

**1** *The legal rights and privileges afforded undocumented students in the United States vary by state. It is important that student affairs professionals understand the laws and policies that shape the personal and academic experiences of undocumented students on their campus to meet their unique needs.*

## Serving Undocumented Students: Current Law and Policy

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Families migrate to the United States for opportunity. Whether they leave extreme poverty or violence or reunite with relatives who made the move before them, immigrants seek opportunity. Sometimes circumstances force families to make tough decisions. Sometimes circumstances and tough decisions manifest in families entering the United States without legal documentation. These families become America's undocumented. The children who migrate as part of these families become undocumented students. This transition to undocumented status is accompanied by limited opportunities, particularly for employment, and increasingly for higher education. Nevertheless, undocumented students continue their families' struggle for opportunity every day on college and university campuses.

Student affairs professionals are vested with the responsibility for assisting and supporting the academic and social success of all students, including those from undocumented families. This chapter outlines the legal context for undocumented students in higher education and provides direction for policymakers in student affairs offices serving these students. We explore how law and policy matter in undocumented students' lives. We also provide additional resources for student affairs professionals to consult when crafting policy and developing expectations for effective practice in the support of undocumented students.

Understanding the legal and policy contexts through which undocumented students struggle to persist in higher education is a first step in developing the capacity to support these students. With this knowledge,

student affairs professionals must become advocates for undocumented students' rights to support their success in higher education and participation in American democracy. The more informed that student affairs professionals are about the legal and policy contexts of undocumented students' lives, the better they can serve these students. Finally, when undocumented students see that student affairs professionals know about and demonstrate an ethic of care regarding their unique realities, it increases the students' opportunity and likelihood to develop trust with student affairs professionals. Students' trust can translate into a more engaged use of student support services, and perhaps even assist student affairs professionals in learning how better to support these students' academic achievement and personal growth.

### **The Everyday Life of Undocumented Students**

Passel and Cohn (2008) estimate that 11.9 million unauthorized immigrants were present in the United States as of March 2008. Often immigrant adults move to the United States with children, who also assume undocumented status. This status poses future challenges for them when they pursue access to higher education and employment.

Currently, 56 percent of all undocumented immigrants are from Mexico, 22 percent from other nations in Latin America, 13 percent from Asia, 6 percent from Europe and Canada, and 3 percent from Africa and other regions of the world (Passel, 2006). For the most part, the children of these undocumented populations have grown up and received much of their primary and secondary educations in the United States (Gonzales, 2007). Of crucial concern for this diverse population of undocumented children is the opportunity to access and succeed in postsecondary education. It is estimated that sixty-five thousand undocumented children who have lived in the United States for five years or longer graduate from high school every year (Passel, 2003). These young people have limited means to legalize their status in this country and, as a result, face a complex and dynamic set of legal and political contexts that can constrain their pursuits for higher education; however, in some cases these legal and political contexts—such as laws providing access to in-state tuition rates—can enable their pursuits.

Beyond this basic demographic portrait of undocumented students, student affairs professionals need to recognize that undocumented students are participants in everyday life. This statement may seem overly simplistic, but its consequences are profound. National media and political discourse often characterize undocumented immigrants as “living in the shadows” or “underground.” Although these images may be accurate, they should be tempered by recognizing that although undocumented students' struggles to persist through higher education can often involve a shadowed or underground dimension, they have and continue to participate in the life of their

college or university. Undocumented students eat in campus dining centers, do research in the library, seek community in campus organizations, look for affordable housing options, talk to friends in the quad, and need resources to support their success in college. To overemphasize the underground dimensions of undocumented students runs the risk of viewing these students as other, thereby classifying their needs as too different or outside the realm of student affairs. Undocumented students in fact are part of the campus community and require the attention of student affairs professionals.

## Undocumented Students' Needs

Based on their undocumented immigration status, undocumented students can face distinct disadvantages compared to their native peers in terms of employment, social service resources, and basic human rights afforded to others in the United States. This also can be true for their access to higher education, where their economic and social resources may be limited (Kaushal, 2008). Undocumented students are often the first in their family to attend college, which suggests they very well may start college with subaltern forms of cultural capital. Oldfield (2007) defines *cultural capital* as the “knowledge, skills, education, and other advantages a person has that make the educational system a comfortable, familiar environment in which he or she can succeed easily” (p. 2). Without anyone in their immediate family to assist them in navigating educational pathways, undocumented students can have difficulty negotiating their way through college. These circumstances beg questions about how to support these students’ self-efficacy and basic sense making around socialization to life as college students and the institutions in which they find themselves.

