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Motions, Pleadings and Filings

United States District Court,
D. Kansas.
Kristen DAY, et al., Plaintiffs,
v.
Kathleen SEBELIUS, personally and in her official capacity as Governor of
Kansas, et al., Defendants.
No. 04-4085-RDR.

July 5, 2005.

Background: State university students and parents sued Governor of Kansas, Kansas officials, and state universities, challenging constitutionality, and legality under federal law, of statute allowing undocumented or illegal aliens to attend Kansas universities and pay resident or in-state tuition. Groups representing interests of Hispanics intervened. Defendants and intervenors moved to dismiss, and plaintiffs moved to dismiss intervenors.

Holdings: The District Court, Rogers, J., held that:
(1) intervenors were not required to show standing;
(2) Governor did not meet Ex parte Young exception to Eleventh Amendment immunity;
(3) students and parents lacked standing under federal statute prohibiting states from offering in-state tuition to illegal aliens;
(4) no private right of action was created by statute limiting illegal aliens' eligibility for higher education benefits based on residence; and
(5) students and parents lacked standing under Equal Protection Clause.
Defendants' and intervenors' motions granted; plaintiffs' motion denied.

West Headnotes

[1] Federal Civil Procedure k311
170Ak311 Most Cited Cases
Intervenors need not show standing. Fed.Rules Civ.Proc.Rule 24, 28 U.S.C.A.

[2] Associations k20(1)

41k20(1) Most Cited Cases
An organization must satisfy three requirements to have associational standing: (1) its members must otherwise have standing to sue in their own right; (2) the interests it seeks to protect must be germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

[3] Federal Civil Procedure k331
170Ak331 Most Cited Cases
Assuming that intervenors were required to show standing, groups representing interests of Hispanics were required to have only one member each with standing in order for groups to have standing to intervene in action challenging Kansas statute allowing illegal aliens to attend state universities. K.S.A. 76- 731a.

[4] Federal Civil Procedure k331
170Ak331 Most Cited Cases
Assuming that Hispanic groups were required to show standing in order to intervene in action challenging Kansas statute allowing illegal aliens to attend state universities, such groups, in demonstrating that they each had member with standing, could rely on members who had failed to comply with district court order requiring them to disclose their real names in instant litigation. K.S.A. 76-731a.

[5] Federal Courts k269
170Bk269 Most Cited Cases
Kansas Governor's generalized responsibility for enforcing laws of Kansas, set forth in state Constitution, was insufficient to establish her connection to statute allowing illegal aliens to attend state universities, as required to meet Ex parte Young exception to Eleventh Amendment immunity in action challenging constitutionality of such statute. U.S.C.A. Const.Amend. 11; K.S.A. Const. Art. 1, <section> 3; K.S.A. 76-731a.

[6] Federal Civil Procedure k103.2
170Ak103.2 Most Cited Cases

[6] Federal Civil Procedure k103.3
170Ak103.3 Most Cited Cases
There are three requirements to Article III standing: (1) injury in fact; (2) causation; and (3) redressability. U.S.C.A. Const. Art. 3, <section> 2, cl. 1
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[7] Federal Civil Procedure k103.2
170Ak103.2 Most Cited Cases
An injury in fact, required for standing, is an invasion of a legally protected interest that is: (1) concrete and particularized, and (2) actual or imminent, that is, not conjectural or hypothetical.

[8] Federal Civil Procedure k103.3
170Ak103.3 Most Cited Cases
Causation, required for standing, requires that the injury is fairly traceable to the defendant's conduct, rather than some third party not before the court.

[9] Federal Civil Procedure k103.3
170Ak103.3 Most Cited Cases
Redressability, required for standing, means that it is likely that a favorable court decision will redress the injury of the plaintiff.

[10] Federal Civil Procedure k103.2
170Ak103.2 Most Cited Cases
If a party satisfies the minimal constitutional requirements for standing, then a court may still deny standing for prudential reasons, which constitute a judicially created set of principles that, like constitutional standing, places limits on the class of persons who may invoke the courts' decisional and remedial powers.

[11] Federal Civil Procedure k103.2
170Ak103.2 Most Cited Cases
The burden of establishing standing rests on the party invoking federal jurisdiction, and the evidence needed to carry that burden depends on the stage of the litigation.

