INTRODUCTION:

With the passage of health reform legislation completed and the enactment of Arizona’s new immigration law, pressure is mounting for the Obama Administration and Congress to tackle immigration reform [1]. One of the key issues any proposed legislation will have to address is resolving the problems facing undocumented students [2]. Undocumented students are students born abroad who are not U.S. citizens or legal residents [3]. Their undocumented status results from having entered the United States illegally or entering legally, but overstaying the authorized period [4]. Plyler v. Doe, 457 U.S. 202 (1982) guarantees them a public school education though grade 12, but they face legal and financial barriers to attaining a college education and they cannot be employed legally in the U.S. upon graduation.

The three biggest obstacles undocumented students face in obtaining a college education are admission, tuition and financial aid. This NACUANOTE reviews the current status of the applicable law, discusses the Development, Relief and Education for Alien Minors (DREAM) Act, the proposed legislative solution to the problem that failed to pass in 2007, and subsequent legal developments and trends.

DISCUSSION:

Admission

Absent federal or state law to the contrary, the decision to enroll undocumented students belongs to colleges [5]. Federal law does not bar colleges and universities from enrolling undocumented students [6]. But increasingly state law appears to be restricting admission. In 2003, only two states, Arkansas and Virginia, had introduced bills to restrict immigrant access to higher education [7]. By 2008, however, the number had increased to five with the addition of Alabama, South Carolina, and North Carolina. The proponents of these bills argued that admitting students who are in the U.S. illegally, even if they are here through no fault of their own, thwarts congressional intent regarding illegal immigrants. In the absence of clear state law addressing the enrollment question, colleges have struggled with drafting policies on enrollment. That struggle is exemplified by the North Carolina Community College System’s (NCCCS) 2009 Board vote to admit undocumented students, reversing its May 2008 decision banning them and marking the Board’s fourth undocumented student admissions policy change in nine years [8]. The result is that school policies on admitting undocumented students are subject to sudden change and are inconsistent, varying from state to
Federal law also does not require colleges and universities to request or collect information on the immigration status of applicants or request information or collect evidence on their immigration status prior to enrollment [9]. Except for the Student Exchange and Visitor Information System (SEVIS) reporting requirements applicable to students who violate the terms of their immigration (mostly F-1) status, colleges and universities are under no obligation to report undocumented students if the school knows the student is out of status. The students themselves, however, run the risk of being deported for violating federal immigration law.

Public Colleges and Universities

The Alabama State Board of Education policy bars undocumented students from entering Alabama state community colleges [10]. In May 2008, the NCCCS stopped admitting undocumented students to degree-granting programs, reversing its 2004 policy that left the decision to individual campuses [11]. But in September 2009, the NCCC’s Board voted to admit undocumented students, provided they paid out-of-state tuition [12]. In Virginia, many four-year state colleges require applicants to submit proof of citizenship or legal residency and refuse admission to students without documentation [13]. And in 2008, South Carolina enacted a new immigration law that effectively bared undocumented students from attending its public colleges [14]. With the exception of South Carolina, however, these positions are taken as matters of policy, not state law.

In a number of other states, public institutions admit undocumented students, but treat them as foreign students, ineligible for state aid and the lower tuition charged to state residents, a policy that effectively prevents them from matriculating [15].

Private Institutions

Unless state law bars it, private institutions are free to matriculate undocumented students [16]. Private schools tend to avoid formalizing their admission policies regarding the undocumented because of the political divisiveness of immigration issues and the low numbers of potential applicants such policies might impact [17]. But Vassar College in New York recently adopted a formal publicized policy allowing for the admission of undocumented students [18].

Tuition

Public Institutions: Qualifying for Lower In-State Tuition Rates - Restrictions on Residency Status

Perhaps the most controversial issue involving undocumented students is whether they should be eligible for the lower tuition rates that in-state residents pay for their state public colleges and universities. Most public institutions charge undocumented students the higher out-of-state tuition rate, even if the student has lived in the state a long time. The reasoning is usually based on the idea that extending them eligibility for lower rates violates federal immigration policy by sanctioning, if not rewarding, illegal immigration.

