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The Issue of In-State Tuition for Undocumented Students

In the 1982 decision of *Plyler v. Doe*, the US Supreme Court established that kindergarten through twelfth grade education must be provided free to the children of undocumented parents.¹ Currently, once undocumented students have graduated from high school in Colorado (no matter how long their residency in the state), public academic institutions do not recognize that residency and will only admit these students if they pay out-of-state tuition.²

Senate Bill 126 is presently before the Colorado legislature: “A BILL FOR AN ACT Concerning Classification as an Unsubsidized In-State Student for Tuition Purposes at State Institutions of Higher Education.” In it, in-state tuition is made available to undocumented students providing they either have attended high school for at least three years in Colorado or earned a GED certificate in the state; are admitted to a higher education institution within twelve months afterward; and submit an affidavit stating they are applying for lawful status as soon as they are eligible. These students may not qualify for state-funded, need-based financial aid or a college opportunity fund stipend.

¹ *Plyler v. Doe*, 457 US 202, 1982, Justice William Brennan, Jr. delivered the opinion of the court

² Senate Bill 11-126: “A Bill for an Act Concerning Classification as an Unsubsidized In-State Student for Tuition Purposes at State Institutions of Higher Education,” First Regular Session Sixty-eighth General Assembly STATE OF COLORADO

Eleven states, including Kansas, New Mexico, Utah, Nebraska and Texas, have passed similar legislation. A number of states, including Texas, have provided more accommodating access and allow these students to be eligible for financial aid. After signing the Texas bill, Texas Governor Rick Perry (R) stated: “Higher education should be open to all, not just an elite few. It must be responsive to the needs of our growing and changing population. (...) That population includes children of undocumented workers, young boys and girls that we serve in our public schools because it is the right thing to do. I believe it is time they get the same treatment in our colleges and universities.”³

Opponents to the proposed legislation voice the opinion that those who are in the country illegally have no right to any special higher education benefits. They also object that the addition of undocumented students to the enrollments of public colleges and universities would create a financial burden borne by taxpaying legal residents during a time of financial hardship for the State.

State Senator Mike Johnston, one of the sponsors of the Colorado bill, asserts that the legislation will increase revenues for universities and colleges at a time when the General Assembly is cutting the higher education budget every year, leaving tuition as the only reliable source of income. He also notes that when these students enroll and pay full in-state tuition with no financial aid, the projected increase in revenue is between \$1.75 to 4.2 million.⁴

Metropolitan State College of Denver President Dr. Stephen Jordan spoke in support of the proposed legislation at the State Capitol on behalf of Metro’s Board of Trustees and Faculty Senate: “We think this is absolutely consistent with who we are as an institution and the students

³ Perry, Governor James Richard “Rick”(R), Texas “Remarks to the Southwest Voter Registration Education Project,” June 22, 2001. <http://governor.state.tx.us/news/speech/10622/>

⁴ Johnston, Colorado State Senator Michael, District 33, “Fact Sheet: SB 11-126 Advancing Students for a Stronger Economy Tomorrow (ASSET),” <http://www.mikejohnston.org/images>

that we serve. We (...) believe that this will make a real difference in the long-term economic stability of our state.”⁵

In testimony before the Senate Finance Committee, Professor Robert Hardaway of the University of Denver Sturm College of Law stated that SB126 would result in the state discriminating against U.S. citizens and legal immigrants who are not Colorado residents and who cannot get in-state tuition. According to Hardaway, allowing undocumented students to go to college will later turn them into felons because they cannot get jobs and will have to break the law to get them. “It’s not fair and not right,” he said. He further testified that his analysis showed that the cost of a public college education is about \$59,000 per year, while the in-state student pays about \$17,000 per year. According to Hardaway’s figures, taxpayers subsidize about \$170,000 for a four-year degree. A public college education should only be available to those who pay taxes, in his opinion, and allowing illegal immigrants into the colleges would keep residents out. Senator Johnston disagreed with those numbers, noting that at CU Boulder, a resident pays about \$6,400 per year and an out-of-state student pays about \$26,000 annually and out-of-state tuition subsidizes costs for resident students.⁶

Other proponents argue that undocumented children had no choice in coming to the U.S. and that they themselves did nothing illegal. As remarked during Committee hearings by Senator Scott Renfroe (R –Greeley): “It tugs at you—the difficult situation a child is put in because of the action of his parents.” Since the legislation requires students to seek lawful permanent residency, it is promoting responsible behavior and will avert the need to procure false documents in order to obtain work. In the words of a report on this issue by the American

⁵ McGowan, Angelina “Metro State Staying the Course in Its Support of Colorado’s Tuition Equity Bill” http://www.mscd.edu/newsroom/top_story/2011/march3.shtml

⁶ Goodland, Marianne, “Party-line Votes Keep Instate Tuition Bill Alive,” Colorado Statesman, April 8, 2011.

Association of State Colleges and Universities: “Student academic success leads to increased earnings, contributing to enhanced state revenues and reduced reliance on state expenditures such as health care, social services and corrections.”⁷

In “Plyler (212),” the Supreme Court establishes that “the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State.” Additionally, that “to claim that certain subclasses of persons are beyond a State’s jurisdiction would undermine the principle purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment” (213). Speaking of undocumented students, the case states: “It is difficult to conceive of a rational justification for penalizing these children for their presence within the United States” (220). Granted, “Plyler” was concerned with the right to an elementary school education. Yet many aspects of the ruling seem equally applicable to students beyond the twelfth grade. And no mention is made of the Constitution being applicable only during a favorable economy.

One auxiliary point in the “Plyler” case is that failure of the Legislative Branch to effectively deal with illegal immigration is the source of the basic issue. “Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial “shadow population” of illegal immigrants –numbering in the millions--within our borders—(...) a permanent caste of undocumented resident aliens encouraged by some to remain here as a source of cheap labor, but denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult

⁷ Russell, Alene, State Policy Scholar, AASCU, American Association of State Colleges and Universities, ‘Higher Education Policy Brief’ August 2007 “In-State Tuition for Undocumented Immigrants: States Right and Educational Opportunity.”

problems for a Nation that prides itself on adherence to the principle of equality under the law” (Brennan).

The basis for the acceptability of undocumented students paying out-of-state tuition versus in-state tuition, and thereby being admitted to Colorado’s public colleges and universities, is nowhere addressed in the literature or committee testimony by opponents to this legislation. There is no state or federal law stating that undocumented students cannot attend public or private universities in the United States, nor are there laws requiring students to prove their US citizenship before they are admitted.⁸ If such students are acceptable as out-of-state students, can irrefutably prove residency (though not legal residency), what is the true basis of denying residency? As stated by Justice Brennan in the Plyler case: “It is difficult to conceive of a rational justification for penalizing these children for their presence within the United States” (Plyler, 220).

⁸ Legal Language Services “In-State Tuition for Undocumented Students” February 8, 2010. <http://legallanguage.com/legal-articles/undocumented-students/>