[12] Federal Civil Procedure k103.2
170Ak103.2 Most Cited Cases

[12] Federal Civil Procedure k2467
170Ak2467 Most Cited Cases
At the summary judgment stage when standing is at issue, a plaintiff must demonstrate that there exists no genuine issue of material fact as to justiciability, and mere allegations of injury, causation, and redressability are not sufficient. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[13] Colleges and Universities k10
81k10 Most Cited Cases
State university students and parents paying out-of-state tuition did not suffer injury in fact as result of, and thus lacked standing to challenge,

Kansas statute allowing illegal aliens to attend state universities, as, inter alia, violating federal statute prohibiting states from offering in-state tuition to illegal aliens, in that students and parents were not subject to statute, they paid out-of-state tuition both before and after passage of statute, and they had no "property right" in in-state tuition. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, <section> 411, 8 U.S.C.A. <section> 1621; K.S.A. 76-731a.

[14] Federal Civil Procedure k103.2
170Ak103.2 Most Cited Cases
Injury in fact, required for standing, must be concrete and imminent.

[15] Federal Civil Procedure k103.2
170Ak103.2 Most Cited Cases
Hypothetical or conjectural harm is not sufficient to constitute injury in fact, as required for standing.

[16] Federal Civil Procedure k103.2
170Ak103.2 Most Cited Cases
When a law does not apply to a party, that party has no invasion of a legally protected interest, and thus does not suffer an injury in fact, as required for standing.

[17] Colleges and Universities k10
81k10 Most Cited Cases
State university students and parents paying out-of-state tuition failed to demonstrate redressability, and thus lacked standing to challenge Kansas statute allowing illegal aliens to attend state universities, in that they would not receive any benefit if statute were found to be preempted by, or in violation of, federal law. K.S.A. 76-731a.

[18] Action k3
13k3 Most Cited Cases
The test for determining whether a private right of action exists under a statute is whether Congress, expressly or by implication, intended to create a private right of action.

[19] Action k3
13k3 Most Cited Cases
No private right of action was created by the statute limiting illegal aliens' eligibility for higher education benefits based on residence. Omnibus

Consolidated Appropriations Act, 1997, Div. C, <section> 505, 8 U.S.C.A. <section> 1623.

[20] Constitutional Law k211(1)
92k211(1) Most Cited Cases
Under the Equal Protection Clause, the state must treat similarly situated individuals similarly, in the absence of an adequate reason to distinguish between them. U.S.C.A. Const.Amend. 14.

[21] Constitutional Law k48(6)
92k48(6) Most Cited Cases
For purpose of the Equal Protection Clause, as a general rule, legislatures are presumed to have acted within their constitutional power despite the fact, in practice, that their laws result in some inequality. U.S.C.A. Const.Amend. 14.

[22] Constitutional Law k46(2)
92k46(2) Most Cited Cases
District court would consider as-applied equal protection challenge to statute, even though plaintiffs had alleged only facial equal protection challenge in their complaint, in that defendants thoroughly responded to as-applied claim, and facial challenge would logically include as-applied challenge. U.S.C.A. Const.Amend. 14.

[23] Constitutional Law k42.2(2)
92k42.2(2) Most Cited Cases
State university students and parents paying out-of-state tuition did not suffer injury in fact as result of, and thus lacked standing to bring equal protection challenge against, Kansas statute allowing illegal aliens to attend state universities, in that statute did not preclude plaintiff students' admission to universities, statute did not deny them any benefit, and students made no showing that statute increased tuition rates in Kansas. U.S.C.A. Const.Amend. 14; K.S.A. 76-731a.

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CA, J. Eugene Balloun, Shook, Hardy & Bacon L.L.P., Overland Park, KS, for
Defendants.

MEMORANDUM AND ORDER

ROGERS, District Judge.

This is an action brought by the plaintiffs challenging K.S.A. 76-731a
(formerly known as House Bill 2145), which became law on July 1, 2004.
Plaintiffs contend that K.S.A. 76-731a unlawfully and unfairly allows
undocumented or illegal aliens to attend Kansas universities and pay resident
or in-state tuition. [FN1] Plaintiffs are either students at Kansas regents
schools or parents of those students. The students are United States citizens
who have been classified as non-residents of Kansas for tuition purposes at
their respective schools. The defendants are the Governor of Kansas, the
members of the Board of Regents, and the registrars of the University of
Kansas, Kansas State University and Emporia State University. Two groups,
Kansas League of United Latin American Citizens (KLULAC) and Hispanic American
Leadership Organization, Kansas State Chapter (HALO), have been allowed to
intervene as defendants in this action.

