

**EDUCATING UNDOCUMENTED STUDENTS:
LEGAL RESONSIBILITIES AND
ETHICAL CONSIDERATIONS**

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INTRODUCTION

Undocumented populations are at the forefront of our national agenda due to an influx of immigrants, fear about security and safety, and the use of taxpayer subsidies (Uwamana, 2013; American Association of State Colleges and Universities, 2005). Some politicians and members of the general public believe noncitizens should not have the same rights as U.S. citizens (Contreras, 2015; Longley, 2017; Stockman, 2017). Others disagree, citing economic benefits, contributions to the public infrastructure and social services, as well as motives and values that are consistent with most Americans (Bandow, 2013; Mansur, 2017; Orrenius, 2016).

At all levels of education, issues are raised about access, institutional expense, tuition, student placement, the quality of instruction, and the threat of deportation (Glum, 2016; Walker, 2016). According to Cosetlo (2011), “[i]mmigration is a powder keg for educators.”

Examined in this paper are current and emerging legislation, policies, and litigation regarding the education of undocumented students. The purpose is to provide K-12 and postsecondary education leaders the information they need to make sound decisions. Addressed:

- rights and responsibilities of undocumented students,
- rights and responsibilities of education institutions,
- ethical considerations related to the education of undocumented students, and
- helpful resources, and how to access these.

DEFINITION

A person is considered undocumented (unauthorized) if he or she is not a legal permanent resident of the U.S. and does not possess a green card, visa or other legal documentation (Gonzales, 2009). Included are the foreign-born children of undocumented parents.

On the other hand, children of unauthorized immigrants who are born in the U.S. are automatically conferred birthright citizenship under the Fourteenth Amendment to the U.S. Constitution. Changing or eliminating birthright citizenship has been debated by Congress (Scarinci, 2015; Ho, 2015).

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K-12 EDUCATION

The Pew Research Center reported approximately 4-million unauthorized children attend K-12 public and private schools (Passel & Cohn, 2016). They represent over 7% of all school-age children.

Common obstacles undocumented school-age children face: registration delays, rigid document requirements, concern that these children will lower state exam scores, placement in an alternative school, and ineffective communication with parents (Booi, et. al, 2016; Borkowshi & Soronen, 2009). Also, some parents hesitate to enroll their children because they fear being deported (Walker, 2016).

Yet, education is vital for one's success and ability to contribute to society—regardless of national origin—as recognized by the U.S. Supreme Court (e.g., Brown v. Board of Education; Plyler v. Doe); Congress (e.g., Civil Rights Act of 1964; 1974 Equal Educational Opportunities Act; Every Child Succeeds Act of 2015), the National School Board Association (Article IV), the National Education Association (resolution I-23), and the United Nations (1948 resolution 217, Article 26; 1951 Status of Refugees; 1965 Elimination of All Forms of Racial Discrimination).

Rights under the 14th Amendment of the U.S. Constitution extend to all persons, citizens and noncitizens alike (Cole, 2010). In 1886, the U.S. Supreme Court ruled that the Equal Protection Clause applies to all persons regardless of nationality (Yick Wo v. Hopkins). Referencing this clause, the Court in 1982 determined undocumented children have the same right to a free, basic public K-12 education as citizens and lawful residents (Plyler v. Doe).

Public school officials are to provide equal educational opportunities to those undocumented students who reside in their district. Under state compulsory attendance laws, these children may

in fact be required to attend (OSPI, 2015). Undocumented students have the right to: the range of programs offered other students; qualified teachers; support services (e.g., for those who qualify—English language acquisition, special education, homeless assistance, migrant

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education, free and reduced lunch); extra-curricular activities; privacy, and access to their records; (Sauer, 2013; Borkowski & Soronen, 2009; U.S. Department of Agriculture, 2008).

Borkowski and Soronen (2009) recommend:

- evaluating policies, procedures and practices at the state and local levels to ensure undocumented children are provided a meaningful education;
- the provision of guidance and training materials to local school officials by federal and state agencies; and
- collaboration between Immigration & Customs Enforcement and education agencies to protect students from the effects of enforcement actions.

U.S. Constitution Amendment XIV (1886)

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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 within its jurisdiction the equal protection of the laws.

Citizenship:

Children born in the U.S. are American citizens regardless of the citizenship of their parents. In United States v. Wong Kim Ark (1898), the U.S. Supreme Court ruled “...a child born in the United States, of parents of Chinese descent...but who have a permanent domicile and residence in the United States, and are there carrying on a business...” is a U.S. citizen at birth [169 U.S. 649 (1898) at 654]. Furthermore:

To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of

English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States. *Id.* at 693-94.

