IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

J. and R. DOE, ET AL.	)	
	)	
V.	)	CIVIL ACTION NO. TY-77-261-CA
	)	
JAMES PLYLER, ET AL.	)	

FINDINGS OF FACT

1. The minor plaintiffs herein are all undocumented school-age children of Mexican origin, who reside with their parents within the boundaries of the Tyler Independent School District ("Tyler I.S.D.").

2. Each minor plaintiff is represented in this civil action by his or her parents. All of the parents in question are aliens of Mexican origin who illegally entered and remained in the United States, and who reside within the boundaries of the Tyler I.S.D. The families represented in this suit have lived in Tyler between three and thirteen years.

3. The Tyler I.S.D. constitutes a public school district. As such it receives some federal funding, in addition to state and local funds.

4. James Plyler is the Superintendent of the Tyler I.S.D. The managing board of the District is the Board of Education, constituted of Charles Childers, Carl Ross, Martin Edwards, Vernon Goss, Michael Breedlove, J. Robert Dobbs, and Robert Randall, defendants in this civil action.

5. Section 21.031 of the Texas Education Code , V.A.T.S., effective September 1, 1975, states;

> (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.
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> (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.
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> (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.

6. Acting in furtherance of and pursuant to Section 21.031, on July 21, 1977, the Tyler I.S.D. Board of Education promulgated a policy concerning the financing and control of education for illegally admitted aliens, which states:

> 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 aliens children may enroll and attend schools in the Tyler Independent School District by payment of the full tuition fee.
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> 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.

7. This policy has been implemented by the defendants and their agents, since the beginning of the 1977 school year.

8. In accordance with the policy and based upon the educational expense analysis conducted by the Administrative Offices of the Tyler I.S.D., an amount of tuition of $1,000.00 per year has been set as a fee for each child who resides within the Tyler Independent School District and who is neither a citizen of the United States, a legally admitted alien, nor an illegal alien who has begun processing his papers for legal admission with the United States Immigration Service.

9. All of the parents of the plaintiffs were informed by school officials that their children could not attend the school without either producing the required documents or paying the $1,000 tuition fee.

10. There can be no reasonable expectation that any of the named plaintiffs or their parents can obtain the required documents from the U. S. Immigration and Naturalization Service.

11. Except for Section 21.031 and the Tyler I.S.D. policy, all of the named plaintiffs are eligible for admission to the Tyler I.S.D. on a tuition-free basis.

12. Because of their poverty, none of the parents of the named plaintiffs can afford to pay the tuition fee of $1,000 or any other significant sum. None of the minor plaintiffs possess independent resources to pay such tuition.

13. None of the named plaintiffs other than J.D. Doe is presently attending the Tyler I.S.D. But for Section 21.031 and the Tyler policy, all would be in attendance in the Tyler public schools.

14. None of the named plaintiffs, with the exception of those children identified as Doe, is presently attending any school. The Doe children, except for J.D., were enrolled in a Catholic school, after being rejected for admission to the Tyler I.S.D. on a tuition-free basis. Mr. Doe works for the Catholic shcool on weekends, in exchange for his children's attendance.

15. All of the minor plaintiffs, with the exception of two, attended the schools of the Tyler I.S.D. in the school year 1976-77. Those two exceptions attended the Tyler Head Start Program in the summer of 1977, preparatory to entering first grade.

16. The parents of plaintiffs Doe are owners of real and personal property in the Tyler I.S.D. All other parents of minor plaintiffs rent housing within the Tyler I.S.D.

17. At least one parent of those children identified as Doe, Roe, and Loe is employed and has federal income and social security taxes withheld from his or her paycheck.

18. Each parent of minor plaintiffs has at least one child, not of school age, who is a citizen of the United States.

19. There are probably thirty to forty otherwise eligible undocumented children in the Tyler I.S.D., in addition to the named minor plaintiffs.

20. The primary purpose of Section 21.031 and the Tyler I.S.D. policy is to employ public educational funds for providing education to U.S. citizens and legally admitted aliens, and to prevent the potential drain on such funds should Tyler or Texas in general,become a haven for illegal aliens.

