

## **Federal Law, State Law and the Right to Attend Public Colleges and Universities**

No federal law prohibits undocumented aliens from attending public colleges or universities. *Plyler v. Doe*, 457 U.S. 202 (1982), held that it was illegal for a state to deny school-aged undocumented aliens the right to a free education. The Supreme Court relied on the equal protection doctrine, which prohibits a state or the federal government from denying equal protection of the laws to any "person" (not just U.S. citizens).

Although post-secondary education is left up to the states, it is possible that the *Plyler* decision can cover this type of education as well. One could argue that post-secondary education is necessary to get by in today's world, over 20 years post-*Plyler*, and that the decision should therefore extend to cover undocumented students' rights to education. And as of yet, no federal law has overruled *Plyler*. The closest provision is IIRIRA § 505, which prohibits states from providing a post-secondary education benefit to an alien not lawfully present in the United States on the basis of the alien's residence in their state unless the state would also provide the same benefit to a citizen or national residing in another state. Translated into plain English, this provision attempts to bar public colleges from charging undocumented aliens an in-state tuition rate, since they would be treated more favorably than out-of-state residents who are U.S. citizens. We discuss section 505 in more detail below.

### **The Right of an Undocumented Student to Attend School**

Some would say that denying admission, access to scholarships, or access to an intensive English program denies a moral right to another human being. On the legal side, the public/private distinction may be important here. A public school may be subject to federal and state constitutional and statutory law considerations, such as equal protection. A private school may declare itself exempt from those, although we would question whether that effort would be successful.

On the policy aspect of this issue, if the applicant meets the academic requirements for your institution, you should admit the student. Other than a school's reporting obligations to F and J status individuals, the student's immigration status is a matter between the student and the USCIS. To quote from an immigration agency cable of January 14, 1994:

"The effect of *Plyler* [*v. Doe*] on post-secondary education is not clear; however, Congress has not adopted legislation which would permit states and state-owned institutions to refuse admission to undocumented aliens or to disclose their records to the Immigration and Naturalization Service."

That statement is still true today.

Some would say that by not permitting an undocumented alien to register for classes, we are denying that person his or her civil right to study. Legally, the question is whether people have a legal right to a university education. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), clearly states that education is not a fundamental right. But *Plyler v. Doe* held that Texas could not deny undocumented school children an opportunity to attend public elementary and secondary schools. Although *Plyler* dealt with children and teenagers, not college students, the Court's reasoning for imposing an intermediate scrutiny test in that case could be applied to a public college barring admission to undocumented aliens. First, you could argue that in today's high-tech world, where people need an advanced degree for most good jobs, undocumented aliens would be

similarly disadvantaged to the school-aged children in *Plyler* if they cannot attend college. Second, many undocumented college-aged students arrived in the United States when they were small children. Thus, like the children in *Plyler*, they are here through no fault of their own.

On the other hand, a court could also say that there is a difference between depriving a child a basic education that teaches reading and writing and denying an adult an opportunity to obtain a college degree. So the law on this issue is unclear.

At many institutions, to deny the student admission would be a violation of the school's equal access policy.

In 2008 US Immigration and Customs Enforcement wrote a letter to the Attorney General's Office in the State of North Carolina. The letter was written in response to an inquiry from the Attorney General's Office.

The letter (which is attached) contains the following language:  
"[A]dmission to public post-secondary educational institutions is not one of the benefits regulated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and is not a public benefit under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)."

To have a document like this, written by Immigration and Customs Enforcement, which clearly states that there is no federal prohibition from enrolling such students, is a real help to colleges and universities who struggle with the issue of admitting undocumented students to their schools. Please note that it does permit individual states to set their own standards, but the reason that admission of such students violates federal statute is not true.

## **Additional Research Tools and Bibliography**

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