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The Court addressed the meaning of the provision *subject to the jurisdiction thereof*. The U.S. District Attorney claimed Wong Kim Ark is not under the laws of California and the United States because since his parents are Chinese and subjects of the Emperor of China, he is also a Chinese person and a subject of the Emperor of China. *Id.* at 650. The Court's majority disagreed, concluding Wong Kim Ark is required to obey U.S. law, and is therefore *subject to the jurisdiction thereof*.

The actual meaning of *subject to the jurisdiction thereof* continues to be debated. Legislation has been introduced to define the scope and abolish birthright citizenship for children of temporary visitors and illegal aliens without amending the Constitution (Feere, 2010). For example, the Birthright Citizenship Act of 2017 seeks to amend the Immigration and Neutrality Act to consider a person born in the U.S. *subject to the jurisdiction* of the U.S. for citizenship at birth if one parent is (1) a U.S. citizen or national, (2) a lawful permanent resident alien whose residence is in the U.S., or (3) an alien performing active service in the U.S. Armed Forces [H.R. 140 – 115th Congress (2017-18)].

Equal Protection & Due Process:

States must guarantee the same rights, privileges and protections to all citizens. Distinctions may not be drawn solely on differences that are irrelevant to a legitimate governmental objective (Legal Information Institute, 2016). The intent is to provide equal application of the law, not guarantee equality among individuals or groups (Persily, 2014; Wright, 2016). Due process deals with fair procedures and ensuring rights are not arbitrarily denied.

The U.S. Supreme Court in Yick Wo v. Hopkins (1886) unanimously determined that equal protection and due process are “universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality” [118 U.S. 356 (1886) at 368]. That “...the rights of the petitioners...are not less because they are aliens and

subjects of the Emperor of China” (*Id.*). Furthermore, a law and its enforcement may not “...make unjust and illegal decisions between persons in similar circumstances, material to their rights, the denial of equal justice...” *Id.* at 374. The Court’s decision advanced equality to include lawful resident aliens (Bernstein, 2008).

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In *Wong Wing v. United States* (1896), Justice Field of the U.S. Supreme Court noted:

The term ‘person,’ used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic [163 U.S. 242 (1896)].

A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of the laws. *Id.*

The U.S. Supreme Court in *Plyler v. Doe* (1982) ruled undocumented children are entitled to the same public education as provided to children who are citizens or legal residents:

...the Equal Protection Clause...provides that no State shall ‘deny within its jurisdiction the equal protection of the laws.’ Whatever his status...an alien is a ‘person’ in any ordinary sense of that term...the phrase ‘within its jurisdiction’ confirms the understanding that the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a state... [457 U.S. 202 (1982) at 210-216].

Furthermore:

The undocumented status of these children *vel non* does not establish a sufficient rational basis for denying them the benefits that the State affords other residents. *Id.* at 203(c).

...the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate State goal. *Id.* at 225.

We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in the country through no fault of their own, access to a basic education. *Id.* at 226.

In *Martinez v. Bynum* (1983), the U.S. Supreme Court determined that the Equal Protection Clause does not prevent a state from permitting only bona fide residents to be provided a tuition-free public education:

A bona fide residence requirement...further the substantial state interest in assuring that services provided for the State's residents are enjoyed only by residents...Moreover...the provision for primary and secondary education is one of the most important functions of local government...an adequate justification for local residence requirements. Absent such requirements, the proper planning and operation of the schools would suffer significantly

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[461 U.S. 321 (1983) pp. 325-330].

Civil Rights Act of 1964 (P.L. 8-352, 78 Stat. 241)

Title IV prohibits discrimination on the basis of race, color, or national origin, among other factors, by public elementary and secondary schools (42 U.S.C. § 2000c-6). Title VI prohibits discrimination by recipients of Federal financial assistance on the basis of race, color, or national origin (42 U.S.C. § 2000d).

School districts are prohibited from unjustifiably utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of a program for individuals of a particular race, color, or national origin [*see* 28 C.F.R. § 42.104(b)(2) and 34 C.F.R. § 100.3(b)(2)].

1974 Equal Educational Opportunities Act (P.L. 93-380, 88 Stat. 484)

Title II prohibits an educational agency from denying equal educational opportunity to any person on the basis of gender, race, color, or nationality through deliberate segregation.

