

CRS Report for Congress

Unauthorized Alien Students: Issues and “DREAM Act” Legislation

January 30, 2007

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Prepared for Members and
Committees of Congress

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Summary

Illegal immigration and the unauthorized alien population in the United States are key issues in the current debate over immigration reform. One group of unauthorized aliens that is of particular interest to Congress is composed of students who were brought to the United States as children by their parents or other adults. Unauthorized aliens in the United States are able to receive free public education through high school. Obtaining higher education is more difficult for several reasons. Among them, a provision enacted in 1996 prohibits states from granting unauthorized aliens certain postsecondary educational benefits on the basis of state residence, unless equal benefits are made available to all U.S. citizens. This prohibition is commonly understood to apply to the granting of “in-state” residency status for tuition purposes. Unauthorized alien students also are not eligible for federal student financial aid. More broadly, as unauthorized aliens, they are not legally allowed to work in the United States and are subject to being removed from the country.

Multiple bills have been introduced in recent Congresses to address the unauthorized student population by taking the general approach of repealing the 1996 provision and enabling some unauthorized alien students to become U.S. legal permanent residents (LPRs) through an immigration procedure known as *cancellation of removal*. These bills are commonly referred to as the DREAM Act. While there are other options for addressing the unauthorized student population, this report deals exclusively with the DREAM Act approach in light of the widespread congressional interest in this approach. Two similar DREAM Act bills were introduced in the 109th Congress (S. 2075 and H.R. 5131). These bills would have repealed the 1996 provision and enabled eligible unauthorized students to adjust to LPR status through a two-stage process. Aliens granted cancellation of removal under the bills would have been adjusted initially to *conditional* permanent resident status. Such conditional status would have been valid for six years and would have been subject to termination. To have the condition removed and become full-fledged LPRs, the aliens would have had to meet additional requirements.

While neither S. 2075 or H.R. 5131 saw any action, S. 2075 was incorporated into the Comprehensive Immigration Reform Act of 2006 (S. 2611), which passed the Senate in May 2006. The 110th Congress may consider DREAM Act legislation, whether as a free-standing bill or part of a larger immigration reform measure.

Those who favor repealing the 1996 provision and granting LPR status to unauthorized alien students argue that many of these students were brought into the United States at a very young age and should not be held responsible for the decision to enter the country illegally. Those who oppose making these students eligible for in-state tuition or legal status emphasize that they and their families are in the United States illegally and should be removed from the country, not granted benefits.

This report will be updated as legislative developments occur.

Contents

Introduction	1
Estimates of the Unauthorized Alien Student Population	2
Higher Education Benefits and Immigration Status	2
1996 Provision	3
Action in the 109 th Congress	4
Action in the 110 th Congress	6
Pro/Con Arguments	6

Unauthorized Alien Students: Issues and “DREAM Act” Legislation

Introduction

A key issue in the current debate about immigration reform is how to address the resident unauthorized alien population, estimated at more than 11 million today.¹ While often described as a whole, this population is not monolithic and can be divided into any number of subpopulations based on different characteristics. One subpopulation of particular interest to Congress consists of unauthorized aliens who, as children, were brought to live in the United States by their parents or other adults. While in the United States, these children are able to receive free public education through high school.²

Many unauthorized aliens who graduate from high school and want to attend college, however, face various obstacles. Among these, a provision enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)³ discourages states and localities from granting unauthorized aliens certain “postsecondary education benefits.” More broadly, as unauthorized aliens, they are unable to work legally and are subject to removal from the United States.⁴

In recent years, multiple bills have been introduced in Congress to provide relief to unauthorized alien students by repealing the 1996 provision and enabling certain unauthorized alien students to adjust to legal permanent resident (LPR) status in the United States. In the 107th and 108th Congresses, the Senate Judiciary Committee reported bills of this type, known as the Development, Relief, and Education for Alien Minors Act, or the DREAM Act. In this report, following common usage, the term “DREAM Act” is used to refer to bills of this type whether or not they carry that

¹ For estimates of the unauthorized alien population in the United States in 2005 and 2006, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

² For a discussion of the legal basis for the provision of free public education, see CRS Report RS22500, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, by Jody Feder.

³ IIRIRA is Division C of P.L. 104-208, Sept. 30, 1996.

