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## “Jim Crowing” Plyler v. Doe: the Resegregation of Undocumented Students in American Higher Education through Discriminatory State Tuition and Fee Legislation

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# “JIM CROWING” *PLYLER V. DOE*: THE RE-SEGREGATION OF UNDOCUMENTED STUDENTS IN AMERICAN HIGHER EDUCATION THROUGH DISCRIMINATORY STATE TUITION AND FEE LEGISLATION

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ZELIDEH R. MARTINEZ HOY\*\*

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## I. INTRODUCTION

This year marks the 60<sup>th</sup> anniversary of the *Brown v. Board of Education*<sup>1</sup> landmark decision, and educators and scholars around the country have been reflecting on the state of our public schools. Although the U.S. Supreme Court outlawed *de jure* segregation in our public schools sixty years ago,<sup>2</sup> our education system is more segregated than ever.<sup>3</sup> “Jim Crow” laws are no longer permissible; however, the essential structure of these discriminatory statutes is still ingrained in

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<sup>1</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

<sup>2</sup> In 1954, the U.S. Supreme Court overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896), and declared that the principle of “separate but equal” has no place in education. *Id.* at 495. The Court unanimously found that segregated public K-12 schools are inherently unequal and unconstitutional under the equal protection provisions of the 5<sup>th</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution. *Id.*

<sup>3</sup> See generally ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? (The Civil Rts. Project, Harv. Univ. 2003).

our society.<sup>4</sup> Today's "Jim Crow" laws no longer come in the form of racially explicit terms; instead, states use other race-neutral, color-blind labels such as "immigration status" to explicitly discriminate.

Continued racial inequality in education is attributed to a number of factors;<sup>5</sup> however, for the purposes of this article, we examine the segregation and re-segregation of public school students based on their immigration status. While legislators constantly debate the issues of border security and unaccompanied children, amnesty and a path to citizenship, and social services for undocumented immigrants, undocumented families live in our neighborhoods, contribute to our economy, and attend our schools. Their uncertain immigration status segregates them from their friends and families. Although they are a part of our society – working together, learning together, and playing together – undocumented immigrants do not receive similar public benefits, and are not afforded the same social security that is fundamental to living a productive life in our society.<sup>6</sup> For the purposes of this article and its focus on education, we will distinguish from undocumented immigrants and concentrate on undocumented students.<sup>7</sup>

For decades, many supporters have been working to pass federal immigration reform to create opportunities for undocumented students. These children, many of whom are now prospective college students and workers, consider the U.S. as their home and the American culture as their own.<sup>8</sup> However, because of their undocumented status, they are constrained from the many social and educational benefits that their friends take for granted. During his presidential campaign, then-Senator Barack Obama recognized the need for immigration reform and pledged that as President, he would work with Congress to finally pass legislation that would allow over 2.1 million undocumented students<sup>9</sup> a path to citizenship and subsequent

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<sup>4</sup> Jim Crow laws were local and state laws enacted between 1877 and 1965 in the southern states. These laws were passed to legalize segregation based on race, gender, religion, and class, and rationalize the unequal treatment and living conditions for Whites and Blacks. Derrick A. Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 13 (1979).

<sup>5</sup> See generally Roslyn Arlin Mickelson, *When Are Racial Disparities in Education the Result of Racial Discrimination? A Social Science Perspective*, 105 TCHRS. C. REC. 1052 (2003); George Farkas, *Racial Disparities and Discrimination in Education: What Do We Know, How Do We Know It, and What Do We Need to Know?*, 105 TCHRS. C. REC. 1119 (2003).

<sup>6</sup> LEO R. CHAVEZ, *SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY* (Wadsworth 3d ed. 2013) (1998).

<sup>7</sup> Although a large number of undocumented immigrants are from Mexico, undocumented immigration in the United States is a global issue. Reporting by the U.S. Department of Homeland Security indicates there are approximately 11.4 million undocumented immigrants with over 6.7 million from Mexico. The remaining almost half are from El Salvador, Guatemala, Honduras, Philippines, India, Korea, China, Ecuador, Vietnam, and other countries. BRYAN BAKER & NANCY RYTINA, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, *ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012* 1, 3 (Mar. 2013).

<sup>8</sup> See CHAVEZ, *supra* note 6.

<sup>9</sup> The Immigration Policy Center of the American Immigration Council estimated that there were 2.1 million undocumented children in the U.S. as of 2011. *The DREAM Act:*

security to seek higher education and employment in the United States. Unfortunately, President Obama is midway through his second term, and immigration reform has yet to pass. In 2012, President Obama issued an executive order implementing the Deferred Action for Childhood Arrivals (DACA) program that gives eligible undocumented students the opportunity to obtain temporary legal status and eliminates these students' fear of being removed.<sup>10</sup>

Although undocumented students have few rights, thirty-two years ago, in *Plyler v. Doe*, the U.S. Supreme Court ruled that all children, regardless of immigration status, shall have the same right to access public K-12 education;<sup>11</sup> however, we find that there are still a number of obstacles today. Many states have passed legislation trying to skirt *Plyler*, and local school districts have implemented procedural obstacles to access public education. While limiting access to public K-12 education is now more constitutionally difficult post-*Plyler*, states have discovered that they can restrict access to affordable higher education for undocumented students. Unlike access to K-12 education, higher education is not constitutionally guaranteed. Thus many proponents of anti-immigration policies have created their own "Jim Crow" laws knowing that this is an attempt to create barriers for undocumented students to continue their education.