Language barriers that impede equal participation in instructional programs must be removed [88 Stat. 484, 515 § 204(f) (codified at 20 U.S. Code § 1703(f)].

McKinney-Vinto Homeless Assistance Act of 1987 (P.L. 100-77, 101 Stat. 482)

Homeless children are entitled to the same educational rights and services provided to other students. Reauthorized by the Every Student Succeeds Act (P.L. 114-95, Title IX, Part A), subtitle VII-B facilitates the enrollment, attendance and success in school of homeless children and youth, including immigrant and unaccompanied alien children and those who lack the normally required records [42 U.S.C. 11431 et seq.).

U.S. Departments

On November 17, 2015, the U.S. Department of Education, U.S. Department of Justice, and U.S.

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Department of Health and Human Services released a fact sheet concerning the rights of unaccompanied (alien) children. Public school officials are to:

- assess language needs,
- evaluate for special education eligibility,
- provide language assistance,
- provide meaningful access to all curricular and extracurricular programs,
- avoid unnecessary segregation, and
- ensure meaningful communication with limited English proficient sponsors or parents.

According to the U.S. Department of Education (2014):

All children in the United States are entitled to equal access to a public elementary and secondary education, regardless of their or their parents' actual or perceived national origin, citizenship, or immigration status. This includes recently arrived unaccompanied children, who are in immigration proceedings while residing in local communities with a parent, family member, or other appropriate adult sponsor.

On May 8, 2014, the U.S. Department of Education (Office for Civil Rights) and the U.S. Department of Justice (Civil Rights Division) published a letter to state and local education agencies. Citing Titles IV and VI of the Civil Rights Act of 1964, as well as the Plyler v. Doe (1982) decision, the federal officials reminded public education officials they are to provide equal opportunities to all children who reside within their school district:

- Students may not be barred from enrolling on the basis of their own citizenship or immigration status, or that of their parents or guardians.
- The district may not request information with the purpose or result of denying access on the basis of race, color, or national origin.
- The district may require students or their parents to provide proof of residency (e.g., copies of phone and water bills, or a lease agreement)—but inquiring into citizenship or immigration status is not relevant to establishing residency within the district.
- The district may not bar a student from enrolling because he or she lacks a birth certificate or has records that indicate a foreign place of birth, such as a foreign birth certificate.

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- A school selected for a homeless child must immediately enroll him or her, even if the child (or parent, or guardian) is unable to produce the records normally required for enrollment, such as birth certificate and proof of residency [*see* 42 U.S.C. § 11432(g)(3)(C)(1)].
- If the district requests social security numbers of its students (e.g., for use as a student identification number), individuals are to be told disclosure is voluntary and how this information will be used [*see* 5 U.S.C. §552a; P.L. 93-579 § 7(a)(2)]. The district may not deny enrollment to a student if he or she (or the parent or guardian) chooses not to provide a social security number.
- Any student demographic data the district is required to gather and report (federal or State) may not be used to discriminate against students. Nor should a child be denied enrollment if his or her parent or guardian refuses to provide such information.
- The district should review the list of required documents to ensure none unlawfully bar or discourage a student from attending school, albeit State- or district-mandated age requirements and jurisdictions.
- In all instances of information collection and review, it is essential that any request be uniformly applied to all students—not in a selective manner to specific groups.
- Districts should review State and district level student enrollment data. Precipitous drops by any group may signal barriers to attendance which warrant investigation.

On January 7, 2015, the U.S. Department of Education (Office for Civil Rights) and the U.S. Department of Justice (Civil Rights Division) addressed the rights of English learners. Referencing the Civil Rights Act of 1964 (Title VI) and the 1973 Equal Education Opportunities Act, departments reminded public education officials they are to ensure English learners participate meaningfully and equally in educational programs and services.

Concerning student eligibility for free and reduced meals, the U.S. Department of Agriculture noted (2016):

United States citizenship or immigration status is not a condition of eligibility for free and reduced price benefits. LEAs (local school districts) must apply the same eligibility criteria for citizens as non-citizens.

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LEAs are prohibited from requesting citizenship or immigration Status on the application because citizenship or immigration Status is not a requirement for participation in the school meal programs, and may pose a barrier to participation and deter otherwise eligible households from applying (p. 62).