The legal issue is unsettled. The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) does not explicitly prohibit states from offering illegal aliens in-state tuition [19], but discourages it by requiring those states to offer in-state tuition to all non-residents, including out-of-state students, if they do [20].

Between 2001 and 2006 ten states, California, Texas, New York, Utah, Illinois, Washington, Nebraska, New Mexico, Oklahoma, and Kansas, enacted laws permitting undocumented students to pay in-state tuition based instead on other criteria [21]. But in 2008, Oklahoma ended its support for in-state tuition [22]; while Wisconsin, in 2009, enacted legislation permitting it [23]. However, the legality of extending in-state tuition to
the undocumented based on criteria other than residency has been questioned. California, for example, requires the undocumented to have attended a California high school for three or more years, to have graduated from a California high school, and to sign an affidavit promising to file an application to legalize their immigration status-provisions similar to the federal DREAM Act, discussed below, and those of other states permitting in-state eligibility.

In September, 2008, the California Supreme Court agreed to hear an appeal of a lower California court's ruling that placed the validity of this law in doubt [24]. The suit, *Martinez v. Regents of California*, was filed, and won, in the lower court by out-of-state students challenging the California law. They argued that the California law undermined the congressional intent behind IIRIRA by providing educational benefits to illegal immigrants, who lack the legal authority to reside in the state, without making them available to all U.S. citizens. While the California Supreme Court's ruling would only be binding in that state, it could influence debates in other states with similar laws [25].

*Martinez* appears to be the first case holding that a state tuition statute violates Section 505 of IIRIRA [26]. Future litigation on this issue can be expected [27]. If DHS were to interpret these state actions as being in violation of Section 505, it could withhold federal funds from the states in question or issue orders directing the states to comply with the law, engendering further legal action [28].

**Financial Aid Restrictions**

*Generally*

The undocumented are ineligible for all federal financial aid and virtually all state financial aid. But they are not barred from qualifying for private scholarships.

*Federally Funded Financial Aid*

Undocumented students cannot legally receive any federally funded student financial aid, including loans, grants, scholarships, and work-study programs.

Federal student aid requires the recipient to be a U.S. citizen or permanent resident (i.e., green card holder) or an eligible non-citizen. Federal law limits eligibility to certain classes of aliens “permanently residing under color of law” (PRUCOL) [29]. For a person to be residing “under color of law,” the United States Citizenship and Immigration Services (USCIS) must know of the person’s presence in the U.S. and must provide the person with written assurance that enforcement of deportation is not planned [30].

In order to receive any federally supported financial assistance (e.g., Pell Grants, Stafford Loans, etc.), the student must file the Free Application for Federal Student Aid (FAFSA). FAFSA will run a computerized cross-check of the applicant's information against both the Social Security and, for non-citizens, the Department of Homeland Security (DHS) databases. If the student is not confirmed through the database checking, the institution must confirm the status by examining visa documents before it can give the financial aid [31]. Keep in mind that the applicant is the student. The FAFSA application does include information about the parent, but the citizenship status of the parent is NOT run against the DHS database, unless the parent is the loan applicant (i.e., certain types of PLUS loans for parents).

**State Financial Aid**

*Public Institutions*

At public institutions, state financial aid for undocumented students primarily takes the form of the in-state tuition rates discussed above. Ten states have laws providing the lower in-state tuition benefits to
undocumented students who have attended high school in their state for three years or more, Wisconsin becoming the newest in 2009 [32]. While the Nevada system of higher education does not consider immigration status for in-state tuition, it requires it for a state-sponsored scholarship. Texas law also allows undocumented students to receive state student financial aid [33]. In 2008, Oklahoma passed HB 1804, which ended its in-state tuition benefit, including financial aid for undocumented students. The other states that ban the undocumented from in-state tuition benefits are: Arizona, Colorado, Georgia, South Carolina, North Carolina and West Virginia, which in 2009 amended the qualifying requirements for its PROMISE scholarship to expressly include U.S. citizenship or legal immigrant status [34].

