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# #ICEOffOurCampus: The Liability and Responsibility of Colleges and Universities for the Educational Attainment of DREAMers

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# #ICEOFFOURCAMPUS: THE LIABILITY AND RESPONSIBILITY OF COLLEGES AND UNIVERSITIES FOR THE EDUCATIONAL ATTAINMENT OF DREAMERS

DAVID H. K. NGUYEN, JD, PhD\*

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## INTRODUCTION

While sixty-five thousand undocumented students graduate high school annually,<sup>1</sup> a dismal 49% of undocumented students drop out.<sup>2</sup> Various laws and policies make higher education, and education generally, unattainable and difficult,<sup>3</sup> especially since all undocumented students have a guaranteed right to a K-12 education.<sup>4</sup> While President Obama's executive orders have opened access and opportunities for undocumented students,<sup>5</sup> the election of President Trump and policies of his Administration have sparked contentious political, societal, and litigious debates surrounding undocumented immigration and specifically for undocumented students.

In response to President Trump's remarks concerning the arrest and deportation of undocumented students and the fear of hundreds of thousands of immigrants and students being detained and deported,<sup>6</sup> many municipalities and college campuses have declared themselves as "sanctuaries" – adopting policies to refuse to collaborate and cooperate with

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1. Leisy J. Abrego & Roberto G. Gonzales, *Blocked Paths, Uncertain Futures: The Postsecondary Education and Labor Market Prospects of Undocumented Latino Youth*, 15 J. EDUC. STUDENTS PLACED AT RISK 144 (2010). See also Zenen Jaimes Pérez, *Removing Barriers to Higher Education for Undocumented Students*, CTR. AM. PROG. (Dec. 2014), <https://www.luminafoundation.org/files/resources/removing-barriers-for-undocumented-students.pdf>.

2. Jeffery S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW RES. CTR. (Apr. 14, 2009), <http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/>. See also Catherine Eusebia & Fermín Mendoza, *The Case for Undocumented Students in Higher Education*, EDUCATORS FOR FAIR CONSIDERATION 5, [http://www.e4fc.org/images/E4FC\\_TheCase.pdf](http://www.e4fc.org/images/E4FC_TheCase.pdf) (2013). See also Daniella Abinum, *Undocumented Student Beats Odds, Heads to Georgetown*, USA TODAY, (Aug. 27, 2015), <http://college.usatoday.com/2015/08/27/undocumented-student-georgetown/>.

3. David H.K. Nguyen & Zelideh R. Martinez Hoy, "Jim Crowing" Plyler v. Doe: *the Resegregation of Undocumented Students in American Higher Education through Discriminatory State Tuition and Fee Legislation*, 63 CLEV. ST. L. REV. 355 (2015). See also Angela Adams & Kerry S. Boyne, *Access to Higher Education for Undocumented and "DACAmented" Students: The Current State of Affairs*, 25 IND. INT'L & COMP. L. REV. 47 (2015).

4. Plyler v. Doe, 457 U.S. 202 (1982).

5. Marisa Bono, *When a Rose is Not a Rose: DACA, the DREAM Act, and the Need for More Comprehensive Immigration Reform*, 40 T. MARSHALL L. REV. 193, 202 (2015).

6. Grace Huerta & Catalina Ocampo, *Daring to Dream: Sustaining Support for Undocumented Students at The Evergreen State College*, 5 LEARNING COMMUNITIES RES. & PRAC. 1 (2017) (A college student shared her heightened fear that she may be deported under the new Trump Administration. The student planned to cancel her plans to study abroad and instead save money for a safety fund for her family). See also Priscilla Alvarez, *Trump's Quiet Reversal on Deporting Young Undocumented Immigrants*, THE ATLANTIC (Apr. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/04/trumps-quiet-reversal-on-deporting-young-undocumented-immigrants/524367/>.

federal immigration officials.<sup>7</sup> #ICEOffOurCampus became the social media movement to create sanctuaries on campuses to protect undocumented students from deportation and provide a learning environment where students are safe. As a response, President Trump signed an executive order denying federal funds to sanctuary cities<sup>8</sup> and Congress has explored the same for campuses.<sup>9</sup> While states have introduced and passed laws prohibiting “sanctuary” cities and campuses,<sup>10</sup> courts have ruled against Trump’s executive order withholding federal funds.<sup>11</sup> The liability and responsibility of college campuses for the educational attainment of undocumented students unravels as these legal issues are debated.

This law review article will: (1) examine the current state of affairs in educational attainment of undocumented students, (2) examine the federal and state policies that impact higher education access to undocumented students, including, but not limited to, state legislation, state action, institutional policies, and federal executive orders, and (3) provide a history of the sanctuary movement, an examination of various campus sanctuary policies, and an analysis of the legality of this debate. By understanding this policy maze and the lack of federal intervention for comprehensive immigration reform, this background forms the foundation to examine the liability and responsibility of college and universities in this sanctuary movement. While this hot topic movement has a direct impact with the educational attainment of students on campus, legal scholars have yet to closely examine the legal liabilities and responsibilities of campus administrators. This article is meant to provide this background and analysis.

## I. DREAMERS IN POST-SECONDARY EDUCATION

### A. DREAMers: Who Are They? Distinguishing Between Undocumented and DACamented Students

The lack of comprehensive and consistent immigration law and policymaking at the federal level has caused a duality among undocumented youth – some have been able to benefit from participating in the Deferred Action for Childhood Arrivals (DACA) program, while others either were

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7. Daniel B. Braaten, *Higher Education in the Age of Trump*, 45 INTERSECTIONS 5 (2017).

8. Darla Cameron, *How Sanctuary Cities Work, and How Trump’s Executive Order Might Affect Them*, WASH. POST (Jan. 18, 2017), <https://www.washingtonpost.com/graphics/national/sanctuary-cities/>.

9. Stephen Dinan, *Congress Looks to Punish “Sanctuary Campus” Colleges that Protect Illegal Immigrants*, WASH. TIMES (Jan. 18, 2017), <https://www.washingtontimes.com/news/2017/jan/18/congress-looks-punish-sanctuary-campus-colleges/>.

10. Mississippi law bars sanctuary jurisdiction; Texas mandates local jurisdictions to honor federal detainers; noncompliance is subject to criminal penalties. Further details and discussion later in the Article.

11. *County of Santa Clara v. Donald J. Trump, et al.*, 250 F.Supp.3d 497 (N.D. Cal. 2017).

not eligible or do not participate out of fear.<sup>12</sup> Through no fault of their own, undocumented youth were brought to the United States by parents who were attempting to escape from poverty, violence, devastation from natural disasters, etc. These parents sought a more prosperous, safe, secure, and promising life for themselves and their families. The undocumented youth lived lives like any other American child—going to school, playing in the neighborhood, participating in high school activities. Unfortunately, there has been no legal path for these young people to fully engage in American society. They struggle to engage in higher education, professional employment, and traveling abroad—things most of us take for granted.

There are an estimated 11.7 million undocumented immigrants in the United States.<sup>13</sup> Of those, there is approximately 1.8 to 2.2 million undocumented youth that are eighteen years and younger.<sup>14</sup> Since June 15, 2012, some undocumented youth were eligible and were approved to receive benefits from President Barack Obama's DACA program. As of the writing of this article, approximately 800,000 young people were considered to be "DACAmended."<sup>15</sup> More details of the DACA program will be described later in this Article. Collectively, for the purposes of this Article and for the ease of reading, these young people are considered to be "DREAMers," named after the law that has been introduced approximately a dozen times to resolve this national issue. Whether these DREAMers are undocumented or DACAmended, they share the need for a comprehensive approach to include them in our national fabric through a pathway to legal status and citizenship. As such, DREAMers will be used in this article to encompass both undocumented and DACAmended students.

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12. Jeanne Batalova, Sarah Hooker, Randy Capps, James D. Bachmeier, & Erin Cox, *Deferred Action for Childhood Arrivals at the One-Year Mark: A Profile of Currently Eligible Youth and Applicants*, 8 MIGRATION POL'Y INST. 1, 1-16, (2013) (criteria and processes to be DACAmended likely exclude certain undocumented youth). See also Tom K. Wong, Angela S. García, Marisa Abrajano, David FitzGerald, Karthrick Ramakrishnan, & Sally Le, *Undocumented No More*, CTR. AMER. PROG. (Sept. 20, 2013), <https://www.americanprogress.org/issues/immigration/reports/2013/09/20/74599/undocumented-no-more/> (during the first year implemented, only 61% of eligible undocumented youth applied for DACA; 98% of those processed applications were approved).

13. Jeffery S. Passel, D'Vera Cohn, & Ana Gonzalez-Barrera, *Population Decline of Unauthorized Immigrant Stalls, May Have Reversed*, PEW RES. CTR. (Sept. 23, 2013), <http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/>.

14. *Id.*

15. Jens Manuel Krogstad, *DACA has shielded nearly 790,000 young unauthorized immigrants from deportation*, PEW RES. CTR. (Sept. 1, 2017), <http://www.pewresearch.org/fact-tank/2017/09/01/unauthorized-immigrants-covered-by-daca-face-uncertain-future/>.

