Legislatures across the country are currently polarized over the issue of immigration. Interest groups and lawmakers sympathetic to immigrants—those here both legally and illegally—push for legislation that would allow these groups access to public services and simplify the naturalization process. On the other side, proponents of tighter borders and immigration reform believe that this group is a drain on national resources, costing the United States $45 billion a year. Regardless of one’s position on the issue, it is undeniable that the children of these immigrants are in a particularly precarious situation. While undocumented students are allowed free public primary and secondary education, thanks to the 1982 decision in Plyler v. Doe, the path to lifelong learning and skills attainment, for many, may stop abruptly at high school graduation.

The confusion caused by inconsistent state and federal policies concerning undocumented immigrants has rarely been addressed by the literature, in particular how this confusion affects higher education administrators. Literature on this topic tends to be positional; either for or against undocumented student access to public higher education. This article attempts to fill that void by providing an overview of undocumented students and their access to public higher education. While the federal government is preeminent in matters of immigration policy, states also play a role in managing access to their systems of higher education, often in contradiction to federal code. As an illustration, we will explore how Virginia is indecisive at both the institutional and legislative levels. Looking at these state and federal regulations will illustrate how this issue may affect higher education administrators and their institutions. Yet there are means of mitigating the consequences of access or lack thereof.

Undocumented immigrants in the United States and education

The Department of Homeland Security Office of Immigration Statistics has estimated that 10.5 million unauthorized immigrants were in the United States in January 2005. Mexico is the leading source country, with an estimated 6 million of its citizens residing illegally in the U.S. California, Texas, Florida, New York, and Illinois are the main receiver states, accounting for 58 percent of the unauthorized immigrant population in the U.S. Children figure heavily into this population: one of every five children born in the U.S. has a foreign-born parent. Researchers estimate that by 2015, the children of immigrants will make up as much as 30 percent of the nation’s public school population.

Immigrants to the U.S. tend to have lower educational attainment. Immigrants from Latin America and the Caribbean have the least education, compared to those from Africa and Asia. The age at the time of immigration also affects educational attainment. Erisman and Looney report that immigrants who arrive at much younger ages. Additionally, immigrant students have higher unmet financial needs, which may deter educational attainment at the college level. A lack of information regarding higher education, family responsibilities, and inadequate academic preparation may also inhibit this population from pursuing higher levels of education.

Yet despite these barriers, in 2003-04, immigrants made up 12 percent of the undergraduate student population in American colleges and universities. The pressure that this exploding population of students will place on the capacity of the nation’s public higher education system must be addressed by lawmakers and administrators alike.

Federal laws, codes, and regulations that affect undocumented students

The federal government has on many occasions attempted to legislate issues regarding the presence of immigrants in the United States. Often these attempts overlap, confuse, and contradict. The same behavior by an immigrant may simultaneously be protected by a Supreme Court decision and punished by a federal statute. The following review of federal case and constitutional law illustrates this problem.

Supreme Court cases and constitutional law: Plyler v. Doe and Toll v. Moreno

In 1982, the Supreme Court rendered its decision on Plyler v. Doe, determining that undocumented children of unauthorized immigrants have the right to free public primary and secondary education. This case prohibited the state of Texas from forcing these children (and their parents) to pay fees for public education and held that the state may not discriminate against undocumented children based on immigration status. This case did not address the issue of access to postsecondary education; however, it did demonstrate that residents of a state, regardless of immigration status, are allowed free public education in that state.

Plyler v. Doe was also the first time that unauthorized immigrants and their children sought equal protection under the Fourteenth Amendment. The Equal Protection Clause states “…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” This case determined that unauthorized immigrants and their children qualified as “persons” and were thusly protected under the Constitution and should be afforded all the protections of the Fourteenth Amendment.

Also in 1982, the Supreme Court decided Toll v. Moreno. In the first postsecondary case to be heard that affected foreign
students, the court ruled that the University of Maryland’s policy of denying reduced in-state tuition to students who were not residents of the state but held legal alien status violated the Supremacy Clause of the U.S. Constitution. Writing for the majority, Justice Brennan, joined by White, Marshall, Blackmun, Powell, and Stevens, ... held that the university’s policy was invalid under the Supremacy Clause since, in light of Congress’ decision in the Immigration and Nationality Act of 1952 to allow G-4 aliens to establish domicile in the United States, the state’s decision to deny “in-state” status solely on account of the G-4 alien’s immigration status mounted to an ancillary “burden not contemplated by Congress” in admitting these aliens to the United States, and since, by imposing on undomiciled G-4 aliens higher tuition and fees than are imposed on other domiciliaries of the state, the university’s policy frustrated the federal policies embodied in the special tax exemptions offered G-4 aliens by various treaties, international agreements, and federal statutes.

