IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

J. and R. DOE, ET AL,	§	
PLAINTIFFS	§	
VS.	§	CIVIL ACTION NO. TY-77-261-CA
JAMES PLYER, ET AL,	§	
DEFENDANTS	§	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

The plaintiffs have moved this Court for a preliminary injunction, enjoining the defendants, their agents, employees and those acting in concert with them, from requiring the plaintiffs or any others similarly situated from producing any documents, either letters or documents from the U. S. Immigration and Naturalization Service, or an American passport or an American birth certificate or any like papers, in order to enroll or register school-age children in the Tyler public schools and without the payment of any tuition fees.

The policy now in force in the Tyler Independent School District (hereinafter Tyler I.S.D.) requires that the children of undocumented aliens be excluded from public schools unless they (in contra-distinction to all others) pay a substantial tuition fee. The Tyler I.S.D. has established an annual tuition of One Thousand ($1,000.00) Dollars per child. For most undocumented aliens the establishment of such a fee amounts to effective exclusion of their children from school. For most undocumented aliens, who traditionally hold low paying positions, such a sum or indeed any significant sum

is prohibitive. The situation of J. Doe, the father of one family of plaintiffs, is typical. Mr. Doe is forced to pay a bill of Five Thousand ($5,000.00) Dollars annually if he wishes to send his children to school. Mr. Doe, like all others confronted with this policy, has been forced to keep his children at home. They will unfortunately have to remain at home, without an education, unless this Court grants the relief requested herein.

The plaintiffs argument, briefly stated, would point out to the Court that the Texas Education Code, Section 21.031 invades the unique province of the Immigration and Nationality Act of the federal government and as such, it is an area completely preempted by the federal government. Texas is without the authority to pass such a statute. The policy of the Tyler I.S.D., predicated as it is upon Section 21.031 must also fall, since it too invades an area solely within the power of the federal government. Finally, assuming arguendo that this statute and the Tyler I.S.D. policy are not preempted by the federal government, this statute and the policy constitute an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment.

I.

THE STATE LAW AND TYLER I.S.D. POLICY CHALLENGED

Texas Education Code Section 21.031 as amended (Vernon Supp., 1976) reads:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of twenty-one years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
> (b) Every child in this State who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of twenty-one years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

> (c) The board of trustees of any public free school district of this State shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over twenty-one years of age at the beginning of the scholastic year if such a person or his parent, guardian or person having lawful control resides within the school district.

On July 15, 1977, the Tyler I.S.D. adopted the following policy implementing the above-stated section:

> The Tyler Independent School District shall enroll all qualified students who are citizens of the United States or legally admitted aliens, and who are residents of this school district, free of tuition charge. Illegal alien children may enroll and attend schools in the Tyler Independent School District by payment of the full tuition fee.
>
> A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation.

II.

SECTION 21.031 OF THE TEXAS EDUCATION CODE AND THE POLICY PROMULGATED BY THE TYLER INDEPENDENT SCHOOL DISTRICT PURSUANT TO IT ARE ATTEMPTS TO REGULATE IMMIGRATION. THE CONTROL OF IMMIGRATION IS PREEMPTED BY THE FEDERAL GOVERNMENT AND TEXAS AND THE TYLER INDEPENDENT SCHOOL DISTRICT ARE WITHOUT AUTHORITY IN THIS FIELD.

The Immigration and Nationality Act, 8 U.S.C. Sections 1101-1503, is the primary and controlling law in the area of immigration and as such, preempts any attempts by the state to regulate in the area. Federal preemption is based upon the Supremacy Clause of the United States Constitution, Article 1, Section 8 and 10, making federal law the controlling law whenever the Constitution grants to the federal government a particular sphere of power or where concurrent powers may be exercised and the federal government has legislated in the field.

The Supreme Court has generally looked for one of the following criteria in determining if federal preemption exists: (1) the extent of the federal government's exclusive authority in the area; (2) a conflict or interference with federal laws or policies; or (3) the need for national uniformity in the

area. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, at 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).