**B. *Plyler v. Doe* and Educational Guarantees for DREAMers**

While examining DREAMers in post-secondary education, it is important to understand how law and policy have created this predicament. The U.S. Supreme Court first dealt with undocumented students and public education in *Plyler v. Doe*,<sup>16</sup> where the Court prohibited states from denying undocumented students access to free education and school districts from charging tuition based on citizenship status.<sup>17</sup> In the mid-1970s, Texas passed a law that withheld funding from school districts that enrolled undocumented children. The law gave these districts the option to deny enrollment or charge tuition to such students.<sup>18</sup> In 1977, a group of undocumented Mexican children attempted to enroll in the Tyler Independent School District and could not prove their lawful immigration status.<sup>19</sup> The federal district court found that there was no rational basis for the discriminatory statute and enjoined the implementation.<sup>20</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>21</sup>

At the U.S. Supreme Court, Justice Brennan skirted the issue of preemption and ruled that this denial of education was a violation of the Fourteenth Amendment's Equal Protection Clause, reasoning that undocumented children could invoke the protections of the Equal Protection Clause.<sup>22</sup> Specifically, Justice Brennan stated that denial of education would create a "lifetime of hardship" and a "permanent underclass" of individuals so that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education."<sup>23</sup> The Court found no "evidence . . . suggesting that illegal entrants impose any significant burden on the State's economy," or that they exhaust public resources while not contributing to social services.<sup>24</sup> The state failed to show a substantial state interest to deny "a discrete group of innocent children" education it offers to others residing within its borders, and as a result, the U.S. Supreme Court afforded the opportunity to K-12 education for all children, immigration status aside.<sup>25</sup> As an important note, the Court stressed that the undocumented children "can affect neither their parents' conduct nor their own status,"<sup>26</sup> and

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16. 457 U.S. 202 (1982).

17. *Id.* at 230.

18. *Id.* at 205 (citing 1975 Tex. Sess. Law Serv. 896 (West), (codified as TEX. EDUC. CODE ANN. SEC. 21.031 (West 1975))).

19. *Id.* at 206.

20. *Id.*

21. *Id.* at 208-09.

22. *Id.* at 210, 215.

23. *Id.* at 223.

24. *Id.* at 228.

25. *Id.* at 230.

26. *Id.* at 220.

consequently, it would be unfair to penalize the children for their parents' presence.

Unfortunately, as undocumented youth matriculate from high school, their status poses challenges as they consider higher education. While *Plyler* opens access to primary and secondary education to undocumented students, a high school diploma is no longer sufficient to compete in today's labor market.<sup>27</sup> Employment is competitive, and in order to find sustainable work to support oneself and his or her family, higher education is essential.<sup>28</sup> Undocumented students face a variety of obstacles. Some are erected by the states, others are institutional to accessing higher education, including the denial of admission, a lack of financial aid, and the inability to pay, just to name a few. Extending the understandings from *Plyler* that it is unconstitutional to treat DREAMers differently from their documented and citizen-peers who are in post-secondary institutions is only logical.<sup>29</sup>

### C. Post-Secondary Education Attainment of DREAMers

Access to higher education is much more uncertain for DREAMers as these young people transition into adulthood and confront various legal, economic, and social barriers.<sup>30</sup> Their lack of legal status is a main constraint as it prevents their incorporation and assimilation into work opportunities.<sup>31</sup> Their legal status prevents DREAMers from accessing financial aid and other employment opportunities, which provides funds that are much needed to persist in higher education. Because of these barriers, those that do seek out higher education focus on attending community colleges where it is more accessible and more affordable than four-year institutions.<sup>32</sup> These

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27. Roberto G. Gonzales, *Young Lives on Hold: The College Dreams of Undocumented Students*, C. BOARD ADVOC. 12, 12 (2009).

28. Stephen B. Knouse, John R. Tanner, & Elizabeth W. Harris, *The Relation of College Internships, College Performance, and Subsequent Job Opportunity*, 36 J. EMP. COUNSELING 35, 36 (1999).

29. Laura A. Hernandez, *Dreams Deferred – Why In-State College Tuition Rates Are Not a Benefit Under the IIRIRA and How This Interpretation Violates the Spirit of Plyler*, 21 CORNELL J. L. PUB. POL'Y 525 (2012).

30. See generally Leisy J. Abrego, "I Can't Go to College Because I Don't Have Papers:" *Incorporation Patterns of Latino Undocumented Youth*, 4 LATINO STUD. 212 (2006). See also Emily Greenman & Matthew Hall, *Legal Status and Educational Transitions for Mexican and Central American Immigration Youth*, 91 SOCIAL FORCES 1475 (2013).

31. Roberto Gonzalez, Veronica Terriquez, & Stephen Rusczyk, *Becoming DACAmended: Assessing Short-term Benefits of Deferred Action for Childhood Arrivals (DACA)*, AM. BEHAV. SCI. 1 (2014).

32. See generally Robert T. Teranishi, Carola Suarez-Orozco, & Marcelo Suarez-Orozco, *Immigrants in Community Colleges*, 21 FUTURE OF CHILDREN 153 (2011); see also Veronica Terriquez, *Trapped in the Working Class?: Prospects for the Intergenerational (Im)mobility of Latino Youth*, 84 SOC. INQUIRY 382 (2014).

challenges continue as DREAMers seek out internships, part-time jobs, and professional positions after graduation that require a Social Security Card.<sup>33</sup>

While there are a myriad of barriers and challenges, DREAMers persist and succeed. The Pew Hispanic Center estimated that among high school graduates ages 18-24 who are undocumented, 49% attend or have attended college.<sup>34</sup> However, since there is a gap in data collection pertaining to undocumented student status and college persistence, generalizable quantitative data examining undocumented student success and persistence is dearth.<sup>35</sup> Many scholars have uncovered examples and stories of persistence and success among the DREAMers that only serve as examples for hundreds of thousands of DREAMers around the country.

## II. FEDERAL AND STATE LAWS AND POLICIES IMPACTING EDUCATIONAL ATTAINMENT

### A. Federal Laws

#### 1. Development, Relief, and Education for Alien Minors (DREAM) Act

Since passing the Immigration Reform and Control Act of 1986 (IRCA), Congress has failed to address comprehensive immigration reform. The IRCA implemented policies requiring verification of immigration status in employment, allowing 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.<sup>36</sup> Ten years later, the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) changed federal social welfare and health benefits for undocumented immigrants, including education.<sup>37</sup> As a result, this federal measure re-segregated educational benefits for undocumented students.<sup>38</sup> IIRIRA specifically prohibited post-secondary institutions from providing any person “who is not lawfully present in the United States” with any post-secondary education benefit, such as in-state tuition and/or state financial aid, “unless a citizen or national of the United

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33. See generally Knouse, et al., *supra* note 28.

34. See Passel & Cohn, *supra* note 2.

35. See Gonzalez et al., *supra* note 31 at 1853.

36. See Susan Gonzalez 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 (1997).

37. See generally Michael A. Olivas, *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 449 (2004); see also Maria Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1396 (2005).

38. See generally Nguyen & Martinez Hoy, *supra* note 3, at 361.

States is eligible” for the same “without regard to whether the citizen or national is such a resident.”<sup>39</sup> In other words, since normally out-of-state residents are not eligible for any in-state benefits, nor are DREAMers, even if they would have qualified otherwise as a resident.

Since the DACA program gave approved DREAMers legal presence in the U.S., they could benefit from in-state educational benefits, but until the enactment of the DACA program, a state must affirmatively pass legislation to give resident undocumented immigrants in-state resident tuition benefits if it so desired. Texas was the first to do so in 2001 and other states followed. A more in-depth discussion of these state laws follows. In the meantime, while states were acting to resolve the issue caused by IIRIRA, members of Congress worked to eliminate any issues by proposing the DREAM Act.

In 2001, the DREAM Act was introduced in hopes that it would solve this national predicament for undocumented students and provide a pathway to citizenship for certain undocumented immigrants who migrated as children.<sup>40</sup> This law would have allowed adjustment to legal status for those undocumented youth who graduated 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.<sup>41</sup> Temporary residency for six years would be permitted for two years of military service or higher education.<sup>42</sup> 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.<sup>43</sup> The DREAM Act, if passed, would restore in-state resident tuition benefits for this population of young people.<sup>44</sup>

There have been several forms of the DREAM Act proposed, but the version proposed in 2010 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>45</sup> This version of the DREAM Act lowered the age cap, further limited eligibility based on incidences of bad moral character, and included more restrictions, but still failed to pass the Senate in 2010 and 2011.<sup>46</sup> Passing the DREAM Act would allow undocumented immigrants to participate in mainstream education and the

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39. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 505, 110 Stat. 3009-546 (1996).

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

41. *Id.*

42. Cardinal Roger M. Mahoney, *The DREAM Act: We All Benefit*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 459, 461 (2012).

43. *Id.*

44. *Id.*

45. See Development, Relief, and Education for Alien Minors Act of 2005, H.R. 5281, 111th Cong. (2010).

46. *Id.*

workforce so they can legally contribute to the nation's economy and cultural fabric.<sup>47</sup>

Because of failed federal attempts, states 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>48</sup> In addition, in 2012, President Barack Obama announced his administration's executive order for the Deferred Action for Childhood Arrivals (DACA) program, which provided a two-year temporary reprieve to qualified undocumented immigrants, enabling them to enjoy certain benefits without a pathway to permanent residency or citizenship.<sup>49</sup> This temporary reprieve was renewable.<sup>50</sup> While it did not provide a pathway to permanent residency or citizenship, it did provide those eligible persons with "legal presence," which allowed DACAmented students to benefit from in-state tuition since being "lawfully present" complied with the restrictions in Section 505 of IIRIRA.<sup>51</sup> On September 5, 2017, the Trump Administration announced that it would end the DACA program and called upon Congress to act.<sup>52</sup> While some undocumented students have been able to take advantage of the DACA program and fully engage in their communities without fear of disclosing their status, the struggle persists without concrete assurance of a pathway to permanent residency or citizenship, especially now that DACA will end.

## 2. Deferred Action for Childhood Arrivals (DACA)

Trying to deliver on his campaign promise and to open more doors for undocumented students, President Barack Obama announced his administration's Deferred Action for Childhood Arrivals (DACA) program on June 15, 2012.<sup>53</sup> This program, through an executive order, has given temporary reprieve to almost 800,000 undocumented youth by enabling them to benefit from certain rights without fear of removal proceedings.<sup>54</sup> This was a change in administrative enforcement policy that deferred deportation from

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47. *Id.*; see also Cardinal Roger M. Mahony, *supra* note 42.

