

January 2006

Dream Come True or True Nightmare? The Effect of Creating Educational Opportunity for Undocumented Youth

Susana Garcia

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>



Part of the [Education Law Commons](#), and the [Immigration Law Commons](#)

Recommended Citation

Susana Garcia, *Dream Come True or True Nightmare? The Effect of Creating Educational Opportunity for Undocumented Youth*, 36 Golden Gate U. L. Rev. (2006).

<http://digitalcommons.law.ggu.edu/ggulrev/vol36/iss2/6>

This Comment is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

COMMENT

DREAM COME TRUE OR TRUE NIGHTMARE?

THE EFFECT OF CREATING EDUCATIONAL OPPORTUNITY FOR UNDOCUMENTED YOUTH

INTRODUCTION

In 1999, when Sindy Vasquez was nine years old, her grandmother paid a “coyote” to facilitate her granddaughter’s illegal entry into the United States.¹ Considering her old age and the increasing gang violence in their Guatemalan town, her grandmother thought it was best to reunite Sindy with her parents in the United States.² Mr. and Mrs. Vasquez entered the United States without documentation in 1991, but were afraid to smuggle their young daughter into the country with them.³ Instead,

¹ See Joan Ryan, *Say Farewell to Sindy -- and to logic*, S.F. CHRONICLE, Sept. 8, 2005, at B1; *also available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/09/08/BAGBFEJVE61.DTL&hw=joan+ryan+logic&sn=003&sc=961>. Some facts not contained in this article regarding the Vasquez family are based on the author's professional in-person experience with the Vasquez family. A coyote is defined as someone who smuggles immigrants into the United States. See Miriam Webster On-line Dictionary at <http://www.m-w.com/dictionary/coyote> (last visited on November 21, 2005).

² Joan Ryan, *Say Farewell to Sindy -- and to logic*, S.F. CHRONICLE, Sept. 8, 2005, at B1.

³ *Id.* An “alien” is any person not a citizen or national of the United States. 8 USC § 1101(a)(3) (2005). An illegal alien is defined as “an alien who enters a country at the wrong time or place, eludes an examination by officials, obtains entry by fraud, or enters into a sham marriage to evade immigration laws. -- Also termed undocumented alien.” Black’s Law Dictionary (8th ed. 2004). For the purposes of this Comment, and “illegal alien” is referred to as an “undocumented

248 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 36]

they left Cindy with Mrs. Vasquez's mother until they decided it was safe and legal to bring her into the country.⁴ Cindy's parents were surprised the day she appeared on their doorstep in San Francisco, California, as they had received no forewarning of her arrival. Nevertheless, they were overjoyed to have their family reunited after many years of separation.⁵

Today Cindy is a sixteen-year-old sophomore at Mercy High School, a prestigious Catholic School in San Francisco, where she earned straight A's in her first semester.⁶ Cindy has worked hard to succeed, and has received a great deal of support from the teachers and staff at her elementary and high schools.⁷ For example, the staff at her former elementary school partly funded her scholarship to attend Mercy, and invited her to speak at the eighth grade graduation.⁸ Tragically, Cindy may never realize her dreams of becoming a working professional in the United States because she is now in removal proceedings and may be forced to return to Guatemala.⁹

Sindy and her parents came to the attention of immigration authorities when Mr. Vasquez decided to open his own janitorial business, yet lacked the necessary work authorization to do so.¹⁰ Mr. Vasquez paid a "notario" in Los Angeles, California, \$2,500 to obtain green cards for him, his wife, and Sindy.¹¹ Sindy's father was unaware that the notario's method of obtaining these green cards was by placing his family in removal proceedings.¹² The method chosen by the notario is considered extremely risky for immigrants, because if they do not have a strong case for remaining in the United States, it is very likely that they will be ordered to return to their home country.¹³

Due to the requirements to qualify for cancellation of removal, a form of immigration relief for undocumented immigrants in removal

immigrant."

⁴ Joan Ryan, *Say Farewell to Sindy -- and to logic*, S.F. CHRONICLE, Sept. 8, 2005, at B1.

⁵ *Id.*

⁶ *Id.*; see also <http://www.mercyhs.org> (last visited on January 21, 2006).