The guarantee of a public K-12 education without assured affordable access to higher education re-segregates undocumented students in our society, especially in a world economy that increasingly calls for a higher education degree in order to be competitive in the marketplace. Because of federal standstill on immigration reform, many states have overtly discriminated against undocumented students by restricting their equal access to higher education based on their legal status. State actors have taken the issue upon themselves to either be inclusive or exclusive of their resources for the attainment of higher education for these students.

This law review article examines the re-segregation of undocumented students in education, more specifically, re-segregation through state laws and policies impacting their attendance at American colleges and universities. Under no fault of their own, undocumented students are marginalized even further after graduating from high school, since they are not afforded the same benefits as their peers to attend college. This article explores the current landscape of these laws and policies after providing background on *Plyler v. Doe* and state and federal attempts to challenge education for undocumented students.

## II. PLYLER V. DOE AND THE INTEGRATION OF UNDOCUMENTED STUDENTS IN K-12 EDUCATION

The U.S. Supreme Court first dealt with undocumented students in public education in *Plyler v. Doe*, where the Court prohibited states from denying undocumented students access to free education and school districts from charging

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*Creating Opportunities for Immigrant Students and Supporting the U.S. Economy*, IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL (Updated May 18, 2011), <http://www.immigrationpolicy.org/just-facts/dream-act>.

<sup>10</sup> See Jeffery Passel & Mark Hugo Lopez, *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules*, PEW RESEARCH HISPANIC TRENDS PROJECT (Aug. 14, 2012), <http://www.pewhispanic.org/2012/08/14/up-to-1-7-million-unauthorized-immigrant-youth-may-benefit-from-new-deportation-rules/>.

<sup>11</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

tuition based on citizenship status.<sup>12</sup> *Plyler*, along with *Brown v. Board of Education*,<sup>13</sup> *Regents of the University of California v. Bakke*,<sup>14</sup> *Gratz v. Bollinger*<sup>15</sup> and *Grutter v. Bollinger*<sup>16</sup> are landmark decisions affording equal opportunity in education.<sup>17</sup> In these cases, the U.S. Supreme Court asserted that undocumented immigrants are protected under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.<sup>18</sup> It is also important to note that 2014 marks the 40<sup>th</sup> anniversary of *Lau v. Nichols*,<sup>19</sup> the U.S. Supreme Court case that affords equal education rights to students who are not proficient in the English language. All of these cases afford educational opportunities to students who would otherwise be marginalized. As a result, state legislatures undertook efforts aimed at creating barriers to the new rights afforded to these under-represented student populations.

In 1975, Texas passed a statute that withheld state funding from school districts that used those funds to educate children who were not legally admitted into the United States, and gave these districts the option to deny enrollment or charge tuition to such students.<sup>20</sup> In 1977, a group of Mexican children living in Smith County, Texas attempted to enroll in the Tyler Independent School District and could not prove their lawful immigration status.<sup>21</sup> The federal district court certified a class of all the undocumented school-aged children residing in the school district and it found that there was no rational basis for the discriminatory statute and enjoined the implementation.<sup>22</sup> The Fifth Circuit Court of Appeals affirmed that the statute did not pass the rational basis test; however, it did not find that federal law preempted the Texas statute.<sup>23</sup>

On appeal, Justice Brennan asserted in the ruling that undocumented children could invoke the protections of the Equal Protection Clause.<sup>24</sup> The Court skirted the issue of preemption and ruled that this denial of education was a violation of the Fourteenth Amendment's Equal Protection Clause, because this denial would create a "lifetime of hardship" and a "permanent underclass" of individuals that "it is

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<sup>12</sup> *Id.* at 230.

<sup>13</sup> 347 U.S. 483 (1954).

<sup>14</sup> 438 U.S. 265 (1978).

<sup>15</sup> 539 U.S. 244 (2003).

<sup>16</sup> 539 U.S. 306 (2003).

<sup>17</sup> María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1385 (2005).

<sup>18</sup> *Id.*; see also Michael A. Olivas, *HIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004).

<sup>19</sup> 414 U.S. 563 (1974).

<sup>20</sup> *Plyler v. Doe*, 457 U.S. 202, 205 (1982) (citing 1975 Tex. Sess. Law Serv. 896 (codified as TEX. EDUC. CODE ANN. § 21.031 (1975))).

<sup>21</sup> *Id.* at 206.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 208-9.

<sup>24</sup> *Id.* at 210, 215.

doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education."<sup>25</sup> Although the state argued that undocumented immigrants exhaust public resources and do not contribute to social services, the Court stated that there was no "evidence . . . suggesting that illegal entrants impose any significant burden on the State's economy."<sup>26</sup> In addition, the Court of Appeals found that undocumented immigrants contribute equally to the funding of education, as do those with legal status.<sup>27</sup> While the Court applied a higher level of scrutiny than rational basis, undocumented students are not a suspect class under the equal protection analysis<sup>28</sup> and public education is not a fundamental federal constitutional right.<sup>29</sup> The state was not able to show a substantial state interest to deny "a discrete group of innocent children" education that it otherwise offers to others residing within its borders, and as a result the U.S. Supreme Court invalidated the law giving the right to K-12 education.<sup>30</sup> As an important note, the Court stressed that the undocumented children "can affect neither their parents' conduct nor their own status,"<sup>31</sup> and as a result, it would be unfair to penalize the children for their parents' presence.

