

Because I am collecting instances of these students being outed or outing themselves, I have posted dozens of stories, website entries, media materials and the like that cover this issue or where students are revealed. (On a side note, I do not blog or enter the blogosphere often, but this is an area where the students have done so, so I have included a number of these resources. Some of them are evanescent and the links are not always “hot,” but I include them to give readers a sense of where the future is going in this field.)

I will also post these developments and materials on my website, which I will update periodically. As always, I would appreciate receiving reference materials from anyone who comes across DREAM Act articles, state DREAM Act statutes and the like, and materials about such students. Please share them with me and I will keep and post them. I have information that the Senate will actually try the DREAM Act again soon, and flog that dead horse; these poor students are very frustrated and do not understand why the adults cannot get it enacted. I wrote about this recently:

<http://www.chron.com/disp/story.mpl/editorial/outlook/7508464.html>

At the end of this piece, I have also posted a number of scholarly articles and reports on the subject. Considering that there are only 50,000-60,000 of these students, there is a remarkable amount of attention on the subject.

Your hardworking Research Assistant,

Michael

Michael A. Olivas

DREAM Act POSTSCRIPT:

Dreams Deferred: Deferred Action, Discretion, and the Vexing Case(s) of DREAM Act Students

(work in progress for 2012 William & Mary Institute of Bill of Rights Law symposium, “Noncitizen Participation in the American Polity”)

In Fall, 2010, at the urging of Latino groups, and to jump start Comprehensive Immigration Reform, Sen. Harry Reid (D-NV) changed his mind and brought forward a bill. Facing a substantial challenge in his reelection to the U.S. Senate, he opted for a down payment approach, with DREAM being the first building block toward future comprehensive reforms, and AGJOBS legislation as the likely next step. The DREAM Act became an Amendment to a Department of Defense bill, S. 3454, the “National Defense Authorization Act for Fiscal Year

2011.” He also added two other amendments: a repeal of Don't Ask, Don't Tell (DADT), regarding the enlistment of gays and lesbian soldiers in the military, and an overhaul of the "secret hold" tradition in the Senate, to require public-disclosure moving legislative actions forward. On September 21, 2010, the vote became hostage to the DADT controversy, and the Republicans voted as a bloc, rather than accord President Obama and the Democrats a victory on this issue; the cloture motion was rejected 43-56 (with 1 absence). Sen. Reid voted No after it was clear that he did not have the required 60 votes. (The No vote for his own motion would allow him to call for reconsideration.) Even Republican supporters of the legislation in the 2007 vote did not support the overall package in the 2010 effort, and two Democrats crossed over to vote against it as well. As before, the DREAM Act was tantalizingly close, and followed many public stories about undocumented college students in the media; these continued through the lame-duck session, where once again the votes were not there.

The “third time” may be the mythical “charm,” but not in this subject matter. In the final days of the same Congress, the greatest disappointment occurred. On December 8, 2010, the House attached the DREAM Act (H.R. 6497) to another moving House bill, H.R. 5281, and passed it: 216 to 198. This was the first time that the House had ever voted upon a version of the DREAM Act since its introduction in 2001. Initially, the Senate was scheduled to take a procedural vote on its version of DREAM (S. 3992), but instead, Senate Democrats voted 59-40 to withdraw S. 3992 and focus on the bill passed on December 8 by the House. On December 18, 2010, the Senate took up the Cloture Motion (technically, the Motion to Invoke Cloture on the Motion to Concur in the House Amendment to the Senate Amendment No. 3 to H.R. 5281, the Removal Clarification Act of 2010). Democratic backers of the legislation fell short of the 60 votes required to move the DREAM Act legislation forward, with a vote of 55-41 in favor. Five

Democrats -- Sens. Max Baucus (Mont.), Kay Hagan (N.C.), Ben Nelson (Neb.), Mark Pryor (Ark.) and Jon Tester (Mont.) -- joined most Republicans in voting against the measure. Three Republicans, Sens. Bob Bennett (Utah), Richard Lugar (Ind.), and Lisa Murkowski (Alaska), voted yes. Four members--Sens. Jim Bunning (R-Ky.), Judd Gregg (R-N.H.), Orrin Hatch (R-Utah), and Joe Manchin (D-W.Va.)--were not present for the vote. The ultimate irony was that in a separate vote, the Don't Ask, Don't Tell policy was repealed, and that Sen. Hatch, who introduced the original legislation a decade earlier, did not vote for the DREAM Act.