As Gildersleeve and Ranero note in Chapter Two (this volume), undocumented students’ precollege social contexts include particular needs related to parents’ labor and employment, as well as the dynamic organizations of family that may shape their lives. These circumstances continue in effect when students attend college. The new environment, expectations, and stressors of college life can become burdensome on some students’ family obligations, and this tension between family and college can become overwhelming, especially for vulnerable populations, such as immigrant families (Gildersleeve, 2010; Rothenberg, 1996). Lopez (2001) established that immigrant students’ academic achievement improves when family needs are met first. Although Lopez’s work is situated in K-12 schooling, it implies that alleviating families of the burdens associated with tough circumstances (for example, poverty, unfair labor practices, inadequate health care) affords students greater opportunity to engage meaningfully with their education. The same logic can be applied to the collegiate environment. Since undocumented students’ social contexts, which are largely related to their legal contexts, can be shaped differently from the normative

student experience, it makes sense that meeting those needs first will help students to engage more fully with their academic lives.

To understand these needs from legal and policy perspectives, it is important to understand the law and policy that shape undocumented students' college-going lives. Fundamental to understanding these contexts is an understanding of how immigration, education, and other social laws and policies operate in the United States. Undocumented students' struggle to persist through higher education pathways is located in a dynamic nexus of federal, state, local, and institutional authority. Immigration has long been understood as the domain of the federal government. Education, by and large, has been understood as the domain of individual state governments. Particular policies to support these laws and enable schools, colleges, and universities to meet the social needs of their community and broader society generally have been left to the autonomy of individual institutions or the broader state systems of institutions of which they are a part. At times, policies have been established in broader popular approaches, where local communities or municipalities influence how individual schools function (for example, K-12 school district elections, community college districts).

Undocumented students seek social opportunities similar to those of their native peers; however, their undocumented status uniquely positions them in a complex web of authorities that do not always communicate well with each other, take one another into account, or necessarily agree on the limits of each other's powers. In sum, undocumented students' higher education opportunity, from a legal and policy perspective, is subject to dueling, sometimes competing, and always changing external forces of influence.

## **Undocumented Students' Legal Rights and Privileges**

Becoming familiar with the rights and privileges afforded undocumented students in the United States is a first step in supporting their college success and meeting their unique needs. As an artifact of the way their families entered this country, students' undocumented status makes their presence in this country a violation of federal immigration law according to the Immigration and Nationality Act (U.S. Citizenship and Immigration Services, 2008). However, despite some popular, or folk, beliefs to the contrary, undocumented students do have legal rights in the United States. In accordance with the Fourteenth Amendment to the U.S. Constitution, undocumented immigrants have legal rights when they are residing in the United States (Olivas, 2004). People living in the United States without legal authorization retain rights to emergency health care, emergency shelter, and disaster aid; due process related to unlawful search and seizure, arrest, and work-related discrimination and unfair employment practices; and unfair housing discrimination. Furthermore, no federal legislation

restricts undocumented immigrants from opening bank accounts, taking out private loans, or purchasing private health insurance. However, some banking institutions and health care providers may practice restrictive policies that limit the banking services available to undocumented immigrants.

Regarding education, the U.S. Supreme Court decision in *Plyler v. Doe* (1982) grants undocumented students the right to a K-12 education. Citing the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, the Court determined that the State of Texas could not deny free public education to undocumented immigrant students (Olivas, 1986; Ruge and Iza, 2005). Therefore, “no child should be denied enrollment in public primary or secondary schools because of immigration status” (Ruge and Iza, p. 259). However, *Plyler v. Doe* did not address the educational needs of these students once they leave compulsory education and aspire to and matriculate in postsecondary institutions.

