



**Equity by Design:**  
Examining Law & Policy for  
Undocumented Immigrant  
Students through the PK-20  
Pipeline

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# Examining Law & Policy for Undocumented Immigrant Students through the PK-20 Pipeline

The issues of border security and protection and safety of unaccompanied children, amnesty, pathways to citizenship, and social services, have been the center of much debate across the United States. Historically, and within the current context, Equity Assistance Centers are charged by the U.S. Department of Education with supporting [public education agencies](#) to ensure the civil rights of all students, regardless of race, sex, religion, *and national origin*. This charge includes support for immigrant students, including those who are undocumented, who attend U.S. schools and who along with their families live in our neighborhoods and contribute to our communities in myriad ways. For decades,

many supporters have worked to pass federal immigration reform that will open up opportunities for undocumented students, many of whom accompanied their parents to the United States as young children (Teranishi, Suarez-Orozco, C., Suarez-Orozco, M., et al., 2015).

Notwithstanding various social benefits that are not accessible by those who are undocumented (Chavez, 2013), in 1982 the U.S Supreme Court ruled that all children regardless of immigration status shall have the same right to access public K-12 education (*Plyler v. Doe*, 457 U.S. 202 (1982)). Many undocumented youth who entered the U.S. since this time are now prospective college students and prospective workers and consider the U.S. as their physical and cultural home (Chavez, 2013). In 2012, after decades-long failure to pass immigration reform, 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 that eliminates the fear of being removed (Passel & Lopez, 2012). At the time of publication of this brief, DACA remains intact despite many public discussions of its status; in this brief, I aim to examine current opportunities and constraints of public school students based on their immigration status and discuss their navigation through elementary and secondary education into higher education. To provide a foundation, I discuss *Plyler v. Doe* (1982) and the impact of its ruling.

## KEY TERMS

**Undocumented Students** - school-aged immigrants who entered the United States without inspection or overstayed their visas and are present in the United States with or without their parents. They face unique legal uncertainties and limitations within the United States educational system.

**Deferred Action for Childhood Arrivals (DACA)** - A program that gives eligible undocumented students the opportunity to obtain temporary legal status that eliminates the fear of being removed (Passel & Lopez, 2012).

**Education for Alien Minors (DREAM) Act** - An act that was introduced with hopes that it would solve this national predicament for all undocumented students (Olivas, 2004, 2009a, 2009b). The DREAM Act would allow adjustment to legal status for those undocumented youth who graduate from a U.S. high school, arrived as minors, and lived in the country continuously for at least five years prior to the passage of the Act.



Then, I provide examples of barriers in some state and school district contexts despite this ruling. Finally, I examine ways to help better navigate and support undocumented students through the K-20 pipeline, since access to affordable higher education is not constitutionally guaranteed. Many states have passed their own laws to assist undocumented students continue their education (Nguyen & Martinez Hoy, 2015; Nguyen & Serna, 2014; Serna, Cohen, & Nguyen, 2017).



### **Plyler v. Doe and the Guarantee of K-12 Education**


The U.S. Supreme Court first addressed the relationship between undocumented immigrant students and public education in *Plyler v. Doe*. 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. 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. The federal district court certified a class of all the undocumented school-aged children residing in the school district,

found there was no rational basis for the discriminatory statute, and enjoined the implementation. 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.

On appeal to the U.S. Supreme Court, Justice Brennan ruled that this denial of education was a violation of the Fourteenth Amendment's Equal Protection Clause, because it would create a "lifetime of hardship" and a "permanent underclass" of individuals that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education" (*Plyler v. Doe*, 1982, p. 223). Although the State argued that undocumented immigrants exhaust public resources and do not contribute to social services, the Court stated there was no "evidence ... suggesting that illegal entrants impose any significant burden on the State's economy" (*Plyler v. Doe*, 1982, p. 228). The State of Texas was not able to show that there was a very important reason 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 STATUTE NUMBER giving the right to K-12 education (p. 230). The Court stressed that it would be unfair to penalize the children for their parents' presence.