State Enacts New Law According Resident Tuition: Maryland

In 2011, the action at the state level increased, and a number of developments have occurred since the December, 2010 Congressional failure. In perhaps the most important action, Maryland passed a resident tuition bill, which the governor has indicated he will sign (as of this writing, May 5, 2011, he has not yet done so). Before he even signed it, a statewide ballot initiative to repeal it was undertaken. This bill, if it becomes law, will be the first to allow the undocumented who can meet the state's durational requirement to enroll solely in public two year institutions as residents, and then they will be allowed to transfer as resident students to senior institutions if they are admitted. This provision became incorporated into the law, in part as a reaction to a lawsuit challenging the Montgomery College (MD) In-County Tuition Policy, which permitted undocumented students to pay in-district tuition, the county equivalent of resident tuition. (The Maryland litigation, *Lee v. Montgomery College*, would be mooted by the state statute.) This legislation will make Maryland the thirteenth state to enact such a policy, although Oklahoma rescinded its statute.

False Start: NJ Community College Enacts Policy, Rescinds It Two Months Later

At County College of Morris, a two year community college in New Jersey, the Board of trustees followed the same path in February, 2011, enacting an in-district tuition policy. However, no student enrolled under its provisions, as the Board rescinded the policy within a few weeks, after being threatened with a suit by Judicial Watch, the same group that had filed the Maryland College suit. The New Jersey policy would have allowed any undocumented student who was resident in the district to establish residency, provided they had graduated from a high school in the United States and had entered the country before the age of 16. For full-time students, the shift had the effect of increasing tuition from \$3,450 to \$9,780 per year. Although two year colleges in Houston and Dallas had enacted policies before 2001 to enroll these students at resident in-district rates, these institutions in Maryland and New Jersey were the first two year community colleges to enact formal resident policies, however short-lived, since the Texas statute was signed into law in 2001, extending residency to all the state's public colleges. It remains to be seen whether individual two year colleges can invoke §§ 1621 and 1623 as the auspices to implement resident tuition, absent a state statute enabling them to do so. Given the governance structure of most public community college districts, virtually all two year colleges operate at sub-state levels in a system of regional districts, making it unclear whether or not this status is a "State and local public" matter as anticipated by § 1621, or whether it would provide eligibility "on the basis of residence within a State (or a political subdivision) for any postsecondary education" as governed by § 1623. More to the point, § 1621 requires a state to pass an enabling statute to provide resident tuition: "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.” (emphasis added) The new Maryland bill is precisely what is needed if the state’s two year colleges are to admit and extend resident tuition to the undocumented who reside in those districts. Nonetheless, even before the governor had signed the bill, opponents began a signature campaign to undertake a state ballot initiative that would repeal the law:

http://vw.vrvm.com/heraldmail/db_9577/contentdetail.htm?contentguid=qtY98QX9&storycount=29&detailindex=1&pn=&ps.

Other States Enacting Resident Tuition Bills in One Chamber: CO, OR, CA

In two states, Colorado (SB 126) and Oregon (SB 742), resident tuition bills have passed both Senates. In April, 2011, the Colorado House version died in Committee. As the news stories below indicate, bills were introduced and are at various stages of the legislative process in Connecticut, Florida, Iowa, Massachusetts, Mississippi, Missouri, New York (which already has such a law on the books), and Rhode Island. Ancillary legislation that would, if passed, affect tuition, resident status, financial aid, and state-sponsored scholarships has been introduced in Arizona, California, Connecticut, Mississippi, New Jersey, and New York. In May, 2011, the California bill (AB 130) passed the State Assembly; if signed into law, it would allow AB 540 students to receive non-federal financial assistance.

States Considering Repeal of Existing Statutes, Restrictions on Resident Tuition or Enrollment, Other Restrictions

In twenty states, legislators are considering various forms of legislation that would restrict access for the undocumented, either by repealing existing statutes that accord status (such as in California, Kansas, Nebraska, Texas, Utah, Washington, and Wisconsin), by proposing restrictions on resident tuition, or by limiting enrollment by other restrictions. These states include Alabama, Arkansas, Arizona, California, Georgia, Indiana, Kansas, Kentucky, Maryland,

Mississippi, Montana, Nebraska, North Carolina, Oklahoma, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. A complete and regularly-updated list of these actions can be found at <http://www.nilc.org/immlawpolicy/DREAM/index.htm>.