⁴ Unauthorized alien students are distinct from a group commonly referred to as foreign students. Like unauthorized alien students, foreign students are foreign nationals. Unlike unauthorized alien students, however, foreign students enter the United States legally on nonimmigrant (temporary) visas in order to study at U.S. institutions. See CRS Report RL31146, *Foreign Students in the United States: Policies and Legislation*, by Chad C. Haddal.

name. DREAM Act bills were introduced in the 109th Congress, one of which was incorporated into the immigration reform bill passed by the Senate. The 110th Congress may consider DREAM Act legislation.

Estimates of the Unauthorized Alien Student Population

As discussed below, versions of the DREAM Act introduced in the 109th Congress would have enabled certain unauthorized alien students to obtain LPR status in the United States through a two-stage process. Requirements to obtain conditional LPR status under these bills included residence of at least five years in the United States and a high school diploma (or the equivalent) or admission to an institution of higher education in the United States. Requirements to have the condition removed and thereby become full-fledged LPRs included acquisition of a degree from an institution of higher education in the United States, completion of at least two years in a bachelor's or higher degree program, or service in the uniformed services for at least two years. In 2003, using data from the March 2000, March 2001, and March 2002 Current Population Surveys, Census 2000, and supplementary research, Jeffrey S. Passel of the Pew Hispanic Center made estimates of the number of potential DREAM Act beneficiaries.⁵ According to his analysis, each year roughly 65,000 undocumented immigrants graduate from high school who have lived in the United States for at least five years. Passel further estimated as part of his 2003 analysis that there were about 7,000 to 13,000 unauthorized aliens enrolled in *public* colleges and universities in the United States who had lived in the United States for at least five years and graduated from U.S. high schools.

Higher Education Benefits and Immigration Status

Unauthorized aliens are neither entitled to nor prohibited from admission to postsecondary educational institutions in the United States. To gain entrance to these institutions, these students must meet the same requirements as any other student, which vary depending on the institution and may include possessing a high school diploma, passing entrance exams, and surpassing a high school grade point average (GPA) threshold. Although admissions applications for most colleges and universities request that students provide their Social Security number, this information typically is not required for admission.

Even if they are able to gain admission, however, unauthorized alien students often find it difficult, if not impossible, to pay for higher education. Under the Higher Education Act (HEA) of 1965, as amended, they are ineligible for federal

⁵ Unpublished work by Passel, Oct. 21, 2003 (on file with CRS).

financial aid.⁶ In most instances, unauthorized alien students are likewise ineligible for state financial aid. Furthermore, as explained in the next section, they also may be ineligible for in-state tuition.

1996 Provision

Section 505 of IIRIRA places restrictions on state provision of educational benefits to unauthorized aliens. It directs that an unauthorized alien

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.

There is disagreement about the meaning of this provision, and no authoritative guidance is available in either congressional report language or federal regulations.⁷ The conference report on the bill containing IIRIRA did not explain §505. (A conference report on a predecessor IIRIRA bill, which contained a section identical to §505, described the section as “provid[ing] that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education.”)⁸ Some interested parties have argued that Congress exceeded its authority in §505 by legislating on how states can dispense state benefits.

Although §505 does not refer explicitly to the granting of “in-state” residency status for tuition purposes and some question whether it even covers in-state tuition, the debate surrounding §505 has focused on the provision of in-state tuition rates to unauthorized aliens. A key issue in the current debate is whether it is possible to grant in-state tuition to unauthorized students (and not to all citizens) without violating §505. Various states have attempted to do this. For example, a California law passed in 2001 makes unauthorized aliens eligible for in-state tuition at state community colleges and California State University campuses.⁹ The measure, however, bases eligibility on criteria that do not explicitly include state residency. To qualify for in-state tuition, a student must have attended high school in California for at least three years and graduated. An unauthorized alien student is also required to file an affidavit stating that he or she has filed an application to legalize his or her

⁶ The HEA is P.L. 89-329, Nov. 8, 1965, 20 U.S.C. §1001 *et seq.* Section 484(a)(5) sets forth immigration-related eligibility requirements for federal student financial aid, and §484(g) requires the U.S. Department of Education to verify the immigration status of applicants for federal financial aid. Also see U.S. Department of Education, Office of Federal Student Aid, Federal Student Aid Handbook 2006-2007, Volume 1 (Student Eligibility), Chapter 2 (Citizenship), at [<http://www.ifap.ed.gov/sfahandbooks/attachments/0607FSAHBkVol1Ch2.pdf>], visited Jan. 30, 2007.

⁷ No implementing regulations on §505 have been issued or appear to be forthcoming.

⁸ U.S. Congress, House Conference Committee, *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, conference report to accompany H.R. 2202, 104th Cong., 2nd sess., H.Rept. 104-828, p. 240.