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

49. Memorandum from Sec'y of Homeland Sec. Janey Napolitano to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot.; Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Servs.; and John Morton, Dir., U.S. Immigration and Customs Enf't (June 15, 2012).

50. *Id.*

51. See Immigration and Nationality Act (INA) § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii) (2013).

52. Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>.

53. See Gonzalez, et al., *supra* note 31.

54. See Batalova, et al., *supra* note 12, at 11.

the U.S. for eligible immigrants. If eligible, recipients were allowed to seek employment, apply for a Social Security number, obtain driver's licenses and professional licenses, among other benefits.<sup>55</sup>

Eligibility depended on a variety of qualifications: (1) entering the U.S. before turning sixteen, (2) being older than fifteen years old but younger than thirty-one years old,<sup>56</sup> (3) having resided in the U.S. continuously for the past consecutive five years,<sup>57</sup> (4) having a high school diploma or its equivalent (if not currently enrolled in high school or a GED program), and (5) neither being convicted of a felony or a significant misdemeanor nor being a threat to national security.<sup>58</sup>

DACA is only a temporary solution that grants "lawful presence" through prosecutorial discretion pertaining to deportation and does not grant "lawful status" or provide a pathway to legal permanent residency or citizenship.<sup>59</sup> The absence of a legal status presents a challenging barrier for undocumented youth to successfully integrate into the American society.<sup>60</sup> This temporary reprieve, which can be and has been terminated by any Presidential administration, had many undocumented youth weary of exposing themselves in fear of possible future anti-immigration policies and deportation.<sup>61</sup>

On November 20, 2014, President Obama announced an expansion of the current DACA program and a new deferred action program for the parents of U.S. citizens and residents.<sup>62</sup> Under the expanded DACA program, the only requirements were that undocumented youth entered prior to their sixteenth birthday and lived continuously in the U.S. since January 1, 2010.<sup>63</sup> Under the new Deferred Action for Parental Accountability (DAPA)

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55. Memorandum from Napolitano, *supra* note 49.

56. *Id.*

57. *Id.*

58. *Id.*

59. *See* Adams & Boyne, *supra* note 3, at 50. A person is unlawfully present in the U.S. if he/she entered the country without being admitted or paroled or remains in the country after an authorized stay has expired. A person has unlawful status if he/she has violated terms of his/her previously lawful status. As a result, if one has lawful status, an individual has permission to be in the U.S. so long as he/she complies with the laws and regulations. A person who is lawfully present may not have lawful status.

60. *See generally* PHILIP KASINITZ, JOHN MOLLENKOPF, MARY C. WATERS & JENNIFER HOLDAWAY, *INHERITING THE CITY: THE CHILDREN OF IMMIGRANTS COME OF AGE* (2008); *see also* RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* (2003).

61. Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 L. SOC. REV. 337, 352 (2011) (fear predominates the legal consciousness of undocumented youth; exposing themselves through DACA may only open themselves to this risk).

62. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec. to León Rodríguez, Dir., U.S. Citizenship and Immigration Servs.; Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf't; and R. Gil Kerlikowski, Comm'r, U.S. Customs and Border Prot. (Nov. 20, 2014).

63. *Id.*

program, President Obama tried extending DACA-like prosecutorial discretion to undocumented people who have U.S. citizen or lawful permanent resident children at the time of the announcement of the program.<sup>64</sup> The Migration Policy Institute estimated that approximately 3.7 million people could have qualified for this program, while an approximate additional 300,000 people will benefit from the expanded DACA program.<sup>65</sup> Shortly after their announcements, Texas, along with twenty-five other states, sued the federal government, leading to an injunction to block the implementation of DAPA and expanded DACA programs.<sup>66</sup> These two programs have never been implemented. In September 2017, President Trump announced that the DACA program would cease six months later, calling for Congress to act.<sup>67</sup>

## **B. State Laws and Institutional Policies**

### **1. Laws and Policies on In-State Tuition and Enrollment**

State governments and institutions have become the primary arbiters of laws and policies that open access to higher education for DREAMers.<sup>68</sup> Understanding state legislation and navigating the maze of policies can be daunting. While these state and institutional policies provide some access to DREAMers as compared to federal policy, states and institutions still discriminate. Not all DREAMers are treated similarly. Undocumented students may be treated differently than DACAmented students, those attending community college may be discriminated against more than those who attend four-year institutions, and access may be more restrictive for selective than less-selective institutions. These kinds of discrimination against DREAMers illustrate how arbitrarily the consequences of their legal status impact their educational attainment.

There is no federal law that prohibits the enrollment of DREAMers in higher education,<sup>69</sup> but three states prohibit enrollment in some manner or

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64. *Id.*

65. *MPI: AS Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program*, MIGRATION POL'Y INST. (Nov. 19, 2014), <https://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>.

66. Elisa Foley, *Over Half the States are Suing Obama For Immigration Actions*, HUFF. POST (Jan. 26, 2015), [https://www.huffingtonpost.com/2015/01/26/states-lawsuit-immigration\\_n\\_6550840.html](https://www.huffingtonpost.com/2015/01/26/states-lawsuit-immigration_n_6550840.html).

67. *See* Shear & Davis, *supra* note 52.

68. *See generally* Gabriel Serna, Joshua Cohen & David H. K. Nguyen, *State and Institutional Policies on In-State Resident Tuition and Financial Aid for Undocumented Students: Examining Constraints and Opportunities*, 25 EDUC. POL'Y ANAL. ARCH. 3, 6 (2017); *see also* David H. K. Nguyen & Gabriel Serna, *Access or Barrier? Tuition and Fee Legislation for Undocumented Students Across the States*, 87 THE CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES, & IDEAS 124, 126 (2014).

69. *See* Adams & Boyne, *supra* note 3, at 48.

another. Alabama and South Carolina, by legislation, prohibit enrollment of any DREAMers at any public institution of higher education.<sup>70</sup> In 2010, The Georgia Board of Regents passed a policy prohibiting the enrollment of any DREAMers at their selective public institutions, which at the time were Augusta University, Georgia College and State University, Georgia Institute of Technology, Georgia State University, and University of Georgia.<sup>71</sup> The Board of Regents' policy prohibited institutions from enrolling undocumented students if other academically qualified students with legal status had not yet enrolled within the previous two years.<sup>72</sup> In 2016, this threshold was met for Augusta University and Georgia State University.<sup>73</sup> The guarantees from *Plyler v. Doe* that states must guarantee free public access to primary and secondary education regardless of immigration status does not outlaw nor encompass the same protections for higher education. As a result, this is left open for states to regulate.<sup>74</sup>

Currently at the writing of this article, there are twenty-one states that allow in-state tuition benefits in some manner or another for undocumented students.<sup>75</sup> Each state offers something different, and some states allow benefits to certain DREAMers and not others, which makes this policy maze complicated. Sixteen states have passed legislation allowing in-state tuition for DREAMers.<sup>76</sup> These are: California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Texas, Utah, and Washington.<sup>77</sup> Two other states, Oklahoma and Rhode Island, extend these benefits through Boards of Regents decisions.<sup>78</sup> Many university and college systems in Michigan and Hawaii offer these benefits also.<sup>79</sup> In Virginia, the state attorney general allowed the granting of in-state resident tuition.<sup>80</sup>

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70. See generally Adams & Boyne, *supra* note 3; Nguyen & Martinez Hoy, *supra* note 3.

71. BD. REGENTS OF THE UNIV. SYS. OF GA., POLICY MANUAL § 4.16 (Oct. 29, 2010). See also KARA UMANA, ULTIMATE GUIDE FOR COLLEGE BOUND UNDOCUMENTED GEORGIA STUDENTS 11 (Matt Hicks, ed., 2014).

72. *Id.*

73. Jeremy Redmon, *Exclusive: 2 Ga. Schools to Consider Immigrants without Legal Status*, THE ATL. JOURNAL-CONSTITUTION (Nov. 20, 2016), <http://www.myajc.com/news/state--regional-govt--politics/exclusive-schools-consider-immigrants-without-legal-status/jdBOvH43hYI8IIDFO8DUtK/>.

74. *Equal Access Education v. Merten*, 305 F. Supp. 2d. 585 (E.D. Va. 2004) (upholding state policy on Supremacy Clause grounds since federal law was absent addressing the admission of undocumented students to public higher education institutions).

75. See Serna, Cohen, & Nguyen, *supra* note 68.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. 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).

Some of the above states discriminate among DREAMers and institution-type. For example, in Maryland, in-state tuition is only available at the community colleges.<sup>81</sup> In Virginia, only DACA recipients are afforded tuition benefits,<sup>82</sup> even though an interpretation of federal law already affords such benefit. In Florida, there is a maximum quota, and students must meet other requirements such as having to attend a Florida high school for three consecutive years.<sup>83</sup> In Indiana, only the DREAMers enrolled in postsecondary education at the time the state legislature passed the law to begin prohibiting in-state tuition actually benefit from in-state tuition rates, notwithstanding those who are DACA recipients.<sup>84</sup> The qualifications to these benefits illustrate arbitrary discrimination among DREAMers. Why should DREAMers in Maryland not be able to attend a four-year institution? How about those undocumented students who are rightfully fearful of registering for the DACA program, or those ineligible in Virginia? Shouldn't those young people be afforded an education as well?

Other states have intentionally created barriers to college access for undocumented students by prohibiting any benefits. While Alabama, South Carolina, and Georgia have prohibited enrollment as discussed above, Arizona, Indiana, and Georgia have passed legislation banning in-state tuition for DREAMers.<sup>85</sup> 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 "lawfully present" through the federal DACA program as described previously. In addition to the fact that the DACA program eliminated the question of "lawful presence," it can also mute state law. For example, 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."<sup>86</sup>

The federal government has recognized DREAMers who are DACAmented as lawfully present in the United States by prosecutorial discretion.<sup>87</sup> As such, under Indiana law, so long as the immigrant is "lawfully in the United States,"<sup>88</sup> he/she is afforded in-state resident tuition at its public institutions. Unfortunately, because DACA is temporary, this is not a long-term solution.