Regarding immigration enforcement actions (e.g., arrests, interviews, searches, surveillance), officers will not engage at sensitive locations (e.g., early learning programs, elementary and secondary schools, colleges and universities, education-related activities and events, and school bus stops that are marked and known to the officer) when children are present (U.S. Immigration and Customs Enforcement, 2011; U.S. Customs and Border Protection, 2013; U.S. Department of Homeland Security). Exceptions include prior approval by a supervisor, or exigent circumstances (e.g., threat to national security, pursuit of a dangerous felon, imminent risk of harm, or risk of the destruction of evidence in a criminal case).

United Nations

As a member of the United Nations, the U.S. agreed to ensure public education is accessible to all children, regardless of race, color, or national or ethnic origin (1948 U.N. resolution 217, Article 26; 1951 U.N. Convention Relating to the Status of Refugees; 1965 Convention on Elimination of All Forms of Racial Discrimination). Included are undocumented children, and those of undocumented parents.

POSTSECONDARY EDUCATION

Approximately 5-10% of undocumented students who graduate from high school will continue to postsecondary education (Ibarra & Ross, 2012). Common challenges include: limited information from postsecondary institutions about eligibility requirements; fear of sharing information about legal status; lack of adequate mentoring; unsupportive college environments; cost, and lack of continued financing for tuition and other expenses; and changes in residency requirements for in-state tuition rates (Perez, 2014; p. 2).

There is no constitutional or statutory guarantee of the right to education. Attendance is not compulsory at the postsecondary level, and there is a private benefit (Swail, 2011). Also, the

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cost of obtaining a postsecondary education causes it to be a privilege (Garces, 2015).

States are not required to provide undocumented students access (Vasilogambros, 2016). On the other hand, no federal law prohibits admission. That said, undocumented students are not eligible for federal financial aid, including loans, grants, scholarships or work-study (Higher Education Act of 1965; Illegal Immigration Reform & Immigration Responsibility Act of 1996; Personal Responsibility & Work Opportunity Reconciliation Act of 1996).

According to the National Conference of State Legislatures (2014), twenty states offer in-state tuition to unauthorized immigrant students (16 by state legislative action, and 4 by state university systems). Although allowed to attend, they are not eligible for federal aid until they gain legal immigration status. Legal status can sometimes be obtained through family or work-based petitions (e.g., U.S. citizen can apply for their spouse or an employer can apply for their employee), or through the Diversity Immigrant Visa program. *Ibid.*

Higher Education Act of 1965 (P.L. 89-329, 79 Stat. 1219)

Title IV provides student assistance through scholarships, low-interest loans, and work study programs. Federal aid is limited to U.S. citizens and permanent residents (Blume, 2011).

Immigration Act of 1990 (P.L. 101-649, 104 Stat. 4987)

Lifted the English testing process for naturalization (Title IV), and provided the Diversity Visa program (Part 3). Lottery applicants must be from a low admittance country (or their nation is underrepresented in the U.S.), have a high school diploma, and have at least two years of work experience in an occupation that requires two years training.

Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193, 110 Stat. 2105)

All unqualified aliens remain ineligible for any federal benefit, including retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance,

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unemployment, or other similar benefit [*see* 8 U.S.C. § 1611, 2006 Edition, Sup. 5, Title 8]. States are granted discretionary power to determine the tuition rates for publicly funded schools and the authority to provide state financial aid. If a state does not pass specific legislation regarding these matters then federal legislation supersedes and inherently prohibits state financial aid for unauthorized immigrants.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208, 110 Stat. 3009)

Per section 505 of IIRIRA, an alien who is not present in the U.S. shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary benefit unless a citizen or national of the U.S. is eligible for such a benefit in no less amount, duration, and scope (*see* 110 Stat 3009-672; 8 U.S.C. 1623). For example, citizens from another state must also be eligible for the same tuition rate (e.g., in-state).

The U.S. District Court in Day v. Sebelius (2005) dismissed the claim that providing undocumented students in-state tuition but denying the same for U.S. citizens who reside in another state violates section IIRIRA section 505 and the Equal Protection Clause (376 F. Supp. 2d 1022). The court determined plaintiffs were unable to prove they suffered an injury-in-fact.

The decision was upheld in the U.S. Court of Appeals for the Tenth Circuit. On June 23, 2008, the U.S. Supreme Court declined to review the federal review court's ruling.

The California Supreme Court in Martinez v. Regents of the University of California (2010) upheld the state's method for providing in-state tuition to unauthorized immigrant students and ruled it did not conflict with federal law (No. CV052014). State policy allows students who attended a California high school for three years and received a diploma or GED to qualify for in-state tuition rates at public colleges and universities in California. An appeal was filed with the U.S. Supreme Court. On June 6, 2011, the Supreme Court declined to review the ruling.

