Braving the Risk:
Legal Implications for Higher Education Institutions
Regarding Access to Higher Education for Undocumented Students

EXECUTIVE SUMMARY:

Disparate federal, state, and institutional policies, coupled with contentious politics, have complicated access to higher education for undocumented students. Nevertheless, higher education institutions ultimately decide whether to admit or enroll these students. While designing policy and interpreting state and federal law, general counsels can serve a critical role in developing inclusive policies at postsecondary institutions, thereby upholding higher education’s core values of access and inclusiveness.

BACKGROUND:

Of the 11.2 million unauthorized immigrants living in the United States, 1.2 million are children. The 1982 Plyler v. Doe Supreme Court decision gave undocumented youths access to K–12 public education. This decision affirmed Fourteenth Amendment protections for undocumented children. Not included in the decision, however, were postsecondary education benefits.

While federal law does not bar colleges and universities from enrolling undocumented students, Section 505 of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) states, “...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.”

Detractors argue that Section 505 should be read as barring in-state tuition benefits to undocumented students because the same tuition benefits are not provided to U.S. citizens who pay out-of-state tuition rates. The IIRIRA provision, however, does not explicitly prohibit states from offering in-state tuition to undocumented students. Many states successfully enacted laws permitting these students to pay in-state tuition rates based on certain criteria.

In short, the ambiguity of the IIRIRA provision leaves it up to the states to determine whether to give postsecondary educational benefits, including admission, in-state tuition and state-based financial aid.

Since the passage of IIRIRA, state legislatures and higher education institutions have been tasked with interpreting and designing policies in accordance with federal law. While reconciling federal and state laws and policies, institutions are free to interpret the ambiguous IIRIRA clause as they design their own admission, financial aid,
and registration policies. Yet institutions of higher education do not escape the disparate political environments under which they operate, and interpretation often seems to restrict undocumented youths from higher education.

**Federal and State Policy:**

The Development, Relief, and Education for Alien Minor (DREAM) Act, first introduced in 2001 by Sen. Richard Durbin (D-IL), offers a pathway to citizenship for undocumented youths who came to the U.S. before their 16th birthdays, obtained their high school diplomas or GEDs, and pursue either military careers or higher education for at least two years. This bipartisan legislative proposal failed to pass, dashing the hopes of many.

However, the U.S. Department of Homeland Security has introduced the Deferred Action for Childhood Arrivals program also known as “DACA”. Eligible undocumented youth receive a two year reprieve from deportation and a temporary work permit, which allows youth to work legally in the U.S. and obtain drivers licenses in most states. An estimated 800,000 undocumented youth may be eligible for the program and will greatly impact the lives of undocumented youth.

While initiatives at the federal level, including the DREAM Act and comprehensive immigration reform have failed to pass, state legislatures have the option of addressing the issue through state policy. However, state and institutional policies often change given the dynamic political landscape of their state. **Table 1** summarizes the differences in state policies and legislation since March 2013. In general, most policies concerning undocumented students tend to fall into three categories: Inclusive, Restrictive, and Undefined.

**Inclusive policies** support access to higher education for undocumented students and uphold values of diversity and inclusion for all students, regardless of immigration status. Inclusion is evident in admission, residency classification, and funding practices. Examples of inclusive policies include: allowing admission of undocumented students to public universities and colleges, giving access to state-based financial aid and to lower tuition rates by classifying undocumented students as residents. Thirteen states have in-state tuition residency classification policies: California, Colorado, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York, Oregon, Texas, Utah, and Washington. Meanwhile, Rhode Island’s and Delaware’s college systems allow undocumented students to pay in-state tuition rates at certain public colleges and universities. Four states—California, New Mexico, Illinois, and Texas—have passed some version of a state DREAM Act, which opens up state-based scholarships and grants to undocumented students. For example, undocumented students attending California public universities and colleges have access to in-state tuition rates and, thanks to the passage of the California DREAM Act, to some state financial aid and scholarships.

**Restrictive policies** limit access to higher education for undocumented students. Alabama, South Carolina, and Georgia currently ban admission of undocumented students in their state public universities and colleges. Other restrictive policies limit access to in-state tuition classification, such as those passed by state legislatures in Arizona, Georgia, Indiana, Oklahoma, and Ohio. Some of the few states that have adopted extreme policies to deny access to undocumented students have the largest growth in immigrant population.