Private Institutions

Private institutions set their own financial aid policies. A number of private schools give undocumented students financial aid without publicizing it. An exception is Vassar College which has formally adopted a policy offering financial assistance to undocumented students [35].

Private scholarships

No law bars undocumented students from receiving privately funded scholarships. Although most private scholarships require the student to be a U.S. citizen or resident or to have a social security number in order to apply, some sources of private scholarship money for undocumented students exist [36].

Employment Bans

Undocumented students without financial support have difficulty paying their own way through college because they have no legal authorization to work [37]. The Immigration Reform and Control Act of 1986 (IRCA) prohibits employers from knowingly hiring, recruiting, or referring for a fee, any alien who is unauthorized to work. The law requires all employers to verify both the identity and employment eligibility of all employees, including student employees, hired after November 6, 1986, and complete and retain a one-page form (I-9) documenting this verification [38]. Failure to comply with these requirements may result in both civil and criminal liability with the imposition of substantial fines ranging from $100 to $1,100.00 for each I-9 paperwork violation, or failure to complete the I-9, and $375-$3,200 for hiring each unauthorized worker, as well as possible imprisonment for a pattern or practice of noncompliance. Most importantly, failure to verify a new employee’s identity and employment eligibility will result in the termination of employment for that affected employee.

The public policy behind this law reflects the federal government’s concern that illegal immigration and employment require greater control and stronger enforcement. But federal enforcement has not been as rigorous as some think it should be. As a consequence, some states such as Arizona, Colorado, Georgia and Oklahoma have passed laws that prohibit employers and/or contractors who provide services to the state from knowingly employing an unauthorized worker and in some cases, require employers to enroll in E-Verify, a program that documents the employee’s identity and work authorization [39].

Occasionally undocumented students with an Individualized Taxpayer Identification Numbers (ITIN) request employment. ITINs do not authorize their holders to work. They merely permit people who are ineligible for social security numbers to open a bank account or declare themselves a dependent on a tax return or pay taxes on unearned (e.g. interest and capital gains) income [40].

The DREAM Act

Given the investment American taxpayers have made in the K-12 education of many undocumented students, the uneven treatment they receive in pursuing a higher education, their inability to work legally, and the absence of any means to legalize their status, Congress sought to address these problems by proposing
The enactment of the DREAM Act. The proposed legislation would have allowed certain students to qualify for conditional immigration status that would have permitted them to attend post-secondary school and eventually become naturalized U.S. citizens [41].

Numerous versions of this legislation have been proposed over the last several years, each failing to secure the number of votes necessary for passage into law. The most recent version which failed to garner enough support for debate on the Senate floor in 2007 would have permitted eligible undocumented students (those who entered the United States before they were 16 years old, resided in the U.S. when the DREAM Act was enacted, and have lived in the U.S. continuously for at least 5 years, and of “good moral character” [42]) to work towards full citizenship under a two step process, and provide students over the age of 12 who had not yet graduated from high school authorization to work and protection from deportation.

Under step one of the process, students who earned a high school diploma or general education diploma (GED), and were admitted to a four-year college, two-year college, or non-profit trade school would have been granted conditional immigration status lasting 6-8 years. Under step two, upon completion of at least two years of college or military service, they could apply to convert their conditional status into permanent resident status. Students who failed to complete their college or military service requirements would be subject to revocation of their conditional status and subject to deportation.

While the Obama Administration campaigned on a platform of improving the American immigration system by finding a way to legalize the undocumented, the future of the DREAM Act is presently uncertain [43]. Senator Lugar reintroduced the DREAM ACT in 2009, but the bill garnered little support in a Congress pre-occupied with health care and economic reform [44]. Now that health reform legislation has passed, the Administration appears to be gearing up to address the immigration issue. And in a recent speech given at Arizona State University, Department of Homeland Security Secretary Napolitano stated that the DREAM Act was among the most popular pieces of the Administration’s immigration reform plans [45]. But its passage is still far from certain [46].

