



UNIVERSITY OF HOUSTON
LAW CENTER

Immigration Status and
Residency Determination
for Tuition Purposes

IHELG Monograph
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IMMIGRATION STATUS AND RESIDENCY DETERMINATION
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By the early 1900s, many state-supported colleges and universities had begun the practice of assessing higher tuition rates to their nonresident or out-of-state students. Legislators, wanting to advantage their constituents, assessed nonresidents a higher tuition rate (Elliot, 1936, p. 10). They did so despite the principle of accessibility reflected in their states' statutes and constitutions that favored low or minimal tuition (Chambers, 1972, p. 57). Although the additional revenues from charging higher tuition to nonresidents were small, the practice gained popularity and spread across the states. By 1927, University of Oregon registrar Carlton Spencer (p.332) wrote, "Most of the tax supported higher educational institutions of the United States discriminate among their students in the matter of tuition fees, basing this discrimination on the residence of the students; the purpose being to collect an additional fee from nonresidents."

From its inception, however, the practice of determining residency has been problematic. Distinguishing between those who are residents and those who are nonresidents is difficult. Scholars have pointed to the need to examine residency determination at the institutional level in order to understand the consequences and problems generated by the complex process.

funds is taxation. In theory, then, residents¹ have contributed to the tax base and therefore to the state's colleges and universities. Logically, they are entitled to a lower tuition than nonresidents who have made little or no monetary contribution prior to enrollment.

Most state courts, colleges and universities, define "nonresident" or out-of state students as those who leave their parents' home or their own homes to attend another state's colleges and universities (Chambers, 1972, p. 59). Although the definition seems clear, actual practice in determining residency is complex. The following questions are significant in determining bona fide² state residents:

How are students who enter a state to attend college distinguished from those who enter the state primarily to make their home and secondarily to continue their education?

Once classified as nonresidents, should students retain that classification throughout their enrollment?

Under what conditions can they be reclassified?

Is intent to become a resident a significant factor in determining residency?

If so, how can purpose or intent be demonstrated?

From the beginning of the practice, varying strategies have been adopted by legislatures, governing bodies of higher education,

¹A resident is: Any person who occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the genuineness of that intent by establishing an ongoing physical presence within the State together with indicia that his presence within the State is something other than merely transitory in nature (Black's Law Dictionary, 5th Ed., 1979, p. 1177)

²In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense (Black's Law Dictionary, 5th Ed., 1979, p. 160)

pay in-state tuition.³ In some cases, the durational residency requirement is only one "test" in determining domicile.

The lowering of the age of majority to 18 in 1971 added to the complexity of residency classification. It meant that students could "declare financial independence...[and] establish residency by means not previously available (as in owning property, acquiring credit, and voting), and...secure a domicile different from their parents" (Olivas, 1983, p. 157). Other changes have also contributed to what Olivas (1983, p. 157) refers to as "a patchwork of residency requirements." The changes have taken the form of special exceptions or exemptions inserted or appended to the original legislation or regulations. This has been especially true regarding "classes of persons who are mobile (military, migrants) or for whom domicile is difficult to determine (aliens, spouses)" (Olivas, 1986, p. 271).

The complexity and diversity of residency requirements across the fifty states and the increasingly unique and complex circumstances of students who cross state or national boundaries and pursue an education have increased the possibility that within the same state, similarly situated⁴ students may be classified differently for tuition purposes. In a 1970 report, the Education Commission of the States (ECS) noted that "the inconvenience and

³Guide to State Residency Requirements and Practices at Selected Public Institutions in the United States, 1991, p.55

⁴Similar: Nearly corresponding; resembling in many respects; somewhat like; having a general likeness, although allowing for some degree of difference (Black's Law Dictionary, 5th Ed., 1979, p. 1240). Situation: State of being placed; posture. Position as regards conditions and circumstances; state; condition (p. 1244)

designed to examine the impact of immigration issues on residency determination.

The residency officers from each of the 9 participating institutions were also interviewed by telephone following their classifications of the hypothetical students. The purpose of the interviews was to identify additional factors that contribute to variability in residency classifications. Some key factors identified included: problems in the higher education coordinating board's transmitting of residency rule updates or interpretations; lack of clarity in the wording of the statutes, rules, and regulations; and the use of "institutionalized rules" by residency officers in their attempt to cope with the complexities of residency determinations. Rules are institutionalized when a residency officer adopts guidelines not specified by state statute. Because the training of residency officers is left to individual institutions, once a new guideline is adopted by a residency officer it tends to be passed on to the next or other residency officers.