Unfortunately, this guarantee to public education does not extend to higher education. The *Plyler* guarantee opens access to primary and secondary education to undocumented students, but a high school diploma is no longer sufficient to compete in today's labor market.<sup>32</sup> Employment is competitive and in order to find sustainable work to support oneself and family, higher education is essential. Perhaps in today's society, Justice Brennan would agree that a permanent underclass with a lifetime of hardship would be created without specialized skills from an affordable higher education. Undocumented students face a variety of obstacles, some erected by the states, to accessing higher education including the denial of admission, a lack of financial aid, and the inability to pay an in-state resident tuition, just to name a few. Some states have taken affirmative action to guarantee the same resident in-state tuition benefits to undocumented students, while others have taken affirmative action to deny those rights.

### III. CONTINUED SEGREGATION OF UNDOCUMENTED STUDENTS IN EDUCATION

Because of their immigration status, undocumented students were and still are segregated in American public schools. Even after *Plyler v. Doe*, there have been political and legal challenges to education for undocumented students. Many states

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<sup>25</sup> *Id.* at 223; see also López, *supra* note 17, at 1389 (citing *Plyler*, 457 U.S. at 219, 223).

<sup>26</sup> *Id.* at 228.

<sup>27</sup> *Doe v. Plyler*, 458 F. Supp. 569, 588-89 (E.D. Tex. 1978).

<sup>28</sup> *Plyler*, 457 U.S. at 219 n.19, 223.

<sup>29</sup> *Id.* at 221 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-39 (1973) ("Public education is not a 'right' granted to individuals by the Constitution . . . . Nor is [it] a fundamental right.") *Id.* at 221, 223.

<sup>30</sup> *Id.* at 230.

<sup>31</sup> *Id.* at 220.

<sup>32</sup> ROBERTO G. GONZALES, *YOUNG LIVES ON HOLD: THE COLLEGE DREAMS OF UNDOCUMENTED STUDENTS* 12 (The College Board 2009).

enacted legislation that directly and indirectly challenged the Court's ruling. Opponents are frequently concerned about funding education during a time of decreasing budgets.<sup>33</sup> As a result, state measures have claimed budgetary concerns to limit educational access to undocumented students. Unbeknownst to taxpayers, undocumented immigrants are generally a net national economic benefit since there is a significant flow of revenue to the federal government from taxing the incomes of the undocumented immigrants and the businesses employing them.<sup>34</sup>

In 1994, California voters overwhelmingly passed Proposition 187 that denied undocumented students access to the state's public primary and secondary schools along with other social services.<sup>35</sup> The proposed law would have required schools to (1) verify immigration status of enrolled students and their parents, (2) report any suspected undocumented immigrants to authorities, and (3) deny any services.<sup>36</sup> Although a federal district court enjoined the implementation of Proposition 187 because of federal preemption and the exclusion of undocumented immigrants from public education,<sup>37</sup> it renewed the intense debate and brought it back to the forefront.<sup>38</sup> These efforts later culminated in proposed federal legislation to authorize states to deny education to undocumented students.<sup>39</sup> Although it passed the House of Representatives, it failed in the Senate and died in committee negotiations.<sup>40</sup>

In addition to state and district-level policies denying admission to certain immigrant and non-immigrant children based on their legal status, the legal obstacles above did not stop other states from passing their own anti-immigration bills. The Arizona and Alabama state legislatures passed Senate Bill 1070<sup>41</sup> in 2010 and House Bill 56<sup>42</sup> in 2011, respectively, and required school districts to track and report undocumented students to determine the financial impact of funding their education. Maryland proposed similar legislation, but its Board of Education immediately quashed the proposal,<sup>43</sup> while Texas<sup>44</sup> passed something similar without any

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<sup>33</sup> Kevin R. Johnson, *The Keyes to the Nation's Educational Future: The Latina/o Struggle for Educational Equity*, 90 DENV. U. L. REV. 1231, 1235-36 (2013).

<sup>34</sup> KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDER AND IMMIGRATION LAWS 137-43 (2007).

<sup>35</sup> See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

<sup>36</sup> *Id.* at 774.

<sup>37</sup> *Id.* at 787.

<sup>38</sup> Udi Ofer, *Protecting Plyler: New Challenges to the Right of Immigrant Children to Access a Public School Education*, 1 COLUM. J. RACE & L. 187, 201-02 (2012).

<sup>39</sup> H.R. 4134, 104th Cong. (1996).

<sup>40</sup> Eric Schmitt, *G.O.P. Will Delete Disputed Measure in Immigrant Bill*, N.Y. TIMES, Sept. 24, 1996, at A1.

<sup>41</sup> S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

<sup>42</sup> H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011).

<sup>43</sup> Megan Miller, *State School Board Bars Frederick Illegal Immigration Checks*, S. MD. ONLINE (Mar. 24 2009), <http://somd.com/news/headlines/2009/9692.shtml>.