Most states, however, have **undefined** policy environments and no state-wide policies. Most states have not implemented in-state tuition policies through their coordinating boards, leaving it to individual higher education institutions to develop their own practices. Other states have attempted to implement in-state tuition policies but have failed at the legislative level. In Michigan, which has no higher education coordinating board, individual institutions have established practices and policies for admitting undocumented students.

Access to in-state tuition has also been addressed in the courts. **Martinez v. Regents of University of California, 50 Cal4th, 1277 (Cal 2012)** the California Supreme Court agreed to review a state law that granted in-state tuition to undocumented students on grounds other than
residence. In 2010, The California Supreme Court held that exemption from non resident tuition did not violate statute prohibiting education benefits to undocumented students on basis of residence. The next year, the U.S Supreme Court refused to hear an appeal that would challenge the state allowing undocumented students to pay in state tuition rates in California. Meanwhile, the Kansas District Court dismissed Day v. Sibelius & Day v. Bond, procedurally on lack of standing grounds without ruling on the merits. No federal court has ruled on whether state policies that provide in state tuition on grounds other than residency violates IIRIRA. The issue is still outstanding.

Meanwhile, new admission and residency policies are being introduced with each legislative calendar. For example, both Wisconsin and Oklahoma, who had previously allowed in-state tuition rates for undocumented students, have now eliminated their respective in state tuition policies. North Carolina’s community college system changed its admission and in-state tuition policies four times before finally agreeing to admit undocumented students only if they paid out-of-state tuition rates.

In Iowa, Ohio, Hawaii, and Pennsylvania, state legislators recently introduced their own versions of state DREAM Acts.

College affordability for undocumented students is also an additional barrier for students. Undocumented students are ineligible for federal financial aid and loans. Some states, including Texas, California, New Mexico, and Illinois, offer access to state-based financial aid and scholarships, but the majority do not. Furthermore, since most states have undefined policy environments, undocumented students do not have access to in-state tuition rates, which would decrease the cost significantly. While some private scholarships are available, this type of aid is limited. Financial aid from colleges and universities themselves varies widely across the states.

Given the complex policy environment, undocumented students face several obstacles in their pursuit of higher education. However, higher education institutions can support undocumented students. At the moment, federal policymakers are considering passage of the DREAM Act or Comprehensive Immigration Reform. While we
wait for passage of the DREAM Act, it is important to consider that, ultimately, states do not admit undocumented students, colleges and universities do.

**ROLE OF GENERAL COUNSELS AND RECOMMENDATIONS:**

General counsels at higher education institutions play a critical role in interpreting laws and policies regarding undocumented students’ access to higher education. Among their constituencies for this service are institutional leaders, such as the president or governing board. The issue can be contentious. In certain circumstances, restrictive state laws might be contrary to the inclusive mission of the college or university. However, whether these students gain access to higher education depends more on the institution’s policies. General counsels can advise the leaders to adopt policies that increase access and success of undocumented students.

Among the resources for general counsels to keep up to date on this issue are these:

- The National Association of College and University Attorneys (NACUA) frequently publishes cases, news items, policy briefs, and practice advisories that can provide legal assistance with on-campus issues such as in-state tuition and residency requirements.
- The American Immigration Council and the American Immigration Lawyer’s Association provide information about the new Deferred Action policy and other immigration law.

At the institutional level, general counsels can help implement the following recommendations that promote inclusive practices for admitting and registering undocumented students.

**Understand your state’s political landscape:** If your role as general counsel includes serving as legal advisor to your institution’s leaders, you most likely are responsible for developing a discerning analysis of your state’s political climate, including having a sense of support or antagonism toward the issue.

**Review your institutional policies:** Some colleges and universities have not revisited their institutional policies to reflect changes in the state policy. Oversight on this issue can create confusion among students and administrators on best practices to follow.

**Understand the implications:** Understand the financial and other business implications that a change in policy may have for your institution by consulting with colleagues in admissions, financial aid and Provost’s office.

**Inclusiveness:** If your state has an undefined policy environment, institutions can interpret the ambiguity of the IIRIRA provision favorably and recommend inclusive policies towards undocumented students.

**CONCLUSION:**

Several institutions and states have committed to implementing inclusive policies for undocumented students, opening a window to greater access to higher education. General counsels can help the effort by interpreting policies and laws to be inclusive without circumventing state and federal laws. The introduction of the Deferred Action policy indicates a growing support for greater integration of undocumented youth. Until a more permanent path is passed, either through the DREAM Act or comprehensive immigration reform, general counsels can recommend more inclusive policies and practices at their institution.