Undocumented College Student Enrollment: A Policy Discussion
Author(s): ***H. Pierce McNair Jr., Lisa G. Driscoll, Mark M. D'Amico***

Affiliation: South Carolina Technical College System, The University of North Carolina at Charlotte

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Access to public higher education is an American successstory. According to the U.S.Department of Education, National Center for Education Statistics (2010),nearly 14 million students enrolled in public colleges and universities in fall2008, which represents a gain of approximately 25% since 1998. The role of the federal government hasfigured prominently throughout the history of higher education'sexpansion. The Morrill Acts of1862 and 1890 established public land grant institutions, broadened access, andemphasized professional education. The legislation offered relevant educational opportunities to thousandsof students who may not have otherwise attended a college or university. After World War II, the Servicemen'sReadjustment Act of 1944, termed the GI Bill, further transformed public highereducation by opening the doors of education to millions of veterans. Later, the Higher Education Act of 1965expanded access through federal financial aid, which put higher educationwithin the reach of many never thought to be college bound. During the contemporary era, whenhigher education is required for the majority of available jobs, an emergingchallenge to higher education access has revolved around the topic of state andfederal policy related to the enrollment of undocumented students.

In the last two decades, state and federal budget crises andescalated growth in mandated costs, especially Medicaid costs, have forcedstate governments to reduce discretionary spending on higher education. Beginning with the recession in theearly 1990s, states began to feel budget pressures¿especially those states withlarge numbers of undocumented residents. In response, Congress passed two laws that changed the landscape ofcollege enrollment eligibility. Thefirst, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996(IIRIRA), did not allow public institutions to offer undocumented studentsin-state tuition unless out-of-state students were offered the same rate. Unlike earlier initiatives by thefederal government, this intrusion into the affairs of higher education was notnecessarily embraced by every state. For states with large numbers of undocumented residents, for example,New York, California, and Texas, enacting barriers to postsecondary attendancefor undocumented students was not a tenable course of action. For states with conservative approachesto inclusion, such as South Carolina, Alabama, and North Carolina, the federalgovernment's actions justified these states' decisions to limit access (U.S.Constitution, Article VI, clause 2).

Thesecond law, the Personal Responsibility and Work Opportunity Reconciliation Actof 1996 (PRWORA), set forth a comprehensive statutory scheme for determiningeligibility for federal, state, and local benefits and services. It categorized all so-called aliens asqualified or not qualified and then assigned public benefits based on thosecategorizations. This act becamethe federal standard on which the courts and the executive relied to determineeligibility for public services and benefits, including enrollment in stateinstitutions.

This article examines the interplay between federal andstate policy regarding the admission of undocumented students to colleges anduniversities. The articleconcludes with a brief discussion of the Development, Relief, and Education forAlien Minors Act of 2009 (DREAM) and what its imminent consideration byCongress means for the balance between the federal government and the states onthis current frontier of higher education access policy.

Undocumented Studentsand Federal Law

Undocumented students, defined as students attending schoolunder the age of 21 years and who were born outside the United States and arenot citizens or legal residents, may have either entered the United Statesillegally or entered legally and overstayed their visas. Minor childrenwho are in the country illegally are entitled to free education fromkindergarten through high school, according to a U.S. Supreme Court decision, *Plylerv. Doe* (1982). However, oncethese individuals graduate from high school or reach the age of 18 years,undocumented residents of any age are ineligible to work in the United States,in accordance with the Immigration Reform and Control Act of 1986. Estimates in2008 suggest that each year, 65,000 undocumented students graduate from highschool, having lived in the United States 5 years or longer (Passel, 2003).

Interestingly, whether undocumentedstudents can enroll in an institution of higher education depends on state andinstitutional laws and not on federal legislation. As a result, laws and policies vary among states,with a recent trend toward greater restriction.

Closing the Open Doorin South Carolina

The South Carolina Illegal Immigration Reform Act of 2008strictly prohibits the enrollment of undocumented students at state institutionsof higher education. Whereas the initial intention of the act was to barthe employment of so-called illegal aliens, section 59-101-430 of the act appliesspecifically to higher education and the enrollment of students:

> An alien unlawfully present in theUnited States is not eligible to attend a public institution of higher learning.. . . The trustees of a public institution of higher learning in this Stateshall develop and institute a process by which lawful presence in the UnitedStates is verified. . . . An alien unlawfully present in the United States isnot eligible on the basis of residence for a public higher education benefitincluding, but not limited to, scholarships, financial aid, grants, or residenttuition.