This opinion by the court maintained that under Article IV the federal government holds exclusive powers over immigration policies and that states may not interfere with this power. While the history of this case is confusing and deals with treaty organization aliens, it marks the first time that the federal government interfered with the residency policies of a public higher education institution and allowed a non-U.S. citizen access to in-state tuition.

Federal code: Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996

In contrast to the Supreme Court cases previously described, the IIRIRA restricts states from granting public benefits to unauthorized immigrants and is often cited as the reason to deny undocumented students physical and financial access to public higher education. This federal statute laid the groundwork for Proposition 187 in California, an initiative that called for the creation of a state-run system that would verify residents’ immigration status before allowing them access to public services. This proposition added public education “from kindergarten to university” to the list of services for which undocumented immigrants were ineligible. Eventually, Proposition 187 was repealed. The language of Section 505 of the IIRIRA “discourages states to enact in-state, resident tuition policies for all students, regardless of immigration status, who graduate from that state’s high schools.” Maki suggests that the guidelines set down by the IIRIRA encourage undocumented students to change their immigration status and apply for naturalization, yet the statute provides no such process. Section 505 also “provides that a state’s public post-secondary educational institution may not grant in-state tuition benefits to illegal aliens unless such an institution also grants in-state tuition to out-of-state United States citizens.” This section of the statute puts public higher education institutions in an untenable position. Those institutions that are allowed to retain the tuition income paid by out-of-state students, which is typically much higher than that paid by in-state students, depend on that additional revenue. Yet the scenario created by Section 505 would force a college or university to choose between changing in-state undocumented students out-of-state tuition or reducing tuition for out-of-state students. IIRIRA eventually became Title 8, the federal code governing issues of aliens and nationality, which has mostly been repealed. Yet Chapter 14, which restricts welfare and public benefits to aliens, remains. Section 1623 of Chapter 14, effective July 1, 1998, explicitly states that:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

Therefore, the problem remains that if undocumented aliens qualify for reduced in-state tuition, then out-of-state students also qualify for reduced in-state tuition. Despite federal provision, there is continued federal and state confusion about undocumented students and their access to higher education as a public benefit. Legislators, both for and against, appear to want stronger legal wording and definitive action to be taken either in policing these students more effectively or offering them opportunities, including public higher education.

Pending legislation: The American Development, Relief, and Education of Alien Minors (DREAM) Act (H.R. 1275; S. 2075)

In response to IIRIRA and the growing undocumented student population, many lawmakers have supported legislation that would allow states to offer in-state tuition breaks to students whose immigration status is uncertain and describes a process that would allow these students to pursue permanent legal status. Federal legislation was first introduced in 2003 as the Student Adjustment Act (H.R. 1918), proposed by Sen. Orrin Hatch and Rep. Chris Can- non, that “would clarify states’ abilities to offer this reduced tuition rate to students who have entered the country prior to their 16th birthday, have lived in the states for at least five years, and have either graduated from high school or enrolled in college.” While this law would provide for current undocumented students, it does not clarify the status of future immigrants to this country with regard to access to public higher education. In April 2006, the Student Adjustment Act’s name was changed in the House to the Dream Act (H.R. 5131). In May 2006, the Dream Act passed the full Senate (S.36-36 vote) as part of the Comprehensive Immigration Reform (CIR) Act (S.2611). Yet the act was not brought to the floor for a vote in the House in 2006 as “House leadership could not be persuaded to bring it up,” according to the National Immigration Law Center. During the 110th Congress of 2007, the Dream Act once again made it onto the House’s agenda, and the Senate has sought to include the act under its new comprehensive immigration reform bill. Critics have been vocal on this piece of federal legislation and similar state legislation. Many say that such public policy is a drain on taxpayer resources and that these benefits should be granted to out-of-state legal U.S. residents—who must pay higher tuition if they choose to attend college in another state—even though the Dream Act would not permit certain financial aid, such as Pell grants, to undocumented students. Yet, according to Olivas, “more than lower tuition for residents lies in the balance, as many other benefits may accrue to state residents in public (and private) colleges, such as preferential admissions, scholarship or loan assistance, and inclusion in quota programs . . . .” Pending legislation: Comprehensive Immigration Reform (CIR) Act of 2007 (S. 1348)