FN1. The statute in general provides that any individual who attended an
accredited Kansas high school for three years and either graduated or
earned a Kansas general education development certificate, and meets the
law's other criteria, is eligible to pay tuition rates equivalent to
Kansas resident rates at regents schools. Although plaintiffs contend
that the statute applies only to undocumented or illegal aliens, the
statute appears to apply to all, with a few minor exceptions, who meet
the designated criteria "regardless of whether the person is or is not a
citizen of the United States of America." K.S.A. 76-731a(b)(2).

In their complaint, plaintiffs object to the ability of undocumented or
illegal aliens [FN2] to avail themselves of K.S.A. 76-731a. Plaintiffs seek

injunctive relief and *1026 declaratory relief. They seek injunctive relief enjoining the defendants from enforcing K.S.A. 76-731a as it applies to "aliens who are unlawfully present in the United States." They also ask the court to enjoin the defendants from discriminating between students who have been classified as legal residents of Kansas and them. Finally, they ask the court to declare that K.S.A. 76-731a violates federal law and is unconstitutional as it applies to "aliens who are unlawfully present in the United States."

FN2. All parties have referred to individuals who are not United States citizens who have entered this country unlawfully without documentation as "undocumented" or "illegal" aliens. The court intends to use these terms interchangeably during the course of this opinion.

On May 10, 2005 the court held a hearing in this matter. The following motions were considered at that time: (1) defendants' motion to dismiss; (2) intervenors' motion to dismiss; and (3) plaintiffs' motion to dismiss intervenor-defendants. Prior to that hearing, the court had conducted several telephone conferences with the parties. The parties were advised that all evidence on the issues in this case should be presented prior to the May 10th hearing or at that hearing. All parties were in agreement that the hearing on May 10th would constitute the final hearing in this matter. The court subsequently received materials outside the pleadings from all parties. Under these circumstances, the court shall convert the pending motions to dismiss to motions for summary judgment. See Burnham v. Humphrey Hospitality Reit Trust, Inc., 403 F.3d 709, 713 (10th Cir.2005); Alexander v. Oklahoma, 382 F.3d 1206, 1214 (10th Cir.2004). Having considered all of the evidence presented and heard extensive argument from the parties, the court is now prepared to rule.

This litigation arises from the passage of two laws by Congress in 1996 restricting immigration and the status of immigrants: the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

(IIRIRA). These laws were passed by the same Congress only about six weeks apart. They were passed in part in response to the Supreme Court's decisions in Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (Texas statute which denies free education to alien children violates Equal Protection Clause) and Toll v. Moreno, 458 U.S. 1, 102 S.Ct. 2977, 73 L.Ed.2d 563 (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).

The Kansas legislature passed the instant statute in 2004. The court is aware of least seven other states that have passed legislation to provide in-state tuition rates to illegal aliens: California, Illinois, New York, Oklahoma, Texas, Utah and Washington. The legislature of Maryland passed legislation to allow in-state tuition to illegal aliens, but the legislation was vetoed by the governor. At least two states have specifically passed statutes that do not allow illegal aliens to gain resident tuition status: Alaska and Mississippi. The legislature of Virginia passed legislation prohibiting illegal aliens from receiving resident tuition, but the legislation was vetoed by the governor. The court believes this is the first case to challenge the type of legislation passed by Kansas.

Plaintiffs' complaint consists of seven claims for relief. The court shall spend some time analyzing the claims made by the plaintiffs due to arguments that have been made about the confusing nature of the claims.

In Count 1, which is entitled "Violation of 8 U.S.C. <section> 1621," plaintiffs contend that K.S.A. 76-731a violates 8 U.S.C. <section> 1621. [FN3] *1027 According to plaintiffs, <section> 1621 prohibits any state from offering any post-secondary educational benefit, including instate tuition, to illegal aliens. Plaintiffs further allege that K.S.A. 76-731a does not meet the statutory loophole set forth in 8 U.S.C. <section> 1621(d), which allows states under certain circumstances to provide eligibility for illegal aliens to state benefits, because it does not contain the express statutory language required by federal law.