The implementation of the act has spawned severalunanticipated issues. First, the law inadvertently targets foreign studentswho were already enrolled in South Carolina's state technical colleges anduniversities. Second, undocumented students who graduated from South Carolinahigh schools are effectively locked out of higher education in the state,although they could attend institutions in neighboring states. Third,the legislation places the burden of developing a legal verification process onthe state's colleges and universities.

This movement to prohibit access seems counterintuitive to SouthCarolina's initiatives that aim to stop the state's high school graduates fromleaving the state to pursue higher education, including state scholarships andtuition benefits. In an attempt to explain the lack of apparent fine-tuningin the law, one state representative stated that the purpose of the legislationwas "to keep immigrants who enter the country illegally from receiving tuitionbreaks or other benefits, . . . not to bar from college theirchildren who graduate from local high schools and pay out of state tuition"(Morris, 2008, paras. 17¿18). It appears that perhaps evensome responsible for the legislation were unaware of its consequences.

Inthe same year, two other southern states initiated policies to ban undocumentedstudents from attending 2-year colleges and other institutions. The AlabamaState Board of Education (2008) passed a policy that denied admission forundocumented students to state-supported 2-year colleges. Similarly,North Carolina's State Board of Community Colleges had approved a policy thatrefused admission of undocumented students to the state's 2-year colleges; however,in 2009, the board voted to allow undocumented students to attend if theygraduated from a high school in the United States and pay out-of-state tuition(North Carolina Community College System, 2009). More recently, the UniversitySystem of Georgia announced the prohibition of undocumented student enrollmentat those institutions where

qualified legal residents are denied admission. Thispolicy currently affects five institutions in the university system (UniversitySystem of Georgia, 2010).

Federal Supremacy andState Autonomy Cases

In California, the case of allowing undocumented students tobe educated in institutions of higher learning is an important one because Californiais the state with the largest number of undocumented students and the earliestlegal challenge to the matter. In 1994, voters in California approvedProposition 187 to stop all so-called illegal immigrants from receiving publicbenefits or services, including K¿12 education and higher education (Alfred,2003). Asuit heard in the U.S. District Court (*Leagueof United Latin American Citizens v. Wilson*, 1997) found that the ban onundocumented students attending institutions of higher education was preemptedby PRWORA and IIRIRA, which were both passed by Congress during the litigation. Byusing a state definition to classify persons ineligible to receive a publicbenefit and requiring state officials to determine status, Proposition 187interfered with duties specifically reserved to the federal government byCongress. Since the decision in *Wilson*,California has not tried to statutorily prohibit the enrollment of undocumentedstudents in public institutions of higher learning. In fact, since 2001, California hasallowed undocumented students to attend public colleges and universities.

In Virginia, a legal challenge to undocumented studentsgaining admission to institutions of higher education occurred when twostudents and one nonprofit association, Equal Access Education, brought suitagainst seven public institutions. In the case, *Equal Access Education, et al. v. Merten*(2004), the students alleged that by prohibiting undocumented students fromattending Virginia public colleges and universities, the state was violatingthe supremacy clause (U.S. Constitution, Article VI, clause 2). Thecourt ruled in favor of the universities. Since the *Merten* decision, most of Virginia's higher education institutionsstill operate under the recommendations of the 2002 attorney general's opinionto prohibit the enrollment of undocumented students. However, some colleges havedecided to ignore this advice, such as some of the state's 2-year colleges, byaccepting illegal immigrants as students (Hebel, 2007a). Up tothis point, no legislation has passed limiting the enrollment of undocumentedstudents in Virginia.

Questions Facing theHigher Education Community

South Carolina's action appears to avert many of the federal¿statesupremacy questions raised in other states. Unlike those in California,state officials in South Carolina are not charged with independently verifyingthe immigration status of students. Instead, the act specificallyprohibits independent verification and requires verification pursuant to 8U.S.C. § 1373 (c). Even though the drafters of the act may have managedto avoid many of the problems debated in the past, there are still significantissues raised by the legislation.

The courts' decisions in *Wilson*and *Merten* are clear: The statecannot step over into areas of the law already controlled by the federalgovernment. Owing to several congressional enactments, the enrollment ofundocumented students is one such area. On one hand, as the *Merten* court made clear, states do havea legitimate interest in keeping illegal immigrants from enrolling in publicinstitutions. However, students currently enrolled may counter this by arguingthat the state has created undue hardship and should act proscriptively.