21. The effect of 21.031 and the Tyler policy will be to deter Mexicans from entering Texas illegally and with the intent to settle there with their families.

22. The total student enrollment in the Tyler I.S.D. is approximately 16,000.

23. The total budget for the Tyler I.S.D. is $18.5 million, approximately eighty percent of which is used for teachers' salaries.

24. The teaching staff of the Tyler I.S.D. has not been reduced as a result of the July 21 policy.

24. Two undocumented children are currently attending the Tyler public schools as tuition-paying students.

26. Plaintiffs and all those similarly situated are suffering and will continue to suffer irreparable harm should they continue to be excluded from the Tyler public schools pending a final determination in this case. They have already missed a week and a half of school. While this amount of time can be recovered, further absence for perhaps months could put these children permanently and irreparably behind their classmates and result in their losing an entire year of school.

27. The potential harm to defendants is substantially less. There has been no adjustment of the budget to account for the 40 to 50 children in plaintiffs' position. The Tyler I.S.D. functioned successfully with all but two of the minor plaintiffs in its schools free of charge during the past school year, and has made no showing that any harm would result from continuing that situation until final resolution of this litigation, or that there is any incremental cost involved in educating the plaintiffs and others similarly situated.

CONCLUSIONS OF LAW

Equal Protection

1. Plaintiffs urge that the Texas statute, implemented by the Tyler I.S.D.'s policy of charging undocumented children a tuition fee of $1,000 (hereinafter "the statute" and "the policy") denies these children their right to equal protection of the laws as guaranteed by the Fourteenth Amendment. Plaintiffs argue that because they are being absolutely deprived of any education, and because they are a politically powerless minority forced to suffer because of the misdeeds of their parents over whom they have no control, this Court should subject the challenged statute and policy to close judicial scrutiny. The fiscal justifications advanced by the Tyler I.S.D. in support of their policy, plaintiffs contend, are insufficiently compelling to justify the discrimination imposed.

2. Defendants counter with the following arguments: Illegal aliens are not entitled to equal protection of the laws. Even if they were, the Tyler I.S.D.'s policy is merely "state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights," thereby requiring only relaxed judicial scrutiny. Dandridge v. Williams, 397 U.S. 471 (1970). Accordingly, defendants' decision to spend public funds toward providing high quality education for U.S. citizens and lawful residents instead of sharing it with people who have no right to be in the State at all, should be subjected only to the rational basis test, which it easily satisfies.

3. This court cannot accept the proposition that the guarantee of equal protection of the laws does not extend to illegal aliens. The United States Supreme Court had indicated through holdings, see, e.g., Wong Wing v. U.S., 163 U.S. 228 (1896), and dicta, Mathews v. Diaz, 426 U.S. 67, 77 (1976), that illegal aliens are entitled to the protection of the due process clause. The language and structure of Section One of the Fourteenth Amendment do not support a different result for the guarantee of equal protection of the laws:

> No state shall make or enforce any laws 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 within its jurisdiction the equal protection of the laws. (Emphasis added).

While process is afforded to "any person," equal protection extends only to "any person within its jurisdiction". Yet this apparent narrowing of the equal protection guarantee, by virtue of its very specificity, should not be read to exclude a class of persons that fits within the narrowed language. Joining Judge Friendly in Bolanos v. Kiley, 509 F.2d 1023, 1025 (2d Cir. 1975), this court "can readily agree that the due process and equal protection clauses of the Fourteenth Amendment apply to aliens within the United States (citations omitted) and even to aliens whose presence here is illegal." Accord: Holly v. Lavine, 529 F.2d 1294 (2d Cir. 1976), cert. denied, 426 U.S. 54; U.S. v. Barbera, 514 F.2d 294, 296 n. 3 (2d Cir. 1975). Cf. Williams v. Williams, 328 F. Supp. 1380 (D.V.I. 1971) (illegal aliens entitled to access to divorce courts); Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576 (N.D. Ill. 1936) (illegal alien allowed to sue to recover for personal injuries in negligence action); Commercial Standard Fire and Marine Co. v. Galindo, 484 S.W.2d 635 (Tex.Civ.App., El Paso, 1972) (err. ref., n.r.e.) (illegal alien not barred from workmen's compensation benefits). But see Burrafato v. U. S. Dept. of State, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910.