In May 2007, the Senate passed the CIR Act by a 69-to-23 vote. The CIR seeks to repeal much of the IIRIRA and to amend Title 8. Introduced by Sen. Harry Reid, the bill addresses border security, interior immigration enforcement, employment issues, visa reform, and reform of worker programs. In addition, Chapter 3, Subtitle C of the CIR Act addresses the Dream Act and seeks to repeal Section 505 of the IIRIRA. Many of the guidelines originally posited under the Dream Act are included in the CIR Act with the added condition that immigration status would last for six years, and it stipulates that during this period, the students’ status may be terminated if they cease to meet certain requirements (i.e., “the alien has acquired a degree from an institution of higher education in the United States or has completed at least two years, in good standing, in a program for a bachelor’s degree or higher degree in the United States”) or becomes wards of the state. In regard to financial assistance, the act indicates that an “alien” who begins naturalization is eligible for student loans, federal work-study, and services under Subchapter IV of Title 20 U.S. Code. While this is a demonstrable change in the access of undocumented students to public benefits, it continues to skirt the issue of in-state tuition assistance.

Legislation in Virginia

Several state legislatures have sought to manage the need of these students despite federal regulations and statutes-de-
Virginia Issues & Answers

Not "knowingly accept for enrollment any illegal alien, and provided that public institutions of higher education may alike to develop policies for managing the growing population.

College administrators at public institutions and lawmakers in Virginia have been trying to address the issue of undocumented students' access to in-state tuition breaks, some states have been very clear on the issue regarding legal permanent residency and allowed them access. The National Immigration Law Center, the State Council of Higher Education, et al. The court ruled in favor of the universities, but the case was decided based on the students' lack of standing to sue, not the Supremacy Clause. Judge T. S. Ellis III granted the universities’ motion for summary judgment as to the first student because, as an illegal alien, he lacked standing since only a legal alien could suffer any injury from the universities’ alleged policies, given that it had previously been determined that the Supremacy Clause did not prevent public universities from denying admission or enrollment to illegal aliens. Because the alien did not have standing, neither did the EAE. The court also held that the second student lacked standing, even though he was a legal alien who enjoyed temporary protective status, because there was no evidence that any action taken by the universities was motivated in any way by his immigration status. Evidence showed that the second student was rejected by one university because of his SAT score and that a second university initially denied him admission because it received his high school transcript late but did admit him the next year.

By the House education subcommittee. This bill stated that "an alien who is unlawfully present in the United States, and therefore ineligible to establish domicile ... shall not be eligible on the basis of residency within Virginia for any postsecondary educational benefit, including in-state tuition, unless citizens or nationals of the United States are eligible for such benefits in no less an amount, duration, and scope, without regard to whether such citizens or nationals are Virginia residents.” This wording, however, was not strong enough for some delegates, so H.B. 1661, offered by Del. Frank Hargrove, was incorporated into H.B. 2623 on Jan. 10 by the House education subcommittee. This bill stated that “an alien who is unlawfully present in the United States shall not be eligible for initial enrollment in any public institution of higher education in the Virginia” and sought to amend and re-enact State code 23-9:2:3, which outlines the rights of the governing bodies of educational institutions in the state. In February, H.B. 2623 was passed in the House and referred to the Senate Committee on Education and Health for consideration. On Feb. 15, H.B. 2623 was “passed by indefinitely” in the education and health committee.

H.B. 1673, amended and signed by the governor in 2007, called for the creation of a commission on immigration. This commission will act in an advisory capacity to the executive branch and help analyze the impact of immigration on the commonwealth. The commission has also been empowered to make recommendations on policies that relate to education. In an obvious attempt at a holistic approach to the issue, the commission will be made up of 21 members, ranging from retirees of the Immigration and Naturalization Service and the U.S. Department of Education to members of the commonwealth’s House of Delegates and Senate.