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81. See Nguyen & Martinez Hoy, *supra* note 3.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. IND. CODE § 21-14-11-1 (2011).

87. See Passel & Cohn, *supra* note 2.

88. IND. CODE § 21-14-11-1.

## 2. Financial Aid

Numbers show that although students qualify for in-state tuition, the price of college remains unaffordable.<sup>89</sup> The price of college is the primary barrier to higher education access, especially for students from low socioeconomic backgrounds.<sup>90</sup> Unfortunately, federal financial aid is not available to DREAMers since the Higher Education Act of 1965 requires that applicants be legal U.S. residents.<sup>91</sup> Of the twenty-one states that grant some kind of in-state resident tuition to DREAMers, only six states allow access to state financial aid.<sup>92</sup> The first was Texas, followed by New Mexico, California, Colorado, Minnesota, and Washington.<sup>93</sup> However, even without access to federal financial aid, it is unlikely that these cost-barriers can be eliminated.<sup>94</sup> Federal financial aid is often the only mechanism that provides enough funds for a student to attend even the most affordable institutions.<sup>95</sup> In addition, being unable to access higher education means that opportunities for educational and employment opportunities remain significantly limited.<sup>96</sup>

In order to receive state financial aid, applicants must often fill out an additional form or complete additional requirements. For example, Texas has its own Texas Application for State Financial Aid (TASFA), similar to the federal Free Application for Federal Student Aid (FAFSA). Other states have similar forms, such as the Colorado COF application and the institutional ASSET eligibility form. While some states may not have legislated financial aid, there may be scholarships. Scholarships can be available from several non-profit organizations, corporations, and philanthropic foundations. There are also state-sponsored scholarship programs, such as the Illinois Dream Fund. It is critical that professionals, both K-12 and higher education, are informed of these processes to correctly

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89. For example, at the University of Connecticut, total enrollment exceeds 18,000 students, while only thirty-three undocumented students have taken advantage of the law. Similarly, at the University of California Berkeley—which has over 25,000 undergraduates—only 250 undocumented students have used the law to their advantage. *See* Serna, Cohen, & Nguyen, *supra* note 68.

90. *See* Serna, Cohen, & Nguyen, *supra* note 68. *See also* Sandy Baum & Stella M. Flores, *Higher Education and Children in Immigrant Families*, 21 *THE FUTURE OF CHILDREN* 1 (2011).

91. 8 U.S.C. § 1641(b).

92. *See* Serna, Cohen, & Nguyen, *supra* note 68.

93. *Id.*

94. *Id.*

95. 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* 2 (2006).

96. AIMEE CHIN & CHINHUI JUHN, *DOES REDUCING COLLEGE COSTS IMPROVE EDUCATIONAL OUTCOMES FOR UNDOCUMENTED IMMIGRANTS? EVIDENCE FROM STATE LAWS PERMITTING UNDOCUMENTED IMMIGRATION TO PAY IN-STATE TUITION AT STATE COLLEGE AND UNIVERSITIES*, NBER (2010). *See also* Michael Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 *THE REV. OF HIGHER EDUC.* 3 (2009).

advise DREAMers.<sup>97</sup> States and institutions that provide financial aid and scholarships to undocumented students will help level the playing field and make education more attainable for DREAMers.<sup>98</sup> Research shows that DREAMers migrate to states that offer educational benefits, enroll at high numbers, and academically succeed and persist.<sup>99</sup> Offering state financial aid and/or scholarships can help bridge this large gap for these young people.

### 3. Professional and Occupational Licensing

Even when DREAMers matriculate from higher education, professional employment may be an indestructible barrier. For many professions, licensing by the state is mandatory. Professional licenses authorize practitioners to work in certain industries, such as law, medicine, education, social work, cosmetology, accounting, nursing, real estate, and others. Federal law prohibits the awarding of professional licensure to DREAMers unless states specifically pass legislation to opt out of these federal requirements.<sup>100</sup> A handful of states have taken steps to help DREAMers seek professional employment in professions that require licensure: California, New York, Nebraska, Florida, and Illinois.

California is the most welcoming state to DREAMers concerning professional licensing since it passed legislation to ban licensing agencies from denying applications based on immigration status.<sup>101</sup> Instead of social security numbers, applicants can use an Individual Tax Identification Number (ITIN). In New York, while the state does not discriminate among the professions, only DACA recipients may apply for professional licenses, teaching certifications, and sit for the New York Bar Exam to practice law.<sup>102</sup> In Illinois, legislators amended the law to allow DACA recipients to obtain a license to practice law.<sup>103</sup> Florida also affirmatively passed legislation to

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97. See Nguyen & Serna, *supra* note 68.

98. See Serna, Cohen, & Nguyen, *supra* note 68.

99. See generally Catalina Amuedo-Dorantes & Chad Sparber, *In-state Tuition for Undocumented Immigrants & its Impact on College Enrollment, Tuition Costs, Student Financial Aid, and Indebtedness*, 49 REGIONAL SCI. & URBAN ECON. 11, 15 (2014) (states that have in-state tuition policies saw increase in enrollment); Baum & Flores, *supra* note 90, at 184; Stella Flores, *State Dream Acts: The Effect of In-state Resident Tuition Policies and Undocumented Latino Students*, 33 REV. OF HIGH. EDUC. 239, 271 (2010); Stella Flores & Catherine Horn, *College Persistence among Undocumented Students at a Selective Public University: A Quantitative Case Study Analysis*, 11 J. C. STUDENT RETENTION: RES., THEORY, & PRAC. 57, 73 (2009).

100. See 8 U.S.C. § 1621 (2017).

101. S.B. 1159, 2015 Leg., Reg. Sess. (Cal. 2015).

102. See *Board of Regents Approves Regulations to Allow DACA Recipients to Apply for Teacher Certification and Professional Licenses*, N.Y. STATE EDUC. DEP'T (Feb. 24, 2016), <http://www.nysed.gov/news/2016/board-regents-approves-regulations-allow-daca-recipients-apply-teacher-certification-and>; See also *In re Vargas*, 10 N.Y.S.3d 579 (N.Y. App. Div. 2015).

103. S.B. 23, 2015 Leg., Reg. Sess. (Ill. 2015).

allow DREAMers to practice law if the applicant has been present in the U.S. for more than ten years and is authorized to work in the U.S.<sup>104</sup>

While most states have passed legislation to allow DACA recipients to obtain professional licenses, these laws are moot since an approved DACA application provides employment authorization and a social security number, notwithstanding state specific rules that may require a specific immigration status to obtain licensure. Given that not all DREAMers have or are eligible for DACA, the California law is most welcoming to all DREAMers and permits them to contribute to their communities through their professions.

### C. Legal Update in the Trump Era

Beginning with his campaign for the presidency, President Trump signaled the public about his anti-immigration policies.<sup>105</sup> In addition to mass deportations,<sup>106</sup> the DACA program was argued to be unconstitutional, and many looked to President Trump to end the program.<sup>107</sup> While he did not decide on President Obama's DACA program right away, there were hints that DACA would eventually be eliminated, which would have detrimental effects on recipients. As discussed above, being a DACA recipient has allowed hundreds of thousands of young people to go to school at an affordable rate, seek professional employment, and participate in society. On September 5, 2017, President Trump announced that the DACA program would cease six months later and called on Congress to act.<sup>108</sup> As of the writing of this article, several proposals have been introduced in Congress trying to either enshrine the protections of DACA or go further to provide a pathway to legal status and citizenship for DREAMers. Below is a sampling of the various proposals that have gained steam.

*DREAM Act of 2017.* Introduced in the U.S. Senate by prominent Senators Dick Durbin of Illinois and Lindsay Graham of South Carolina on July 20, 2017, this bill is the latest iteration of various DREAM Acts proposed in years prior. Similar to the previous versions, this bill would provide a pathway to citizenship or permanent residency if certain requirements are met.<sup>109</sup> While it would take thirteen years to achieve

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104. H.B. 755, 2014 Leg., Reg. Sess. (Fla. 2014).

105. Philip Klinker, *Anti-Immigrant Views Helped Trump Win. Will They Also Cause His Undoing?*, CHI. TRIB. (Apr. 18, 2017, 1:15 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-trump-supporters-anti-immigrant-20170418-story.html>.

106. Nick Gass, *Trump's Immigration Plan: Mass Deportation*, POLITICO (Aug. 17, 2015, 6:25 AM), <http://www.politico.com/story/2015/08/donald-trump-immigration-plan-121420>.

107. Danielle Kurtzleben, *Republicans are Happy Trump Ended DACA. They're Less Sure About Deporting DREAMers*, NPR (Sept. 17, 2017, 7:00 AM), <http://www.npr.org/2017/09/17/551392700/republicans-are-happy-trump-ended-daca-they-re-less-sure-about-deporting-dreamer>.

