

A Rebuttal to FAIR

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DAN STEIN OF FAIR [Federation for American Immigration Reform] recently stated in this magazine ["Controversy," April 2002] that undocumented college students should not receive residency status or even be enrolled in college. He got it wrong. I am also responding to some legislators' fears that any action on this issue is foreclosed, due to federal statutes that appear to prevent states from enacting residency for undocumented persons who might be living in their states. I believe the federal law "bar" is not applicable or preclusive. This is why:

- **In-state residency is entirely a state-determined benefit or status.** There are no federal funds tied to this status (as in the case of federal highway programs, where accepting the dollars obligates the state to abide by federal speed limits, for instance). In the one instance when this matter was considered by the U.S. Supreme Court (the Maryland case of *Toll v. Moreno*, where the question was whether G-4 non-immigrants could establish postsecondary residency in the state for in-state tuition purposes), the Court certified this question to the Maryland State Supreme Court. The Maryland Court held that G-4 aliens were not precluded from doing so, and the U.S. Supreme Court then deferred to this finding, and adopted it into its ruling on the issue. Had this been a matter of federal law, the U.S. Supreme Court would have decided this issue itself, but it left determination of a state benefit to a state court.

- **The provisions of IIRIRA, the 1996 federal statute, do not preclude states' abilities to enact residency statutes for the undocumented.** For example, Sec. 505, 8 U.S.C. §1623 reads: "An alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a state (or 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." Congress does not have the authority to regulate state benefits, and the Maryland case established this in the area of postsecondary residency/domicile issues. But if Congress *does* have such authority, §1623 does not preclude any state from enacting undocumented student legislation, due to the word "unless." A flat bar would not include such a modifier. The only way to read this convoluted language is: State A cannot give any more consideration to an undocumented student than to a nonresident student from state B. No plan I

have seen does this; indeed, several of the plans now require three years residency for the undocumented, as well as state high school attendance—neither of which is required for citizen non-residents. This is the only plausible reading of §1623.

- **Dan Stein misconstrues what constitutes a benefit.** In §1623, the term "benefit" appears to mean dollars ("amount, duration, and scope"), as if prohibiting state scholarships or fellowships. However, the benefit actually being conferred by residency statutes is the right to be considered for in-state resident status. This is a non-monetary benefit, and this definition lends support to my reading of the statute.

- **Some, including Dan Stein, have incorrectly read §1621 to prohibit residency reclassification.** That provision reads, in pertinent part: "[An undocumented alien]...is not eligible for any state or local public benefit (as defined in subsection (c) of this section." But a careful reading of subsection (c) confirms my interpretation, by referencing payments. It prohibits "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided [emphasis added] to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government."

Thus, the benefit of being reclassified as a resident student in a state does *not* trigger any of the prohibitions. Sec. (1) (B)'s reference to "postsecondary education" is modified by "or any other similar benefit for which payments or assistance are provided...by an agency, a state or local government or by appropriated funds of a state or local government." This clearly indicates that what is proscribed is money or appropriated funds, not the "status benefits" confirmed by the right to declare state residency. Further, (d) provides that states may provide otherwise-prohibited public benefits "only through the enactment of a state law after August 22, 1996 which affirmatively provides for such eligibility." This must allow states to do as I have urged they do.

Any fair reading of this statute refutes Mr. Stein's position on this matter. Fortunately, a number of states have seen through the FAIR extremist position and have enacted laws to allow these few students—who have broken no law themselves—to enroll in college. **U**



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States can enact residency statutes for the undocumented, as evidenced by a fair reading of §1623.