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Development, Relief and Education for Alien Minors Act [S.729 – 111th Congress (2009-2010)]

The DREAM Act was intended to restore the state option to determine residency for purposes of higher education benefits. Eligibility requirements for individuals: have not entered the U.S. on a non-immigration visa; proof of having arrived in U.S. before age 16; proof of residence for at least 5 consecutive years; if male, have registered with the Selective Service; be between the ages of 12-35 at the time of enactment; have graduated from an American high school, obtained a GED, or been admitted to an institution of higher education; and be of good moral character [Sect. 4(a)(1)(A)]. Conditional legal status (6 years) would be granted to an individual who: (a) graduated from a 2-year college, or (b) completed at least 2 years toward a 4-year degree, or (c) served 2 years in the U.S. Coast Guard or Armed Forces. Although not eligible for such federal grants as the Pell Grants, postsecondary students would be permitted to apply for student loans and work study [Sec. 5(c) & (d)].

Initially introduced in 2001 (S.1291), and many times since, the act has failed to pass. A number of states created their own versions of the DREAM Act to lower tuition for undocumented students, and some of these also provide scholarship support (Gordon, 2016).

Deferred Action for Childhood Arrivals (June 2012)

DACA, an executive order for the U.S. Department of Homeland Security, provides temporary relief from immigration enforcement and deportation proceedings, as well as the authorization to work. Provides legal presence, but not legal status. Individuals may request consideration of deferred action for a period of 2 years, subject to renewal. The following requirements apply (U.S. Department of Homeland Security, 2017):

- under the age of 31 as of June 15, 2012 (at least 15 years or older at the time of application);
- arrived in the U.S. before age 16;
- have continuously lived in the U.S. since June 15, 2007, up to the present time;
- were physically present in the United States on June 15, 2012, and at the time of making

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the request for consideration of deferred action with USCIS;

- had no lawful status on June 15, 2012;
- are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

According to Johnson (2015), some states are either supporting or impeding undocumented student access to a college education. Tuition policies vary by state and institution. In fact, some states have rolled-back their tuition-equity policies (Perez, 2015). On September 5, 2017, President Trump and Attorney General Sessions announced the Justice Department intends to end DACA (Edelman, 2017).

U.S. Department of Education

On October 20, 2015, the U.S. Department of Education published “Resource Guide: Supporting Undocumented Youth.” Suggestions for higher education officials include:

- help youth and families navigate the higher education admissions process;

- provide dual enrollment opportunities that are open to all secondary students;
- create a supportive and welcoming institutional environment;
- provide mentoring and advice;
- develop services and resources that specially support undocumented students;
- share DACA information with students, their families, and the community;
- openly and proactively advertise how the institution supports undocumented students;
- provide peer-to-peer support, and relationship-building opportunities; and
- build staff capacity, and knowledge of relevant issues (pp. 15-21).

ETHICAL CONSIDERATIONS

Crawford (2017) examined the legal and ethical issues associated with educating undocumented students, concluding:

Leaders must be prepared to protect all students with knowledge of law when educational access is compromised, question whether laws are just, and be ready to use sound ethical decision-making skills (p. 171).

Ethics, according to Velasquez and associates (2015), “refers to well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues.” “Ethics also means the continuous effort of studying our own moral beliefs and our moral conduct, and striving to ensure that we, and the institution we help shape, live up to standards that are reasonable and solidly based.” *Ibid.*

The debate over illegal immigration is a complicated moral issue (Davis Hanson, 2010). Typical points of contention are the impact on education and health care, employment and wages, the economy, and national interest/security (Duncan, 2007). Not everyone agrees that educating undocumented students is ethical. Some feel otherwise.

Carroll (2007) posed the following ethical questions:

- Are illegal aliens who enter the country committing an unethical act?

- Is illegal entry fair to existing citizens, and also to those trying to enter the country through appropriate channels?
- Are citizens' rights being encroached upon in the form of higher taxes, crowding in education and social services or in the right to safety?
- Do the legal rights of citizens surpass the rights of those who are here illegally?

Considerations Against Educating Undocumented School-Age Children

A 2014 national survey of eligible voters found 53% did not believe undocumented children should be allowed to attend public schools (Rasmussen Reports, 2014). Approximately 14% were undecided, and only one-third supported educating undocumented school-age children.

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Primary issues of concern appear to focus on extending rights to illegal aliens and providing them government resources. In his dissent opinion for *Plyler v. Doe* (1982), Justice Burger noted:

By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with government services at the expense of those who are lawfully in the state [457 U.S. 202 (1982) at 250].