108. See Shear & Davis, *supra* note 52.

109. S. 1615, 115th Cong. (2017).

naturalization,<sup>110</sup> an immigrant could become a permanent resident if he/she lived in the U.S. for a certain amount of time and meets certain educational, employment, or military service requirements. While the DREAM Act has been proposed in Congress for over fifteen years, the Trump White House has signaled that such a bill would not be supported.<sup>111</sup>

*Recognizing America's Children Act.* This bill was introduced by Representative Carlos Curbelo of Florida on March 9, 2017; it enshrines the protections of DACA and provides a pathway to legal status and eventually citizenship.<sup>112</sup> There would be three pathways to legalization: higher education, military service, or work authorization. After a five-year conditional status, applicants could apply for a five-year permanent status, which would then lead to the opportunity to apply for naturalization.<sup>113</sup> This plan is modeled similarly to the current system for family-based immigration petitions by marriage where immigrant spouses are given conditional residency and then an opportunity to remove the conditions after two years.<sup>114</sup>

*The American Hope Act.* Sponsored by Representative Luis Gutierrez of Illinois on July 28, 2017, in the U.S. House of Representatives, the American Hope Act provides the fastest path towards citizenship and does not require any work, education, or military service conditions.<sup>115</sup> However, applicants must have entered the U.S. before the age of eighteen.<sup>116</sup> Similar to the proposed Recognizing America's Children Act, this proposal allows those that are eligible to apply for conditional permanent residency, which is valid for up to eight years.<sup>117</sup> However, after three years of conditional status, applicants can apply for permanent residency, and then after a total of five years, applicants could apply for naturalization.<sup>118</sup> This proposal is the least restrictive and would provide wide-sweeping reprieve to DREAMers.

*BRIDGE Act.* Sponsored by Representative Mike Coffman of Colorado, this bill was introduced in January 2017 as the presidential inauguration and threats that DACA would end under the Trump Administration were impending. The Bar Removal for Individuals Who Dream and Grow our Economy (BRIDGE) Act would codify the current DACA program into law and extend it for three years to allow Congress time to pass a more comprehensive immigration bill.<sup>119</sup> Compared to other bills proposed, this bill does nothing more to solidify legal status for

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110. *Id.*

111. *Id.*

112. H.R. 1468, 115th Cong. (2017).

113. *Id.*

114. *Id.*

115. H.R. 3591, 115th Cong. (2017).

116. *Id.*

117. *Id.*

118. *Id.*

119. H.R. 496, 115th Cong. (2017).

undocumented youth, such as a pathway to citizenship or permanent residency.<sup>120</sup>

*SUCCEED Act.* The most recent proposal, named the Solution for Undocumented Children through Careers Employment Education and Defending our nation (SUCCEED) Act, was introduced by Senators Thom Tillis of North Carolina, James Lankford of Oklahoma, and Oren Hatch of Utah on September 25, 2017.<sup>121</sup> This proposal calls for conditional status for those maintaining employment, pursuing higher education, or serving in the military.<sup>122</sup> To be eligible, the applicant must have arrived in the U.S. before the age of sixteen, have a high school diploma or equivalent, pass a criminal background check, submit biometrics to the U.S. government, and satisfy any existing federal tax liabilities.<sup>123</sup> After five years of conditional status, the applicant could apply for another five-year status after which then the applicant can apply for permanent residency and begin the naturalization process.<sup>124</sup> Criticism around this bill results from other immigration priorities, such as e-verify and border security, being included.

While a handful of proposals sit for Congress to act, DACA recipients must be proactive to protect themselves and their legal status. Initial DACA applicants had up to September 5, 2017, to submit their initial applications.<sup>125</sup> Current DACA recipients whose status will expire between September 5, 2017, and March 5, 2018, must have applied for renewal by October 5, 2017.<sup>126</sup> All other recipients must wait and depend on action from Congress. In addition, DACA recipients who are currently abroad should return to the U.S. as soon as possible. As of September 5, 2017, advance parole, which allows DACA recipients to re-enter the U.S. if abroad, will no longer be approved.<sup>127</sup> Too much is at stake for almost 800,000 young people only because of decisive politics and a policy-making standstill. As a result, DREAMers and their supporters have taken proactive steps to advocate for solutions, provide assistance, create safe spaces, and be vigilant for updates in policymaking. One method of resistance has been the creation of sanctuary campuses to provide those young people who are affected a place to be safe and continue their life pursuits.

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120. *Id.*

121. S. 1852, 115th Cong. (2017).

122. *Id.*

123. *Id.*

124. *Id.*

125. Memorandum from Elaine Duke, Acting Sec'y, U.S. Dep't of Homeland Security, to James W. McCament, Acting Director, U.S. Citizenship and Immigration Services; Thomas D. Homan, Acting Director, U.S. Immigration and Customs Enforcement; Kevin K. McAleenan, Acting Comm'r, U.S. Customs and Border Protection; Joseph B. Maher, Acting General Counsel; Ambassador James D. Nealon, Assistant Sec'y, International Engagement; Julie M. Kirchner, Citizenship and Immigration Services Ombudsman (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

126. *Id.*

127. *Id.*

### III. #ICEOFFOURCAMPUS: SANCTUARY CAMPUSES AND THE MOVEMENT FOR EDUCATIONAL SUCCESS

#### A. The Sanctuary Movement

According to the Pew Research Center, approximately 200,000 to 225,000 college students in the U.S. are DREAMers.<sup>128</sup> As it became clear that President Trump clinched the 2016 U.S. Presidential election and that his policies would be enacted, especially against DREAMers, students and supporters began to protest and stage demonstrations to demand that institutions of higher education declare themselves “sanctuary campuses” to protect students from President Trump’s planned mass deportations. On November 15, 2016, Portland State University and Reed College were the first to declare themselves sanctuary campuses,<sup>129</sup> and others followed. This was the birth of the sanctuary campus movement. But to gain an understanding of sanctuary campuses, it is important to understand what a sanctuary is and the birth and development of the movement.

So, what is a sanctuary in the immigration context? Sanctuaries for immigration purposes were first used in the 1980s and referred to the efforts by religious organizations and cities to provide assistance and shelter to asylum applicants from Central America.<sup>130</sup> Identifying as a sanctuary became the moral and ethical obligation that churches and cities aimed to remind others of their implied purpose to the public and social good.<sup>131</sup> Even today, sanctuaries serve as private and public safe spaces for undocumented immigrants; however, sanctuary policies have changed over the years. While proponents of the sanctuary movement believe it is morally incumbent to support and protect our undocumented neighbors,<sup>132</sup> opponents believe that sanctuaries perpetuate illegal immigration and continue to drain public funds.<sup>133</sup>

#### 1. Sanctuaries: A Historical Background

The concept of sanctuaries began during biblical times as churches served as places of refuge for those people accused of crimes and vulnerable

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128. See generally Kaitlin Mulhere, *Undocumented and Stressed*, INSIDE HIGHER ED (Jan. 26, 2015, 3:00 AM), <https://www.insidehighered.com/news/2015/01/26/study-finds-undocumented-colleges-students-face-unique-challenges>.

129. See Elliott Young, *Sanctuary in Name Only*, OR. HUMANITIES (Apr. 5, 2017), <https://oregonhumanities.org/rll/magazine/carry/sanctuary-in-name-only/>.

130. See generally Rose C. Villazor, *What is a Sanctuary*, 61 S.M.U. L. REV. 133 (2008).

131. *Id.*; See also IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* 20 (1985).

132. See generally Villazor, *supra* note 130.

133. See Lisa Anderson, “*Sanctuary Cities*” *Draw Fire, No Light*, CHI. TRIB. (Dec. 12, 2007), at 6 (reporting on how Mitt Romney used the concept of sanctuary city against opponent Rudy Giuliani).

to attacks by others.<sup>134</sup> Churches served as these sanctuaries because there were little to no legal recourse for these individuals because of the lack of legal rights to the accused during these periods.<sup>135</sup> During slavery, the Holocaust, the civil rights movements, and the Vietnam War draft, sanctuaries provided refuge for individuals to seek safety from forced labor, violence, and dangerous situations.<sup>136</sup> More specifically, the sanctuary movement aimed to be a symbol of non-violent and church-based reactions to distress caused by the U.S. government, as seen by the efforts to offer protection to El Salvadorian and Guatemalan immigrants fleeing continued violence and murders of civilians by the governments of these countries, for which some argue the U.S. was partially responsible.<sup>137</sup> Because the U.S. government refused to offer asylum to these immigrants, sanctuaries risked violating immigration law by offering legal assistance, providing food, shelter, and clothing, and transporting immigrants.<sup>138</sup>

While churches were the primary places of sanctuary, state and local governments began to assure their immigrant constituents that they and their families would be safe within the municipality boundaries. Public places began to be declared as sanctuaries; the states of New York and Massachusetts and cities of Berkeley, New York City, and Seattle were some of the first to declare themselves as sanctuaries to strengthen the efforts by churches as a response to the criticized rejection of asylum for Central Americans.<sup>139</sup> Eventually twenty-three cities and four states declared themselves as sanctuaries in the 1980s, including Los Angeles, Oakland, San Diego, San Francisco, California; Burlington, Vermont; Cambridge, Massachusetts; Chicago, Illinois; Ithaca and Rochester, New York; Madison, Wisconsin; Olympia, Washington; Duluth and St. Paul, Minnesota; and Takoma Park, Maryland.<sup>140</sup> Today, there are nearly 500 sanctuary cities in the United States.<sup>141</sup> Sanctuary policies evolved from the specific protection of Central American immigrants to general protections of all immigrants.<sup>142</sup> Contemporary sanctuaries provide safe spaces for undocumented

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134. See Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or A Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747, 749-51 (1986) (the term sanctuary can be found in many verses of the bible).

135. *Id.*

136. See generally Douglas L. Colbert, *The Motion in Limine: Trial Without Jury, A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 38-48 (1986).

137. See ANN CRITTENDEN, *SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW* 62 (Weidenfeld & Nicolson, 1988).

138. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382 (2006).

139. *Id.* at 1383.

140. See Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 600-605 (2008).

141. See generally Steve Salvi, *The Original List of Sanctuary Cities, USA*, OHIO JOBS & JUST. PAC, <http://www.ojjpac.org/sanctuary.asp>.

142. See generally Pham, *supra* note 138.

immigrants. Recognizing that all people deserve human rights and dignity to be safe, provide for their families, and be free from hatred, discrimination, and unreasonable deportation, today's sanctuaries aim to keep families intact.