⁷ Joan Ryan, *Say Farewell to Sindy -- and to logic*, S.F. CHRONICLE, Sept. 8, 2005, at B1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Interview with Mark Silverman, Staff Attorney, Immigrant Legal Resource Center, in San Francisco, Cal. (Oct. 1, 2005). "Notario" is the Spanish word commonly used to describe a notary public. *Id.* Notarios are known among immigration attorneys for misinforming immigrants of their legal rights and misrepresenting their options for immigration relief. *Id.* Lawful permanent residents or "greencard holders" have a right to work and live permanently in the United States, and travel to other countries. ILRC Staff Attorneys, *A Guide For Immigration Advocates*, Vol. 1, Ch. 1 at 1-15 (2004).

¹² Joan Ryan, *Say Farewell to Sindy -- and to logic*, S.F. CHRONICLE, Sept. 8, 2005, at B1.

¹³ Interview with Mark Silverman, *supra* note 11.

proceedings, Sindy's removal case is being tried separately from her parents.¹⁴ Until their hearing in 2006, Sindy's parents plan to wait patiently, pray, and strengthen their case for cancellation of removal, which is their only hope for staying in the country legally.¹⁵ Unlike her parents, Sindy does not qualify for cancellation and will have to seek an alternate form of immigration relief.¹⁶

Under current immigration laws, asylum may be the only viable legal claim Sindy has for remaining in the United States.¹⁷ Although Sindy has a *prima facie* case for asylum and pursuing an administrative and federal appeal would allow her to stay here temporarily, it will be difficult for her to prevail.¹⁸ The law requires that claims for asylum be brought within one year after the date of the immigrant's arrival in the United States.¹⁹ For an asylum application not brought within the one-year period to be considered, Sindy must demonstrate to the satisfaction of the Attorney General either: (1) the existence of changed circumstances materially affecting her eligibility for asylum, or (2) extraordinary circumstances relating to the delay in filing her application.²⁰ Because Sindy did not apply for asylum within one year of her arrival, this standard will be difficult for her to meet and it is unknown if she will qualify for this exception.²¹

If denied asylum on appeal, Sindy's last legal recourse would be to petition a Congressperson for a private immigration bill.²² If passed by Congress, a private immigration bill on Sindy's behalf could halt any legal proceedings to remove her from the United States and grant her legal status.²³ Private immigration bills allow for notions of fairness and

¹⁴ 8 USC §1229(b) (2006). One element of cancellation of removal under this statute is that the applicant must prove that their removal will result in exceptional and extremely unusual hardship to their U.S. citizen or lawful permanent resident child, spouse or parent. *Id.*

¹⁵ Interview with Mark Silverman, *supra* note 11. Sindy's parents must focus on the exceptional and extremely unusual hardship that their U.S. citizen daughter will suffer if they are removed from the United States. *Id.*

¹⁶ *Id.*

¹⁷ *Id.*; see also 8 USC § 1158 (2006). In order to qualify for asylum, an applicant must meet the definition of a "refugee." *Id.* A refugee is someone who "is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 USC § 1101(a)(42) (2006).

¹⁸ See 8 USC § 1158(a) (2006).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Interview with Mark Silverman, *supra* note 11.

²² See generally Ryan Quinn and Stephen Yale-Loehr, *Private Immigration Bills: An Overview*, Benders Immigration Bulletin, October 1, 2004, 1147.

²³ Interview with Mark Silverman, *supra* note 11; see also Ryan Quinn and Stephen Yale-

250 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 36]

equity to militate against the frequently harsh operations of immigration standards, yet Congress rarely approves them.²⁴ For example, in the 107th Congress eighty-five private immigration bills were introduced, but only one was enacted.²⁵ In order to convince a Congressperson to introduce a private bill, Sindy would have to demonstrate that she would suffer extreme hardship if removed to Guatemala.²⁶ Guatemala poses the serious dangers of gang violence and femicide to returning immigrants like Sindy.²⁷ Furthermore, since the Vasquez family does not have any close family remaining in their home country, it is unclear who will care for Sindy if she is forced to return.²⁸ While together these facts seem to evidence extreme hardship, given the standard that must be met for introduction of a private bill together with its infrequent passage by Congress, it is unlikely that such a bill would succeed.²⁹

Sindy's story illuminates an on-going and serious problem in the United States: the failure of Congress to specifically consider the needs of undocumented children in the development of our nation's immigration policy.³⁰ As a consequence, our nation continues to lose the potential benefit these aspiring children may provide for our society.³¹ Each year, approximately 60,000 undocumented immigrants graduate from United States' high schools.³² Upon graduation, many of these discover that they not only face great hardship in pursuing a higher education, but also that they may never be able to legalize their

Loehr, *Private Immigration Bills: An Overview*, Benders Immigration Bulletin, October 1, 2004, 1147. A private bill is legislation sponsored by an individual's representative in his/her district and may cancel out any basis for the individual's deportation or removal, allowing them to stay legally in the United States. *Id.* Such bill, if passed by Congress, applies only to that individual. *Id.* Sindy would petition Nancy Pelosi, San Francisco, California, 8th District. See <http://www.house.gov/pelosi>.