⁹ The law does not apply to the University of California system.

status or will file such an application as soon as he or she is eligible. California officials have argued that by using eligibility criteria other than state residency, their law does not violate the §505 prohibition on conferring educational benefits on the basis of state residency. The federal courts have not yet ruled on whether state laws that authorize in-state tuition for unauthorized students violate §505.¹⁰

Action in the 109th Congress

Bills to provide relief to unauthorized alien students by repealing the 1996 provision and enabling certain unauthorized alien students to obtain LPR status were introduced in recent Congresses. In both the 107th and 108th Congresses, the Senate Judiciary Committee reported such bills, known as the DREAM Act.¹¹ In the 109th Congress, Senator Durbin introduced the Development, Relief, and Education for Alien Minors Act of 2005 or the DREAM Act of 2005 (S. 2075) in the Senate. Representative Diaz-Balart introduced the American Dream Act (H.R. 5131) in the House. Both bills had bipartisan cosponsors.

Both S. 2075 and H.R. 5131 would have repealed §505 and enabled eligible unauthorized students to adjust to LPR status in the United States. Among the eligibility requirements to adjust to LPR status, both bills would have required the alien to demonstrate that he or she had been physically present in the United States for a continuous period of not less than five years immediately preceding the date of enactment and had not yet reached age 16 at the time of initial entry. Both bills also would have required the alien to demonstrate that he or she had been admitted to an institution of higher education in the United States, or had earned a high school diploma or the equivalent in the United States.

The eligibility requirements in S. 2075 and H.R. 5131 differed with respect to the applicable grounds of inadmissibility and deportability. Under the Immigration and Nationality Act (INA), as amended,¹² except as otherwise provided, aliens who are inadmissible under specified grounds, such as health-related grounds, criminal grounds, and security grounds, are ineligible to receive visas from the Department of State or to be admitted to the United States by the Department of Homeland Security.¹³ Similarly, the INA enumerates classes of deportable aliens.¹⁴ S. 2075 and H.R. 5131 each specified which of the INA grounds of inadmissibility and deportability would have applied to aliens seeking to adjust status under its provisions. A greater number of these grounds would have applied under S. 2075

¹⁰ For a discussion of related legal issues, see CRS Report RS22500, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, by Jody Feder.

¹¹ For further information and analysis, see CRS Report RL31365, *Unauthorized Alien Students: Legislation in the 107th and 108th Congresses*, by Andorra Bruno and Jeffrey J. Kuenzi.

¹² Act of June 27, 1952, ch. 477; 8 U.S.C. §1101 *et seq.*

¹³ The INA grounds of inadmissibility are in INA §212(a).

¹⁴ The INA grounds of deportability are in INA §237(a).

than H.R. 5131. For example, with respect to grounds of deportability, both bills would have required that to be eligible for adjustment to LPR status, an alien could not have been deportable on smuggling, criminal, or security grounds. S. 2075 also would have required that the alien not be deportable on grounds covering marriage fraud, failure to register or falsification of documents, document fraud, falsely claiming citizenship, or unlawful voting.¹⁵ In addition, in an eligibility requirement not included in H.R. 5131, S. 2075 would have required that the alien never have been under a final administrative or judicial order of exclusion, deportation, or removal, with some exceptions.

Under both S. 2075 and H.R. 5131, eligible aliens could have adjusted to LPR status through an immigration procedure known as *cancellation of removal*. Cancellation of removal is a discretionary form of relief authorized by the INA that an alien can apply for while in removal proceedings before an immigration judge. S. 2075 and H.R. 5131 would have allowed aliens to affirmatively apply for cancellation of removal without being placed in removal proceedings. There would have been no limit on the number of aliens who could be granted cancellation of removal/adjustment of status under the bills.

Aliens granted cancellation of removal under S. 2075 and H.R. 5131 would have been adjusted initially to *conditional* permanent resident status. Such conditional status would have been valid for six years and would have been subject to termination. To have the condition removed and become full-fledged LPRs, the aliens would have had to submit an application during a specified period and meet additional requirements.