### **Continued Barriers in K-12 Education for Undocumented Students**

After *Plyler v. Doe*, there have been efforts to create additional barriers for undocumented students. Opponents are frequently concerned about funding education



during a time of decreasing budgets (Johnson, 2013). Yet, 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 (Johnson, 2007).

In 1994, voters of California overwhelmingly passed Proposition 187 that denied undocumented students access to the State's public primary and secondary schools along with other social services (See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995)). The 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. Although a federal district court enjoined the implementation of Proposition 187 because of federal preemption and the exclusion of undocumented immigrants from public education, it renewed the intense debate and brought it back to the forefront (Ofer, 2012).

In addition to state and district-level policies not admitting 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 in 2010 and House Bill 56 in 2011, respectively, requiring 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 idea, while Texas

passed something similar without any obstacles. Many have interpreted such legislation as discriminatory against children in education based on their immigration status.

The guarantee to a public education does not extend beyond PreK-12 schooling into to higher education. Despite *Plyler's* guarantee of access to primary and secondary education for undocumented students, a high school diploma is no longer sufficient in today's labor market (Gonzales, 2009). Employment is competitive and in order to find sustainable work to support oneself and one's family, higher education is essential. Perhaps in today's context, 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 state legislation, to accessing higher education including denial of admission, lack of financial aid, and being changed out-of-state resident tuition, 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.

### **Undocumented Students' Access to Higher Education**

Every year over sixty-five thousand undocumented students graduate high school with ambiguous direction because of the federal laws and policies that cause higher education to be unaffordable and employment difficult (Passel & Cohn, 2009). In 2001, the Development, Relief, and Education for Alien Minors (DREAM) Act was introduced with hopes it would solve this national predicament


for all undocumented students (Olivas, 2004, 2009a, 2009b). The DREAM Act would allow adjustment to legal status for those undocumented youth who graduate from a U.S. high school, arrived as minors, and lived in the country continuously for at least five years prior to the passage of the Act. Temporary residency for six years would be permitted for two years of military service or higher education. Within those six years, permanent residency is possible if the undocumented student acquired a higher education degree, completed two years of higher education, or served two years in the armed forces. This 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.



Since its introduction, there have been several forms of the DREAM Act proposed. Passage of the proposed DREAM Acts would allow undocumented immigrants to participate in mainstream education and workforce so that they can legally contribute to the Nation's economy and cultural fabric (Mahoney, 2012). Current political and social discourse around immigration reform has left many undocumented students concerned about their futures in a

country in which they grew up and call their own (Abrego, 2008; Abrego & Gonzales, 2010). Higher education costs have risen for all students, including those who are undocumented but 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 (Rivera-Batiz, 1999). Since comprehensive immigration reform is uncertain to happen, many undocumented students cannot attend affordable higher education and resort to low paying wage jobs (Rivera-Batiz, 1999). 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 (Archibald & Feldman, 2011, Nguyen & Serna, 2014).

Because of failed federal attempts, states have responded by legislating their own versions of the DREAM Act. In addition, in 2012, President Obama announced his administration's executive 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. This temporary "legal status" is renewable, but it is dependent on legislative decisions under President Trump's administration.



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.

### **Protecting and Navigating Undocumented Students through the Education Pipeline**

These policies impact not just the students but also the schools they attend, the providers who help them, and those who teach and advise them. The implications likely stretch across the P-20 system in states that have created restrictive barriers to access PK-12 and/or taken an affirmative action to either allow or prohibit in-state tuition benefits and/or state financial aid. For primary and secondary education teachers, not only do they continue to have the challenges of access to free public education regardless of immigration status, but with prospective undocumented graduates, teachers may encounter challenges encouraging undocumented students to continue onto college. Because many undocumented youth are unaware of their status until they apply for a part-time job or college admission, these obstacles and barriers of access to affordable higher education only further contribute to the stress and fear for undocumented students, thereby exacerbating their oppression in education and society. These anti-immigration restrictions create immense fear of deportation and a life overcome with anxiety (Abrego, 2008).