Modern education...is enormously expensive, and there can be no doubt that very large added costs will fall on the State or its local school districts as a result of the inclusion of illegal aliens in the tuition-free public schools. *Id.* at 252.

Wood (2014) claims educating undocumented children "...puts a huge burden on local districts and states – many of whom are already struggling to provide a good education for children who live there legally." Increased costs, according to Wood, are associated with employing more teachers, providing English language programs (incl. specialized staff and resources), and a larger number of students receiving free-and-reduced lunch.

The Federation for American Immigration Reform (2016) estimates Language Education Programs (LEP), which are provided to undocumented school-age children as well as refugees

and other immigrants, cost over \$59-billion annually, and about 98.9% of that is funded by taxpayers at the local and state levels. The report asserts “LEP programs are growing faster than the school district’s ability to run-or fund-them effectively” and, as a result, some local schools are having difficulty providing LEP services without impacting other students. *Ibid.*

According to English (2015), “...the growing number of immigrant students represents a significant burden on layers of government that have no control over the influx of illegal immigration.”

Considerations For Educating Undocumented School-Age Children

Proponents tend to emphasize the importance of education to not only individuals, but also to states and the nation (i.e., the common good). Ethical and moral responsibilities are embedded

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in international protections, humanitarian beliefs, the values and policies of respected national organizations, and specific U.S. Supreme Court opinions.

In the Right to Education section of its webpage, the United Nations Educational, Scientific and Cultural Organization (UNESCO) proclaims:

Education is a fundamental right...and is enshrined in the Universal Declaration of Rights (1948)...” “Education is itself an empowering right and one of the most powerful tools by which economically and socially marginalized children and adults can lift themselves out of poverty and participate fully in society.

Furthermore, “universal access to education free of discrimination and exclusion is the cornerstone of the right to education” (UNESCO, Right to Education-Fundamental Principles).

The U.S. Supreme Court in *Brown v. Board of Education* (1954) noted:

Today, education is perhaps the most important function of state and local governments . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be

made available to all on equal terms. . . [347 U.S. 483 (1954) at 493].

In *Plyler v. Doe* (1982), the U.S. Supreme Court addressed the importance of a public education for every child:

...the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological wellbeing of the individual, and poses an obstacle to individual achievement [457 U.S. 202 (1982) at 203, 222].

In his dissent opinion, Justice Burger agreed with the ethical soundness of educating all children:

Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children--including illegal aliens--of an elementary education.

I fully agree that it would be folly-and wrong-to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language. *Id.* at 242.

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Denying a free education to illegal alien children is not a choice I would make were I a legislator. Apart from compassionate considerations, the long range costs of excluding any children may well outweigh the costs of educating them. *Id.* at 252-3.

Addressing undocumented children's right to a public education, the Intercultural Development Research Association (2013) notes:

Denying children access to education does not eliminate illegal immigration. Instead, it ensures the creation of an underclass. Without public education for children, illiteracy rates will increase and opportunities for workforce and community participation will decrease. Research has proven that for every \$1 spent on the education of children, at least \$9 is returned.

The Beliefs & Policies statement of the National School Boards Association:

Public schools should provide equitable access and ensure that all students have the knowledge and skills to succeed as contributing members of a rapidly changing, global society, regardless of factors such as race, gender, sexual orientation, ethnic background, English proficiency, immigration status, socioeconomic status, or disability (Article IV, Section 1.3, as amended 4/8/2016).

On May 6, 2011, the National Association of Secondary School Principals (NASSP) adopted the following guidelines:

- NASSP believes that each child is entitled to an excellent public school education regardless of his or her immigration status.
- NASSP believes that all students should graduate from high school with the skills to help them succeed in postsecondary education and the workplace.
- NASSP has endorsed the Common Core State Standards Initiative because the high mobility rate of U.S. students demands that student proficiency be measured against a consistent and rigorous set of common standards and assessments.

Article I-12 of the National Education Association (2016-17) states, in part:

The National Education Association believes that the governments of all nations must respect and protect the basic human and civil rights of every individual, including equal access to education as embodied in the United Nations (p. 318).

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Postsecondary: Considerations for Not Providing In-State Tuition

As previously mentioned, there is no constitutional or statutory guarantee of the right to a higher education. Ultimately, the decision to admit undocumented students to public colleges and universities rests with each state. Likewise regarding the provision of in-state tuition.