²⁴ *Id.* Successful private immigration bills have been likened to "[w]inning the jackpot in a state lottery." *Id.*

²⁵ *Id.*

²⁶ *Id.* at 1149.

²⁷ See Risa Gras Targo, *Femicide in Guatemala*, Bard College BGIA Journal, Vol. 5, at 29-31 available at <http://www.bard.edu/bgia/journal/vol5/29-31.pdf>. Femicide is generally defined as the killing of women, to be contrasted with the term "homicide" which means the killing of men. *Id.* In Guatemala, girls between the ages of 15 and 26 have been targeted and 1,500 women have been murdered in the last three years. *Id.*

²⁸ Joan Ryan, *Say Farewell to Sindy -- and to logic*, S.F. CHRONICLE, Sept. 8, 2005, at B1.

²⁹ Interview with Mark Silverman, *supra* note 11.

³⁰ Rachel Bien, Notes and Comments, *Nothing to Declare but Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children*, 12 J.L. & POL'Y 797, 810 (2004).

³¹ *Id.*

³² National Immigration Law Center, *DREAM Act: Basic Information* (November 2005) http://www.nilc.org/immlawpolicy/DREAM/DREAM_basic_info_1105.pdf.

2006] *EDUCATION FOR UNDOCUMENTED YOUTH* 251

immigration status.³³ If a student like Sindy wants to attend college, some states may offer her in-state tuition, but she may not be able to take advantage of this opportunity.³⁴ Other states refuse outright to admit undocumented students.³⁵ Congress must provide a remedy for these inconsistencies and an opportunity for these young, intelligent, and undocumented children to advance in our society.³⁶

This Comment analyzes the Development Relief and Education for Alien Minors (“DREAM”) Act, which is proposed legislation that provides undocumented immigrant youth an opportunity to achieve higher education and legal status.³⁷ Part I of this Comment describes the legislative history, specific provisions, and need for the DREAM Act.³⁸ Part II demonstrates how state laws are insufficient to overcome some of the barriers that undocumented youth face in attempting to achieve higher education, and how the DREAM Act will help overcome those barriers.³⁹ Part III of this Comment recommends that Congress should seriously consider the Convention on the Rights of the Child and the special needs of undocumented children upon assessing the DREAM Act in the 109th Congress.⁴⁰ Part IV demonstrates that the DREAM Act does not encourage illegal immigration, it is not too costly to implement, it rewards hard work, and its passage will benefit society as a whole.⁴¹

I. THE DREAM ACT

The DREAM Act proposes to amend a section of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).⁴² This amendment would unequivocally return to the states the discretion to decide whether to provide in-state tuition to undocumented students.⁴³ Additionally, the DREAM Act would provide a way for undocumented students to legalize their immigration status provided they meet the

³³ *Id.*

³⁴ Karin Fisher, *Illegal immigrants rarely use hard won tuition break: some states offer in-state rates, but some students still have trouble paying*, THE CHRONICLE OF HIGHER EDUCATION, Dec. 10, 2004, at A19.

³⁵ Chris Echegary, *Barriers Curb Immigrant Student Access to College, Job Market*, TAMPA TRIBUNE, September 30, 2005, at 1.

³⁶ National Immigration Law Center, DREAM Act: Basic Information, *supra*, note 32.

³⁷ DREAM Act, S. 2075, 109th Cong. (2005).

³⁸ *See infra* notes 43-83 and accompanying text.

³⁹ *See infra* notes 84-109 and accompanying text.

⁴⁰ *See infra* notes 110-133 and accompanying text.

⁴¹ *See infra* notes 134-203 and accompanying text.

⁴² DREAM Act, S. 2075, 109th Cong. (2005).