<sup>44</sup> H.B. 22, 82d Leg. (Tex. 2011).

obstacles. These state measures are a continued effort to discriminate against children in education based on their immigration status.

#### IV. FEDERAL DREAM ACT ATTEMPTS TO DESEGREGATE UNDOCUMENTED STUDENTS IN HIGHER EDUCATION

Congress has failed to address comprehensive immigration reform – an area of law where the federal government’s power is unlimited – since the passing of the Immigration Reform and Control Act of 1986 (IRCA). The IRCA implemented new immigration policies that required employers to verify their employees’ immigration status and made it a crime to knowingly hire undocumented immigrants. The IRCA also allowed certain seasonal-farming, migrant workers and about three million other undocumented immigrants who entered and resided in the U.S. continuously since January 1, 1982, to have legal documents, which later became known as “amnesty.”<sup>45</sup> Ten years later, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which changed the federal social welfare and health benefits for undocumented immigrants.<sup>46</sup> Additionally, the IIRIRA also denied higher education benefits to undocumented students if not afforded to a U.S. national.<sup>47</sup> As a result, this federal measure again re-segregated educational benefits for undocumented students. If a state wanted to give resident undocumented immigrants in-state resident tuition, it must affirmatively do so by passing legislation. Texas did so in 2001 and other states followed, as illustrated in Tables 1 and 2 below.

Every year over sixty-five thousand undocumented students<sup>48</sup> graduate high school with ambiguous direction because of the federal laws and policies that cause higher education to be unaffordable and employment difficult.<sup>49</sup> In 2001, the Development, Relief, and Education for Alien Minors (DREAM) Act was introduced with hopes that it would solve this national predicament for all undocumented students.<sup>50</sup> The DREAM Act would allow adjustment to legal status

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<sup>45</sup> Susan González Baker, *The “Amnesty” Aftermath: Current Policy Issues Stemming from the Legalization Programs of the 1986 Immigration Reform and Control Act*, 31 INT’L MIGRATION REV. 1, 5-27 (1997).

<sup>46</sup> See generally Olivas, *supra* note 18; see also López, *supra* note 17.

<sup>47</sup> *Id.*

<sup>48</sup> An undocumented student is a foreign national who: 1. Entered the United States without inspection or with fraudulent documents; or 2. Entered legally as a nonimmigrant but then violated the terms of his or her status and remained in the U.S. without authorization. EDUCATORS FOR FAIR CONSIDERATION, *An Overview of College-Bound Undocumented Students*, available at [http://dsa.csupomona.edu/ab540/files/FactSheetundocumentedcollegeboundstudents\\_3386.pdf](http://dsa.csupomona.edu/ab540/files/FactSheetundocumentedcollegeboundstudents_3386.pdf) (citing the definition provided by the National Immigration Law Center).

<sup>49</sup> Jeffrey S. Passel & D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEWRESEARCH HISPANIC TRENDS PROJECT (Apr. 14, 2009), <http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/>.

<sup>50</sup> Cardinal Roger M. Mahony, *The DREAM Act: We All Benefit*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 461 (2012); see also Michael A. Olivas, *The Political Economy of the*



for those undocumented youth who arrived in the U.S. as minors, lived in the states continuously for at least five years prior to the passage of the Act, and graduated from a U.S. high school.<sup>51</sup> Temporary residency for six years would be granted for completion of two years of military service or higher education.<sup>52</sup> Within those six years, permanent residency would be possible if the undocumented student acquired a higher education degree, completed two years of higher education, or served two years in the armed forces.<sup>53</sup> The proposed DREAM Act would repeal the section of the IIRIRA that allows states to discriminate against undocumented students on the definition of residency for the purposes of in-state resident tuition.<sup>54</sup>

Since its introduction, several forms of the DREAM Act have been proposed. The 2010 version did not call for the repeal of Section 505 of IIRIRA and continued to force states to charge non-resident tuition to undocumented students if states had not acted otherwise.<sup>55</sup> The 2010 version lowered the age cap for eligibility and further limited eligibility based on incidences of bad moral character.<sup>56</sup> The revised DREAM Act included more restrictions, but it still failed to pass the Senate in 2010 and again in 2011.<sup>57</sup> The passage of the proposed DREAM Act would allow undocumented immigrants to participate in mainstream education and workforce so that they could legally contribute to the nation's economy and cultural fabric.<sup>58</sup>

Reform was close in 2013 when a bi-partisan group of eight Senators proposed what later became known as the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013.<sup>59</sup> This act would establish guidelines for potential citizenship of undocumented immigrants after permanent residency was granted to legal immigrants, expedite processing of those immigrants with advanced degrees in the science, technology, engineering, or math (STEM) fields, and provide

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*DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1785-86, 1788 (2009).

<sup>51</sup> Mahony, *supra* note 50, at 461.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 459.

<sup>55</sup> See Elisha Barron, *Recent Development: The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 644-45 (2011).

<sup>56</sup> *Id.* at 640-41 (summarizing the additional limitations and requisite qualifications from the 2009 version).

<sup>57</sup> *Id.* at 632-37; see also Mahony, *supra* note 50, at 469.

<sup>58</sup> Mahony, *supra* note 50, at 459.