## B. The Birth of Sanctuary Campuses

Sanctuary campuses derived from the concept of sanctuary cities as a mechanism to resist anti-immigration policy and discourse. Similar to the idea that sanctuary cities protect and provide refuge to immigrants within its boundaries, sanctuary campuses aim to provide safe spaces and protection to its undocumented and immigrant students. With the election of President Trump and a campaign that included public statements that vilified undocumented immigrants and Muslims, planned for massive deportations, and called for the end of DACA and a registry for Muslims, student-led movements and supporters reinvigorated the sanctuary movement by engaging with their campus administrators and faculty to develop the strongest policies to protect the hundreds of thousands of students living, studying, working, and engaging on campuses nationwide. The momentum of the sanctuary campus movement stems from work already done and the path laid from advocating for the DREAM Act, state laws and policies for undocumented students, DACA, and broader immigration protections.

While most institutions have made public statements condemning the anti-immigrant rhetoric of the Trump campaign and election, only a small percentage have publicly declared themselves sanctuary campuses. Below is a chart listing these institutions.

**Table 1:**

<b><u>Institutions that have declared themselves as “sanctuaries”</u></b> <sup>143</sup>
City College of San Francisco <sup>144</sup>
Drake University <sup>145</sup>

143. Xavier Maciel, *Sanctuary Campuses*, [https://www.google.com/maps/d/u/0/viewer?mid=1LcIME474-IYWbTf\\_xQChIhSSN30&hl=en&ll=36.20397974434343%2C-113.89148150000005&z=3](https://www.google.com/maps/d/u/0/viewer?mid=1LcIME474-IYWbTf_xQChIhSSN30&hl=en&ll=36.20397974434343%2C-113.89148150000005&z=3) (last visited Jan. 7, 2017).

144. *Action Item: City College of San Francisco Joins the City and County of San Francisco in Affirming Its Sanctuary Status for All People of San Francisco*, CITY C. OF S.F. (Dec. 15, 2016), <http://www.ccsf.edu/BOT/2016/December/346r.pdf>.

145. Steffi Lee, *Drake University President Declares Institution a “Sanctuary Campus,”* KGAN (Dec. 1, 2016) <http://cbs2iowa.com/news/local/drake-university-president-declares-institution-a-sanctuary-campus>.

Emerson College <sup>146</sup>
Pitzer College <sup>147</sup>
Portland State University <sup>148</sup>
Queensborough Community College <sup>149</sup>
Reed College <sup>150</sup>
San Francisco Art Institute <sup>151</sup>
Santa Fe Community College <sup>152</sup>
Scripps College <sup>153</sup>
Swarthmore College <sup>154</sup>
University of Pennsylvania <sup>155</sup>

146. Ross Cristantiello, *Faculty Approves Sanctuary Campus Proposal*, BERKELEY BEACON (Nov. 30, 2017), <http://www.berkeleybeacon.com/news/2016/11/30/emerson-declared-a-sanctuary-campus>.

147. Message to the Community from Melvin L. Oliver, President Oliver and the Board of Trustees Declare Pitzer a Sanctuary College, <https://www.pitzer.edu/president/president-oliver-and-board-of-trustees-declare-pitzer-a-sanctuary-college>.

148. *President Wim Wiewel Declares PSU a Sanctuary University*, THE SKANNER (Nov. 18, 2016), <http://www.theskanner.com/news/newsbriefs/24691-president-wim-wiewel-declares-psu-a-sanctuary-university>.

149. *Academic Senate Resolution to Designate Queensborough Community College of the City University of New York as a Sanctuary Campus for Immigrants and Members of the Protected Class*, (Dec. 13, 2016) [http://www.qcc.cuny.edu/governance/academicSenate/docs/ay2016-17/December\\_2016/Attachment-J-Sanctuary-Campus-Resolution-December-2016.pdf](http://www.qcc.cuny.edu/governance/academicSenate/docs/ay2016-17/December_2016/Attachment-J-Sanctuary-Campus-Resolution-December-2016.pdf).

150. Chris Lydgate, *Kroger Declares Reed a Sanctuary College*, REED MAG. (Nov. 18, 2017) [http://www.reed.edu/reed\\_magazine/sallyportal/posts/2016/sanctuary-college.html](http://www.reed.edu/reed_magazine/sallyportal/posts/2016/sanctuary-college.html).

151. Memorandum from Gordon Knox, President of San Francisco Art Institute, Declaration of Sanctuary Campus Status (Mar. 8, 2017, 2:08 PM), <https://moodle.sfai.edu/mod/forum/discuss.php?d=4143>.

152. Robert Nott, *SFCC Declared a "Sanctuary Campus" for Immigrants*, SANTA FE NEW MEXICAN (Nov. 30, 2016), [http://www.santafenewmexican.com/news/education/sfcc-declared-a-sanctuary-campus-for-immigrants/article\\_cb2a01c6-52d4-55d7-b888-f6d4a16b0ecc.html](http://www.santafenewmexican.com/news/education/sfcc-declared-a-sanctuary-campus-for-immigrants/article_cb2a01c6-52d4-55d7-b888-f6d4a16b0ecc.html).

153. Office of the President: Message in Response to Petition, Lara Teidens, President (Dec. 11, 2016), <http://inside.scrippscollege.edu/news/office-of-the-president-message-in-response-to-petition>.

154. Thomas E. Spock & Valerie Smith, *Swarthmore Board Pledges Sanctuary for Undocumented Students, All Community Members*, SWARTHMORE C. NEWS & EVENTS (Dec. 2, 2016), <https://www.swarthmore.edu/news-events/swarthmore-board-pledges-sanctuary-undocumented-students-all-community-members>.

155. Amy Guttman, Vincent Price, & Craig R. Carnaroli, *A Message to the Penn Community Concerning our DACA and Undocumented Community Members*, PENNNEWS (Nov. 30, 2016), <https://news.upenn.edu/message-penn-community-concerning-our-daca-and-undocumented-community-members>.

Wesleyan University<sup>156</sup>

While others did not publically declare themselves as sanctuaries, many universities have adopted policies and reaffirmed their support for DREAMers. While each have adopted varying policies, below is a sampling of policies that sanctuary campuses have adopted to reiterate their support for DREAMers.

**Table 2:**

<b><u>Sampling of Sanctuary Campus Policies</u></b> <sup>157</sup>	
<input type="checkbox"/>	Refusing to voluntarily share information with federal immigration officials to the fullest extent of the law
<input type="checkbox"/>	Refusing physical access for federal immigration officials to any and all university/college-owned land and facilities to the fullest extent of the law
<input type="checkbox"/>	Prohibiting campus police from inquiring about an individual's immigration status, enforcing immigration laws, intimidating undocumented activists and protests, and/or participating with federal immigration officials in immigration-related actions
<input type="checkbox"/>	Refusing to use the federal government e-verify system
<input type="checkbox"/>	Prohibiting the discrimination in housing based on immigration status
<input type="checkbox"/>	Supporting DREAMers' (DACA and undocumented students) equal access to enrollment, in-state tuition, financial aid, and scholarships
<input type="checkbox"/>	Continuing the support of the DACA program
<input type="checkbox"/>	All contractors and subcontractors of the college/university must agree and abide to the institutional policies
<input type="checkbox"/>	Providing distance-learning options for affected students
<input type="checkbox"/>	Providing legal assistance to impacted students

The use of the word “sanctuary” can have a negative connotation<sup>158</sup> that prevented institutional leaders to embrace and adopt as a way to support their DREAMers. However, the use of the term “sanctuary campus” can be

156. Michael S. Roth, *Wesleyan University a Sanctuary Campus*, WESLEYAN UNIV.: ROTH ON WESLEYAN (Nov. 20, 2016), <http://roth.blogs.wesleyan.edu/2016/11/20/wesleyan-university-a-sanctuary-campus/>.

157. See generally Stephanie F. Ward, *Can Universities Create “Sanctuary Campuses” to Protect Immigrant Students?*, A.B.A. J. (Nov. 15, 2016), [http://www.abajournal.com/news/article/can\\_universities\\_create\\_sanctuary\\_campuses\\_to\\_protect\\_immigrant\\_students](http://www.abajournal.com/news/article/can_universities_create_sanctuary_campuses_to_protect_immigrant_students); *Sanctuary Campus Frequently Asked Questions*, IMMIGR. RESPONSE INITIATIVE, HARV. L. SCH. (Feb. 2017), <https://today.law.harvard.edu/wp-content/uploads/2017/02/Sanctuary-Campus-Toolkit.pdf>.

158. See Villazor, *supra* note 130, at 158.

a symbolic gesture to the college/university community of resistance and noncompliance of anti-immigration policies.<sup>159</sup> Many campuses have pledged their support to the DREAMer population without declaring themselves as sanctuaries. In these cases, they have affirmed their support and may have adopted one or more of the above listed policies. Whether or not campuses have used the word “sanctuary,” campuses should consider their liabilities and responsibilities for the educational attainment of their DREAMers. Therefore, the mere use of the word “sanctuary” is not enough to ensure the safety of their students; institutions must embrace the full intent of the movement.

### 1. Legal Responsibilities of Sanctuary Campuses

Whether campuses declare themselves as sanctuaries or not, they continue to have legal responsibilities to protect the privacy of their students’ information and provide a safe learning environment. While one of the sanctuary campus policies request that institutions refuse to share information about their students to federal immigration officials, federal law already requires the protection of student data. The Federal Educational Rights and Privacy Act (FERPA) is a federal law that applies to all primary, secondary, and postsecondary schools that receive federal funding through programs administered by the U.S. Department of Education, such as federal financial aid.<sup>160</sup> Under FERPA, educational institutions must protect “educational records,”<sup>161</sup> which is broadly defined to include records and information that are “directly related to the student” and “maintained by an educational agency or institution.”<sup>162</sup> For students to receive financial aid or in-state tuition benefits, students would have revealed their undocumented status during an admissions or financial aid process, which makes this information and those records subject to protection under FERPA.<sup>163</sup> Unless students consent to the release of this information, or if there is a court order or any other exceptions under FERPA,<sup>164</sup> the law prohibits schools from

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159. Pullias Ctr. for Higher Educ., *The University as a Sanctuary*, UNIV. OF S. CAL., 4 (2017), [https://pullias.usc.edu/wp-content/uploads/2017/01/The\\_University\\_as\\_a\\_Sanctuary\\_Final.pdf](https://pullias.usc.edu/wp-content/uploads/2017/01/The_University_as_a_Sanctuary_Final.pdf).