A 2011 national survey of eligible voters found 81% oppose in-state tuition for undocumented persons residing in their state (Rasmussen Reports, 2011). In 2015, the National Conference of State Legislatures noted the following concerns of those who do not support allowing undocumented students to pay in-state tuition rates:

- Takes opportunities away from U.S. citizens and legal immigrants, especially during tight economic times.
- Rewards undocumented students and their families for breaking the law, while at the same time punishes legal citizens and legal immigrants by taking away enrollment slots for them.
- Provides incentives for people to immigrate illegally to the U.S, or to remain in the U.S. after visas have expired.

- Violates Section 505 of IIRIRA, and Section 401 of PRWORA. Section 401 states that an "alien who is not a qualified alien is not eligible for any public benefit," which opponents claim includes in-state tuition.
- Too costly, and tax dollars should not be used to support undocumented students. Organizations such as the Federation for American Immigration Reform (FAIR) contend that undocumented students should not have access to publicly funded benefits, including postsecondary education.
- Even if undocumented students attend college, they will not be employable if they are still undocumented after graduation.

Additional concerns of those opposed to in-state tuition for undocumented students include (Drachman, 2006, p. 95):

- States should not have to pay benefits to undocumented students when the government has failed in its responsibility to keep illegal immigrants out of the country.
- Because of the global war on terror, undocumented students pose an unacceptable security risk to the country.
- Large waves of immigrants coming largely from Mexico, both legal and illegal, are adversely transforming the country (values, culture, community).

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Stimson and von Spavosky (2011) contend in-state tuition for undocumented persons is not only a violation of federal law, but also discriminatory:

Federal law prohibits state colleges and universities from providing in-state tuition rates to illegal aliens 'on the basis of residence within the state' unless the same in-state rates are offered to all citizens of the United States.

Granting financial preference to illegal aliens...discriminates against otherwise qualified citizens from outside the state. Furthermore, states that offer in-state tuition to illegal aliens act as a magnet for more illegal aliens to come to the state.

According to Schlafly (2004):

Despite their legal status, U.S. taxpayers have already generously treated these alien students by giving them free schooling from kindergarten to 12th grade, as well as free emergency health care. Many Americans think that

giving them college tuition subsidies that are unavailable to U.S. citizens is too much, especially when U.S. parents are struggling to pay for their own children.

The Deferred Action for Childhood Arrivals (DACA) executive order eased many of the barriers undocumented students face, from gaining access to in-state tuition in many states, to higher wages, and to added job security after graduation (Malik, 2015). Wilcox (2017) believes DACA serves to protect undocumented persons from the consequences of breaking the law. Welch (2017) notes:

The whole point of DACA is immunity: from deportation...

...legalizing the residency of people living here illegally amounts to forgiving them (or their parents') infractions, while ratifying their cutting in line ahead of other would-be legal immigrants. You do this because of a logistical and moral tradeoff: deporting millions of 'dreamers' would be a net negative relative to the costs associated with them staying vs. the moral hazard of rewarding their rule-breaking.

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Postsecondary: Considerations for Providing In-State Tuition

Proponents of in-state tuition for undocumented students make the following arguments (National Conference of State Legislatures, 2015):

- Many undocumented students came to the U.S. with their parents as young children and should not be deprived of higher education because of their parents' choices.
- A large percentage of undocumented students have either graduated from a public high school or obtained a GED. It is inconsistent to provide these students with an education that ends at high school graduation. Currently, the postsecondary options for undocumented students are severely limited, which limits their future social and economic mobility.
- Legislation granting undocumented students in-state tuition rates gives these students an incentive for completing high school, attending college, and eventually contributing to a state's society and economy.
- Legislation allowing undocumented students to pay in-state tuition rates would make higher education more affordable and accessible for those who already meet the proper

residency and academic requirements. Without access to postsecondary education, a growing uneducated workforce results in significant costs to states.

- According to a 2005 report from the American Association for State Colleges and Universities (AASCU), failing to help students attend college results in higher costs to state prisons and state welfare systems.
- Another AASCU report, Access for All, found that a large portion of undocumented college-age individuals are likely to stay in the U.S. even if they do not have access to higher education.

Additional arguments from those who support in-state tuition for undocumented students include (Drachman, 2006):

- Many undocumented students drop out of high school or do not take a college preparatory program because they do not believe they can afford college.

