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## THE FEDERAL “OBAMA DREAM ACT A BENEFIT OR A BURDEN FOR POST-SECONDARY STUDENTS

Once again Institutions of higher education in California are facing a controversial issue regarding whether or not undocumented students will be eligible to benefit of in-state resident fees as a result of the recent passage of the “Obama’s Dream Act” on June 15, 2012.

The purpose in writing this paper is to research the issues around the passage of the “Obama Dream Act” and to better inform those individuals who are approved for this new prosecutorial discretion with a clear understanding as to how this deferred action will help them enroll in institutions of higher education, but more importantly that these students are rightfully classified as residents or nonresidents. Furthermore, if there is evidence that they are entitled to an exemption from having to pay nonresident fees, that the California legislature take responsibility to engage in the task of providing California colleges and universities the specific guidelines they need to follow, so that these institutions are in full compliance with federal and state laws.

The issue of undocumented students being able to receive free public education started in 1977. It began with the filing of a class action lawsuit which was brought in the United States District Court on behalf of a group of undocumented school-age students who challenged a Texas statute that prohibited schools to admit students who were not U.S. citizens or legally admitted students.

The issue in question in this class action suit was whether consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas had the right to deny free public education to undocumented school-age children. The Court in the *Plyler v. Doe*<sup>1</sup> decision cited an 1886 case *Yick Wo v. Hopkins*,<sup>2</sup> in regards to the protections under the Fourteenth Amendment and held that: “The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says:

*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.*

*These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the protection of the laws is a pledge of the protection of*

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<sup>1</sup> *Plyler v. Doe*, 457 U.S. 202 (1982)

<sup>2</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)

*equal laws.*<sup>3</sup>

Further, in 1982 when the Supreme Court delivered the opinion of the Court in *Plyler* in favor of undocumented students, in its ruling it held that "the illegal alien of today may well be the legal alien of tomorrow," and that, without an education, these undocumented children, [a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class."<sup>4</sup>

The *Plyler v. Doe*<sup>5</sup> case set the path for undocumented students in grades K to 12 to benefit from free public education in all states. However, regarding the issue of post-secondary education the federal government left that responsibility to each state to implement their own legislation.

After the *Plyer*<sup>6</sup> decision it did not take long for undocumented students who were attending state colleges or universities to begin challenging their right to receive in-state tuition. In 1982 Justice O'Connor, in *Toll v. Moreno*<sup>7</sup> held that: "I concur in the Court's opinion insofar as it holds that the State may not charge out-of-state tuition to nonimmigrant aliens who, under federal law, are exempt from both state and federal taxes, and who are domiciled in the State. Imposition of out-of-state tuition on such aliens conflicts with federal law exempting them from state taxes, since; after all, the University admits that it seeks to charge the higher tuition in order to recover costs that state income taxes normally would cover."

Nineteen years after the *Plyer* and *Toll* cases were decided, in California and in October 2001 California signed an assembly bill known as AB-540 which is a bill that provides students with an exemption to the requirement for undocumented students to pay nonresident fees. This bill was adopted by the California Community Colleges, the California State University and the University of California. AB-540 is a law that the California legislature passed by adding on January 1, 2002 Section 68130.5<sup>8</sup> to the Education Code which provided that unlawful aliens who meet certain requirements are exempt from paying nonresident fees at Community State Colleges and California Universities.

Ten years after the California legislature signed AB-540 into law which is also known as the "California Dream Act", the federal government on June 15, 2012, signed the Consideration of Deferred Action for Childhood Arrivals Process also known as the federal "Obama's Dream Act." The Secretary of Homeland Security announced that certain people who came to the United States as children and met several key guidelines may request consideration of deferred action for a period of two years, subject to

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<sup>3</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1985)

<sup>4</sup> *Plyler v. Doe*, 457 U.S. 202 (1982)

<sup>5</sup> *Plyler v. Doe*, 457 U.S. 202 (1982)

<sup>6</sup> *Plyler v. Doe*, 457 U.S. 202 (1982)

<sup>7</sup> *Toll v. Moreno*, 458 U.S. 1 (1982) Supreme Court of the United States Argued March 2, 1982

<sup>8</sup> California Education Code Section 68130.5

renewal, and would then be eligible for work authorization. Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion.<sup>9</sup>

The introduction of California Code Section 68130.5<sup>10</sup> or as is better known the California AB-540 or the California Dream Act, does not provide students with a path for acquiring legal permanent residency or citizenship but it provides students, who meet certain requirements, with an exemption of payment of their nonresident fees. The federal “Obama Dream Act,” which is a deferred action, does not provide an individual with lawful status or a path for acquiring legal permanent residency or Citizenship’ and it did not establish whether or not students will be eligible to pay in-state fees when they enroll in California community colleges or state universities.