160. 20 U.S.C. § 1232(g) (2013); *see also* U.S. Dep’t of Educ., *Family Educational Rights & Privacy Act*, <https://ed.gov/policy/gen/guid/fpco/ferpa/index.html?src=rn>.

161. 34 C.F.R. § 99.3 (1988).

162. *Id.*

163. *See id.*

164. *Id.* (Under FERPA, there are a number of exceptions that allow schools to share personally identifiable information without the students’ consent. These exceptions are: (1) if school officials have legitimate educational interest; (2) transferring school; (3) for audit or evaluation purposes; (4) financial aid purposes; (5) for research purposes; (6) accreditation bodies; (7) complying with a court order; (8) for health and safety purposes; (9) state and local authorities pursuant to state law.)

disclosing student information and records to third parties.<sup>165</sup> From the exceptions enumerated in FERPA, none would permit or mandate institutions to share immigration information of students with federal officials, since there is no legitimate educational interest in removing a student from the classroom and college campus.

As a result, under FERPA, educational institutions must not release students' immigration status to Immigration and Customs Enforcement (ICE) or any other federal agency unless directed by a lawful judicial order. Even if the school has been presented with an order for a student's immigration status, the school must make reasonable efforts to notify the student of the order and that the information may be disclosed.<sup>166</sup> It is important to note that this analysis does not apply to the recordkeeping through the Student and Exchange Visitor Information System (SEVIS) for the Student and Exchange Visitor Program (SEVP) that tracks and monitors student on a F-1 and M-1 visa while attending school.<sup>167</sup> However, international students and international exchange visitors are documented, because they enter the U.S. with a valid visa, are inspected at the border, and are current in their status.

Those that argue schools must comply with the federal government's request for students' immigration status point to a provision of the Immigration and Nationality Act that limits the ability of any governmental entities (federal, state, local, etc.) from restricting the maintenance and sharing of individuals' immigration status.<sup>168</sup> The statute, 8 U.S.C. § 1373, provides:

(a) In general. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local governmental entity or official may not prohibit, or in any way restrict, any governmental entity or official from sending to, or receiving from, the Immigration and Nationalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities. Notwithstanding any other provision of Federal, State, and local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Nationalization Service.

(2) Maintaining such information.

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165. 34 C.F.R. § 99.3 (1988).

166. 20 U.S.C. § 1232g(a)(5)(B) (2013).

167. *Student and Exchange Visitor Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/sevis>.

168. 8 U.S.C. § 1373(a) (1996).

(3) Exchanging such information with any other Federal, State, or local governmental entity.

(c) Obligation to respond to inquiries. The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.<sup>169</sup>

Since many public institutions of higher education can be interpreted as state or local entities, proponents of such anti-sanctuary laws argue that schools must cooperate with federal immigration officials. However, compliance with § 1373 only applies to citizenship and immigration status information, and as such, if institutions of higher education were asked to comply with this section, information devoid of name and any personal identifiers would suffice.<sup>170</sup> While there is no judicial interpretation of this statute, FERPA and other federal privacy laws are meant to ensure the privacy of educational records notwithstanding § 1373.<sup>171</sup> In addition, hijacking state government operations for federal policy purposes may be found to be unconstitutional.<sup>172</sup> Moreover, since compliance with FERPA is a condition for educational grants from the U.S. Department of Education, compliance with § 1373 would be contrary to Congress' intent.<sup>173</sup>

While institutions may set policy to restrict information sharing with federal immigration officials, it is critical that institutional staff handling public records requests are properly trained to secure student privacy. Interpretation of policy and procedure may vary among staff members, especially if training is lacking in specificity. One human error that leaks immigration information with identifiers to immigration officials may be detrimental to the educational attainment of a student. As such, institutions should consider funneling public records requests either to their legal counsel to ensure the utmost protection of student privacy, or a specified and trained individual.

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169. *Id.*

170. Elizabeth McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 202 (2016) (anti-sanctuary provisions embedded in laws were not intended to and do not repeal conflicting provisions protecting privacy).

171. *Id.*

172. See Erwin Chemerinsky, Annie Lai, & Seth Davis, *Trump Can't Force 'Sanctuary Cities' to Enforce His Deportation Plans*, WASH. POST (Dec. 22, 2016), [https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d\\_story.html?utm\\_term=.39dd97603909](https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.39dd97603909).

173. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 582 (2012) (quoting Pennhust State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

In addition to protecting student privacy, colleges and universities must also limit immigration enforcement on campus and preserve the safe learning environment for students. On October 24, 2011, the U.S. Immigration and Customs Enforcement (ICE) issued a memorandum addressing enforcement actions at and focused on sensitive locations. The memorandum instructs field office directors that no enforcement actions were to occur at, and were not to be focused on, schools (pre-schools, primary, secondary, and post-secondary), hospitals, funeral sites, weddings or other religious ceremonies, protests, and churches.<sup>174</sup> While the memorandum is not binding law, it does provide critical guidance that immigration enforcement actions are not to occur around or on college campuses.

Depending on where the enforcement action is taking place, a warrant may or may not be required. The more the expectation of privacy from the student, the more likely a warrant is required.<sup>175</sup> Schools may request that ICE obtain a true warrant and show this true warrant to a university official before entering campus. Such a policy can be crafted and facilitated by local police with immigration agencies. University and college police and security forces should be on alert to potential immigration enforcement actions in order to intervene and ensure the constitutional rights of its students. While the Sensitive Locations memorandum has not been revoked, these kinds of memos and guidance can be revoked swiftly by a stroke of the pen.

It is important to note that immigration enforcement actions are civil law matters and campus police only have local criminal law enforcement authority.<sup>176</sup> As such, campus police cannot issue, serve, and execute administrative immigration warrants.<sup>177</sup> They cannot stop or detain an individual solely based on or suspicion of an immigration violation.<sup>178</sup> However, under the 287(g) program, as it is termed, local police can become deputized federal immigration agents,<sup>179</sup> but they must first undergo training

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174. Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to Field Office Directors, Special Agents in Charge, and Chief Counsel (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>; see also Letter from Karyn V. Lang, Director, Immigration and Customs Enforcement, to Rep. Zoe Lofgren (Mar. 14, 2007), <https://www.publiccounsel.net/iii/wp-content/uploads/sites/15/2014/07/ICE-Warrants-Practice-Advisory.pdf>.

175. Bryan R. Lemmons, *Public Education and Student Privacy: Application of the Fourth Amendment to Dormitories at Public College and Universities*, 2012 B.Y.U. EDUC. & L.J. 31, 34-35 (2012). See also Richard Fossey, *A Student's Right to Privacy in a College Residence Hall*, in CONTEMPORARY ISSUES IN HIGHER EDUC. L 391, 392 (Richard Fossey & Suzanne Eckes, eds., 2015).

176. See *Arizona v. U.S.*, 567 U.S. 387, 406 (2012).

177. See 8 C.F.R. § 287.5(e) (2016).

178. Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 138 (2009); see also Jennifer M. Chacón, *Producing Liminal Liability*, 92 DENV. U. L. REV. 709 (2015).

179. 8 U.S.C. § 1357(g) (2006).

and cooperate under a memorandum of agreement. While cooperation may be permissible, there is no federal law or mandate that requires local and campus police to cooperate with ICE.

The purpose of the sanctuary campus policies and responsibilities of campuses is to provide a safe space for students to learn and resist, very similar to the purpose of sanctuaries in the past. The creation and protection of safe and brave spaces for students have been shown to be impactful to the educational attainment of students, especially low-income, first-generation, and ethnic minority students. Creating communities of resistance and protection is not new to colleges and universities. In 1858, students and faculty at Oberlin College in Ohio were instrumental in saving the life of a runaway slave, John Price.<sup>180</sup> Upon word that Mr. Price had been captured, some students and a professor found him, freed him, and traveled with him back to Oberlin where he hid in the home of the future college president. Thereafter, the students traveled with Mr. Price to Canada to escape from the Fugitive Slave Act.<sup>181</sup>

During World War II and the period of the Japanese internment, a coalition of campuses arranged for the transfer of Japanese college students to those campuses in the East that were dedicated to the principles of education and tolerance.<sup>182</sup> Some of the most dedicated university administrators were presidents from University of California, Occidental College, University of Washington, and Oberlin College.<sup>183</sup> President Seig of the University of Washington sent out correspondences seeking assistance from other campuses for Japanese and Japanese-American students to continue their education.<sup>184</sup> Sixteen colleges responded.<sup>185</sup> Oberlin College, alone, accepted a total of forty students during these wartime years.<sup>186</sup> Additional examples during other periods of time were during the Vietnam War draft<sup>187</sup> and the defense of LGBT students from the enforcement of the Solomon Amendment.<sup>188</sup> As history illustrates, campuses have been

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180. WILBUR H. SEIBERT, *THE UNDERGROUND RAILROAD: FROM SLAVERY TO FREEDOM* 376 (1898).

181. *Id.* at 376-77.

182. John H. Provinse, *Relocation of Japanese-American College Students: Acceptance of a Challenge*, 1 HIGHER EDUC. 1 (Apr. 16, 1945), <http://www.lib.washington.edu/specialcollections/collections/exhibits/harmony/interrupted/text/provinse>.

