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COURT UPHOLDS STATE LAW GRANTING IN-STATE TUITION TO ILLEGAL IMMIGRANTS

by

James Flanagan

A recent trend in state governments is to grant in-state tuition rates to illegal aliens that reside in the state. The difference between “in-state” tuition and “out of state” tuition can be substantial, potentially saving a college student thousands of dollars per year.¹ However, this in-state tuition is not offered to U.S. citizens who are applying to state schools and are not citizens of the state. Currently nine states offer discounted rates to illegals, but not to all U.S. citizens: New York, Texas, California, Kansas, Illinois, Utah, Oklahoma, New Mexico, and Washington.²

These states are violating federal law. In 1996 Congress passed The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and The Personal Responsibility and Work Opportunity Act of 1996 (PRWORA). Congress passed these laws six weeks apart, in response to the U.S. Supreme Court’s decisions in *Plyer v. Doe*³ and *Toll v. Moreno*.⁴

A key section of IIRIRA, 8 U.S.C. § 1623, declares that any state which offers discounted, in-state tuition to illegal aliens on the basis of their *residence* in the state must offer the same discounted rates to all U.S. citizens. Note that this allows a public college, for instance, to grant an illegal alien a football

¹For example, for a freshman entering the University of Kansas, the difference between “in-state” tuition and “out of state” tuition for the year is \$10,410. Said another way, the student not receiving the “in-state” tuition will pay over \$41,640 more at the completion of four years of college than the “in-state” student. See <http://www.tuition.ku.edu/rates.shtml>.

²*Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373 (2005).

³*Plyler v. Doe*, 457 U.S. 202 (1982) (Texas statute which denies free education to alien children violates Equal Protection Clause).

⁴*Toll v. Moreno*, 458 U.S. 1 (1982) (University of Maryland’s policy of denying treaty organization aliens the opportunity to pay reduced, in-state tuition constituted a violation of the Supremacy Clause).

James Flanagan is in his 3rd year at Catholic University Columbus School of Law. Mr. Flanagan was a law clerk for the Washington Legal Foundation from 2006-2007.

scholarship but choose not to grant an athletic scholarship to an American citizen who is less talented in sports. Thus a state may not favor an illegal alien over a non-resident American citizen in the award of benefits if the favoritism is in any way related to the illegal alien's physical presence within the state.

The states that choose to ignore these federal statutes are striking at the heart of the Constitution. Federal supremacy over immigration, rooted in the Constitution, vests in Congress the power "to establish a uniform Rule of Naturalization".⁵ Indeed, breaking federal law is a prerequisite for aliens seeking in-state tuition because state laws expressly *deny in-state tuition to legal aliens* who have valid student visas. In essence, the states are giving illegals subsidized tuition if the illegals somehow are able to live in the state and evade the federal government.

Late this past summer, in a ruling certain to have ramifications for the in-state tuition debate, the U.S. Court of Appeals for the Tenth Circuit⁶ upheld Kansas's illegal immigrant tuition policy in *Day v. Bond*.⁷ The circumstances of a student represented by Washington Legal Foundation in its *amicus* brief, Brigitte Brennan, well reflect the complaints of the plaintiffs. Ms. Brennan grew up in Missouri but attended high school in Kansas. After high school Ms. Brennan applied for and was accepted at the University of Kansas. Despite living in Lawrence, Kansas when she was studying at the University, Ms. Brennan was denied in-state tuition multiple times. The plaintiffs challenged the legality of the Kansas law providing illegals with the advantage of in-state tuition, K.S.A. § 76-731a, and initially lost in the federal district court. Before the Court of Appeals, the plaintiffs made two major arguments: that Kansas's actions denied her equal protection under the law, and that 8 U.S.C. § 1623 preempts the state law.

Under the equal protection claim, the plaintiffs argued that Kansas was treating them adversely compared to another group of college students (illegal aliens), and Kansas lacked a proper basis for distinguishing the plaintiffs from the other students. The plaintiffs articulated the following claims expressing a violation of equal protection:

- (1) The denial of equal treatment, in and of itself, caused by barriers in K.S.A. § 76-731a that make it impossible for nonresident U.S. citizens to obtain the benefits extended by the statute.
- (2) The increased tuition faced by [the Plaintiffs], as the burden of subsidizing illegal alien beneficiaries of K.S.A. § 76-731a is passed along to other students through tuition hikes.
- (3) The injury that results from competition for scarce tuition resources.
- (4) The extra tuition paid by nonresident [Plaintiffs] during the 2004-2005 academic year over the in-state tuition paid by nonresident illegal aliens, as a consequence of the discriminatory operation of K.S.A. § 76-731a.

The court ruled that the plaintiffs' claims of a violation of equal protection failed to establish their standing. The court stated that:

⁵ART. I, SEC. 8.