Undocumented immigrants’ access to higher education can be a highly politicized and controversial issue, especially depending on the state of the nation’s economy and the political atmosphere in the country at the time (Massey, Durand, and Nolan, 2002, as cited in Frum, 2007). This has become an even more hotly contested and sensitive political issue since September 11, 2001, with young, undocumented immigrants finding themselves caught in the wake of political and national debates and controversies related to homeland security and U.S. border policy. While the federal government has the primary responsibility for enforcing immigration laws, in the spring of 2010 the Arizona state legislature passed Senate Bill 1070, which made being undocumented a violation of state law as well. The law does not address higher education specifically, but The Associated Students of the University of Arizona passed a resolution opposing the new law out of concern that students would be subject to unwarranted police action (Donovan, 2010). As Frum (2007) noted, “The politicization of the broader issue of immigration has resulted in a number of legislative efforts to limit access to certain benefits, including higher education” (p. 84).

The two federal statutes most often cited and debated concerning undocumented students’ access to higher education are the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). However, the language used in these statutes does not encourage states to deny benefits such as in-state tuition to undocumented immigrant students. Section 505 of the IIRIRA indicates that an “alien” who is not lawfully present in the United States is not eligible for any postsecondary education benefit on the basis of residency unless a citizen of the United States is eligible for the same benefit regardless of whether the citizen is a resident. PRWORA proclaims that an unqualified “alien” is not eligible for any federal public benefit including postsecondary education or any other benefit in which payment or other assistance is provided.

The intent behind these two statutes is interpreted in different and controversial ways; however, there seems to be at least some agreement that “these statutes do not prevent institutions from enrolling or admitting an undocumented immigrant student” (Ruge and Iza, 2005, p. 263). Nevertheless, undocumented students remain ineligible for federal financial aid programs (Ruge and Iza). Less clear is whether states can extend in-state tuition benefits to undocumented students (Frum, 2007). Consequently states tend to interpret the intent of the law in their own ways and enact legislation or policies depending on their interpretations. There is no uniform set of standards for undocumented students’ admission and access to higher education across the board, and rules and regulations vary considerably by state. This is yet another obstacle for undocumented immigrant students to maneuver if they want to attend college.

The Student and Exchange Visitor Information System (SEVIS) was recently established to monitor and track students with nonimmigrant visas in the United States (Ruge and Iza, 2005). This system is designed primarily for international students who are studying in the United States, and “there is no requirement under SEVIS that university personnel report an undocumented immigrant student” (p. 264). Thus, undocumented immigrant students’ right to privacy remains intact; higher education officials, including student affairs professionals, do not have the authority to enforce immigration laws. The Family Educational Rights and Privacy Act also comes into play here, and “SEVIS does not mandate that states or institutions of higher education refuse admission to undocumented students or report them to the Department of Homeland Security” (p. 264).

## Undocumented Students’ Legal and Policy Constraints

Undocumented students face myriad challenges and obstacles in their lives directly and indirectly related to higher education. Although no federal legislation prevents undocumented students from attending higher education, some states and individual institutions have taken action to contest or deny undocumented admissions. Federal policies restrict undocumented students from accessing most financial aid resources, serving as a policy framework for many state, institutional, and private financial aid resources to follow. One hotly contested legal issue related to undocumented students is the extension or restriction of in-state tuition residency benefits for public higher education institutions. The following sections address each of these constraining sets of laws and policies that directly influence undocumented students’ higher education opportunities, summarizing the legal constraints on undocumented students with a brief discussion of broader immigration policy, which serves as the backdrop against which particular education law and policy exists.

**Contested Rights to Admissions.** Some undocumented students face obstacles simply in being admitted to colleges and universities, despite the

fact that no federal law prohibits institutions from admitting them. Some schools require students to provide proof of legal residency, while others do not. Some institutions request proof of citizenship or immigration status, yet they have no policy that restricts students from attending as a result of their status, whatever it may be. Nevertheless, some institutions restrict admissions to legal residents, disenfranchising undocumented students. The lack of uniformity of disclosure and policy related to students' citizenship or immigration status makes it difficult for students and their families to engage authentically with the broader social institution of higher education in the United States. A survey conducted by the American Association of Collegiate Registrars and Admissions Officers found that 53.6 percent of responding schools (613 of 2,000 the association's member institutions) knowingly admit undocumented immigrant students, while many schools do not verify students' citizenship or immigration status, regardless of institutional or state policies related to admissions (Redding, 2009). The survey suggests that undocumented college student admission lacks oversight, institutional or systemic congruency, and, perhaps, informed practice.