Despite the lack of movement in the state legislature regarding issues of immigration and higher education during the past two years, at least the issues made it formally onto the Commonwealth of Virginia’s legislative agenda. While some states have been very clear on the issue regarding undocumented students’ access to in-state tuition breaks, others, including Virginia, have been unable to establish laws that govern the policies of public higher education institutions.

To make matters more interesting, this past July, the attorney general’s office notified SCHEV that students with “protected status” can establish Virginia residence and can become eligible for reduced in-state tuition. This protected status applies only to foreign nationals residing in the United States whose homeland conditions are recognized by the U.S. government as being temporarily unsafe or overly dangerous for them to return. While this ruling does not cover all undocumented students of college age, it will, no doubt, be added to the list of issues to be considered by the commission on immigration created by the General Assembly to study this topic. Hopefully, this group will give legislators the opportunity to be thoroughly educated on the needs of this population and to create more informed policies. Until then, the indecisiveness that has governed this issue will continue to affect the decisions made by administrators at public institutions.

Legal implications and recommendations for higher education administrators

In 2004, the presidents, rectors, and boards of visitors of George Mason University, James Madison University, Northern Virginia Community College, the University of Virginia, Virginia Commonwealth University, Virginia Polytechnic Institute and State University, and the College of William and Mary were sued by two undocumented students and a nonprofit organization, Equal Access Education (EAE), claiming to represent the interests of immigrant students in the Commonwealth of Virginia. This case, Equal Access Education, et. al. v. Alan C. Merten, et. al., marked the first time in Virginia that undocumented immigrant students sued the leaders of state higher education institutions directly to gain physical admission. More specifically, students alleged that in implementing the commonwealth’s policies “to deny admission or enrollment to illegal aliens, these institutions violated the Supremacy Clause by allowing state officials to make immigration status determinations; and by using standards different from those of the federal government to determine an applicant’s immigration status, resulting in the misclassification of certain illegal aliens as illegal aliens.”

The court ruled in favor of the universities, but the case was decided based on the students’ lack of standing to sue, not the Supremacy Clause. Judge T. S. Ellis III granted the universities’ motion for summary judgment as to the first student because, as an illegal alien, he lacked standing since only a legal alien could suffer any injury from the universities’ alleged policies, given that it had previously been determined that the Supremacy Clause did not prevent public universities from denying admission or enrollment to illegal aliens. Because the alien did not have standing, neither did the EAE. The court also held that the second student lacked standing, even though he was a legal alien who enjoyed temporary protective status, because there was no evidence that any action taken by the universities was motivated in any way by his immigration status. Evidence showed that the second student was rejected by one university because of his SAT score and that a second university initially denied him admission because it received his high school transcript late but did admit him the next year.

nrying them access. The National Immigration Law Center, an advocacy group for immigrants, cites Texas, California, Utah, Washington, New York, Oklahoma, Illinois, Kansas, New Mexico, and Nebraska as states that have passed laws permitting undocumented students to pay in-state tuition at public colleges and universities. Yet as recently as January 2007, it was reported that Georgia, Nevada, Minnesota, and Arizona have either passed legislation preventing undocumented students from receiving tuition benefits or are in the process of creating legislation that is in line with federal code on the matter. These examples show that higher education access for undocumented students remains a highly contentious issue in many state legislatures. Acrimony and indecision continue to reign at the state policy-making level.

Virginia’s General Assembly has remained static on this issue for the past several years despite several attempts to decide the issue. Legislators in Virginia have been trying to identify a coherent way to manage the growing immigrant population in the state, last estimated at 8 percent of all residents. From day laborer laws to education, lawmakers continue to attempt to address this population through regulatory public policy.

In 2002, the issue of undocumented students and their access to public higher education in the Commonwealth of Virginia became an item on the state’s public policy agenda. In a memorandum to the General Assembly, Attorney General Jerry Kilgore advised all public universities and colleges in the state not only to prohibit illegal immigrants from attending public institutions but also to report known illegals to the federal authorities. Kilgore’s memo acted to galvanize college administrators at public institutions and lawmakers alike to develop policies for managing the growing population and need of these students.