The federal government's exclusive authority in immigration matters was established in Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). The Court articulated the need for uniformity in the area and the need for "one master theory" and stressed that the federal government's exclusive authority in international affairs warranted its being the single authority in the regulation of immigration.

However, in DeCanas v. Bica, 424 U.S. 351 (1976) the Court held that not every state enactment dealing with aliens is a regulation of immigration and thus per se preempted by the federal government's power over immigration. In DeCanas, a California statute made it unlawful for an employer to knowingly employ an illegal alien if such employment would adversely affect employment of legal aliens or American citizens. The statute dealt with a traditional state power, that of the regulation of employment, was enforced against the employer and not the alien, and put no direct burden on aliens to produce documentation. In light of these factors, the Court found a "purely speculative and indirect" impact on the immigration laws, thus creating no preemption by the federal government.

The case is very different in this instance. The burden is directly on the alien. Only the alien must produce the documentation required. Only the alien suffers the attendant consequences, that of not being allowed to obtain an education. In California, an employer was subject to penalities for employing illegal aliens. The alien was not subjected to any burden or penalities. In Texas, however, the alien is subject both to the burden of producing documents and the penalities of non-education simply for being an alien. The

"purely spectlative and indirect" impact in DeCanas has become a reality in Texas through Section 21.031.

Preemption by the federal government is clear in this instance from looking at the immigration laws. The central concern of the Immigration and Nationality Act is with "the terms and conditions of admission" to the United States. States can neither add to nor detract from the regulations controlling the admission, naturalization or residence of aliens. Takahoshi v. Fish and Game Commission, 344 U.S. 410 419 (1948).

The Texas statute, however, leaves it up to local school or state authorities to determine if a child is in this country lawfully. This determination is precisely the decision that must be made under the Immigration and Nationality Act by the federal government. In DeCanas, only those individuals who the federal government had already determined could not work in this country were affected by the statute. In other words, the federal government had already decided who was included in the terms of the stattue. Here, by contrast, each school district is free to define a "legally admitted" alien. Section 21.031 contains no definition. The Tyler I.S.D. has, by its policy of July 15, 1977, defined a legally admitted alien as "one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation." This is precisely the sort of decision that is the exclusive province of the federal government. If it were not, the exact problem would arise that the Texas statute creates: every school district is free to adapt its own definition, any one of which could be different from any other, all different from that of the Immigration and Nationality Act. The problems

this would create are exactly those the federal preemption doctrine was meant to avoid.

To allow the state, or even local school districts, to determine a person's immigrant status creates not just a potential for, but an actual conflict with federal immigration policies. That conflict has been exactly articulated with the promulgation of the Tyler I.S.D.'s new definition of a legally admitted alien. Further conflict with the Immigration and Nationality Act is realized when one looks at its Sections 261-266 (8 U.S.C. Sections 1301-1306). These sections clearly state that minor children under fourteen (14) years of age are not responsible for their proper registration with the Immigration Service. Section 262(b) makes it the duty of every alien parent, who has children under fourteen (14) years of age, to register them. Section 264 makes it the duty of every alien eighteen (18) years or older to carry with him or her at all times a certificate of registration. Section 265 makes it the duty of every alien parent to give notice of a change of address for his or her minor children. Finally, Section 266 imposes a penalty for willful failure to register and again the parents are liable for their unregistered minor children. Congressional intent to preempt in the field of alien children's registration is clearly manifested by these statutes. Minor children are not to be victimized by their parent's failure to secure documentation. Yet the Tyler I.S.D. and Section 21.031 clearly punish minor children for their parents deeds. All the plaintiffs herein are under the age of fourteen (14) and all are being denied admittance to school because of their parents lack of documents. The Congressional intent in this area is clear and Section 21.031 and the Tyler I.S.D. admittance and tuition policy are in absolute conflict with this intent.