Undocumented admissions are politically charged. In 2008, South Carolina "became the first state to enact a statute barring these [undocumented] students from attending state institutions, and Alabama's higher education board acted through regulation to do the same" (Olivas, 2009, p. 408). In addition, North Carolina's community college system banned the enrollment of undocumented immigrants pending a comprehensive study (Redding, 2008). These restrictive actions by individual states highlight the ways in which immigration and education law and policy intertwine in ways that make undocumented students' opportunities difficult to assess. Furthermore, the movement in these southern states to restrict undocumented students' social opportunities through higher education marks the dynamic landscape of college admissions for undocumented students.

**Barriers to Financing Higher Education.** Pursuing higher education can be accompanied by expensive financial investment. Undocumented students cannot gain lawful employment and do not qualify for most forms of financial aid. As it stands, the lack of financial resources to fund one's college education is the central barrier that limits undocumented students' access to higher education (Diaz-Strong and Meiners, 2007). Qualification for federal and most state-based financial aid requires U.S. or permanent legal residence. For this reason, undocumented students are automatically disqualified from government financial aid programs including federal student loans, Pell Grants, and work-study programs (Oliverez, 2006). Moreover, many higher education institutions and scholarship providers piggyback on the requirements of federal financial aid for scholarship monies, which disqualify undocumented students from receiving institutional and private funds (Diaz-Strong and Meiners, 2007). Currently,



only Texas and New Mexico offer state-funded financial aid for undocumented immigrant students.

Aside from financial aid, undocumented students do not have legal documentation to work in the United States, which limits their potential to earn income while in college. With the increasing costs of higher education and living expenses, it is no surprise that seven of eight undocumented students attend two-year colleges (Diaz-Strong and Meiners, 2007). Lack of employment opportunities after college graduation can be an additional obstacle, even while a student struggles to persist and earn her or his degree. These legal barriers create an undue burden on students that can have a negative effect on their academic achievement. In short, the financial pressures and lack of opportunities facing undocumented students while in and immediately following college mean that they must work harder to finance their education for a promise of future opportunity that may go unfulfilled.

**Contested In-State Tuition Benefits.** The U.S. Supreme Court decision in *Toll v. Moreno* (1982) is the primary case dealing with whether states can offer in-state tuition to undocumented students. The Court found that in-state tuition need not be limited to U.S. citizens and legal permanent residents (Ruge and Iza, 2005). Nevertheless, in the majority of public colleges and universities, undocumented students are required to pay nonresident tuition (Burdman, 2005). Generally the cost of resident tuition rates compared to nonresident tuition for undocumented students is substantial. Denying in-state tuition benefits to undocumented students effectively could deny them the opportunity to attend college altogether, as many, if not most, undocumented students come from lower-income families that cannot afford higher out-of-state tuition rates (Oliverez, 2006; Protopsaltis, 2005).

Currently ten states have laws that clearly extend in-state tuition benefits to undocumented immigrants in public colleges and universities (California, Illinois, Kansas, Nebraska, New Mexico, Oklahoma, New York, Texas, Utah, and Washington). Oklahoma, which had been a forerunner in granting in-state benefits to undocumented students, passed legislation in 2008 that seemingly rescinded a law that had granted in-state tuition (National Conference of State Legislatures, 2008; Olivas, 2009). Oklahoma's House Bill 1804, the Citizens and Taxpayers Protection Act, places restrictions on the accessibility of in-state tuition for undocumented students and nearly guarantees that they cannot receive state-funded financial assistance through scholarships or other sources.

Oklahoma is an example of the complex and dynamic politicization of this issue. Public opinion, state legislatures, and state and federal courts increasingly are shifting in unpredictable ways as they consider whether undocumented immigrants deserve equal opportunity to attend college as their native counterparts.