<sup>59</sup> The Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. (1st Sess. 2013).

additional work visa options for low-skill migrant workers.<sup>60</sup> Although the bill passed in the Senate, it did not in the House of Representatives.<sup>61</sup>

The current political discourse in Washington D.C. has repeatedly derailed possibilities of immigration reform and has left many undocumented students concerned about their futures in a country they grew up in and call their own.<sup>62</sup> Moreover, the current immigration crisis on the southern border and issues of international terrorism has opponents weary about immigration reform.<sup>63</sup> Higher education costs have risen for all students, including undocumented students. Unfortunately, whether undocumented students are afforded the same financial aid or tuition benefits as their resident peers largely depends on the state. The low cost, and sometimes free, education guaranteed to all students notwithstanding their immigration status at the K-12 level is no longer available past high school.<sup>64</sup> Because the future of comprehensive immigration reform is uncertain, many undocumented students cannot attend affordable higher education and instead resort to low paying jobs.<sup>65</sup> As a result, many states have taken affirmative action to allow undocumented students who qualify as residents to pay in-state resident tuition rates when pursuing college. Although this does not resolve all of the financial aid issues, it does lower the cost barriers for advanced education.<sup>66</sup>

Because attempts at passing federal legislation have failed, states and the federal executive branch have responded with their own versions of the DREAM Act. For example, in 2011, California enacted the California DREAM Act giving undocumented students access to private college scholarships for state schools.<sup>67</sup> In addition, in 2012, President Barack Obama announced his administration's executive

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<sup>60</sup> Madeleine Sumption & Claire Bergeron, *Remaking the U.S. Green Card System: Legal Immigration Under the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013*, MIGRATION POLICY INSTITUTE (June 2013), <http://www.migrationpolicy.org/research/remaking-us-green-card-system-legal-immigration-economic-opportunity>.

<sup>61</sup> Lauren Fox, *Immigration Reform Could Boost U.S. Economy*, U.S. NEWS AND WORLD REPORT (Aug. 20, 2013), <http://www.usnews.com/news/articles/2013/08/20/immigration-reform-could-boost-us-economy>.

<sup>62</sup> Leisy Abrego, "I Can't Go To College Because I Don't Have Papers": *Incorporation Patterns of Latino Undocumented Youth*, 4 *LATINO STUDIES* 212 (2006).

<sup>63</sup> Seung Min Kim, *Border Crisis Scrambles the Politics of Immigration*, POLITICO (July 15, 2014), <http://www.politico.com/story/2014/07/border-crisis-scrambles-the-politics-of-immigration-108913.html>.

<sup>64</sup> Frances Contreras, *Sin Papeles y Rompiendo Barreras: Latino Students and the Challenges of Persisting in College*, 79 *HARV. EDUC. REV.* 610, 611 (2009).

<sup>65</sup> Francisco L. Rivera-Batiz, *Undocumented Workers in the Labor Market: An Analysis of the Earnings of Legal and Illegal Mexican Immigrants in the United States*, 12 *J. POPULATION ECON.* 91 (1999).

<sup>66</sup> David H.K. Nguyen & Gabriel R. Serna, *Access or Barrier? Tuition and Fee Legislation for Undocumented Students across the States*, 87 *THE CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES & IDEAS* 124 (2014).

<sup>67</sup> Patrick McGreevy & Anthony York, *Brown Signs California Dream Act*, LOS ANGELES TIMES (Oct. 9, 2011), <http://articles.latimes.com/2011/oct/09/local/la-me-brown-dream-act-20111009>.

order for the Deferred Action for Childhood Arrivals (DACA) program, which provides a two-year temporary reprieve to qualified undocumented immigrants enabling them to enjoy certain benefits without a pathway to permanent residency or citizenship.<sup>68</sup> This temporary “legal status” is renewable, but it is dependent on whether it is offered by the Presidential administration.<sup>69</sup> Some undocumented students have been able to take advantage of this program and fully engage in their communities without fear of disclosing their status; however, the struggle persists without concrete assurance of a pathway to permanent residency or citizenship.

#### V. STATE POLICIES ON IN-STATE RESIDENT TUITION FOR UNDOCUMENTED STUDENTS

Since Congress has made higher education unaffordable for undocumented students and has not yet been able to come to a common ground on comprehensive immigration reform, state governments have become the primary arbiters of these laws and policies. Across the United States, undocumented students must navigate and rely upon state legislation in order to access higher education or face state-directed barriers to college. According to the National Conference of State Legislatures, at least eighteen states have enacted legislation that promotes access to higher education for undocumented students through allowing in-state tuition benefits.<sup>70</sup> In Virginia, the state attorney general allowed the granting of in-state resident tuition to those residents who were part of the federal DACA program, beginning in April 2014.<sup>71</sup> Table 1 outlines the history and some highlights of these legislative or legal processes.

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<sup>68</sup> Roberto G. Gonzales, Veronica Terriquez & Stephen P. Rusczyk, *Becoming DACAmented: Assessing the Short-Term Benefits of Deferred Action for Childhood Arrivals (DACA)*, 58 AM. BEHAV. SCIENTIST 1852, 1856 (2014).