4. The conclusion that illegal aliens are entitled to equal protection of the laws in no way means, however, that illegal aliens are entitled to precisely the same treatment afforded U. S. citizens and lawfully resident aliens. As Mr. Justice Jackson described the "salutary doctrine" of the equal protection clause, "cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants, except upon some reasonable differentiation fairly related to the object of regulation." Railway Exrpess Agency v. N.Y., 336 U.S. 106, 112 (1949) (concurring opinion) (emphasis added). Viewed in this light, as a guarantee only that unfair or unreasonable lines will not be drawn, the content of the right to equal protection of the laws must be assessed with respect to each individual case.

5. The fairness of the legislative classification contained in the challenged statute and policy must be measured within the framework of the well established two-tiered test. If the challenged law threatens a fundamental right or creates a suspect classification, the Court must subject the states' interests served by the law to strict scrutiny. Otherwise, the law need only be supported by a rational basis. San Antonio I.S.D. v. Rodriguez , 411 U.S. 1 (1973). Although commentators have suggested the emergence of a sliding scale or intermediate scrutiny, see, e.g., Gunther, "The Supreme Court 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Portection," 86 Harv. L. Rev. 1 (1972), and various Supreme Court decisions indicate some flexibility in the test, see Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972), a majority of the Supreme Court has never explicitly sanctioned such an approach. But see San Antonio I.S.D. v. Rodriguez, supra (Marshall, J., dissenting). Feeling compelled, therefore, to choose between the two established levels of review, this Court concludes that heightened scrutiny is more appropriate.

6. As a result of the Texas statute, as implemented by the Tyler I.S.D., a distinct class of poor, undocumented children living within the borders of the Tyler I.S.D. is absolutely deprived of any education whatsoever by virtue of their poverty. This kind of total deprivation of education has never before been considered by the Supreme Court. In San Antonio I.S.D. v. Rodriguez, the Court said that "Education, of course, is not among the rights afforded explicitly protection under our Federal Constitution. Nor do we find a basis for saying it is implicitly so protected." 411 U.S. at 35. Yet the holding of the case was explicitly and repeatedly limited to the sort of relative deprivation of education challenged in the case itself. Under the Texas school financing scheme attacked, children in property-poor school districts attended schools with access to fewer funds than those in property-rich school districts; no children were prevented from attending school altogether. Indeed, the opinion is conspicuous in its efforts not to foreclose constitutional challenge to absolute deprivation of educational opportunity.[1/]

7. An additional indication that heightened scrutiny is appropriate is that the challenged statute and policy constitute discrimination on the basis of wealth. Relatively wealthy illegal

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1/ "If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of 'poor' people - definable in terms of their inability to pay the prescribed sum--who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today". 411 U.S. at 25 n. 60. "Whatever merits appellees' argument might have if a State's financing system occasioned an absolute denial of education opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights were only relative differences in spending levels are involved . . ." Id. at 37.

aliens are able to attend school despite the policy, and indeed two such children are doing so, while poor illegal aliens are excluded. Such absolute deprivations imposed only on poor people have long been considered deserving of judicial solicitude. See e.g. Griffin v. Illinois, 351 U.S. 12 (1958); San Antonio School District v. Rodriguez, 411 U.S. at 25, n. 60 (quoted supra at _____. The Supreme Court has already rejected the argument that discrimination against a sub-class of a suspect class (in this case the sub-class poor illegal aliens within the class of poor persons in general) is any less suspect than discrimination against the class as a whole. Nyquist v. Mauclet, 45 U.S.L.W. 4655, 4657 (1977).

8. Furthermore, although it is not inaccurate to characterize Section 21.031 as "state regulation in the social and economic field," Dandridge v. Williams, 397 U.S. 471 (1970), as defendants urge, this case does not follow the pattern of those in which such a characterization has triggered relaxed rather than hightened review. Once again, in Dandridge the deprivation was relative rather than absolute. Some families received less aid in proportion to the number of children than others, but no discrete class of needy families was completely cut off from benefits. See also Jefferson v. Hackney, 406 U.S. 535 (1972).