According to state statute, a student who enrolls in an institution of higher education prior to residing in the state for 12 consecutive months is a nonresident for tuition purposes. Some residency officers in the study modified the requirement to allow a student to enroll for three credit hours without disqualifying the student from being reclassified after the 12 months. Other residency officers allowed six hours of enrollment. On the surface it may appear that they were attempting to address what they viewed as the unfair disqualification of students. Closer investigation,

of residency determination. Variability was also found in the classifications of the new hypothetical students.

The following is a summary of the profiles used in both studies, the questions they were designed to examine, and the actual classifications made by the residency officers.

Hypothetical Student Profile Summaries

10. Lawrence Aronowski (same profile for both studies)

Facts: The student is a 22 year old male who entered the United States as a political exile. He has been working full-time in the state as a construction worker since his arrival. He has resided in the state for 14 months. During the first 6 months in the state and the country, his status was as a pending asylee and for the following 8 months he had asylee status. He is now enrolling for classes as a part-time student and is requesting to pay resident tuition.

Questions: Does the 12 month durational residency requirement "clock" begin from the time he entered the state or does it begin after he was officially granted status as a political asylee? Does the fact of full-time employment influence his qualification for residency?

11. Carlos Weisman (Original Study)

Facts: The student is an 18 year old male and an entering freshman. Born in Mexico, his parents brought him to the United States at the age of 8. His parents entered the country without

full-time and has purchased a home. He is now returning to school as a part-time student.

Questions: While he has met the durational residency requirement of 12 months and has been gainfully employed, can he qualify for payment of the resident tuition rate despite not being in status for immigration purposes?

12b. Kinto Mogabi (Follow-Up Study)

Facts: Same as in original study

Added Questions: Is he admissible? How do you handle such cases?

New Profiles (Follow-up Study)

13. Stephanie Nguyen (In parts a & b)

Fact: Student is a 20 years old refugee from Vietnam. She left Vietnam and entered a refugee camp in Thailand where she was judged eligible for immigration to the U.S. by a State Department interview team. She was sent for processing to the Philippine Refugee Processing Center in the Philippines. She resided there for 6 months and then came to live in Texas. She has her I-94 form and I-688A (stamped refugee). She has been in the state (a. 9 months) (b. 12 months) and is seeking admission. She has not yet received her green card. She has worked full-time since entering the country.

Questions: Does the 12 month durational residency requirement "clock" begin from the time she entered the refugee processing camp or the state? Does receipt of her green card or lack thereof

CLASSIFICATIONS OF THE HYPOTHETICAL STUDENTS

| | |
|---------------------|----------------------------|
| <u>Institutions</u> | <u>Student Enrollments</u> |
| IA, IIA, IIIA | 25,000+ |
| IB, IIB, IIIB | 8,000 - 24,999 |
| IC, IIC, IIIC | 2,000 - 7,999 |

N = Nonresident R = Resident - = No classification

INSTITUTIONS

| HYPOTHETICAL STUDENTS | INSTITUTIONS | | | | | | | | | TOTALS | | |
|--------------------------|--------------|-----|------|----|-----|------|----|-----|------|--------|---|---|
| | IA | IIA | IIIA | IB | IIB | IIIB | IC | IIC | IIIC | R | N | - |
| 10a | N | R | R | R | N | N | R | R | N | 5 | 4 | 0 |
| 10b | R | N | R | N | | N | N | R | R | 4 | 4 | 0 |
| 11a | - | N | - | N | - | - | - | - | - | 0 | 2 | 7 |
| 11b | N | N | N | N | | N | N | R | N | 1 | 7 | 0 |
| 12a | N | N | N | N | - | - | N | N | N | 0 | 7 | 2 |
| 12b | N | N | N | N | | N | N | N | N | 0 | 8 | 0 |
| <u>New</u> | | | | | | | | | | | | |
| 13a | N | N | N | N | | N | N | N | N | 0 | 8 | 0 |
| 13b | N | R | R | R | | R | R | R | R | 7 | 1 | 0 |
| 14 | R | R | R | N | | N | N | R | R | 5 | 3 | 0 |

Note: The residency officer of institution IIB was the only non participant in the follow-up study. Consequently, the (N) designation for hypothetical student 10a in the original study represents a classification of nonresident while the (-) designation for profiles 11a and 12a indicates a decision that additional information is required prior to making a definitive classification.

program. While it was clear that Carlos was undocumented, the residency officers wanted to know if he had applied for amnesty, and if so, what stage in the process he was at. In the follow-up, the dates in the profile made it clear that he was in the same situation but in the post amnesty time period. The clear belief of all but one of the residency officers was that an undocumented alien cannot be considered for residency status and must be handled as an international student. The special circumstances of undocumented students will be examined later in this paper.