183. *Id.*

184. Letter from President Wilkens to L.P. Seig, UNIV. OF WASH. (Mar. 19, 1942), <http://www.lib.washington.edu/specialcollections/collections/exhibits/harmony/interrupted/text/yama>.

185. *Id.*

186. *Id.*

187. See F. B. Taylor, Jr., *Marine Seeks Sanctuary at Harvard Divinity*, BOS. GLOBE (Sept. 23, 1968) (During the Vietnam War draft, many campuses provided sanctuary to those resisting being drafted. The first was Harvard Divinity School.).

188. See 10 U.S.C. § 983 (2013) (The Solomon Amendment allowed the Secretary of State to withhold federal funds from schools that prevented ROTC access and military recruiting on campus.). See also *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509 (E.D. Pa. Aug. 19, 2004); *Burt v. Gates*, 502 F. 3d 183 (2nd Cir. 2007); *Student*

sanctuaries to create, promote, and defend safe spaces for minoritized students to be educated, resist, and thrive.

Research has shown safe and brave spaces help students achieve academic success through the valuation and appreciation of diversity<sup>189</sup> — the root of the university mission. A safe space is an “environment in which students are willing and able to participate and honestly struggle with challenging issues.”<sup>190</sup> Scholars in varying disciplines have found the importance of safe spaces to facilitate student engagement and improve academic outcomes.<sup>191</sup> And safe spaces can encompass multiple purposes, such as affirming spaces, therapeutic spaces, supportive spaces, and empowering spaces.<sup>192</sup> By declaring their campus a sanctuary campus, or by overtly declaring support and implementing sanctuary-like policies on campus, leaders are creating and supporting these various spaces for their DREAMers to learn, live, and thrive. The various sanctuary campus policies mentioned above serve students to make campuses places of affirmation, therapy, support, and empowerment by allowing students to continue their education, seek assistance from professionals during these challenging times, and openly protest, resist, and address their concerns.

## 2. Legal Liabilities of Sanctuary Campuses

While the declaration of being a sanctuary can bring the sense of security to many students and support their educational objective, it can also bring various liabilities to administrators and campus leaders since the topic is very political. Challengingly, leaders must balance the negative political implications with the benefits of semantics. The liabilities of declaring a campus a sanctuary are virtually entirely political. As discussed above, over the years, this term has gained a negative political connotation that is similar to harboring fugitives. While the liabilities may be political, public

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Members of SAME v. Rumsfeld, 321 F. Supp. 2d. 388 (D. Conn. 2004); and Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006).

189. Vinay Harpalani, “Safe Spaces” and the Educational Benefits of Diversity, 13 DUKE J. CON. L. & PUB. POL’Y (forthcoming 2017) 1, 12 -21, <https://ssrn.com/abstract=2942980>.

190. Lynn C. Holley & Sue Steiner, *Safe Space: Student Perspectives on Classroom Environment*, 41 J. SOC. WORK EDUC. 1, 49 (2005). Lynn C. Holley & Sue Steiner, *Safe Space: Student Perspectives on Classroom Environment*, 41 J. SOC. WORK EDUC. 1, 49 (2005).

191. See generally Robert Toynton, “Invisible Other” Understanding Safe Spaces for Queer Learners and Teachers in Adult Education, 38 STUD. EDUC. ADULTS 2 (2006); Mary Ann Hunter, *Cultivating the Art of Safe Space*, 13 RES. DRAMA EDUC.: J. OF APPLIED THEATER & PERFORMANCE 1 (2008); Susan Rieck & Laura Crouch, *Connectiveness and Civility in Online Learning*, 7 NURSE EDUC. PRAC. 6 (2007); Angela Frusciante, *Identifying Transcendence in Educating for Public Service: Reflections on Qualifying to Teach as a Pedagogic Example*, 15 TEACHING HIGHER EDUC. 6 (2008).

192. Kevin K. Kumashiro, *Toward a Theory of Anti-Oppressive Education*, 70 REV. EDUC. RES. 25, 27-29, (2000).

institutions specifically must carefully consider these ramifications since they are dependent on state funding and public perception to serve their constituents.

The declaration as a sanctuary may risk the loss of funding—both state and federal. While President Trump has signed an executive order denying federal funds to sanctuary cities,<sup>193</sup> Congress and the executive branch could require campuses that receive public monies not implement or participate in sanctuary campus-like policies. While this has yet to happen, it is difficult to predict the political outcomes in today's environment. Most federal funding comes in the form of federal student financial aid.<sup>194</sup> Given that sanctuary campuses may decide to choose certain policies to implement over others, they can choose and implement those that are consistent with existing federal regulations, which is currently the case for all of the current campuses declared as sanctuaries. There are also constitutional considerations to the limit of federal funding, which do not make this route as easy as it looks.

However, this does not preclude state policy. Several states have passed various laws and policies against sanctuary cities and campuses. As of the writing of this article, thirty-three states have considered legislation in 2017 to prohibit sanctuary policies.<sup>195</sup> Those that passed and directly impact postsecondary institutions are Georgia, Texas, Mississippi, and Indiana. Mississippi Senate Bill 2710 was the first to be enacted on March 27, 2017.<sup>196</sup> It bars state, local, and campus jurisdictions from prohibiting cooperation with federal immigration officials to verify or report immigration status of an individual.<sup>197</sup> In Georgia, House Bill 37 was enacted on April 27, 2017, and broadly prohibits postsecondary education institutions from adopting sanctuary policies and includes penalties for such violations, including the withholding of state funding or state administered federal funding.<sup>198</sup> In Indiana, the legislature enacted Senate Bill 423 on May 2, 2017, which added postsecondary institutions to its already enacted law barring municipalities from refusing to cooperate with federal law enforcement.<sup>199</sup>

While these states and others have considered and passed anti-sanctuary campus laws, Texas' Senate Bill 4, which was signed by the

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193. Exec. Order No. 13768, 8 C.F.R. § 287.7 (2017).

194. *Federal and State Funding of Higher Education: A Changing Landscape*, THE PEW CHARITABLE TRUSTS (June 11, 2015), [http://www.pewtrusts.org/~media/assets/2015/06/federal\\_state\\_funding\\_higher\\_education\\_final.pdf](http://www.pewtrusts.org/~media/assets/2015/06/federal_state_funding_higher_education_final.pdf).

195. *Sanctuary Policy FAQ*, NAT'L CONF. ST. LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx>.

196. *Id.*

197. S.B. 2710, 2017 Leg., Reg. Sess. (Miss. 2017), <http://billstatus.ls.state.ms.us/2017/pdf/history/SB/SB2710.xml>.

198. GA. CODE ANN. § 20-3-10(3)(c) (2017).

199. S.B. 423, 120th Gen. Assemb., Reg. Sess. (Ind. 2017).

governor on May 7, 2017, has been the most contentious bill.<sup>200</sup> The law bans local and campus police departments from limiting cooperation with federal immigration officials.<sup>201</sup> Penalties would include fines of up to \$25,500 per day if entities prevented their police officers from inquiring about detained individual's immigration status or from sharing information with federal immigration officers.<sup>202</sup> The bill also made it a misdemeanor crime if the police chief or sheriff knowingly failed to comply with an ICE detainer request. The bill's impact on higher education was much more vast than other state's bills. The bill handcuffed college campuses from protecting the privacy rights of its students by requiring the sharing of information and making it a crime to refuse cooperation with federal ICE officials. For a state that has been the first to enact in-state tuition and state financial aid for undocumented students, this bill would unravel any gains that those legislative acts helped create by placing fear in students' minds.

On August 30, 2017, a federal judge enjoined parts of the law. Local and campus police officials do not have to comply with federal immigration authorities.<sup>203</sup> They can make their own decisions about when they want to collaborate. In addition, local police are free to decline requests for ICE detainers, and they can speak overtly about the detriments of SB4. While these provisions were blocked, others remain in effect. If local police officers choose to inquire about immigration status, they can still do so at their discretion, but only during a lawful stop or arrest. It is important to note that it is no longer a requirement to ask, but officers can if they choose. These provisions will only increase and place in stone instances of racial profiling, which is unconstitutional.

### CONCLUSION

Hundreds of thousands of DREAMers across the country are caught in the crosshairs of law, policy, and politics. While they have grown up in the United States, consider her their home, and live just like Americans, law and policy-makers quibble on legislation that has a direct impact on these young people's educational attainment and success. For most of us, we take it for granted that if we study hard, then we have a chance for a career and stable family life. As a society, it is incumbent on us to use our privilege and embrace our neighbors to advocate for their legal status so that they may fully embrace and contribute to our society.

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200. Julián Aguilar, *Judge Temporarily Blocks Immigration Enforcement Law*, THE TEX. TRIB., (Aug. 30, 2017), <https://www.texastribune.org/2017/08/30/judge-temporarily-blocks-sanctuary-cities-law/>.

201. S.B. 4, 2017 Leg., Reg. Sess. (Tex. 2017).

202. *Id.*

203. *See City of El Cenizo v. Texas*, No. SA-17-CV-404-OLG, 2017 U.S. Dist. LEXIS 140309, (W.D. Tex. Aug. 30, 2017).

Until Congress is able to resolve their differences and pass comprehensive immigration reform, we will continue to have a policy maze that is difficult to predict and navigate. Advocates, teachers, and student affairs professionals are critical to the educational success of DREAMers to help advise and direct them through a landmine of potential issues they may face as they traverse through higher education and into the workforce. As a result, whether a campus decides to declare itself a sanctuary or not, it is the resources and assistance from the institution for DREAMers that makes the biggest difference rather than the semantics of being named a sanctuary. While some may declare themselves as such, the title does not mean much if there are no resources or assistance to their students. However, some institutions may need to navigate the politics of their state, and those that are able to funnel resources and assistance to help their DREAMers safely learn, live, and thrive create their own “sanctuaries” through their commitments.