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College Access for Undocumented Students and Law

Jessica C. Enyioha

There are over 32 million undocumented immigrants in the United States and of this population, over 1.5 million are children (Palmer & Davidson, 2011). These children grow up in the US, achieve primary and secondary education, and when they are ready to pursue postsecondary education, it becomes harder for them to achieve. In this paper, undocumented students' access to postsecondary education in the US is examined: laws that affect their access to postsecondary education, previous cases on access to education for undocumented students, and the difficulties undocumented students often encounter when pursuing postsecondary education are discussed and analyzed. Best practices and suggestions for supporting undocumented students in pursuing postsecondary education are shared.

It is predicted that as of 2018, higher education will be required for 62 percent of jobs in the US and by 2025, there will be a shortage of 23 million people living in the US with postsecondary education in the US workforce (Moore, Bridgeland, & Dilulio, 2010). Postsecondary education in this paper is referenced to as attaining a Certification, Associate's degree, or Bachelor's degree. Attaining postsecondary education is essential to achieving career opportunities with higher-paying salaries (Knight-Diop, 2010). However, postsecondary education is not accessible to or attainable for all of the US population such as students from underserved backgrounds due to numerous barriers (Kezar, 2009). Undocumented students in the US are underserved. As of 2016, 17 percent of the US undocumented immigrant population attained a Bachelor's degree (López & Radford, 2016).

Who are Undocumented Students in the United States?

Undocumented students are students who were not born in the US, but immigrated, live and attend school in the US: about 65,000 undocumented students graduate from US high schools each year (Olivérez, 2006). According to the National Immigration Law Center, an undocumented immigrant "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 United States without authorization" (as cited in San Jose State University, 2017, para 2). Undocumented students were youth when their parents decided to immigrant their family to the US (San Jose State University, 2017). They lived the majority of their lives in the US, have grown up learning English and customs taught in American schools.

Acts and Laws that Affect Undocumented Students

The United States Constitution, federal statutes, and treaties are recognized as "the supreme law of the land" (U.S. Const. art. VI, cl. 2). These documents are the highest form of law within the US and have to be followed by the states. What is not stated in these documents is left to be regulated by the individual states (U.S. Const. amend. X). An item that is not mentioned is education and because education is not mentioned, each state is responsible for its own education system. States decide how to regulate their public postsecondary education systems (NCLS,

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2015). Each state has the authority to prohibit, limit, or permit undocumented students to pursue postsecondary education. Public postsecondary education institutions receive funding from the state thus making them obligated to abide by the laws of the state regarding postsecondary education for undocumented students. Private postsecondary education institutions do not receive funding from the state. Private schools regardless of the state they are in have the ability to make their own rules regarding admission and financial aid for undocumented students. However, a barrier to accessing private postsecondary education is that private school tuition is often double the cost of public in-state tuition.

Title IV of the Higher Education Act. Title IV of the Higher Education Act passed in 1965, requires that applicants for federal postsecondary education financial aid be US citizens or US permanent residents (Drachman, 2006). While this act does not forbid undocumented students from attending postsecondary education institutions, it creates the barrier of high expenses associated with achieving postsecondary education: tuition, fees, room, board, books, and supplies. There are different forms of federal financial aid: the Federal Pell Grant, Federal Supplemental Educational Opportunity Grant, Federal Work-Study, Direct Subsidized Loan, and Direct Unsubsidized Loan. The Federal Pell Grant maximum award for the 2018-2019 school year is \$6,095 (US Department of Education, 2018); the Pell Grant is a significant amount of money awarded to eligible US citizens and permanent residents to assist with postsecondary education expenses. Undocumented students are not eligible for federal financial aid (Flores & Chapa, 2009). While a state public postsecondary institution or private institution may allow undocumented students admission, unless the undocumented student's family is able afford the college's expenses, the undocumented student is unable to attend. This is an example of how a state or private college may not outwardly/directly deny undocumented students college access but are indirectly by not offering the undocumented student financial aid.