Although the “California Dream Act” legislation was specifically added by signing into law an amendment to the California Education Code, the new federal “Obama’s Dream Act” language does not prevent states and does not direct states to enact new legislation for students who fall under this deferment to have their nonresident fees exempted when they enroll at California colleges or universities.

As a result here in California the new “Obama Dream Act” is creating confusion not only for higher education officials in charge of overseeing student’s residency but also for those individuals who have applied for the deferred action.

## **DISCUSSION**

### **A. Introduction**

Colleges in California base residency determinations upon various regulations and instructions from Federal legislation, California Education Code, and guidelines from the California Community College Chancellor’s office. It first must determine whether an individual’s visa status allows a student to establish domicile in the United States for fee purposes. If the individual’s visa allows establishment of domicile, then we must determine physical presence and intent to make California the student’s home of record. In both cases, students must provide original documents showing evidence of valid status and proof of at least one year and one day’s physical presence in California and intent to maintain California as home. We also make residency determinations on students who come from other states regarding whether they are US citizens, permanent residents, or any other visa holders by first determining INS status, if applicable, and then determining if they meet physical presence and the intent to make California their home state. Attending California Colleges for educational purposes alone does not grant the student residency.<sup>11</sup>

### **B. Residency Reclassification**

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<sup>9</sup> Secretary of Homeland Security, Janet Napolitano’s letter

<sup>10</sup> California Education Code Section 68130.5

<sup>11</sup> College of the Canyons Residency Affidavit Questionnaire

The first step in the process of residency reclassification for alien students who attend a California college is to determine whether or not the student is precluded from establishing domicile in the United States.<sup>12</sup> Until today Congress has prohibited the States from making unlawful aliens eligible for postsecondary education benefits under certain circumstances.<sup>13</sup> However, in California effective January 1, 2002, the Legislature has provided that unlawful aliens are exempted under AB-540, from paying nonresident fees at California state colleges and universities under certain circumstances.<sup>14</sup>

Each student who is identified as a nonresident based on the information initially provided on the application for admissions, and attempts to reclassify by providing documentation; and after the student's Residency Affidavit and documentation is reviewed; the student is classified as a resident or nonresident.<sup>15</sup> If the student is classified as a nonresident and the student is not precluded from attending a California College, then the student will be required, except as otherwise provided, to pay, in addition to other fees required by the institution, nonresident fees.<sup>16</sup>

### **C. Aliens Precluded from Enrolling in a Course of Study**

An alien who is admitted as, or changes status to, a B-1 or B-2 nonimmigrant on or after April 12, 2002, or who files a request to extend the period of authorized stay in B-1 or B-2 nonimmigrant status on or after such date, violates the conditions of his or her B-1 or B-2 status if the alien enrolls in a course of study. Such an alien who desires to enroll in a course of study must either obtain an F-1 or M-1 nonimmigrant visa from a consular officer abroad and seek readmission to the United States, or apply for and obtain a change of status under section 248 of the Act and 8 CFR part 248. The alien may not enroll in the course of study until the Service has admitted the alien as an F-1 or M-1 nonimmigrant or has approved the alien's application under part 248 of the chapter and changed the alien's status to that of an F-1 or M-1 nonimmigrant.<sup>17</sup>

### **D. California Guidelines for Students to Qualify for In-State Tuition Under AB-540:**

Any student, other than a nonimmigrant alien, who meets all of the following requirements, shall be exempt from paying nonresident tuition at College of the Canyons:

"Notwithstanding any other provision of law:

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<sup>12</sup> 8 U.S.C. 1101, et seq.; California Education Code Section 68040; California Code of Regulations Title V Section 54045.

<sup>13</sup> 8 U.S.C. Section 1623

<sup>14</sup> California Education Code Section 68130.5

<sup>15</sup> California Education Code Section 68040

<sup>16</sup> California Education Code Section 68050

<sup>17</sup> Title 8 of the Code of Federal Regulations Sec. 214.2(b)(7)

"(a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges:

"(1) High school attendance in California for three or more years.