⁴³ *Id.*

252 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 36

requirements set out in the Act.⁴⁴

A. LEGISLATIVE HISTORY

In October 2003, after amendments to the DREAM Act in the Senate Judiciary Committee by Senator Diane Feinstein (D-CA) and Senator Charles Grassley (R-Iowa), the DREAM Act passed the Judiciary Committee by a sixteen to three vote.⁴⁵ Despite the overwhelming bipartisan approval of the Committee, opposition by key Republicans prevented the DREAM Act from being placed on the voting calendar before the close of the 108th Congress.⁴⁶ On November 18, 2005, a bipartisan group of senators introduced the DREAM Act of 2005.⁴⁷ The sponsors of the 2005 DREAM Act are Senator Richard Durbin (D-IL), Senator Chuck Hagel (R-NE), and Senator Richard Lugar (R-IN).⁴⁸ Since its reintroduction, immigrant rights advocates remain optimistic that the DREAM Act will become law due to its bipartisan support.⁴⁹

B. PROVISIONS OF THE DREAM ACT

The DREAM Act proposes to amend a provision of the IIRIRA, signed into law by President Clinton in 1996.⁵⁰ IIRIRA is a federal law that changed several aspects of pre-existing immigration law.⁵¹ IIRIRA prohibits undocumented students from accessing any post-secondary education benefit based on their residence in a state unless a United States citizen or national is also eligible for the same benefit.⁵² IIRIRA also banned undocumented students' eligibility for federal financial aid in the form of grants, loans, and work-study.⁵³ Furthermore, IIRIRA severely limits states, although it does not prohibit them, from

⁴⁴ See *infra* notes 60-75 and accompanying text.

⁴⁵ Mark R. von Sternberg, *International Legal Development in Review: 2003*, 38 INT'L LAW, 415, 419 (2004).

⁴⁶ Christopher Smith, *Hatch's bill for tuition breaks for undocumented immigrants bypasses floor vote*, SALT LAKE TRIBUNE, Oct. 2, 2004, at A.

⁴⁷ National Immigration Law Center, DREAM Act reintroduced in Senate (November 21, 2005), <http://www.nilc.org/immlawpolicy/DREAM/Dream002.htm>.

⁴⁸ *Id.*

⁴⁹ Interview with Mark Silverman, *supra* note 11.

⁵⁰ 8 USC § 1623 (2006).

⁵¹ *Id.*

⁵² *Id.* "National of the United States" is defined as a citizen of the United States or a non-citizen who owes permanent allegiance to the United States. Black's Law Dictionary (8th ed. 2004).

⁵³ Congressional Budget Office, Cost Estimate January 20, 2004, S. 2075, available at <http://www.cbo.gov/showdoc.cfm?index=4981&sequence=0&from=6>.

2006] *EDUCATION FOR UNDOCUMENTED YOUTH* 253

determining an undocumented students' eligibility for in-state tuition and other post-secondary education benefits.⁵⁴

The DREAM Act would amend IIRIRA by unequivocally returning to the states the discretion to decide whether to provide in-state tuition to undocumented students.⁵⁵ The DREAM Act also provides qualifying youth access to certain governmental financial aid as well as the opportunity to obtain lawful permanent residency.⁵⁶ Legal status would be possible through the DREAM Act's provision of conditional permanent resident status to youth who (1) came to the United States before the age of sixteen, (2) have lived in the United States at least five years at the time of the bill's enactment, (3) have good moral character, and (4) have graduated from a United States high school.⁵⁷

For example, if the DREAM Act is made federal law, students like Cindy could apply for relief under the Act.⁵⁸ Cindy arrived in the United States when she was nine years old.⁵⁹ Because Cindy is now sixteen-years-old, she has already satisfied the required five years of continuous physical presence.⁶⁰ In light of her academic excellence, it is probable that Cindy will graduate from Mercy High School and thus satisfy the Act's graduation requirement.⁶¹ Cindy is also a model citizen and is likely to satisfy the good moral character condition.⁶² Cindy and others like her would be prime candidates for relief under the DREAM Act.

Although Cindy would not be eligible to affirmatively apply for relief under the DREAM Act because she has not yet graduated from high school, Section 7 of the Act protects her from removal.⁶³ Section 7 of the DREAM Act would require the Attorney General to stay removal proceedings for an undocumented immigrant over the age of twelve who has yet to graduate from high school.⁶⁴ To remain eligible for this protection, the youth must be enrolled in secondary school and avoid

⁵⁴ Brian De Bose, *Illegal aliens push bills on tuition Hill considers in-state benefits*, THE WASHINGTON TIMES, Apr. 21, 2004, at A4.

⁵⁵ DREAM Act, S. 2075, 109th Cong. (2005). "To amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents." *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004); *see also* 8 C.F.R. § 216.1 (1996).

⁵⁸ DREAM Act, S. 2075, 109th Cong. § 4 (2005).

⁵⁹ Joan Ryan, *Say Farewell to Cindy -- and to logic*, S.F. CHRONICLE, Sept. 8, 2005, at B1.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ DREAM Act, S. 2075, 109th Cong. § 7 (2005).

