reduced need for governmental assistance.

Conclusion

In a recent poll, illegal immigration was identified as the most important issue we face as a nation (Rasmussen, 2014). While this poll was undoubtedly influenced by the immigration crisis of 2014, issues related to illegal immigration impact everyone. Most reliable estimates place the number of unauthorized residents living and working in the United States at anywhere from 11-12 million people (Preston, 2013). There is certainly evidence to suggest that the presence of millions of unauthorized residents has a substantial positive economic impact on the U.S. economy, but this positive impact is outweighed by the considerable financial stain placed on public services and government programs (Rector & Richwine, 2013). Politicians have been promising comprehensive immigration reform for several decades, but appear to be more interested in using the issue for political gain rather than legitimately seeking plausible resolutions. Changes to immigration policy are long overdue, but the issue of higher educational

access through the expansion of in-state tuition coverage for unauthorized residents who reside in this country, and are likely to remain, stands apart from other important issues associated with illegal immigration.

In 1982, the Supreme Court recognized the individual and collective value of a high school diploma for unauthorized residents. There is little if any justification for limiting the holding in *Plyler* to elementary and secondary educational opportunities given the fact that a college degree today has about the same professional value as a high school diploma did more than 30 years ago. Almost half of all states currently allow in-state-tuition rates for unauthorized residents who meet neutral residency requirements and it is time for the remaining states to eliminate this unjustified barrier. Establishing policies which promote higher educational access is a win-win proposition for both citizen and non-citizen alike in terms of greater economic productivity, less crime and a lower overall need for governmental assistance. Instead of giving people a fish so they can eat for today, let us teach them to fish so they can eat for a lifetime.

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