The Personal Responsibility and Work Opportunity Responsibility Act. The Personal Responsibility and Work Opportunity Responsibility Act (PRWORA) was passed into law in 1996. The PRWORA declares undocumented immigrants in the US ineligible for federal public benefits: "retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by the United States" (Civic Impulse, 2015, p. 1). The PRWORA prohibits undocumented students from receiving forms of government assistance: this includes federal financial aid. If undocumented students cannot afford the cost of postsecondary education and are not provided with the financial assistance they are unable to attain postsecondary education.

The Illegal Immigration Reform and Immigrant Responsibility Act. Along with the PRWORA, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) passed in 1996. The IIRIRA states that undocumented immigrants present in the US are not eligible on the basis of residence within a state for any postsecondary education benefit unless a US citizen or national is eligible for such a benefit (Fragomen, 1997). This act implies that undocumented students cannot receive postsecondary benefits solely based on where they live. States have the ability to create a criteria allowing eligible undocumented students access to state postsecondary benefits. Many states that allow undocumented students to receive state financial aid and/or in-state tuition rates base undocumented students' eligibility on three qualifiers. All three qualifiers

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must apply to the student: having attended a public high school in the state for three years leading to high school graduation, having earned a high school diploma or a General Educational Development (GED) certificate in the state, and having lived in state 12 months prior to the date of the student's enrollment in his/her first semester at the postsecondary institution (Gildersleeve & Hernandez, 2012).

After passing of both PRWORA and IIRIRA, states began practicing their own decisions on in-state, out-of-state, and international tuition rates for undocumented students (Kim & Díaz, 2013). The states determined whether or not they would allow eligible undocumented students access to state postsecondary education financial assistance. Twenty states allow eligible undocumented students to pay in-state tuition and of these twenty states, five states allow eligible undocumented students to receive state financial aid for postsecondary education: California, Minnesota, New Mexico, Texas, and Washington (Bradley, 2014). The states that enable undocumented students access to the combination of in-state tuition rates and state financial aid are the states that are most in support of undocumented students achieving postsecondary education. These states assist in making postsecondary education more affordable and accessible to undocumented students.

The Dream Act and Deferred Action for Childhood Arrivals. In 2001, the Development, Relief, and Education for Alien Minors (DREAM) Act was created to “make undocumented immigrant students eligible to pay in-state tuition funds for public higher education along with putting them on a path to citizenship” (Palmer & Davidson, 2011, p. 2). Unfortunately this act has failed to pass at the federal level. In 2012, President Obama made an executive order to implement Deferred Action for Childhood Arrivals (DACA), “this initiative offers a renewable two-year grant of deportation relief along with work authorization and a social security number to eligible undocumented immigrants” (D'Ottavio, 2013, p. 931). DACA allows undocumented students the opportunity to have a driver's license, work permit, and works to alleviate the fear of being deported from the US. There are eligibility guidelines for DACA: entered the US before reaching one's 16th birthday; continuously resided in the US since June 15, 2007, up to the present time; had no lawful status, do not pose a threat to national security or safety; are currently in school, have graduated or have obtained a GED (Gonzales, Terriquez, & Ruszczyk, 2014). DACA must be renewed every two years and has an application fee of \$465.00. DACA aids undocumented students with eliminating the barrier of not being able to legally work in the US.

With DACA, undocumented students can gain legal employment and use the money earned to help with the expenses of postsecondary education. DACA also assists undocumented students who are pursuing postsecondary education be able to focus on their studies as to the fear of deportation from the US to their native country.

Many laws directly impact undocumented students. PRWORA and IIRIRA work to inhibit undocumented students from attaining postsecondary education. DACA however, has been a benefit for eligible undocumented students. Just as the previously mentioned laws have worked to hinder and aid undocumented students' postsecondary education access, there are judicial cases that have done the same.