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- The difference between in-state and out-of-state tuition is substantial. Thus many undocumented students who would enroll in college cannot afford to do so. This is damaging psychologically and emotionally to these students, as well as a terrible waste of talent and potential.
- From an economic point of view, college graduates generally pay more in taxes and cost the government less in criminal justice and welfare expenses than high school dropouts.
- Undocumented students would not necessarily take the seats of legal immigrants or legal residents, or receive preference for admissions based on their immigration status. Instead, they would be part of the general in-state applicant pool.
- The enrollment of undocumented students adds important diversity to the campus.
- Undocumented students are in this country to stay.

Concerning DACA, more than 600 college and university presidents support its continuation (Pamona College, 2017). Excerpts from the Statement in Support of the Deferred Action for Childhood Arrivals (DACA) Program and Our Undocumented Immigrant Students:

DACA beneficiaries on our campuses have been exemplary student scholars

and student leaders, working across campus and in the community. With DACA, our students and alumni have been able to pursue opportunities in business, education, high tech, and the non-profit sector; they have gone to medical school, law school, and graduate schools in many disciplines. They are actively contributing to their local communities and economies.

To our country's leaders we say that DACA...is both a moral imperative and a national necessity. America needs talent and these students...are already a part of our national community. They represent what is best about America, and as scholars and leaders they are essential to our future.

In its letter to President Trump, the Education Coalition (2017) proclaimed:

Ending DACA...would be a grave injustice to hundreds of thousands of young immigrants raised in America, would undermine our economy, and would diminish our moral standing as a nation.

...this public would be deeply troubled by a decision to expel immigrants who, having arrived as minor children, have acted consistently with the best of American values and who are for all intents and purposes, American.

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Over 1,600 educators from Jesuit Institutions signed a letter to White House Chief of Staff John Kelly urging DACA be upheld, noting:

It is a moral and policy failure when our government targets children and young adults who simply aspire to live the American dream. Breaking up families and communities undermines the best values of our nation (Ignation Solidarity Network, 2017).

Conclusions: Public K-12 Education

Public school officials are to provide equal educational opportunities to undocumented students who reside in their district. These children must be given access to the range of curricular and extra-curricular programs offered other students, qualified teachers, and support services. School personnel are also required to assess language needs and provide language assistance, evaluate for special education eligibility, avoid unnecessary segregation, and ensure meaningful communication with limited English proficient sponsors or parents.

The school district may not: bar a student on the basis citizenship or immigration status; request information with the purpose or result of denying access on the basis of national origin; inquire

beyond what is needed to establish residency within the district; deny enrollment if the student (or parent or guardian) does not or cannot provide a birth certificate, social security number, and/or demographic information.

National survey data indicate the majority of eligible voters do not believe undocumented children should be allowed to attend public schools. Primary issues of concern: extending rights to undocumented persons who are here illegally; the fiscal burden on states and local school districts; difficulty providing services without impacting citizen students.

On the other hand, the U.S. Supreme Court, Congress, the United Nations, and professional education associations appear to agree that education is vital for one's success and ability to contribute to society. As such, education is considered a basic human and civil right regardless of national origin, citizenship or immigration status.

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Conclusions: Postsecondary Education

States are not required to provide undocumented students access. Although no federal law prohibits admission, undocumented students are not eligible for federal financial assistance (e.g., loans, grants, scholarships or work-study). Cost is a common barrier for undocumented persons. Tuition policies vary by state and institution.

National survey data indicate the majority of eligible voters are opposed to in-state tuition for undocumented persons who reside in their state. Primary issues of concern: tax dollars should not be used to support students who are here illegally; enrollment slots are decreased for legal citizens and legal immigrants; discriminatory unless the in-state rate is provided to citizens from outside the state; many U.S. citizens struggle to pay for college; attracts more illegal aliens to the state; undocumented students pose a threat to national security.

Reasons cited by proponents of in-state tuition for undocumented students: several have lived in the U.S. since they were young children; large percentage have either graduated from a public

high school or obtained a GED; many college-age persons are likely to stay; waste of talent and potential if college is not affordable and accessible to capable undocumented students; an educated workforce is beneficial to the national economy.

Implications

Education leaders are responsible for understanding the rights and responsibilities of undocumented students as well as those of their institution. Leaders need to ensure organizational policies, procedures and practices are legally compliant—and ethically sound. Furthermore, it is essential that leaders access credible resources and make certain they and their key stakeholder groups are provided accurate information and whatever assistance is needed. Perhaps most important is to not lose sight of the purpose of education, and its extraordinary impact not only on individual students, but also on society.

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U.S. Department of Education, Office for Civil Rights.
(800) 421-3481; ocr@ed.gov
<http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>

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