9. Finally, this Court is not prepared to say that undocumented children are a suspect class which must always be treated equally with citizens and lawfully resident children, absent a compelling government interest. Nevertheless, decisions of the Supreme Court with regard to stigmatizing and penalizing children for a status which is beyond their control lend support to this Court's choice of a more exacting scrutiny of the Texas law. As Mr. Justice Powell said of laws disfavoring

illegitimate children:

> [V]isiting this condemnation on the head of an infant is illogical and unjust (fn. omitted). Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175 (1972).

10. The argument advanced by the Tyler I.S.D. in support of its policy is essentially one of the fiscal integrity of its school system. "There is a limited amount of revenue available within the State which can be used to achieve the social goal of educating the State's children. The legislature has determined that those funds are to be used to educate the United States' citizens and the legally admitted aliens who reside in Texas." (Defendants' Brief at 16.)[2/] While the defendants' attorneys deny any desire to deter illegal entrants from coming to Tyler, Superintendent Plyler did testify that the Board of Trustees finally initiated its policy, some two years after the Texas statute was in effect, out of growing fear that Tyler would become a haven for illegal aliens.

11. The state's concern with husbanding its limited resources is not a compelling state interest. Shapiro v. Thompson, 394 U.S. 618 (1969). Consequently, the Texas statute cannot survive strict scrutiny. Furthermore, this Court has serious doubts whether the state has even a rational basis for its law. The state has advanced no reason to support its choice of singling out undocumented children to bear the brunt of the schools' financial problems. Defendants' Brief states that undocumented children are selected to pay tuition since they

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[2/] The Attorney General has attempted to amplify the State's fiscal concerns with testimony from the Director of the Dallas District of the U. S. Immigration and Naturalization Service and defendant Superintendent Plyler that illegal alien children are often transient and Spanish speaking (as opposed to bilingual), thereby making school planning difficult and requiring special attention. Yet however accurate a description this may be of illegal aliens in Texas in general, the evidence does not

are not "entitled" to free education. (Defendant's Brief at 16.) But this is a conclusion, not a rational basis. All the plaintiff parents in this suit have lived in Tyler for three to thirteen years. They all rent or own homes, thereby subjecting themselves to property taxes, either indirectly or directly. Many of the plaintiff parents are employed and have shown evidence of having paid federal income and social security taxes. Several own cars, and it is undisputed that these cars are subject to personal property tax. All undoubtedly pay sales taxes. On the basis of the allegedly insufficient contributions to tax revenues by the illegal imigrants, defendants are very far from having shown that these aliens are not "entitled" to public education on the same terms as other taxpayers, particularly other low income taxpayers. If it is the fact of illegal conduct that renders these children not "entitled" to free public education, it still needs to be explained why tuition should be required of children who commit or whose parents commit this particular illegal act as opposed to other illegal acts.

12. While the question of whether the State could constitutionally attempt to discourage illegal entry by excluding children of illegal entrants from public education is more acutely posed by plaintiffs' preemption attack, the scope of the State's legitimate interests is highly relevant in determining what this Court can consider as a rational basis for its law, without fully addressing the preemption question

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2/ (continued) support such a characterization of the plaintiffs in this case. The families represented have lived in Tyler for three to thirteen years. There was testimony that many of the children speak English. The Court also takes judicial notice of the fact that all minor plaintiffs present at the hearing were exceedingly well-behaved.

at this point, this Court finds support from the Supreme Court's reasoning in Mathews v. Diaz, 426 U.S. 67, 85 (1976):

> Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are non-citizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business.

13. Defendants rely on the following dictum in Mathews: "Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests." 426 U.S. at 80. (Emphasis added.) This, too, should be distinguished from the case before this Court, in that Mathews' language was directed at the federal government. An act of Congress forbidding all states from providing free education to undocumented children would pose an entirely different case. While the level of scrutiny might remain the same, the legislative interests would appear much stronger. To be considered, also, in assessing the relevance of this dictum to the present case, are the problems with a state law requiring tuition from the children of resident diplomats.