Litigation:

In Nebraska, the challenge to the existing state statute that accords residency tuition to the undocumented, *Mannschreck v Clare*, was ordered to be dismissed by the state court on December 27, 2010, on the grounds that the plaintiffs did not have standing to bring suit. As noted above, there was an effort by the plaintiffs (LB 657) to get the Nebraska Legislature to repeal the statute, but time ran out on the effort. Litigation was brought in Maryland against the first effort by a community college to enact its own policy, but that was mooted (or will be, if it is signed into law) by the Legislature's subsequent enactment of the authorizing statute. The threat of bringing a similar suit against the community college district in New Jersey caused the Trustees to rescind their two-month old policy. The only remaining residency case in a state court concerning the undocumented is *IRCOT v Texas*, where motions to dismiss have been filed in April, 2011. The case was also considered in federal court, but was removed to state court. 706 F. Supp. 2d 760 (S.D. Tex. 2010) the original defendants included several senior state institutions, including the University of Houston, but all were dismissed except the Lone Star College system, a two year, multi-campus district in the larger Houston area. The plaintiff Immigration Reform Coalition of Texas originally filed a state taxpayer challenge in 2009 to enjoin Texas' state residency tuition law and administration of tuition grants for undocumented immigrant students. Unlike the Kansas case (*Day*), this was not a federal preemption challenge. The case was removed by the then-defendants to federal court but then was remanded

to the Houston state district court, where it is as of May 1, 2011. I predict it will be dismissed, even with the loosey-goosey taxpayer status in Texas.

Strum v. SUNY is also in state court, in New York, and involves New York State Education Law, Section 355(2)(h)(8), which is the state statute where residency for the undocumented is located. The plaintiff Raquel Balsam, a US citizen from New Jersey, attended a religious high school in Brooklyn, New York, and then attended Binghamton University, a campus of the State University of New York, where she was determined to have been a non-resident, out-of-state student; as a result, she was charged tuition at a level almost twice the amount as were in-state students. Several years after graduating, she discovered that the residency statute would have applied to her, as she commuted to high school for the required two years and applied to SUNY within five years of her graduation. The statute was complex, and had amended three different existing statutes, and had been drafted by its sponsor to accommodate the special residence situation of the undocumented. Except in densely-populated cities such as the New York City metropolitan area, students do not necessarily follow the traditional pattern of living and attending school in the same state, which, in her case, would have allowed her to claim residency both in New Jersey (due to her domicile and that of her parents, while she was a minor) and in New York, which used high school graduation as the determinant of residency. Many students are able to claim multiple residences due to their special circumstances or more likely, their parents' special circumstances, and some are able to claim none, due to the important differences between domicile (one's true, permanent, fixed abode) and residence (often, a durational requirement rather than a function of intent). But these plaintiffs are arguing in their case that their SUNY tuition was more costly than the bargain they made, and that they were erroneously overcharged. They are seeking certification to bring a class

action, while SUNY has averred that any exceptions available to New Jersey should have been brought to their attention. While this is not a challenge to the underlying statute, it is a challenge as applied to such non-domiciliaries who are charged non-resident tuition.

In another example of how these residency laws play out, attention has been paid to the California undocumented residency statute that was litigated in *Martinez v. UC Regents*, 50 Cal. 4th 1277, 241 P. 3d 855, 117 Cal. Rptr. 3d 359 (2010). Studies showed during the trial, completed in November, 2010, when the California Supreme Court upheld the statute, that almost 4 of 5 of the hundreds of students who used the provision were actually US citizens who attended high school in California, left the state to attend college elsewhere, and returned for graduate or professional school and reclaimed their residence for the lower tuition. There is also evidence that students in California who wish to claim in state residency also marry other residents, so as to render themselves as domiciled in the state or as independent from their parents. There is even a website (www.WhyPayTuition.com) that serves as what the *New York Times* characterized as a “matchmaking site for couples seeking to marry in order to gain in-state tuition privileges and other savings that come from being classified as independent.”

[In the remainder of this paper, I will examine the phenomenon of the many DREAM Act students whose legal status was either made known through unrelated acts (such as traffic stops or other civil matters) or through self-outing acts of publicity, some of which stopped removal or deportation actions, through the use of various discretionary administrative actions by federal immigration authorities, particularly the use of Deferred Action. I will review the features and uses of DA, the several uses to which the Bush and Obama administrations have employed DA, and the implications of this default-policy.]

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