The plaintiffs would also point out to the Court that the area of elementary education for alien children has been spoken to in a treaty signed by President Nixon in 1970 and ratified by two-thirds (2/3) of the Senate in the same year. This was the Protocol of Buenos Aires, ratified by Mexico in 1968, which states, inter alia:

> "The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right of education on the following basis:
> (a) Elementary education, compulsory for children of school age, shall also be offerred to all others who can benefit from it. When provided by the State it shall be without charge."

See United States Treaties and Other International Agreements (T.I.A.S.) Vol. 21, pp. 607 et seq. (1970). The Texas statute is clearly contrary to this treaty's spirit and creates further conflict with the federal government's exclusive domain in international law. As the DeCanas Court pointed out in a footnote:

> ".... (E)ven absent such a manifestation of congressional intent to 'occupy the field', the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties."

The regulation of aliens is a field, more than almost any other, that requires a uniformity of policy that only a federal scheme can provide. States attempting to regulate the behavior or rights of aliens may only adversely affect neighboring states to which aliens may move. If Texas denies free education to children it alone has decided are illegally admitted, these children and their families may simply shift the so-called economic burden to another state. See, e.g. Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 600 (1969); Memorial Hospital v. Maricopa County, 415 U.S. 250 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). The "tranquility of all the states" would be harmed, as was warned by the Court in Hines v. Davidowitz, supra. State enforcement of laws relating to aliens is a dangerous area since" subjecting...(aliens)... to indiscriminate and repeated interception and interrogation

by public officials ... bears an inseparable relationship to the welfare and tranquility of all the states." 312 U.S. at 65-66.

When the facts of a particular case indicate that the federal interest in uniformity is great, as is the case here, the presence of even a potential conflict with state law mandates preemption. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). See also City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973).

As in Takahashi, supra, no matter how traditionally revered the state interest may be, if it is antithetical to the realization of a legitimate federal objective, it cannot prevail. The federal government's exclusive authority in the area of immigration, its great need for uniformity, and the unbridled freedom with which the Texas statute may be defined by various state and school officials, all mandate that a finding of federal preemption in this area be imposed.

II.

THE REQUIREMENT THAT UNDOCUMENTED CHILDREN PAY TUITION IN ORDER TO ATTEND THE TYLER INDEPENDENT SCHOOL DISTRICT DENIES THEM THE EQUAL PROTECTION OF THE LAWS.

A. Undocumented children are protected by the Fourteenth Amendment.

Section 1 of the Fourteenth Amendment of the United States Constitution states in part that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person without its jurisdiction the equal protection of the law."(emphasis added)

It is notable that while the privileges and immunities clause is limited to ciitzens, due process and equal protection guarantees are granted to all "persons" without the jurisdiction of the state. This distinction has long served as the basis for granting equal protection to non-citizens--

including undocumented aliens.

In Yick Wo v. Hopkins, 118 U.S. 356 (1886) the court struck down a business licensing scheme which discriminated against recently entering non-citizen Chinese laundry owners. In striking down this scheme the Court observed:

> These provisions (The Due Process and Equal Protection) are universal in their application, to all persons within the territorial jurisdiction without regard to any differences of race, color, or of nationality; and the equal protections of the laws is a pledge of the protection of equal laws." 118 U.S. at 369.

More recently the Court expressly acknowledged the right of undocumented aliens to Due Process. In Mathews v. Diaz, 426 U.S. 67, 77 (1967), the Court stated:

> The Fifth Amendment, as well as the Fourteenth Amendment, protects everyone of these persons from deprivations of life, liberty, or property without due process of law... Even one whose presence in this country is unlawful is entitled to that protection. (emphasis added)

While the Court has not had occasion to expressly rule on the equal protection rights of undocumented persons their conclusion would neccessarily be the same;. The language of the Due Process and Equal Protection clauses insofar as coverage is discussed is identical. See also Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51; Wong Wuy v. United States, 163 U.S. 228, 238; Williams v. Williams, 328 F.Supp. at 1383.