⁶Washington Legal Foundation (WLF) filed an *amicus curiae* brief in the *Day* case. In addition, WLF has also filed administrative complaints with the United States Department of Homeland Security, arguing that Texas and New York are violating federal immigration law by offering in-state tuition rates to illegal aliens. As of the time of this paper's release, there has been no formal response to the complaints to the United States Department of Homeland Security.

⁷*Day v. Bond*. 500 F.3d 1127 (10th Cir. 2007).

As to the second and third of these alleged injuries, the Plaintiffs have not demonstrated that they have suffered a concrete and nonspeculative injury based on the discriminatory treatment provided by § 76-731a. As to the first and fourth of these alleged injuries, the Plaintiffs cannot show that their asserted injury was proximately caused by § 76-731a, nor that any injury could be redressed by a decision in their favor. We must, therefore, dismiss their equal protection claim for lack of standing.⁸

The court initially addressed the second and third injuries claimed by the plaintiffs. The court rejected plaintiffs' second argument that the burden of financing illegals in-state tuition is passed on to other students through tuition hikes. The court stated that the plaintiffs only provided newspaper and opinion articles that suggested that this was indeed the case and did not present other evidence showing a causal relationship between funding illegals' tuition and the rise in tuition for other students. Next, the court focused on the third claim that the illegals getting in-state tuition creates competition for scarce resources in the educational system. In a rationale to that for rejecting the second injury claim, the court stated that:

Plaintiffs' failure to adduce any evidence in support of their theory of injury would force us into speculating on the inner workings of university and state budgetary mechanisms to discern a genuine issue of material fact over the existence *vel non* of this injury.⁹

The court then turned to plaintiffs' first and fourth arguments under their equal protection challenge. While granting that arguments one and four had more substance and evidence supporting them than arguments two and three, the court nonetheless found that these arguments failed to establish "either injuries caused by allegedly unlawful discrimination the plaintiffs decry or that any such injuries would be redressed by a favorable decision from this court."¹⁰ The court went on to say that the plaintiffs did not have to show that they *would* receive the benefit but for the discriminatory effects of government action but rather that the plaintiffs *could* receive the benefits. In this case, the court reasoned, none of the plaintiffs would receive the benefit of in-state tuition even if the statute favoring illegal aliens was eliminated. That is, because the plaintiffs had not attended high schools in Kansas for at least three years and either graduated from a Kansas high school or received a Kansas GED certification, they did not meet the prerequisites for receiving in-state tuition under the statute. Thus the court concluded that the plaintiffs' harm was not caused by the discriminatory conduct of the state and the injuries would not be redressed by striking down the discriminatory section of the statute. The court rejected plaintiffs' argument that their unequal treatment – they were treated less equally than illegal aliens – was by itself insufficient to establish injury.

Finally, the court looked at the plaintiffs' preemption argument. The plaintiffs claimed standing in the matter because they were being deprived the putative statutory right conferred to them by § 1623. The court rejected this claim stating:

However, we conclude that § 1623 does not vest any federal right in nonresident citizen students like the Plaintiffs to assert preemption. We therefore conclude that the Plaintiffs cannot claim such a right as the basis of an injury supporting standing. Thus, they lack standing to pursue their preemption claim, and we affirm its dismissal.

⁸*Id.*

⁹*Id.* at 1134.

¹⁰*Id.*

The court held that whether the plaintiffs had standing to assert a violation of § 1623 depended on whether they had a private right of action under the statute. The court ruled that the plaintiffs had no such right. In determining that there was no private right of action, the court looked at the text of the statute:

Its text “entirely lack[s] the sort of ‘rights-creating’ language critical to showing the requisite congressional intent to create new rights.” *Gonzaga Univ.*, 536 U.S. 273, 287 (2002). Section 1623 does not provide that “No nonresident citizen shall be denied a benefit” afforded to an illegal alien, but rather imposes a limit on the authority of postsecondary educational institutions.

Furthermore, the court stated that the statute specifically addresses those educational institutions and not private citizens. The court looked both at § 1623 and 8 U.S.C. § 1103 (a) (1) and concluded that Congress wanted federal enforcement of the statute, not private enforcement.

The Tenth Circuit was presented with a choice — either approve in-state tuition to all non-residents (including American citizens like Brigette Brennan) or discontinue Kansas’s practice of granting illegal immigrants in-state tuition. Unfortunately, the three-judge panel invoked procedural rules as a basis for ducking its obligation to enforce federal law and the U.S. Constitution. The legal fight over these states’ tuition policies will likely now move to other federal circuits, with the policies’ opponents seeking to create a split among federal courts, an essential step in bringing the controversy back to the U.S. Supreme Court.