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Judicial Cases Impacting Undocumented Students

There are three judicial cases that have outcomes that affect undocumented students' access to postsecondary education: *Plyler v. Doe* (1982), *Equal Access Education v. Merten* (2004), and *Martinez v. Regents of University of California* (2010). Prior to 1982, various school districts across the US attempted to ban undocumented children access to public primary and secondary education or implemented a tuition fee for undocumented students to pay in order to attend public primary and secondary schools (Perez, 2010). Undocumented children in several states were not allowed to achieve a kindergarten through twelfth grade education.

Plyler v. Doe (1982). A Texas education law revision in 1975 granted Texas to withhold funding from public school districts who allowed undocumented children access to public primary and secondary education. The law also allowed school districts to charge tuition for undocumented children to attend. This law was put in place to help avoid what was being considered as an excessive usage of the state's financial resources for education: there was a continuous wave of undocumented immigration of people coming from Mexico to Texas meaning the schools were now being tasked with teaching immigrant students English.

James Plyler, a superintendent of a school district in Tyler, Texas, enforced the law of not allowing access to public primary and secondary education to undocumented children without them paying tuition. Two parents who are undocumented and chose to be unnamed filed suit against the school district claiming that the law was a violation of the Equal Protection Clause of the Fourteenth Amendment.

The defendants claimed that undocumented immigrant children had high special needs for education that required extra efforts made by school districts thus meaning the need for additional funding. The defendants also claimed that because the children are undocumented they should not have Fourteenth Amendment rights.

The court held that the Texas education law could not prove that it was necessary to serve a compelling state interest thus entailing that all public schools are prohibited from denying undocumented children access to free public primary and secondary education. The court stated that while undocumented people are not citizens they are people which means they have the protections of the Fourteenth Amendment. The court held that undocumented children have the right to free public education just as children who are United States citizens and permanent residents; school districts cannot discriminate against children based off of their immigration statuses. Lastly, the court stated that they are children and have no control over their parents' actions and decisions which directly and indirectly affect them and because of this, undocumented children should not be denied free public primary and secondary education because of their parents' choices to immigrate without documentation.

This case serves as the platform for undocumented students' access to education. However, this case focuses specifically on primary and secondary education and does not include postsecondary education. The Supreme Court ruled that "denying undocumented children access to free public [primary and secondary] education, imposes a lifetime of hardship on a discrete class of children not accountable for their disabling status, [and that] the stigma of illiteracy will

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mark them for the rest of their lives” (as cited in Drachman, 2006, pg. 92). Questions that can be raised from the ruling are what is the difference between primary, secondary, and postsecondary education in regard to undocumented students having access to some public education but not all? How does not having access to public postsecondary education not also pose as a lifetime of hardship for undocumented students? At what point are undocumented children considered accountable for their immigration statuses? It is important to note that this ruling was made in 1975, an era when achieving a high school diploma was the equivalent to what a bachelor’s degree is in 2019.

Postsecondary education continues to be in the power of each state. In *Equal Access v. Merten (2004)*, the District Court of Virginia confirms that postsecondary education access, laws, and fees are mandated by each state.

Equal Access Education v. Merten (2004). Equal Access Education is an association that works to provide access to postsecondary education for all students. Brian Marroquin is an undocumented immigrant, and Freddy Vasquez is not a US citizen or permanent resident but does obtain a visa that grants him permission to be the US; both Marroquin and Vasquez applied to seven public universities in Virginia and were not granted admission to the universities for what they believed was based off the universities’ perceptions of their immigration statuses. Equal Access Education, Marroquin, and Vasquez filed suit against the seven public universities (George Mason University, James Madison University, Northern Virginia Community College, University of Virginia, Virginia Commonwealth University, Virginia Tech, and College of William and Mary) claiming that the universities had admissions policies that violated the US Constitution’s Supremacy, Commerce, and Due Process clauses.