Since teachers and providers are more often than not the first point of contact and advocate for these students, they are often able to build a

relationship of trust with them throughout the years. Teachers and providers are well-poised 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.

“Many [undocumented students] also lack support networks that would bolster aspirations and expectations about postsecondary education” (Baum & Flores, 2011, p. 187). 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 the P-20 pipeline. Unfortunately, many of these can be a challenge because of shrinking budgets.

In order to ensure that schools and school districts are not discriminating and creating barriers for the educational attainment of undocumented students, teachers and



administrators must keep the following in mind. Schools and school districts may require proof of residency in order to enroll; however, proof of residency must not inquire into the students' citizenship or immigration status, but it may include a utility bill, lease agreement, etc. It is encouraged that schools and districts do not use social security numbers as identification numbers for students. Not only does this protect sensitive information but it also does not inquire into whether a student has a social security number or not. While birth certificates may inform teachers and administrators about the age of the student and provide information on minimum and maximum age requirements, other documents may achieve the same intent and may be more readily available.



Faculty, staff, and professionals on college campuses will have to examine methods to best support these students whether in-state tuition benefits or financial aid are available or not (College Board, 2014). The struggle is even more pronounced if these are not available to the student. Support services for undocumented students will become necessary since few of these students have the necessary social capital and overall familial or community support that can help them succeed in college (Baum &

Flores, 2011). New 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.

Although some implications of state action allowing in-state tuition benefits have been examined, for educators and administrators in states prohibiting these benefits the challenge to bridge the gap is even greater. There are hundreds if not thousands of narratives of students who are prepared to attend college but cannot do so because of out-of-state tuition costs (Serna, Cohen, & Nguyen, 2017). State legislation that further erects barriers to college access accentuates this issue 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 further segregates them from their peers and society and decreases the likelihood that they will attend college.

Educators and administrators may consider the following information in developing and refining their policies and practices with regard to undocumented students:

- Under Immigration and Customs Enforcement (ICE) Policy 10029.2, FEA Number: 306-112-002b, schools are considered to be sensitive locations and ICE agents should not be conducting their business in and around educational settings as they can

hinder the educational attainment of children.

- Be sure to strictly abide by FERPA and protect student and family records and information. This can include, but is not limited to, information being provided while filing for the Free Application for Federal Student Aid (FAFSA), college applications, and/or state financial aid applications.
- Implement and enforce hate crime and/or hate language reporting process and procedures in order to monitor safety and ensure a safe academic environment for all students.
- Train administrators, staff, and teachers on current policies and practices that support undocumented students and families. Provide resources to teachers and staff of information and organizations that provide assistance to students and families.
- Create a safe space for your students and families to learn about their rights and seek school resources available to them. Trust and understanding is very critical to creating a safe space, and making a public statement (e.g., board resolution, press release, proclamation, etc.) is a good first step to give assistance.

### **State Policies on In-state Resident Tuition and state Financial Aid For Undocumented Students**

State governments have become the primary arbiters of laws and policies pertaining to higher education attainment for undocumented students, since Congress has yet to pass comprehensive immigration reform (Vargas, 2011). Undocumented students must navigate and rely upon state legislation in order to access higher education or face state-directed barriers to college. The following section provides an overview of these laws of the 13 states within the geographic area of the Midwest and Plains Equity Assistance Center. From the following chart, educators can better understand what benefits are afforded to undocumented students in their state.

Within the Midwest & Plains Equity Assistance Center's 13-state region, only five states have passed legislation allowing in-state tuition benefits. Federal financial aid is often the only mechanism that provides enough funds for a student to attend even the most affordable institutions (de la Rosa & Tierney, 2006). In addition, being unable to access higher education means that opportunities for educational and employment opportunities remain significantly limited (Amuedo-Dorantes & Sparber, 2014). Out of these five states, only one, Minnesota, allows both in-state tuition and state financial aid. However, Boards of Regents have acted, such as in Michigan and Oklahoma. Indiana, for example, banned in-state tuition, but then retroactively grandparented in those students who were enrolled in higher education when the law was passed (See Table 1 on Page 9).