To date, none of the states that offer in-state tuition have been found to be in violation of IIRIRA or PRWORA. Most of the states require that



undocumented students meet certain requirements, such as graduation from a state high school or attendance for two to four years, a high school diploma or GED (General Educational Development), and an affidavit that the student is pursuing permanent resident status (Education Commission of the States, 2008). Therefore, citizens who are not residents of these states also could be eligible for in-state tuition if they met those qualifications, which places these policies firmly on solid ground in relation to *Toll v. Moreno*. A number of states (Arizona, Colorado, Georgia, Oklahoma, and South Carolina) have enacted laws barring undocumented students from receiving in-state tuition (Olivas, 2009). Ironically, Georgia once provided tuition scholarships for undocumented students (Gutierrez, 2004) but now does not even grant them in-state tuition. Denial of in-state tuition for undocumented students continues to widen the gap between students and their access to higher education.

Other states leave admission policies up to their respective governing boards, many of which make their decisions based on their interpretation of federal laws (as North Carolina does) or simply leave the decisions up to individual institutions. Policy then generally is left to the political views of a select few rather than democratically contested in a public forum. This haphazard mode of policy development sends mixed signals to undocumented students, who can never be quite sure what the rules are for admissions, tuition, and financial aid. In addition, legal challenges to state laws are in effect. For example, Kansas was the first state to face a challenge of its tuition policies for undocumented students. And in early 2009, the California Supreme Court agreed to hear arguments concerning a case on whether it is constitutional, under the California State Constitution, for public colleges and universities to provide in-state tuition benefits for undocumented immigrants (Gorman, 2009). However, some schools have taken steps to try to clarify or make more explicit their policies regarding tuition policies for undocumented students. For example, some Minnesota schools charge a flat tuition fee for all students. Also, some schools, such as Vassar College, make their policies transparent by clearly stating them on their Web site (Redding, 2009).

State decisions, as evidenced by changes in laws in Oklahoma and Georgia, as well as the contests in California and Kansas, are in constant flux. Changes and challenges in law and policy are introduced nearly annually across different states and institutions. Some initiatives support undocumented students' access to higher education, while others restrict it. Student affairs professionals must remain informed of recent changes to state laws, policies, and regulations.

## **The Backdrop of Broader Immigration Policy**

Immigration policy in the United States is more than simply a set of rules stating who can and cannot enter the country. Some policies set out the

reasons that people may be allowed entry, including the types of activities in which they may be permitted to participate while in residence. Other policies detail how immigrants can participate in U.S. democracy and perhaps become citizens. These policies also include the rights and privileges that all immigrants (including undocumented immigrants) are afforded. Another group of policies deals with the judicial realm of immigration—how immigration law can be enforced and the consequences for not abiding by immigration regulations. Then there are laws and policies that deal particularly with U.S. borders. Each set of laws and policies is politicized differently, and each set has differential effects on different groups of immigrants. It is important for student affairs professionals to understand that immigration policy is a complex system of rules and regulations that change over time and play out differently for different groups in different contexts. Border policy may not affect a Southeast Asian immigrant, for example, whereas it may have direct impact on a student from Central America.

## **The DREAM Act**

What has become known as the Development, Relief, and Education for Alien Minors (DREAM) Act was first introduced in 2001 (then called the Student Adjustment Act) as bipartisan legislation in the U.S. House of Representatives. It sought to clarify the contested rights of states to extend in-state tuition benefits to undocumented immigrants, as well as provide a pathway to citizenship for those students. Since 2001, the DREAM Act has undergone multiple revisions, often coinciding with the ebb and flow of the political role that immigration issues play in federal elections. It has not yet been enacted.

According to the National Immigration Law Center (2009), the latest revision of the proposed legislation would “provide 360,000 undocumented high-school students with a legal means to work, and could provide incentives for another 715,000 youngsters between the ages of 5 and 17 to finish high school and pursue post-secondary education” (p. 1). In its most recent version, the DREAM Act would achieve a secured right for undocumented students to attend public colleges and universities, a secured option for states to extend public higher education benefits (for example, in-state tuition) to undocumented students, the opportunity for some undocumented students to receive some types of financial aid, and a pathway to citizenship (Olivas, 2009).