FN3. This statute provides as follows:

(a) In general
Notwithstanding any other provision of law and except as provided in
subsections (b) and (d) of this section, an alien who is not--
(1) a qualified alien (as defined in section 1641 of this title),
(2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C.A.
<section> 1101 et seq.], or
(3) an alien who is paroled into the United States under section
212(d)(5) of such Act [8 U.S.C.A. <section> 1182(d)(5)] for less than
one year, is not eligible for any State or local public benefit (as
defined in subsection (c) of this section).
(b) Exceptions
Subsection (a) of this section shall not apply with respect to the
following State or local public benefits: (1) Assistance for health care
items and services that are necessary for the treatment of an emergency
medical condition (as defined in section 1396b(v)(3) of Title 42) of the
alien involved and are not related to an organ transplant procedure.
(2) Short-term, non-cash, in-kind emergency disaster relief.
(3) Public health assistance for immunizations with respect to
immunizable diseases and for testing and treatment of symptoms of
communicable diseases whether or not such symptoms are caused by a
communicable disease.
(4) Programs, services, or assistance (such as soup kitchens, crisis
counseling and intervention, and short-term shelter) specified by the
Attorney General, in the Attorney General's sole and unreviewable
discretion after consultation with appropriate Federal agencies and
departments, which (A) deliver in-kind services at the community level,
including through public or private nonprofit agencies; (B) do not
condition the provision of assistance, the amount of assistance
provided, or the cost of assistance provided on the individual
recipient's income or resources; and (C) are necessary for the
protection of life or safety.
(c) "State or local public benefit" defined
(1) Except as provided in paragraphs (2) and (3), for purposes of this
subchapter the term "State or local public benefit" means--
(A) any grant, contract, loan, professional license, or commercial
license provided by an agency of a State or local government or by
appropriated funds of a State or local government; and
(B)
(2) Such term shall not apply--

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99- 239 or 99-658 (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C.A. <section> 1101 et seq.] qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Secretary of State, after consultation with the Attorney General;

or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

(3) Such term does not include any Federal public benefit under section 1611(c) of this title.

(d) State authority to provide for eligibility of illegal aliens for State and local public benefits

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

In Count 2, which is entitled "Violation of 8 U.S.C. <section> 1623," plaintiffs assert that K.S.A. 76-731a violates 8 U.S.C. <section> 1623(a). [FN4] According to plaintiffs, <section> 1623 *1028 prohibits any state from providing any postsecondary education benefit, including in-state tuition, to an illegal alien unless a United States citizen is eligible for the same benefit. Plaintiffs further assert that <section> 1623 eliminated the application of 8 U.S.C. <section> 1621(d).

FN4. This portion of the statute provides as follows:

(a) In general

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

In Count 3, which is entitled "Violation of Regulations Governing Alien Students," plaintiffs contend that K.S.A. 76-731a violates the comprehensive regulatory scheme enacted by the federal government to govern the admission of nonimmigrant aliens to the United States for the purpose of enrolling them as students at postsecondary educational institutions. They specifically point to the Student and Exchange Visitor Information System (SEVIS), a comprehensive computerized system designed to track international students and exchange students. Plaintiffs contend that K.S.A. 76-731a frustrates this federal purpose by allowing aliens to illegally pose as students at Kansas institutions of higher education while remaining outside the SEVIS registration system.

In Count 4, which is entitled "Preemption," plaintiffs claim that K.S.A. 76-731a is preempted by the federal regulation of immigration. Plaintiffs suggest that Congress clearly intended to "occupy the field" in the area of regulating the provision of public benefits to aliens without a lawful immigration status. They assert: "The power to regulate immigration is unquestionably an exclusively federal power, and any state statute that regulates immigration is unconstitutional and therefore proscribed.... States can neither add to nor take from conditions lawfully imposed upon the admission or residence of aliens in the United States.... [K.S.A. 76-731a] is preempted because it is impossible for a person who is an illegal alien or otherwise present in the United States to both receive postsecondary education under [K.S.A. 76-731a], and to comply with federal immigration law."

In Count 5, which is entitled "Creation of Residence Status Contrary to

Federal Law," plaintiffs allege that K.S.A. 76-731a creates residence status
for illegal aliens contrary to federal law. Plaintiffs assert: "Congress has
created a legal disability under federal law that renders illegal aliens
incapable of claiming bona fide legal domicile in Kansas, notwithstanding the
fact of physical presence or a subjective 'intent' to remain indefinitely in
the jurisdiction." They further allege: "None of the members of the class of
alien beneficiaries of [K.S.A. 76-731a] who are illegal aliens possesses
federal authorization to remain in the United States for even the shortest
period of time, and therefore cannot, as a matter of law acquire or possess
the requisite intent to be a legal resident or domiciliary of Kansas. Kansas
may not deem such non-citizens to possess such intent, nor alternatively waive
such intent by exercise of its legislative powers." By doing so, plaintiffs
argue that K.S.A. 76-731a violates the comprehensiv