14. The fact that plaintiffs are not in school makes complete vindication of their rights, should they ultimately prevail, more and more unlikely. Thus, this Court has been forced to consider the opposing contentions in this case within severe time constraints. With the reservation that further reflection may require some modification of this conclusion, the Court holds that Section 21.031 of the Texas Education Code, as implemented by the Tyler I.S.D., denies to plaintiffs the equal protection of the laws.

Preemption

15. Plaintiffs also challenge the statute and policy on the grounds that the state of Texas is attempting to regulate immigration in an area which is preempted by federal law. Defendants respond that the regulation is constitutionally sound under the standards employed by the Supreme Court in DeCanas v. Bica, 424 U.S. 351 (1976).

16. In DeCanas, the Supreme Court upheld a California statute penalizing employers who "knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." California Labor Code Ann. §2805(a). The Court rejected the argument that "every state enactment which is any way deals with aliens is a regulation of immigration and thus per se preempted by" the exclusive federal power to regulate immigration. Id. at 355. Rather the Court required, and found lacking, "a demonstration that complete ouster of state power--including state power to promulgate laws not in conflict with federal laws--was 'the clear and manifest purpose of Congress.'" Id. at 357, quoting Florida Lime and Avocado Growers v. Paul, 373 U.S. 351 (1963) and Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

17. The facts in DeCanas are distinguishable from that of the instant case in several significant respects. First, the burden of the Texas law falls directly on all illegal aliens and their children, while the California law burdens the employer of the illegal alien, and only under the limited circumstances of such employment could be proven to have an adverse effect on lawful resident workers. The significance of this distinction is that the California law's impact on

immigration is at best "purely speculative and indirect." 424 U.S. 355. The deterrant impact of the Texas law, on the other hand, is much more concrete. Furthermore, California had made a convincing showing of grave local problems which the legislation was directed toward:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. Id. at 356-367.

Neither the state of Texas nor the Tyler I.S.D. has made any showing of local problems of the same magnitude. Doubtless large numbers of illegal aliens pose economic problems in Texas similar to those in California. But the California law, as the Court observed, "focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils." Id. at 357. Finally, the Court found evidence in the Immigration and Naturalization Act (INS), that Congress had in fact intended the states to regulate employment of illegal aliens.

18. Notwithstanding these distinctions, this Court cannot find at this time that plaintiffs have made the clear showing of intentional Congressional ouster of state regulation of education for illegal aliens required by DeCanas. Before resolving the preemption challenge, the Court desires to look more closely at the INS and hopes to determine the position of the federal government on the preemption question. The

Court is further interested in researching the Protocal of Buenos Aires (ratified by both Mexico and the United States), cited by plaintiffs on p. 7 of their brief, which addresses the question of reciprocal education. Plaintiffs have, however, "raised questions so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." Tampa Phosphate Co. v. Seaboard Coastline R. Co., 418 F.2d 387, 392 (5th Cir. 1969), quoting from Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953).

Relief

19. The prerequisites to this Court's granting of a preliminary injunction are as follows: (1) a substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the party or parties opposed; and (4) a showing that an injunction, if issued, would not be adverse to the public interest. State of Texas v. Seatrain International, S.A., 518 F.2d 175, 179 (5th Cir. 1975).

20. Plaintiffs have met their burden in this case. They have made a strong showing that they are likely to prevail on the merits, especially on their equal protection claim. They have shown that they will suffer irreparable harm if they continue to be excluded from school until the case can be set for trial and finally resolved; while they can likely make up for the week and a half they have already missed, a loss of months in the early grades will probably mean that the whole year must be repeated. Defendants, on the other hand, will not suffer substantial harm should the preliminary injunction issue.

The Tyler I.S.D. functioned successfuly last year when all but two of the minor plaintiffs were enrolled, nor have defendants pointed to any incremental costs involved in educating these forty or so children along with the approximately 16,000 others currently enrolled in the Tyler public schools.

Finally, it is apparent to the Court that a preliminary injunction would not be contrary to the public interest, since any incremental cost in providing schooling to the children in question would be relatively small, and the public interest demands a just adjudication of the status of such children.

SIGNED and ENTERED this 11th day of September, 1977.

UNITED STATES DISTRICT JUDGE