Under the DREAM Act, students would follow a two-step process toward legal residency. First, they would receive conditional status for six to eight years while pursuing higher education or serving in the military (Olivas, 2004). After successfully completing two years of college or military service, they could apply for permanent residency. To be eligible for

benefits under the DREAM Act, a student must have lived in the United States for a period of five years or more, entered the United States before the age of sixteen, been admitted to a postsecondary institution, earned a high school diploma or GED, and have “good moral character.”

The DREAM Act will not be a panacea for ameliorating the struggles (legal, political, and otherwise) that undocumented students may face in higher education. There are some concerns about what the DREAM Act would not provide. For example, the DREAM Act effectively would repeal section 505 of the IIRIRA, but it would not require states to afford undocumented students in-state tuition. Also, the act could make undocumented students eligible for some state and federal financial aid but not Pell Grants, even if students qualified for them. Pell Grants are among the most useful financial aid instruments available, as they primarily serve the most financially needy students and have been shown to have a direct impact on students’ ability to afford higher education (Price, 2004). Still, supporting the DREAM Act has become a strong signifier of support for immigrant rights, and for undocumented students in particular.

## **Implications for Student Affairs**

Huber and Malagon (2007) argue that institutional missions need to reinforce social justice ideals to make clear to faculty, staff, and students that serving undocumented students’ academic and social needs is part of achieving equity in higher education. We put forth that student affairs professionals already are called to serve all students in the promotion of equity, and we have presented a brief sketch of the legal and policy contexts that undocumented students face in order to assist student affairs professionals in doing so. Without understanding the nexus of policy and law that helps shape undocumented students’ experiences, student affairs professionals cannot meaningfully respond to their unique needs. This chapter provides a broad overview of these contexts, but a dynamism and nuance complicate these contexts. Immigration, law, education, and policy are always shifting ground, so student affairs professionals must take this broad landscape of law and policy—the rights, privileges, constraints, and controversies—and use it as a tool for investigating the particular legislative, judicial, and political realities in their local and institutional contexts.

We have offered a short set of practical implications derived from this broad sketch of the current law and policy affecting undocumented students in college. In becoming familiar with their local law and policy, student affairs professionals should pay particular attention to admission, tuition, and financial aid policies at their institutional and state levels. Recognizing that some laws and policies may afford undocumented students greater opportunity (for example, in-state tuition benefits), while others

may constrain students' opportunity (for example, restrictive financial aid policies), student affairs professionals can assess their immediate situations and explore creative ways to assist students. For example, understanding that undocumented students may struggle to afford college yet may not qualify for financial aid, student affairs professionals may find opportunities for students to work in situations where compensation can come in forms that may not require reporting to federal agencies, such as smaller stipends for special projects or service.

Finally, the best way for student affairs professionals to serve undocumented students, from a legal and policy perspective, is to become advocates for these students' legal and political rights to attend college under the same circumstances as other students. Advocacy means going beyond the basic service of informing oneself of the local law and policy and demonstrating to undocumented students the importance of struggling in their quest for educational opportunity. Supporting and engaging in activities such as letter-writing campaigns in support of beneficial legislation provide evidence to undocumented students that student affairs professionals desire to support and assist them in their lives as college students. Advocacy is central to student affairs work, and it should not be restricted to students' lives on campus. Rather, advocacy should work to benefit students on campus by recognizing ways that the legal and policy contexts off-campus shape students' lives in college.

## Resources

The following organizations and Web sites may help student affairs professionals begin to familiarize themselves with the unique legal and policy contexts that undocumented students in their institutions may face:

- American Association of State Colleges and Universities: <http://www.aascu.org/>
- Education Commission of the States: <http://www.ecs.org>
- Immigration Policy Center: <http://www.immigrationpolicy.org/>
- Institute for Higher Education Law and Governance: <http://www.law.uh.edu/ihelg/>
- MALDEF Mexican American Legal Defense and Educational Fund: <http://www.maldef.org/>
- Migration Policy Institute: <http://www.migrationpolicy.org/>
- National Conference of State Legislatures: <http://www.ncsl.org/>
- National Immigration Forum: <http://www.immigrationforum.org/>
- National Immigration Law Center: [www.nilc.org](http://www.nilc.org)
- Pew Hispanic Center: <http://pewhispanic.org/>
- Truth in Immigration: <http://www.truthinimmigration.org>
- Urban Institute: [www.urban.org](http://www.urban.org)

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