CONCLUSION:

Congress’ failure to pass the DREAM Act in 2007, added to the uncertainty regarding the meaning of IIRIRA and federal policy towards undocumented students. As the sun set on the Bush administration in 2008, the tide, at the state level, appeared to be turning against undocumented students. Alabama bars undocumented students from enrolling in their community colleges as a matter of state policy, while South Carolina bars them as a matter of law. Prior to 2007, none of the state legislative efforts to ban undocumented students from receiving in-state tuition had succeeded. By the end of 2009, six states, including Oklahoma, where it had previously been permitted, banned undocumented students from receiving this benefit.

It remains to be seen whether this uneven treatment will be eased or exacerbated by the rulings in the cases pending before the courts in California and other states. Federal legislation resolving the problem would clearly be a preferable solution, but it seems unlikely to be undertaken as an ad hoc issue and comprehensive immigration reform, while broadly supported by the Obama Administration, may not be enacted soon. Practitioners should therefore continue to monitor state law developments until such time as federal legislation is enacted or action by DHS in the wake of Martinez occurs.
FOOTNOTES:


FN3. Children born in the United States are treated as U.S. citizens. But foreign-born children who are brought into the United States without proper documentation have no means of becoming a legal resident. Foreign-born children who overstay their authorized period of stay in the U.S. have very limited means of becoming a legal resident and this chance disappears once they over stay 180 days past their 18th birthday. The notable exception to this situation is Section 153 of the Federal Immigration Act of 1990, which provides Special Immigrant status to undocumented children who are dependents of the juvenile court and deemed eligible for long-term foster care and for whom the court has declared it is not in the child’s best interest to be returned to his or her country of origin. Special Immigrant status is a grant of lawful permanent resident status. 8 C.F.R. § 204.11 (c).

FN4. Under current law and United States Customs and Immigration Services’ (USCIS) policy, individuals who entered illegally (EWI or Entry without Inspection) may not adjust their visa status while they are in the U.S. INA. § 212 (a)(6)(A). But leaving the United States triggers a ban on re-entering the U.S for three years or ten years, depending on the length of the unauthorized period in the U.S. INA § 212(a)(9)(B).


FN6. Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) 8 USC 1623(a) (2005). A 2008 Immigration and Customs Enforcement (ICE) agency statement reaffirmed the government’s position that colleges and universities are not violating federal law by admitting undocumented students, because “admission to public post-secondary educational institutions is not one of the benefits regulated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and is not a public benefit under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).”


FN9. But when states, as a matter of law or policy, or individual schools make the decision to deny illegal aliens from enrolling in post-secondary institutions, they must use federal immigration status standards to determine the student’s immigration status; they cannot make up their own. Letter from Sheriff (Ret.) Jim Pendergraph, Executive Director Department of Homeland Security, U.S. Immigration and Customs Enforcement, Office of State and Local Coordination to Thomas J. Ziko, Special Deputy Attorney General, North Carolina Department of Justice, supra, note 5.


FN11. Michelle J. Nealy, “Undocumented Students to be denied Admission to N.C. Community Colleges”.

FN12. 'Hollow Victory' for Undocumented Students', supra, note 8.

FN13. Id.


FN16. Note, states cannot deny legal permanent residents admission on the basis of their status as non-citizens. Once an alien is issued permanent residency status under federal law, the Supremacy Clause of the U.S. Constitution bars or “preempts” states from enacting any laws affecting the alien’s status as a U.S. resident. Toll v. Moreno, 458 U.S. 1 (1982).


FN19. Section 505 of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) prohibits conferring educational benefits on the undocumented based on state residency. The benefit actually conferred by residency statutes is the right to be considered for in-state resident status. IIRIRA does not preclude states from enacting residency statutes for the undocumented. 8 U.S.C. §1623 (a)(2005) at http://www.uscodesurf.com/08/1623. But states cannot enact laws that favor the resident status of the undocumented within their state over other non-resident applicants. Id.