B. The imposition of disparate access to an education for aliens requires strict scrutiny under the Fourteenth Amendment. The Supreme Court has developed two standards by which to measure the propriety of distinctions under the Equal Protection Clause. [1] If a "suspect" class is singled out for unequal treatment or if a fundamental interest is implicated then the classification must be analyzed to determine if the

[1] Some have observed that a middle standard may be evolving. See e.g. Gunther, "The Supreme Court 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", 86 Harv. L. Rev. 1 (1972).

distinction is necessary to achieve goals of the state which are deemed compelling. Further, if rigid scrutiny is required, a distinction can only be upheld if it is the least obtrusive way of achieving the compelling interest. San Antonia I.S.D. v. Rodriquez, 411 U.S. 1973).

If rigid scrutiny is not required due to the absence of a suspect class or fundamental interest, the Court must accord the legislation a presumption of Constitutionality and uphold it if it is rational. Lindsey v. Normet, 405 U.S. 56, (1972).

1. This classification based upon alienage is suspect; Thus rigid scrutiny is required. The genisis of the strict scrutiny standard is found in Footnote 4 of United States v. Carolene Products, 304 U.S. 144, 152 (1937). At that juncture Justice Stone observed, prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relief upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. One could not imagine a more politically powerless group than undocumented children of Mexican heritage. Given the current wave of hysteria concerning illegal aliens it is not unexpected that this powerless group has been subjected to treatment which is unjustifiable under any standard.

The Courts have long noted that alienage uniquely meets the standards set forth in Carolene products. NyQuit v. Mauclet, 45 U.S.L.W. 4655 (June 13, 1977); Graham v. Richardson, 403 U.S. 365; In Re Griffith, 413 U.S. 717; Sugarman v. Dougall, 413 U.S. 634. It is notable that in Mathews v. Diaz, supra, 426 U.S. 67, 44 U.S.L.W. 4748, 4752, 4754 the Court acknowledged that while distinctions based upon alienage may in certain instances meet equal protection standards, higher scrutiny would be attended legislation passed by states. Especial deference is accorded to Congress in areas that touch upon alienage due to the unique role of the federal government in regulating international affairs and the effects thereon of the treatment of aliens. The legislation and policies here

in question, passed as they were by state and local authorities which effectively deny an education to a class of alien children is surely suspect.

While the Courts as yet have not held that children as such constitute a suspect class, there has been recognition that children are in fact politically powerless and thus in need of special protection. This concern has found expression in a line of cases which have special meaning in the context of this litigation. In these cases the court has struck down legislation which has disabled children for a status for which they were not responsible. See e.g. Weber v. Aetna Casualty and Surety Co. 406 U.S. 164 (1972) (illegitimacy); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy). The theory of these cases has been that "legal burdens should bear some relationship to individual responsibility for wrongdoing " Weber, supra at 175. The children excluded from school by this policy are here because their parents, desperate for the employment possibilities which exist in the United States, brought them here. They are made the innocent victims of their parents' desire to achieve a better life.

Thus under a well established body of law holding alienage to be a suspect classification strict scrutiny must attend this legislation. Further, the fact that it strikes at undocumented children heightens the need for such scrutiny.

2. Effective exclusion from education invites strict scrutiny.

While the Court in San Antonio I.S.D. v. Rodriquez, 411 U.S. 1 (1973) refused to rule on the facts there presented that education was a fundamental interest deserving strict scrutiny it did leave open the possibility that if there was total exclusion from education (as opposed to the relative inequality in resources allocated) such might result in the denial of a fundamental interest; as Justice Powell, speaking

for the Court observed in upholding the Texas School Financing Scheme,

> Whatever merit appellee's argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where -- as is true in the present case -- no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process. 411 U.S. at 37.

In the instant case it cannot seriously be questioned that the tuition penalty effectively denies these children access to the only formal education possible. For them, the right to acquire even minimal skills is denied. They are being deprived of a fundamental interest by this policy of the state and the Tyler I.S.D.