The Virginia District Court held that federal law allows the states to regulate admission to public postsecondary education institutions and because of this, the state of Virginia can determine whether or not they will allow undocumented immigrants admittance to public postsecondary education institutions. The court did state however, that the institutions must use the same federal immigration status standards that the US government uses to classify people; in regard to Virginia postsecondary education institutions, they must use federal immigration status standards when deeming whether or not to admit an applicant based on his/her immigration status. The ruling in *Equal Access Education v. Merten (2004)* reinforced that the states are to make the decision of whether or not to allow undocumented students access to postsecondary education: this shows that the court will stand by states’ decisions. However, the court will make sure that states follow applicable federal laws when determining students’ immigration statuses. Postsecondary applications have multiple questions about citizenship and residency status which aid admission offices in clarifying students’ immigration statuses as to making assumptions.

Martinez v. Regents of University of California (2010). United States citizen (Martinez) paying non-resident, out-of-state tuition at public higher education institutions in California filed suit against the Regents of University of California challenging a state statute that allows eligible undocumented students to be exempt from paying non-resident tuition. Martinez claimed that the statute violated the IIRIRA because he and fellow non-residents of California who are US citizens were not given the benefit of paying in-state tuition that undocumented students are given; he also stated that this violated his and his peers’ Fourteenth Amendment rights. Martinez

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claimed that the statute violated the PRWORA because eligible undocumented students are being given post-secondary education assistance.

The court held that the statute allowing eligible undocumented students to pay in-state tuition did not violate the IIRIRA because these eligible undocumented students were not being given exemption to out-of-state tuition based off of them residing in the state of California. The undocumented students were given exemption based off of the qualifiers of having attended a public high school in California for three years leading to high school graduation, having earned a high school diploma or a GED in California, and having lived in California 12 months prior to the date of the student's enrollment in his/her first semester at the postsecondary education institution. The court also held that the PRWORA did not affect eligible undocumented students' exemption from out-of-state tuition and eligibility for state aid because the financial aid that the eligible undocumented students receive is coming from state funds and not government funds. The court concluded by stating that the statute did not violate Martinez and his peers' Fourteenth Amendment rights. Martinez and his peers were not eligible for the benefits because they did not meet all three qualifiers to be eligible for in-state tuition and state financial aid.

Court rulings have benefited and hindered undocumented students in pursuing postsecondary education. It was ruled that a primary and secondary education is a "right" for undocumented students. This was a win for undocumented students but it stops there because it does not apply to postsecondary education. The court also ruled that undocumented students did not have control over their parents' decisions to immigrate without documentation and should not be punished for their parents' actions. However, undocumented students technically are being punished in regard to having difficulty accessing postsecondary education. Lastly, the court ruling that undocumented students cannot be granted in-state tuition solely based on their current place of residency but can be considered based on different criteria was a benefit for undocumented students.

Difficulties Encountered by Undocumented Students

According to Aramburo and Bhavsar (2013), "the opportunities and advantages that traditional [US citizen and permanent resident] students take for granted include having employment, receiving financial aid, and being able to study or travel abroad" (p. 48); these opportunities are considered privileges for undocumented students because they require having legal status in the US which undocumented students do not have. In addition to not having certain privileges that students who are US citizens and permanent residents have, undocumented students often encounter feelings of fear, discrimination, lack of financial support, and difficulty attaining a career.

Fear. Students who are US citizens or permanent residents tend to encounter fear in regard to going off to college in forms of questioning whether he/she selected his/her school of best fit, being assigned a roommate who he/she does not get along with, and the anxiety of failing his/her first exam (Contreras, 2009). For undocumented students while they too may experience these worries, their fears also include the harsh reality that they or their families may be deported from the US during their time pursuing postsecondary education (Conger & Chellman, 2013).