FN20. IIRIRA, Subsection 8 U.S.C. §1621(d) permits states to provide illegal aliens with state and local public benefits provided it is pursuant to a state law enacted after August 22, 1996, specifically permitting them to receive such benefits. Found at http://www.uscodesurf.com/08/1621. Some argue that this subsection makes a potentially limiting reference to subsection 1621(a) and therefore fails to override the restrictions in 8 U.S.C. §1623(a). Id. Arguably under such interpretation, state laws permitting in-state tuition for undocumented students would not be permitted by federal law.

FN21. For more information on state legislation, see National Conference of State Legislatures (NCSL), In-State Tuition and Unauthorized Student Immigrants, November 30, 2008. See also, Michael A. Olivas, IIRIRA, the DREAM Act, and Undocumented College Student Residency, 30 JCUL 435, 453-454 (2004).

FN22. NCSL, In-State Tuition and Unauthorized Student Immigrants, supra, note 21.

FN23. See “WI” at NCSL, In-State Tuition and Unauthorized Student Immigrants (2009).


FN25. Higher education officials and advocates for immigrants worry that the lower court’s ruling, if it stands, will make it impossible for students covered by such laws to attend college. See “In California, Uncertainty on Immigrant Student Tuition”. Inside Higher Ed, September 17, 2008.


FN27. Plaintiffs in such cases face a host of procedural challenges, including establishing a right of private action to sue. See Day v. Sebelius, 376 F. Supp. 2d. at 1022, 1039-40 (D. Kan. 2005), aff’d, 500 F.3d 1127


FN29. PRUCOL is not recognized as an immigration status by the U.S. Citizenship and Immigration Service (USCIS); this category was created by the courts and is a public benefits eligibility category. PRUCOL has been construed by federal agencies to include at least refugees, asylees, conditional entrants, parolees, aliens whose deportation has been suspended, Cuban-Haitian entrants, and applicants for registry, but excludes undocumenteds. See Peter Reich, Public Benefits for Undocumented Aliens: State Law into the Breach Once More, 21 N.M.L. REV. 219 (1991).

FN30. A person residing under color of law cannot directly apply for U.S. citizenship or sponsor family members to obtain U.S. citizenship. Id.

FN31. If the student is a U.S. citizen (naturalized or U.S. born) but one or both parents are undocumented, the student is still eligible for federal student aid. If, however, the parents supply a fake or stolen social security number (SSN) on the student’s financial aid application form, the student’s application will be rejected when the parent’s SSN fails to match. Parents without social security numbers can avoid this problem by using 000-00-0000 as their SSN on the FAFSA form because the system will not reject it.

FN32. See discussion, supra, under “Tuition”.


FN35. The Miscellany News, supra note 18.


FN37. 8 U.S.C. §274A.

FN38. The Immigration Service has provided an Employer Handbook for completing the I-9 process.

FN39. See, NCSL tracking state laws that require E-Verify. See also, E-VERIFY: Compliance for College and University Federal Contractors, NACUANOTE Vol. 8 No. 5 (January 20, 2010).

FN40. IRS, ‘Understanding Your ITIN’.

FN41. This legislation can be tracked via www.thomas.loc.gov/home/C108query.html or at, NCSL, which tracks such legislation at the state level: http://www.ncsl.org/default.aspx?tabid=19897.

FN42. An immigration law term meaning not having committed certain criminal offenses.


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RESOURCES:

NACUA Resources:

- E-Verify and Form I-9 Resource Page
- Immigration and Employment Resources

Other Resources:

Regulations


Government Web Sites

- U.S. Visitor and Immigration, Status Indication Technology System (U.S. VISIT) program initiative, tracks all non immigrants, including students.

DREAM Act Legislation

- Library of Congress.
- The National Conference of State Legislators.

Association Reports

Law Reviews


Articles

- Elizabeth Redden, *DREAM Act Vote on Tap*, Inside Higher Ed, October 24, 2007
To advance the effective practice of higher education attorneys for the benefit of the colleges and universities they serve."