<sup>69</sup> *Id.*

<sup>70</sup> National Conference of State Legislatures, *Undocumented Student Tuition: Overview* (May 5, 2014), <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>.

<sup>71</sup> Laura Vozzella & Pamela Constable, *Virginia Attorney General Declares ‘Dreamers’ Eligible for In-State Tuition*, WASH. POST (Apr. 29, 2014), [http://www.washingtonpost.com/local/virginia-politics/virginia-attorney-general-declares-dreamers-eligible-for-in-state-tuition/2014/04/29/ed594aea-cfb0-11e3-b812-0c92213941f4\\_story.html](http://www.washingtonpost.com/local/virginia-politics/virginia-attorney-general-declares-dreamers-eligible-for-in-state-tuition/2014/04/29/ed594aea-cfb0-11e3-b812-0c92213941f4_story.html).

Table 1: Overview of State Actions Allowing In-State Tuition for Undocumented Students<sup>72</sup>

State	Year Adopted	Notes
California	2001	This legislation was challenged in <i>Martinez v. Regents</i> , 241 P.3d 855 (2010), upheld by the California Supreme Court in 2010 and an appeal declined for review by the U.S. Supreme court in 2011
Texas	2001	
New York	2002	
Utah	2002	
Washington	2004	
Oklahoma	2004	Law amended giving authority for allowing in-state tuition to the Oklahoma Board of Regents. Currently, authorized by regents.
Illinois	2004	
Kansas	2004	This legislation was challenged in <i>Day v. Sibelius</i> , No. 376 F. Supp. 2d 1022 (2005)/ <i>Day v. Bond</i> , 500 F.3d 1127 (2007), upheld by U.S. Court of Appeals for the 10th District and an appeal declined for review by the U.S. Supreme Court in 2008
New Mexico	2005	
Nebraska	2006	
Wisconsin	2009	Law was repealed in 2011
Maryland	2011	In-state tuition authorized at community colleges only
Connecticut	2011	
Minnesota	2013	Also grants state financial aid
Oregon	2013	
Colorado	2013	Initially banned in 2008, repealed in 2013
New Jersey	2014	
Florida	2014	Still considered as out-of-state students, but a fee waiver discounts tuition to in-state rate. State imposed a maximum quota and other criteria in order to qualify.
Virginia	2014	VA attorney general granted benefit to those covered under federal DACA program

<sup>72</sup> See Nguyen & Serna, *supra* note 69; see also National Conference of State Legislatures, *supra* note 73.

A number of states have purposely passed barriers to college access for undocumented students by stripping away their state residency, which would otherwise qualify them for in-state tuition. The states listed in Table 2 have adopted legislation banning in-state tuition for undocumented students as of September 2014. Table 2 also notes that some states have gone an extra step to prohibit enrollment of undocumented students altogether.

Table 2: Overview of State Actions Banning In-State Tuition or Enrollment for Undocumented Students<sup>73</sup>

State	Year Adopted	Notes
Arizona	2006	
Georgia	2008	
South Carolina	2008	This is not a ban on in-state tuition for undocumented students. Instead students must prove that they are in the country legally to enroll at public institutions of higher education
Indiana	2011	H.B. 1402 & S.B. 590 prohibited resident tuition rates for all undocumented students among other anti-immigration measures. In 2013, S.B. 207 passed to grandfather those enrolled in 2011 to receive in-state tuition.
Alabama	2011	Same as South Carolina, however there are explicit rules disallowing enrollment by undocumented students
North Carolina	2009	The state has a checkered history on this front changing its policy at least five times since 2001. Currently, if a student can pay out-of-state tuition and has graduated from a North Carolina high school they can legally enroll at community colleges in the state

While some state laws are written to prohibit in-state resident tuition for undocumented students, higher education institutions may still be permitted to grant resident tuition rates to those students who are “documented” through the federal DACA program. For example, Indiana law provides “[a]n individual who is not lawfully present in the United States is not eligible to pay the resident tuition rate that is determined by the state educational institution.”<sup>74</sup> The federal government, however, has recognized that those undocumented immigrants who are eligible for DACA and have been granted deferred removal action are lawfully present in the United States by prosecutorial discretion.<sup>75</sup> As a result, under Indiana law, so long as

<sup>73</sup> *Id.*

<sup>74</sup> H.B. 1402, 117th Gen. Assemb. (Ind. 2011).

<sup>75</sup> See Passel & Lopez, *supra* note 10.

the immigrant is "lawfully in the United States"<sup>76</sup> through the DACA program, they are afforded in-state resident tuition at its public institutions. Unfortunately, because DACA is temporary, this is not a long-term solution.

State legislatures are not the only bodies establishing policies impacting undocumented students. As of September 2014, at least four states' Boards of Regents have taken action as well. Table 3 outlines the policy action undertaken by boards in Georgia, Hawaii, Michigan, and Rhode Island. It is evident that many states are dealing with the question of in-state resident tuition and other benefits or obstacles for undocumented students since federal law is silent on the issue.