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Because of the fear of deportation, undocumented families may feel extremely hesitant in providing their students with some of the information they need to fill out college application forms such as where the families work and how much they make (Contreras, 2009). Undocumented families may be afraid that providing personal information may be used against them as a source to send them back to their place of birth. The lack of needed information for college and financial aid applications creates being admitted into college and receiving financial aid a harder process for undocumented students (Conger & Chellman, 2013). Aramburo and Bhavsar (2013) use an intelligent undocumented student as an example, “at Cal Poly Pomona, a Hispanic-serving institution known for its engineering college, an honor, magna cum laude, aerospace engineering graduate was not able to take a job at the Jet Propulsion Laboratory for fear of deportation” (p. 48). Here a hard-working student was presented with the opportunity to have a high-paying job yet he/she turned it down because he/she did not want to risk being deported from the US. Had the student had legal status in the US, he/she would have been able to accept the position without having the fear of deportation.

How to Help Alleviate Fear. When guiding undocumented students through the college admission process it is important to establish a genuine, strong rapport with them. The more confident and trusting undocumented students feel with an individual or organization, the more likely they are to be open about their lives, provide information needed for the application process, and not have fear. With this trust also comes the need to ensure students of confidentiality. Letting students know that the information they provide is going to stay between them, oneself, and the postsecondary education institution. Having signs or stickers posted in one’s office stating that undocumented students are supported in the space is a visual that informs students one can be trusted. Another way to establish trust is to stay updated on laws that affect undocumented students and knowing undocumented students’ rights. Education empowers individuals and by being an expert on factors that aid or hinder undocumented students shows students that one cares about them and can be trusted in guiding them through pursuing postsecondary education. Becoming familiar with postsecondary institutions that work well with undocumented students regarding admission and financial aid and others to avoid is crucial to supporting undocumented students and alleviating fear. It is important to prepare undocumented students that many postsecondary education professionals may not be familiar with their institutions’ processes regarding to working with undocumented students. Empower undocumented students by teaching them about different institutions’ processes and requirements so they can be confident when interacting with postsecondary professionals: ideally also have a contact person for the admission and financial aid offices who have experience working with undocumented students.

Having a running list of resources for undocumented students to utilize is also helpful in alleviating fear. Resources that can offer services such as free legal advice, assistance with completing DACA applications, and tax services to undocumented families are helpful. It is comforting to undocumented families to know that there are organizations that support and want to help them.

At the legislative level officials can work to ensure that DACA will not be repealed. This would help undocumented students who have DACA not fear that it will be taken away and they will no longer have the ability to work or protection from deportation.

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Discrimination. States such as Alabama and South Carolina do not allow undocumented students to attend their public, postsecondary institutions (NCLS, 2015). Undocumented students in these two states still choosing to pursue postsecondary education would have to either attend a private institution or a public institution out of state (Conger & Chellman, 2013).

Another form of discrimination that undocumented students encounter is not being eligible for numerous scholarships or to participate in certain college admission events. There are scholarships and programs that receive funding from the government or other entities that strictly state in their criteria that recipients of the funds must be US citizens or permanent residents. A way to support undocumented students is by having a list of opportunities undocumented students are eligible for. The Dream.US Scholarship for example is a scholarship that is specifically for undocumented students (TheDream.US., 2018).

How to Help Combat Discrimination. The case of *Plyler v. Doe* (1982) should be revisited to extend the ruling to postsecondary education in addition to primary and secondary education. The court stated that undocumented students are to be provided access to primary and secondary education because not allowing them an education sets them up for a lifetime of hardship. Expanding the ruling to also apply to postsecondary education would then require all states to allow undocumented students access to postsecondary education attempting to eliminate discrimination of undocumented students. However, postsecondary education institutions could then find other means to discriminate against undocumented students by allowing them admittance to the institution but making the costs so expensive for them that they cannot afford to attend.

Another way to combat discrimination against undocumented students is by ensuring that one uses sensitive language when describing individuals' immigration statuses. Terms such as "illegal alien" work to dehumanize people. Using the term "undocumented" describes that one does not have legal immigration documentation without dehumanizing the person: to dehumanize is to deprive which is a form of discrimination.