"(2) Graduation from a California high school or attainment of the equivalent thereof.

"(3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year.

"(4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

"(b) A student exempt from nonresident tuition under this section may be reported by a community college district as a full-time equivalent student for apportionment purposes.

"(c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall prescribe rules and regulations for the implementation of this section.<sup>18</sup>

Applicants that that meet the requirements outlined above must supply College of the Canyons with the following documentation at the same time they submit this affidavit:

1. Transcripts from a California high school showing three or more years of attendance.

2. A high school diploma or equivalent (GED or high school proficiency exam) from California.

3. The Residency Affidavit Questionnaire

Students eligible for this exemption who are transferring to another California public college or university must submit a new request (and documentation if required) to each college under consideration. Nonresident students meeting the criteria will be exempted from the payment of nonresident tuition, but they will not be classified as California residents. They continue to be "nonresidents". Nonimmigrant aliens hold one of the following visa statuses: B, C, D, F, J, M, O, P, or Q is not eligible for this exemption. Home schooled students – where instruction was provided by a tutor or other person (including the student's parents) who did not have a valid California teaching credential, or are not affiliated with a state approved home-schooling program are not eligible for this exemption.<sup>19</sup>

A student who meets all the qualifications to have fees exempted under AB-540 signs the Affidavit under penalty of perjury under the laws of the State of California declaring that the student if an alien

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<sup>18</sup> Barclays Official California Code of Regulations, Title 5

<sup>19</sup> California Nonresident Tuition Exemption Request, AB-540 Affidavit

without lawful immigration status, has filed to legalize his/her immigration status or will file an application as soon as he/she eligible to do so. As a result, and although AB-540 does not grant a student a lawful residency it does not prevent them from continue to process their immigration documents to legalize his/her immigration status while attending College of the Canyons.<sup>20</sup>

#### **E. Federal Guidelines for Consideration of Deferred Action for Childhood Arrivals Process**

Certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of two years, subject to renewal, and would then be eligible for work authorization. Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. Deferred action does not provide an individual with lawful status.

Consideration of deferred action for childhood arrivals can be obtained if the applicant meets the following requirements:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Entered without inspection before June 15, 2012, or your lawful immigration status expired as of June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

Age Requirements: Anyone requesting consideration for deferred action under this process must have been under 31 years old as of June 15, 2012. You must also be at least 15 years or older to request deferred action, unless you are currently in removal proceedings or have a final removal or voluntary departure order.<sup>21</sup>

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<sup>20</sup> California Nonresident Tuition Exemption Request, AB-540 Affidavit

<sup>21</sup> Consideration of Deferred Action for Childhood Arrivals Process

In *Martinez v. Regents*,<sup>22</sup> the Court held in regards to 8 USC Section 1621: "...Section 1621 text contains no requirement that a state law giving unlawful aliens a benefit must expressly reference the section." Further the Court in its opinion held that "...to conclude that Congress intended to require states to comply with Section 1621's requirement..." and "If Congress had intended to require more, we believe it would have said so clearly and would not have set a trap for unwary legislatures. Section California Education Code Section 68130.5 satisfies Section 1621."

In *De Canas v. Bica*<sup>23</sup> "While the immigration power is exclusive, it does not follow that any and all state regulations touching on aliens are preempted." According, it seems that in 2010 and with the *Martinez* decision the issue of preemption in California was settled. It opened the doors for California to enact legislation by adding an amendment to the California Education Code for undocumented students to have their nonresident fees exempted when these students meet the requirements set forth in the AB-540 legislation.

The California Community Colleges Chancellors Office's which its mission is to "empower the community colleges through leadership, advocacy and support" issued the following statement: "On June 15, the US Department of Homeland Security issued a memorandum which will provide temporary legal residency to more than 800,000 undocumented immigrants who can remain in the United States without fear of deportation. This action was taken in lieu of Congress passing the DREAM Act and *did not address or eliminate federal restrictions on states that wish to offer in-state tuition for DREAM students*. For individuals who meet a set of criteria, their deportation will be deferred for two years (subject to renewal), and individuals will also be able to apply for a work permit during this time period. Administration officials said the President was within legal authority in making this broad policy change. President Obama did not consult Congress, where Republicans have historically opposed measures that benefit undocumented immigrants."<sup>24</sup>

8 USC Section 1621(d) in regards to State authority to provide for eligibility of illegal aliens for State and local public benefit states: "A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility."<sup>25</sup>

Undocumented students face a lot of barriers and have tremendous difficulties when they leave high school and soon they face the uncertainty of having to enroll in higher education institutions. Today 14 states allow these students to have their nonresident fees waived and in some instances such as here in California as on January 2013 AB-540 students will be able to apply for state aid.