Table 3: Overview of Boards of Regent Actions for Undocumented Students<sup>77</sup>

State	Year Adopted	Notes
Rhode Island	2011	Policy adopted by the Rhode Island Board of Governors for Higher Education allows for in-state tuition at the state's public institutions and did not go into effect until 2012
Georgia	2010	The policy of the Georgia State Board of Regents requires institutions of the University of Georgia System to verify lawful presence for in-state tuition.
Michigan	2013	Policy adopted by the University of Michigan Board of Regents allows in-state tuition for undocumented students. Other institutions in the state have the authority to set their own policies concerning the matter.
Hawaii	2013	

While many states have opened up opportunities for undocumented students to access higher education, those legislative efforts are not enough. Unfortunately, studies show that few undocumented students have taken advantage of in-state tuition laws.<sup>78</sup> For example, at the University of Connecticut, total enrollment exceeds 18,000 students, but only 33 undocumented students have taken advantage of the in-state tuition law.<sup>79</sup> Similarly, at the University of California Berkeley,

<sup>76</sup> H.B. 1402, *supra* note 74.

<sup>77</sup> See Nguyen & Serna, *supra* note 66; see also National Conference of State Legislatures, *supra* note 70.

<sup>78</sup> Caitlin Emma, *Immigration Debate: Tuition Breaks Go Largely Unclaimed*, POLITICO (July 7, 2013), <http://www.politico.com/story/2013/07/an-in-state-tuition-deal-that-is-largely-unclaimed-93795.html>.

<sup>79</sup> *Id.*

which has over 25,000 undergraduates, only 250 undocumented students have used the in-state tuition law to their advantage.<sup>80</sup> These numbers show that although students now qualify for in-state tuition, the price of college remains unaffordable.

Out of the twenty-two states that permit in-state resident tuition to be granted to undocumented students, only five states have allowed undocumented students access to state financial aid. Table 4 illustrates those states that provide state financial aid to undocumented students. However, without access to federal financial aid, it is unlikely that these cost-barriers can be eliminated for these students. Federal financial aid is often the only mechanism that provides enough funds for a student to attend even the most affordable institutions.<sup>81</sup> In addition, being unable to access higher education means that opportunities for educational and employment opportunities remain significantly limited.

Table 4: Overview of States Allowing State Financial Aid to Undocumented Students<sup>82</sup>

State	Year Adopted	Notes
Texas	2001	
New Mexico	2005	S.B. 582 allows state-funded financial aid; attempts to repeal this law have been unsuccessful (H.B. 173).
California	2013	A.B. 131, or the California Dream Act, grants “Cal Grants,” fee waivers, and institutional student aid programs.
Minnesota	2013	H.F. 875, or The Prosperity Act, affords in-state tuition, state financial aid, and privately funded institutional financial aid.
Washington	2014	State Need Grant is available to those lawfully present through DACA

#### VI. PIPELINE AND SOCIETAL IMPLICATIONS FROM RE-SEGREGATION

State policies which have the effect of re-segregating undocumented students, impact not just these students but also schools, providers, and teachers at all academic levels. Primary and secondary educators encounter the challenge of encouraging undocumented students to continue onto college even though these

<sup>80</sup> *Id.*

<sup>81</sup> MARI LUNA DE LA ROSA & WILLIAM G. TIERNEY, BREAKING THROUGH THE BARRIERS TO COLLEGE: EMPOWERING LOW-INCOME COMMUNITIES, SCHOOLS, AND FAMILIES FOR COLLEGE OPPORTUNITY AND STUDENT FINANCIAL AID (University of Southern California Center for Higher Education Policy Analysis 2006).

<sup>82</sup> *See* National Conference of State Legislatures, *supra* note 70.

students face the uncertainty of continued access to affordable higher education. And because many undocumented students are unaware of their status until they apply for a part-time job or college admission, these obstacles to access only further contribute to these students' stress and fear, thereby exacerbating their re-segregation in education and society. These anti-immigration restrictions create immense fear of deportation and a life overcome with anxiety.<sup>83</sup>

"Many [undocumented students] also lack support networks that would bolster aspirations and expectations about postsecondary education."<sup>84</sup> Public primary and secondary schools can help fill this gap. Our K-12 system can help students prepare for college-level work, in some cases master the English language, and assist with successful transitions between high school and college. Similarly, guidance counselors can help promote and advise students to attend college. Since most state-level price-barriers have been lowered, though still not eliminated, guidance counselors can begin exploring financial assistance earlier in the student's high school career. School administrators can play an important role in their decision-making and allocate resources to helping more of these students successfully navigate access to education. Unfortunately, many of these can be a challenge because of shrinking budgets.

At the collegiate level, faculty, staff, and other providers are challenged to examine methods to best support these students whether or not in-state tuition benefits or financial aid are available. Support services for undocumented students are necessary since few of these students have the social capital and overall familial or community support that can help them succeed in college.<sup>85</sup> Additional sources of funding or a reallocation of limited resources may be required to implement necessary support, but these costs may help institutions more closely align their resources with their stated public service and social justice missions. This is especially true at public institutions where in-state tuition benefits have been made possible for undocumented students.

Since teachers and providers are more often than not the first point of contact and serve as advocates for these students, they are often able to build a relationship of trust with them throughout the years. Teachers and providers are most capable to respond to these students' needs and help them navigate the maze of policies to continue their education. Although options are available, some students fear that the disclosure of their status may bring consequences to them and their families, even after the issuance of the DACA program. Because of the professional struggles of these teachers and providers to help undocumented students achieve in a system that is so segregating and challenging, many of them suffer the trauma of compassion fatigue.<sup>86</sup>

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<sup>83</sup> Leisy Abrego, *Legitimacy, Social Identity, and the Mobilization of Law: The Effects of Assembly Bill 540 on Undocumented Students in California*, 33 LAW & SOC. INQUIRY 709 (2008).