C. No interest advanced by the state or the Tyler I.S.D. can meet the rigid requirements of strict scrutiny.

While it may be premature to anticipate the arguments advanced by the Tyler I.S.D. in support of this policy, it is not difficult to imagine what they will be. Either the Tyler I.S.D. and the state will seek to justify this policy as a local effort to stem the tide of illegal immigration, or they will justify the policy on fiscal grounds. If the former justification is advanced it is clear that it runs afoul of the preemption doctrine (see supra). If fiscal concerns are advanced it is clear that (a) the policy under question, by its imposition of tuition on all undocumented aliens is overly broad; and (b) even if narrowly drawn, fiscal considerations are insufficient justification to meet strict strutiny standards.

There is no evidence that undocumented aliens do not pay their fair share of taxes. If they own a house, as does J. Doe, they pay property taxes directly; if they rent, as do the other representative plaintiffs, it can be fairly assumed that the owners tax liability is passed on to his tenants.

Thus undocumented aliens, like all other parents of school children, contribute to the fiscal well-being of the schools. (Through the payment of state and federal taxes deducted from pay for employment.[2]) Undocumented aliens contribute, like all others, to the state and federal treasuries. Indeed general studies show that undocumented aliens contribute more in taxes than they take in public services.[3]

Section 21.031 and the Tyler I.S.D. policy here in question make no effort to distinguish between those who actually contribute to the fiscal well-being of the district and those who do not. They conclusively presume that undocumented aliens do not so contribute and others do. Such a conclusive presumption flies in the face of the facts. C.f. Vlandis v. Kline, 412 U.S. 528 (1973).

Even assuming that some nexus could be shown between the fiscal contributions of all undocumented aliens and others, such is an improper basis upon which to ground a denial of essential services. As the Supreme Court has observed:

> "A State has valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens..." (emphasis added)

Shapiro v. Thompson, 394 U.S. 618, at 633, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); Hosier v. Evans, 314 F.Supp. 316, 319 (D.V.I., 1970). Mills v. Board of Education, 348 F.Supp. 866, 876 (D.D.C. 1972). Thus one cannot ground a distinction which requires rigid scrutiny on a fiscal justification. This is especially so when any nexus between presumed contributions and actual contributions is so highly questionable.

In sum the plaintiffs and the class they represent are being denied equal protection of the laws.

[2] In 1970-1971 State aid accounted for 48% of funds for Texas schools, Local funds 41.1% and Federal sources contributed 10.9%. San Antonio School District v. Rodriquez, 411 U.S. 1, 9 N. 21. It is presumed that the state share has increased as a result of recent school financing initiatives.

[3] See e.g. North and Houstocum, "The Characteristics and Role of Illegal Aliens in the United States Labor Market; An Exploratory Study" (Washington D.C., Linton & Co., 1976)

IV.

THE DUE PROCESS RIGHTS OF PLAINTIFFS HAVE BEEN VIOLATED

None of the plaintiffs was offered any opportunity to challenge their exclusion from the schools of Tyler I.S.D. No hearings were offered nor were any given.

In Goss v. Lopez, 419 U.S. 565 (1975) the Supreme Court ruled that suspension of even a few days required some form of prior hearing. The Court further ruled that a long term suspension or exclusion must be accompanied by stringent procedural protections.

In the landmark case of Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1960) cert. den. 368 U.S. 930 (1961), the Fifth Circuit ruled that a full panoply of procedures must accompany an exclusion from school.

Finally it is notable that in Wisconsin v. Constantineau, 400 U.S. 433 (1971) the Court ruled that any state act which causes substantial stigma must be proceeded by a due process hearing. Given the temper of the times, the classification of individuals as "illegal" must be construed as causing such a stigma.

The Texas Act and its Tyler I.S.D. counterpart are thus unconstitutional for the additional reason that they fail to provide constitutionally sufficient procedural protection.

Respectfully submitted,

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