The DREAM Act andImplications for State Policy

Since its initial introduction in 2001, the DREAM Act hasbeen discussed as a federal remedy to the illegal immigrant¿higher educationproblem. Although the bill has yet to pass Congress, supporters believe itwill

solve many of the problems states face with regard to illegal immigrantsattending public higher education institutions and providing a pathway to legalresidency.

If passed in its current form, the DREAM Act would result inthe following:

1. It would repeal Section 505 of IIRIRA to restore theoptions of states to determine residency for the purposes of higher education.
2. It would offer conditional permanent residency statusto those who (a) have been in the United States for more than 5 years andarrived in the country before age 16 years, (b) are of good moral character, (c)have earned a high school diploma or GED or have gained admission to aninstitution of higher education, and (d) are under the age of 35 years.
3. It would provide a pathway to permanent residency if,within 6 years, the student (a) completes a college degree, including a 2-yearassociate degree or 2 years toward a baccalaureate degree, or (b) serves for 2years in the military.

Batalovaand McHugh (2010) estimate that up to 2.1 million youths and young adults mayqualify for conditional legal status under the DREAM Act, and it is predictedthat nearly 40% of those who qualify may earn permanent legal residency.

Althoughmany states are awaiting comprehensive immigration reform out of Washington,the passage of the DREAM Act in its current form would mark Congress's desireto occupy this area of the law as it relates to conditional residency forstudents and as it forms a pathway to permanent residency through highereducation or military service.

Thefinal DREAM Act language would need to be analyzed in light of federalsupremacy and existing state policy, but at the least, it would require areview of state action that currently limits the enrollment of undocumented studentsin state institutions of higher education. For example, while SouthCarolina could consider amending the section of its Illegal Immigration ReformAct that affects undocumented students, it may be determined that no suchchanges are required. Those who qualify for conditional permanent (legal)residency under the DREAM Act may be eligible for enrollment in a statetechnical college or university because they would no longer be considered "analien unlawfully present in the United States." Essentially, those who enterthe country before age 16 years and who earn a high school credential would nolonger be penalized by limited access to higher education. Oneof the questions that South Carolina may consider is whether the administrativeburden of verifying legal residency would be an appropriate use of resources.

Though each state must consider DREAM Act provisions interms of current policy, the greatest impact of federal legislation may be topreempt continued state-by-state approaches by dealing with immigration andhigher education enrollment through federal legislation. Also, statesshould begin considering how the legislation would impact the different sectorsof higher education. Basedon a survey of state community college directors, Katsinas and Tollefson (2009)reported that 45% of respondents believed that DREAM Act passage would impactcommunity colleges more than other public colleges and universities.

Although this article addresses the issues surroundinghigher education enrollment, tuition policy is a related topic that continuesto be at the forefront of state policy discussions. Since 2001, 10 states (California,Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, andWashington) have passed their own versions of the DREAM Act through legislationallowing undocumented immigrants to pay in-state tuition. Approximately30 states have at least considered such legislation (Russell, 2007). Stateremedies to the problem, no matter the provisions in allowing the enrollmentand in-state tuition, do not provide as much as the federal DREAM Act, whichmay lead to a path to citizenship (Olivas, 2009a; Olivas, 2009b). Itshould be noted that Oklahoma has since repealed its in-state tuition provisionfor undocumented students (Hebel, 2007b).

In addition, recent literature has discussed the linkbetween tuition policy and undocumented student enrollment. Flores(2010) found that state policy allowing undocumented students to pay in-statetuition increased the likelihood of enrollment among Latino foreign-bornnoncitizens, and Flores and Chapa (2008) found that the greatest impact onenrollment occurred with in-state tuition policies in the states withtraditional migration of undocumented students (California, New Mexico, Texas,New York, and Illinois).

Continued state activity in the area of undocumented collegestudent enrollment demonstrates the absence of clear federal policy in thisarea. Itis yet to be determined whether the legislation will pass soon, if ever, and itsimpact, though predicted by some, is largely unknown. Perhaps the true measure of thebill's impact will be whether future discussions of major policy affectinghigher education access will include the Morrill Land Grant Acts, the GI Bill,the Higher Education Act of 1965¿and the DREAM Act.

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