Lack of Funding. Individual states hold the decision to select if they will allow undocumented students to pay in-state or out-of-state tuition along with whether or not they will allow undocumented students access to state postsecondary education financial aid (NCLS, 2015). This means that undocumented students who live in the states that allow eligible undocumented students to receive state financial aid rely on this financial support to help fund their education along with their own part-time jobs and support from their families (Nienhuser, 2013). A form of state postsecondary financial aid in Texas is the Towards EXcellence, Access, and Success Texas (TEXAS) Grant. The maximum award for the 2018-2019 school year for the TEXAS grant is \$5,000; eligible undocumented students can receive up to \$5,000 in postsecondary financial aid from the state of Texas along with additional scholarships or grants given directly from the postsecondary institution (Texas Higher Education Coordinating Board, 2018). Along with eligible undocumented students having the opportunity to receive state postsecondary financial aid it is also a valuable opportunity for undocumented students to be eligible to pay in-state tuition as to out-of-state tuition; according to Flores & Chapa (2009), "a typical discount offered per academic year by the in-state resident tuition policy in Texas is \$2,000 at the public

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community college level and almost \$8,000 at the 4-year public college level” (p. 94). Public, postsecondary education becomes more affordable/attainable when a student qualifies for in-state tuition and can use state financial aid to cover the educational expenses.

How to Help with Lack of Funding. At the state level each state can help undocumented students with lack of funding by granting undocumented students who have graduated from a public high school to pay in-state tuition. With in-state tuition at community colleges undocumented students could potentially pay out-of-pocket without the help of financial aid and earn two years of credits to either transfer to a university or complete an Associate’s degree or certification. At the legislative level work permits could be made more accessible to undocumented students which would allow them to gain employment where they can work in safe conditions and not be underpaid by employers who take advantage of their vulnerability.

Postsecondary Education Career Attainment. A college degree for US citizens and residents entails the beginning of new career opportunities (Nienhuser, 2013). There are not legal career opportunities for undocumented students in the US who have postsecondary education but not work permits (Ibarra, 2013). According to Palmer and Davidson (2011), “the lack of federal support means even for undocumented students in states that permit access to funding for postsecondary education, their degree may be useless in the American workforce because of their citizenship status” (p. 2). This means that even if an undocumented student graduates from college, he/she may not be able to use his/her degree to gain legal employment in the US (Ibarra, 2013). In the US, Americans are taught that if they achieve postsecondary education and work hard enough they can have a successful life. According to Drachman (2006), “like most Americans, they [undocumented students] pursue the American dream of a better life than they left behind. Education is the key to fulfilling this dream” (p. 91). Undocumented students are typically raised in the US since childhood, and they too have been taught that hard work results in success. Achieving a degree involves diligence. Undocumented students who have achieved a degree find that even though the US is said to offer opportunities to Americans who work hard, this does not necessarily include undocumented students because of their lack of legal status (Nienhuser, 2013).

How to Help with Postsecondary Education Career Attainment. Individuals working with undocumented students can help them by asking if they have DACA. If the students do not have DACA finding out the reason why and if they are eligible assisting them through the DACA application process. However, as of September 6, 2017, only DACA renewal applications are being accepted: no new applications (National Immigration Law Center, 2019). Individuals must stay updated on the status of the continuation or termination of the DACA program to best support undocumented students. Individuals can also help remind DACA recipients to renew their DACA status on-time every two years working to prevent it from lapsing. With DACA comes a work permit which allows undocumented students to attain a career.

Conclusion

Undocumented students in many states have access to postsecondary education but not to the extent as students who are US citizens and permanent residents. Laws such as the PRWORA (1996) and IIRIRA (1996) make it difficult for undocumented students to have access to

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assistance to fund postsecondary education. The states are left to determine if they will assist undocumented students in pursuing postsecondary education or be a preventative. Undocumented students are faced with the fear of deportation, discrimination, and high expenses without access to enough financial assistance to aid them in achieving postsecondary education. Professionals can support undocumented students pursue postsecondary education by having knowledge of up-to-date laws that affect them along with an ongoing list of resources that work to support undocumented students. Professionals should also work to empower undocumented students with education to know their rights and advocate for themselves.

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