Although 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 “legally present” through the federal government DACA program. For example, the Indiana law reads:

*“An 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”* (H.B. 1402, 117<sup>th</sup> Gen. Ass. (Ind. 2011)).

The federal government 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 (Passel & Lopez, 2012). As result, so long as the immigrant is “lawfully in the United States,” they may be afforded in-state resident tuition at its public institutions. Yet, because DACA is temporary, this is not a long-term solution.

## Conclusion

The number of undocumented children under the age of 18 is rising. 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 poorer 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 (Baum & Flores, 2011; Gildersleeve, 2010). State laws and policies continue to be the primary reasons that make educational attainment difficult, if not impossible, for students. The dire situation is intensified when students face policy as barriers and out-of-state tuition rates and no financial aid, 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 students with many options, not to mention those who are undocumented (Chin & Juhn, 2010).

Finally, it is important to point out that these policies do not only impact undocumented students. Research shows that undocumented students not only leave to states that offer favorable benefits and conditions, but also, they are more likely to enroll in higher education and persist well in larger numbers (Flores, 2010; Flores & Horn, 2010; Flores & Kaushal, 2008). States that discriminate and have 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 impacted when a large proportion of the population is limited by their undocumented status. For communities that want undocumented students to thrive, there must be access to good and affordable education as the Justices in *Plyler* reasoned.

**Table 1: Overview of Current In-State Tuition Benefits and/or State Financial Aid for Undocumented Students in the Midwest and Plains Equity Assistance Center Region**

State	In-State Tuition	State Financial Aid	Notes
Illinois	+		
Indiana			H.B. 1402 & S.B. 590, passed in 2011, prohibited resident tuition rates for all undocumented students. In 2013, S.B. In-state tuition is only permitted under S.B. 207 to those who were enrolled in 2011. Institutions may allow in-state tuition to those who are DACA recipients.
Iowa			
Kansas	+		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.
Minnesota	+	+	
Michigan			Institutions have the authority to set their own policies. A policy was adopted in 2013 by the University of Michigan Board of Regents to allow in-state tuition.
Missouri			
Nebraska	+		
North Dakota			
Ohio			
Oklahoma	+		The law was amended in 2008 to give authority for allowing in-state tuition to the Oklahoma Board of Regents. Currently, it is authorized by the Regents.
South Dakota			
Wisconsin			While legislation was passed in 2009 permitting in-state tuition, it was repealed in 2011.
Serna, Cohen, & Nguyen (2017)			



## **About the Midwest & Plains Equity Assistance Center**

The mission of the Midwest & Plains Equity Assistance Center is to ensure equity in student access to and participation in high quality, research-based education by expanding states' and school systems' capacity to provide robust, effective opportunities to learn for all students, regardless of and responsive to race, sex, and national origin, and to reduce disparities in educational outcomes among and between groups. The Equity by Design briefs series is intended to provide vital background information and action steps to support educators and other equity advocates as they work to create positive educational environments for all children. For more information, visit <http://www.greatlakesequity.org>.

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Recommended Citation: Nguyen, D.H.K. (2017). Examining Constraints and Opportunities in Law & Policy: Navigating and Protecting Undocumented Students through the PK-20 Pipeline. *Equity by Design*. Midwest & Plains Equity Assistance Center (MAP EAC). Retrieved from: [http://glec.education.iupui.edu/Images/Briefs/Nguyen\\_undocumentedimmigrantstudents.pdf](http://glec.education.iupui.edu/Images/Briefs/Nguyen_undocumentedimmigrantstudents.pdf)

## **Disclaimer**

Midwest & Plains Equity Assistance Center is committed to the sharing of information regarding issues of equity in education. The contents of this practitioner brief were developed under a grant from the U.S. Department of Education (Grant S004D110021). However, these contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the federal government.



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