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<sup>22</sup> Robert Martinez v. The Regents of the University of California

<sup>23</sup> De Canas v. Bica (1976) 424 U.S. 351-354

<sup>24</sup> California Community Colleges Federal Relations Division

<sup>25</sup> 8 USC Section 1621(d)

California institutions of higher education are yet not sure what the federal “Obama Dream Act” means to their institutions and they are trying on their own to provide the best service to these students who fall under this category. However, nor the California Community Colleges Chancellor’s office or the California legislature has giving California colleges and universities the guidelines as to how they wish community colleges and state universities to make residency reclassifications.

It is clear that there are no issues regarding preemption which at this time will prevent the California legislature from writing deferred action guidelines for California colleges and universities. The issue of preemption regarding undocumented students benefiting from in-state fees was already decided in *Martinez v. Regents*. Moreover, it is not the responsibility of institutions of higher education in California to interpret what Congress intended when they passed deferred action into law. It is solely a responsibility of the California legislature to provide those guidelines to California colleges and universities.

Providing in-state tuition for undocumented students who have been approved under the federal “Obama Dream Act” is a benefit not only for the students but also for the state of California. Researchers at Roger William University’s Latino Policy Institute concluded “that the 11 states which offered an in-state rate at the time of the study was completed came out slightly ahead financially.”<sup>26</sup> The thought of states benefiting financially by allowing undocumented students to pay in-state fees was supported by Kimberly Mehlman-Orozco, director of the policy institute. She noted that more study was needed to substantiate the economic benefits of providing in-state tuition policies, “but from the digging we’ve done, it appears that there is no cost to states, and there might even be a financial benefit.”<sup>27</sup>

Those undocumented students who have managed to finish their professional careers by qualifying under the AB-540 tuition exemption are beginning to experience the negative effects of their efforts when as a result of their immigration status they are unable to take on jobs or obtain professional licenses that are necessary for them to gain employment on their chosen professional fields.<sup>28</sup> Sergio Garcia is a perfect example of an undocumented student who is a hard working, self sufficient immigrant, and who has never been arrested. He also has never received public benefits and has relied on his own resources to put himself thru law school. He is not even responsible for his undocumented status; his parents are, because his parents brought him to this country as a minor.<sup>29</sup>

Sergio is not the only one example there are many students like Sergio, outstanding citizens who are not to be held accountable for their undocumented status as not all undocumented students are criminals. Denying professional undocumented students to obtain their professional licenses not only

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<sup>26</sup> In-State Tuition for Illegal Immigrants Can Be a Plus for both States and Students

<sup>27</sup> In-State Tuition for Illegal Immigrants Can Be a Plus for both States and Students

<sup>28</sup> Why Deferred Action isn’t enough

<sup>29</sup> In Re Sergio C. Garcia On Admission



denies California from benefiting from the fruit of their work but more importantly it prevents the State of California from obtaining a return on the investment it made on these students when the State of California provided them with 12 years of free public education and another four or six years at the college and university level allowing these undocumented students to benefit from in-state fees.<sup>30</sup>

### Conclusion

“Deferred Action is not enough”<sup>31</sup> According to the California Chancellor’s office notice, there are about 800,000 young undocumented immigrants who can remain in the U.S. without fear of deportation.<sup>32</sup> However, how many of those students will apply for the deferred action and of those who are approved for this deferral action, how many students will be attempting to enroll in college and/or universities in California is anybody’s guess and this issue perhaps not a concern to the California’s colleges and universities. However, the most important step that the California legislature can take now in regards to this federal deferred action is to take immediate action to begin writing guidelines and regulations that will govern tuition and fees for students who will be approved for the deferred action program. A service that not only will benefit the deferred action student but more importantly a step in the right direction to aid California colleges and universities to meet federal and state compliances in regards to the governing of student’s residency and student’s fees and tuition policies.

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<sup>30</sup> In Re Sergio C. Garcia On Admission

<sup>31</sup> Why Deferred Action isn’t enough

<sup>32</sup> California Community Colleges Federal Relations Division

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