Both S. 2075 and H.R. 5131 would have placed restrictions on aliens who adjusted to LPR status under their provisions, with respect to eligibility for federal student financial aid under Title IV of the Higher Education Act of 1965, as amended. Under that act, LPRs and certain other eligible noncitizens may receive federal financial aid. S. 2075 would have made aliens who adjust to LPR status under the bill eligible only for student loans, federal work-study programs, and services (such as counseling, tutorial services, and mentoring), subject to the applicable requirements. Thus, they would not have been eligible for federal Pell Grants or federal supplemental educational opportunity grants. H.R. 5131 would have imposed similar restrictions on eligibility for federal student financial aid, but they would have been temporary. It would have made aliens adjusting status under the bill ineligible for federal Pell Grants and federal supplemental educational opportunity grants, but these restrictions would have applied only to aliens with conditional permanent resident status. Once the conditional basis of an alien's LPR status had been removed, these restrictions would no longer have applied.

The 109th Congress took no action on S. 2075 or H.R. 5131. S. 2075, however, was incorporated into the Comprehensive Immigration Reform Act of 2006 (S. 2611) as Title VI, Subtitle C. S. 2611 passed the Senate on May 25, 2006, but saw no further action. The House-passed Border Protection, Antiterrorism, and Illegal

¹⁵ S. 2075 would have provided for exceptions in certain cases of aliens deportable solely under the document fraud or falsely claiming citizenship grounds.

Immigration Control Act (H.R. 4437) did not contain any provisions on unauthorized alien students.

Action in the 110th Congress

As discussed above, DREAM Act legislation was introduced in the 109th Congress both as free-standing bills and as part of a larger Senate immigration reform bill. A key question for supporters of such legislation in the 110th Congress is whether to attempt to enact a free-standing DREAM Act bill or whether to attempt to enact DREAM Act provisions as part of a larger S. 2611-type immigration reform measure. Those favoring the former approach could argue that a free-standing bill, without the more controversial S. 2611-type legalization or guest worker proposals,¹⁶ would have better prospects for enactment. They also might suggest that enactment of a DREAM Act bill could serve as a stepping stone to enactment of a broader immigration reform measure. Those supportive of such broader reform, including legalization and an expanded guest worker program, could argue, however, that a comprehensive solution is needed to address the nation's immigration problems and that working to enact a separate DREAM Act bill could detract from that larger effort.

Pro/Con Arguments

Those who favor DREAM Act proposals to repeal §505 and grant LPR status to unauthorized alien students offer a variety of arguments. They maintain that it is both fair and in the U.S. national interest to enable unauthorized alien students who graduate from high school to continue their education. And they emphasize that large numbers will be unable to do so unless they are eligible for in-state tuition rates at colleges in their states of residence.

Advocates for unauthorized alien students argue that many of them were brought into the United States at a very young age and should not be held responsible for the decision to enter the country illegally. According to these advocates, many of the students have spent most of their lives in the United States and have few, if any, ties to their countries of origin. They argue that these special circumstances demand that the students be granted humanitarian relief in the form of LPR status.

¹⁶ S. 2611, as passed by the Senate in the 109th Congress, would have created several legalization programs. In addition to the DREAM Act provisions discussed here to enable certain unauthorized alien students to adjust to LPR status, S. 2611 included a legalization program for certain agricultural workers (Title VI, Subtitle B, Chapter 1). The main and most controversial legalization program, however, was the program for aliens who could meet specified requirements, including presence and employment requirements (Title VI, Subtitle A). S. 2611 also would have established a sizeable new nonagricultural guest worker program and overhauled the existing agricultural guest worker program. For further information on the legalization provisions in S. 2611, see CRS Report RL33125, *Immigration Legislation and Issues in the 109th Congress*, by Andorra Bruno. For further information on the guest worker provisions in S. 2611, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

Those who oppose making unauthorized alien students eligible for in-state tuition or legal status emphasize that the students and their families are in the United States illegally and should be removed from the country. They object to using U.S. taxpayer money to subsidize the education of individuals (through the granting of in-state tuition rates) who are in the United States in violation of the law. They maintain that funding the education of these students should be the responsibility of their parents or their home countries. They further argue that it is unfair to charge unauthorized alien students in-state tuition, while charging some U.S. citizens higher out-of-state rates.

More broadly, these opponents argue that granting benefits to unauthorized alien students rewards lawbreakers and, thereby, undermines the U.S. immigration system. In their view, the availability of benefits, especially LPR status, will encourage more illegal immigration into the country.¹⁷

¹⁷ For pro and con arguments, see, for example, Lourdes Medrano, "A Dream Deferred," *Arizona Daily Star*, May 28, 2006; Eunice Moscoso, "Bill to Aid Immigrant Students Could Pass in New Congress," Cox News Service, Dec. 17, 2006; and Karina Gonzalez, "Legal Status for Students," *Chattanooga Times Free Press*, Dec. 21, 2006.