Of all the profiles in both studies, hypothetical student 12, Kinto Mogabi, received the most consistent classifications. Although he was classified in a consistent manner, the actual responses from the residency officers about how they would deal with such a student differed dramatically. Two believed they were required by law to report him to the Immigration and Naturalization Service (INS) with one expressing the opinion that "he should be deported." Another officer stated that he would not be considered for readmission. Because the INS authorizes universities to issue the documents required for international students, there was a strong concern expressed by the residency officers about doing something that might threaten that authorization.

Hypothetical student 13, Stephanie Nguyen, also received very consistent classifications. Clearly the residency clock was interpreted as beginning no earlier than from the time of physical presence within the state. All but one of the residency officers believed that in the case of a refugee, the residency clock begins from the time of entry into the country. The lone dissenting

received any type of memorandum from the state coordinating board about special handling of those under the president's directive, they were required to handle the case like that of any student changing status from an F1 visa to permanent resident.

There can be little doubt that immigration status has a direct impact on the practice of residency determination for tuition purposes. The complex circumstances of students are made even harder to understand and interpret when viewed through the two hazy windows of immigration and the residency laws, rules, and regulations. Consequently, similarly situated students receive inconsistent residency classifications.

Admissibility Issues

Although not designed to deal with questions of admissibility, the participants in the first study volunteered information and expressed their opinions and attitudes about the admissibility of students that were either out of status with the INS or were undocumented⁵ (entered the country without authorization). The follow-up study included questions about admissibility. Both studies pointed to problems in the way undocumented students are dealt with for admission purposes. The original study found that some public institutions were unwilling to admit undocumented students. The follow-up study found a significant change; all surveyed institutions now admit undocumented students. Two private

⁵ Undocumented aliens are often referred to as illegal aliens. The term undocumented is a better descriptor since the actions of individuals can be illegal, not the individuals themselves.

immediately sets them apart from out-of-state students who often desire only to resemble a resident and pay the lower in-state tuition and then return to their state of origin or some other state.

By understanding residency determination as the attempt to determine domicile, many of the complexities of cases dealing with immigration and residency laws are simplified. This is especially true in determining residency for tuition purposes for one class of undocumented students. The hypothetical student profile of Carlos Weisman is an excellent example.

Has Carlos Weisman established domicile? In the (b) version of the profile, he has lived in the country and the state continuously for 7 years. He has attended state institutions of education. There is no other place that can be construed as his residence, much less his home. He clearly intends to remain in the state and is in the state for purposes other than to get an education. Domicile is established. Yet all but one of the residency officers indicated that Carlos would be treated as an international student for both admission and tuition purposes. The finding was not a surprise. In discussions with residency officers that did not participate in the study, the general belief is that undocumented students are ineligible to establish their domicile in the state.

It is the opinion of this author that within the law, based on the concept of domicile which underlies the law, a student like Carlos Weisman can legitimately be assigned a classification of resident. Does this mean that all undocumented persons or those

evidence of the distinctions that can be made between groups of immigrants.

The issue is not simply an academic one. In the state of New York, undocumented students may be classified as residents within some, but not all, of the public institutions of higher education. In California, undocumented aliens were able to pay resident tuition until a higher court ruling, Regents v. Branford, invalidated the 1985 ruling in Leticia "A" et al. v. The Board of Regents of the University of California et al. An appeal is in process.

The coming months and years will see an increase in the amount of litigation and debate centered on immigration status and residency determination. Legal resolutions will be slow in coming and are likely to be contradictory. In the interim, students affected by their immediate circumstances will continue to present themselves as they seek to be classified as residents for tuition purposes. Those charged with making complex residency determinations can be well guided by the existing statutes, rules, and regulations if they view and interpret them in the light of the concept of domicile.

Suggested Changes to Improve Residency Determination

Additional recommendations that can improve the practice of residency determination and provide for better consistency in classifications across institutions within the state of Texas include:

continued, but in addition, the updates should periodically be published in a companion manual, perhaps employing a rule/comment/example format.

The terminology employed in the statutes, rules, and regulations should be better defined in a more inclusive glossary section. The residency manual should also be changed to avoid referring the reader from section to section.

Each section should be as self contained and clearly explained as possible. Throughout the responses given to questions during the interviews, the residency officers alluded both to the lack of clarity and the ambiguity of the residency terminology employed in the manual. They also had problems in understanding how to apply some of the statutes because the accompanying rules and regulations were segmented and awkward. While referring the reader from one section to another saves duplication of information and limits the size of the manual, it also increases the likelihood of errors and makes reading and interpreting the rules more difficult than necessary.

A standard residency questionnaire should be used at all public colleges and universities in the state.

During the original study, seven residency questionnaires from participating institutions were examined. While the questionnaires requested similar information, the formats of the questionnaires varied dramatically. One residency questionnaire consisted of only one side of one page and asked only 13 questions,

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