In 2003, Del. John Reid submitted H.B. 1562, which provided that public institutions of higher education may not “knowingly accept for enrollment any illegal alien, and directs each institution, upon discovering an enrollment of an illegal alien, to provide for the prompt dismissal of any such person from the institution.” During the same session of the General Assembly, Del. Karen Darner proposed House Bill 1610, which would allow immigrants without formal immigration status to be eligible for in-state tuition but not for legal state residency. According to the language of the bill, the student must have graduated from a Virginia high school and have resided in the state for at least two years. These bills marked the first time that language was introduced that provided undocumented students a method for legal permanent residency and allowed for these students to receive the same benefits as other students in the state, including financial aid and grants. H.B. 1562 and 1610 were both tabled in the House Subcommittee on Education. Concurrently, S.B 753, similar to H.B. 1562 in tone and content, was reviewed and tabled in the Senate.

The State Council of Higher Education for Virginia (SCHEV) moved immigration to its hot list of higher education legislative issues for 2007. In January, the issue of undocumented students made it again to the House’s agenda, pressed by Del. Reid, whose H.B. 2623 addressed in-state tuition benefits and stated that an “[a]lien who is unlawfully present in the United States, and therefore ineligible to establish domicile ... shall not be eligible on the basis of residency within Virginia for any postsecondary educational benefit, including in-state tuition, unless citizens or nationals of the United States are eligible for such benefits in no less an amount, duration, and scope, without regard to whether such citizens or nationals are Virginia residents.”

This wording, however, was not strong enough for some delegates, so H.B. 1661, offered by Del. Frank Hargrove, was incorporated into H.B. 2623 on Jan. 10 by the House education subcommittee. This bill stated that “an alien who is unlawfully present in the United States shall not be eligible for initial enrollment in any public institution of higher education in the Virginia” and sought to amend and re-enact State code 23-9:2:3, which outlines the rights of the
public sentiment, and the work being done by the Virginia Futures Collaborative Team tends to support such action. Once that legislation is passed into law, the commonwealth will be ready to help students move from high school to college in tandem with naturalization. This will, no doubt, help to abate some of the barriers to educational attainment that so many immigrant students face. Third, college administrators (and other constituents invested in this topic) need not wait for federal and state regulations. Indeed, they should assert themselves in these matters and attempt to influence policy at the state and federal levels. National professional associations, such as the American Association of Collegiate Registrars and Admissions Officers (AACRAO) and the National Association of Student Financial Aid Administrators, have demonstrated significant ability to manipulate federal policy in the past. For example, the U.S. Department of Education frequently seeks expert advice from AACRAO staff on issues regarding foreign diploma evaluation, the Student and Exchange Visitor Information System, the Family Educational Rights and Privacy Act, and the Higher Education Act Reauthorization.

AACRAO staff, concurrently with other higher education associations, have directly solicited members of Congress and requested that the DREAM Act be adopted in the interest of their association members and higher education. Virginia also has state-level associations, such as the Virginia Association of Collegiate Registrars and Admissions Officers and the Virginia Association of Student Financial Aid Administrators, who influence state policy to act on the state level. If the members of these organizations do not attempt to influence state and federal lawmakers, then they will continue to be at the mercy of lawmakers and their often uninformed and inconsistent policy decisions.

Virginia’s public higher education institutions are in a precarious position due to the acrimony and indecision that currently governs the policies affecting undocumented students. College and university administrators must remain vigilant in their understanding of state and federal policy evolution and public sentiment. If they chose not to, public interest groups may follow the example set by Equal Access Education and initiate action against the institutions, not only in the legal system but also in the court of public opinion.

References


So what does all of this mean for college administrators and policymakers in the Commonwealth of Virginia?

First, college administrators should stay abreast of legal issues confronting other states with defined policies in key immigration areas. College administrators may be able to broadly adopt institutional policies that may reduce the risk of litigation. University officials, by a thorough review of the literature on the subject, can anticipate the impacts that a lack of clearly defined policies may have at all levels of the university. Particularly sensitive to the issues of student access are the registrars who implement in-state residency requirements, financial aid officers who award loans and scholarships, and admissions officers who interpret and implement university admissions standards. Yet until the federal and state governments reach a consensus on undocumented student access to public higher education, more university officials will likely be sued over the confusion surrounding this issue.

Second, despite the lack of federal regulation that encompasses the entire issue of undocumented students, college administrators and legal scholars should work with their PK-12 colleagues to develop plans for admitting undocumented students to higher education institutions in accordance with DREAM Act legislation. What we know about the Supreme Court’s decision in Toll v. Moreno, current