<sup>84</sup> See Sandy Baum & Stella M. Flores, Higher-Education and Children in Immigrant Families, 21 *The Future of Children* 187 (2011).

<sup>85</sup> Sandy Baum & Stella M. Flores, 171. *Id.* at 171.

<sup>86</sup> Zelideh Martinez Hoy, *The Lived Experience of Higher Education Service Providers Working with Undocumented Students: A Phenomenological Inquiry* (2014) (published Ph.D. dissertation, Indiana University Bloomington), available at ProQuest Dissertations and Theses, Accession Order No. 13301.



While some implications of state action allowing in-state tuition benefits have been examined, for educators and administrators in states prohibiting these benefits for undocumented students, the struggle is even greater to bridge the segregation gap. There are hundreds if not thousands of narratives of very bright and capable students who are prepared to attend college but cannot do so because of cost barriers. State legislation that further erects barriers to college access accentuates this dilemma for undocumented students. Although in-state benefits for undocumented students will not create unfettered access to college, state legislation prohibiting the in-state resident tuition benefits to those qualified students only further segregates them from their peers and society and decreases the likelihood that they will attend college.<sup>87</sup>

As a nation, these challenges for such a large population of our society should be a concern. The number of undocumented children under the age of 18 is rising.<sup>88</sup> The number of U.S. citizens born to undocumented parents is larger, and many of these families have few resources to support continued education for their children. In other words, socioeconomic status is a challenge. Although these children have a K-12 education, their families often reside in poor areas with under-financed schools and limited job opportunities. This results in fewer chances to access needed resources and information needed to direct them towards successful educational pathways.<sup>89</sup> State laws and policies continue to be the primary reasons that make college enrollment difficult, if not impossible, for these students. The dire situation is intensified when students are discriminated against and face out-of-state tuition rates, which make it inordinately costly to access higher education only because of their immigration status – an issue of no fault of their own. Limitations to state and federal financial aid with the socioeconomic concerns cited above does not leave undocumented students with many options.<sup>90</sup>

Finally, it is important to point out that these bans on in-state tuition benefits do not only impact undocumented students. Research shows that undocumented students gravitate to states that offer favorable benefits, enroll in higher education, and succeed well in larger numbers.<sup>91</sup> Therefore, states with anti-immigration policies are losing a potentially large number of otherwise skilled and educated workers. Job-market outcomes and the social-good of the state are negatively

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Aimee Chin & Chinhui Juhn, *Does Reducing College Costs Improve Educational Outcomes for Undocumented Immigrants? Evidence from State Laws Permitting Undocumented Immigrants to Pay In-State Tuition at State Colleges and Universities*, in *LATINOS AND THE ECONOMY: INTEGRATION AND IMPACT IN SCHOOLS, LABOR MARKETS, AND BEYOND* (David Leal & Stephen Trejo eds., 2011).

<sup>91</sup> See Baum & Flores, *supra* note 84; see also Stella M. Flores, *State Dream Acts: The Effect of In-State Resident Tuition Policies on the College Enrollment of Undocumented Latino Students in the United States*, 33 *REV. HIGHER EDUC.* 239 (2010); Stella M. Flores & Catherine L. Horn, *College Persistence Among Undocumented Students at a Selective Public University: A Quantitative Case Study Analysis*, 11 *J. C. STUDENT RETENTION* 57 (2009); Stella M. Flores & Neeraj Kaushal, *In-State Tuition for the Undocumented: Education Effects on Mexican Young Adults*, 27 *J. POL'Y ANALYSIS & MGMT.* 771 (2008).

impacted when a large proportion of the population is limited by their undocumented status. While some lawmakers and policymakers believe they are advancing their own by being exclusive, this kind of thought process is in fact limiting their own success as a state. For communities that have undocumented students to thrive, there must be access to good and affordable education as the Justices in *Plyler* reasoned. Unfortunately, until the federal government passes comprehensive immigration reform, the states will remain as the primary players in this area.

#### VII. CONCLUSION

Prior to *Plyler*, undocumented children did not have the guarantee of a free public education similar to their peers. The U.S. Supreme Court recognized the importance of education for not only the individual student, but also for the family structure and the larger community and society. The landmark ruling set a new stage for so many living amongst us; however, opponents have tried to limit educational access at all levels through state and local policies.

The myriad of federal and state policies impacting higher education for undocumented students can become cumbersome and have resulted in the re-segregation of undocumented students in education. Since federal legislation is largely at a standstill, states have been charged with deciding whether to afford or deny undocumented students an opportunity to obtain higher education- and too many states have developed laws and policies excluding undocumented students. In this article we have highlighted these state policies to illustrate how re-segregation of undocumented students has implications for the students and for society. Without comprehensive reform at the federal level, opportunities in higher education for undocumented students is dependent on the state. Education is the foundation of productivity and success in life; lowering the cost-barriers of higher education for all, especially undocumented students, is a step in the right direction.