⁶⁴ *Id.*

254 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 36

committing certain acts that might destroy her good moral character.⁶⁵ Cindy would therefore be protected from removal until after high school graduation, at which time she could affirmatively apply for the DREAM Act and obtain conditional permanent resident status.⁶⁶ Provided she meets certain requirements, Cindy would eventually have the opportunity to adjust her status to permanent legal residency.⁶⁷

After six years of conditional permanent resident status under the DREAM Act, an applicant would have two options for adjusting status to legal permanent residency.⁶⁸ First, the applicant may acquire a degree from an institution of higher education or be a student in good standing in a program for a bachelor's degree or higher for at least two years.⁶⁹ An applicant may also adjust status by serving in the U.S. Armed Forces for at least two years.⁷⁰ In order for Cindy's conditional legal status to become legal permanent residency, she would have to fulfill at least one of the above requirements.⁷¹ Given her academic success and ambitions, it is likely that she would enroll in a program for a bachelor's degree and adjust her status under the DREAM Act this way.⁷² Therefore, the DREAM Act would allow Cindy and others like her to remain in the United States, pursue higher education and attain legal status without being subject to removal.⁷³

C. THE NEED FOR THE DREAM ACT

Current immigration laws provide very limited and complicated forms of relief for undocumented immigrants.⁷⁴ IIRIRA not only limits

⁶⁵ *Id.*

⁶⁶ 8 C.F.R. § 216.1 (1996). Unless otherwise specified, the rights, privileges, responsibilities and duties which apply to all other lawful permanent residents apply equally to conditional permanent residents, including but not limited to the right to apply for naturalization (if otherwise eligible), the right to file petitions on behalf of qualifying relatives, the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed; the duty to register with the Selective Service System, when required; and the responsibility for complying with all laws and regulations of the United States. *Id.* A conditional permanent resident is subject to certain conditions and responsibilities set forth in 8 U.S.C. § 1186 (2000). *Id.*

⁶⁷ DREAM Act, S. 2075, 109th Cong. § 5 (2005).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ DREAM Act, S. 2075, 109th Cong. § 4 (2005).

⁷² Joan Ryan, *Say Farewell to Cindy -- and to logic*, S.F. CHRONICLE, Sept. 8, 2005, at B1.

⁷³ DREAM Act, S. 2075, 109th Cong. (2005).

⁷⁴ See generally ILRC Staff Attorneys, *A Guide for Immigration Advocates*, Vol. I & II (2004).

access to higher education benefits for undocumented youth, but it also limits their options for immigration relief.⁷⁵ The most common way that undocumented immigrants attain legal status is through family immigration.⁷⁶ Among other things, family immigration requires an immigrant to have a “qualifying relative” who is a United States citizen, or have a permanent legal resident who is willing to petition for her.⁷⁷ A “qualifying relative” is defined as a mother, father, sibling, or adult son or daughter.⁷⁸ Without a qualifying relative an undocumented immigrant is ineligible for family immigration and is likely ineligible for many other forms of immigration relief as well.⁷⁹ Even when an undocumented immigrant is eligible to immigrate through a qualifying relative, it could be twelve years or more until the government adjudicates their family visa petition.⁸⁰ The stringency of immigration laws increases the urgent need for passage of the DREAM Act.⁸¹ Because many potential beneficiaries of the Act are currently ineligible and may never become eligible for existing forms of immigration relief, it is imperative that they have alternative relief such as the DREAM Act.⁸²

II. THE DREAM ACT’S REMEDY TO INCONSISTENT STATE LEGISLATION AND FINANCIAL OBSTACLES FACED BY UNDOCUMENTED YOUTH

Since 2001, nine states have passed laws permitting certain undocumented students to pay in-state tuition at state universities rather than the more expensive out-of-state tuition rate.⁸³ Currently, Texas,

⁷⁵ *Id.*

⁷⁶ Interview with Mark Silverman, *supra* note 11.

⁷⁷ ILRC Staff Attorneys, *A Guide for Immigration Advocates*, Vol. I, Ch. 4 at 4-1 (2004).

⁷⁸ *Id.*

⁷⁹ *Id.*; *see, e.g.*, 8 USC § 1101 (2006) and 8 USC § 1229(b) (2006). Cancellation of removal, for example, requires that the applicant show that their removal will cause exceptional and extremely unusual hardship to a spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. 8 USC § 1229(b)(1)(D) (2006).

⁸⁰ Visa Bulletin for March 2006, Number 91, Volume VIII, Washington D.C. *available at* http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html. For Family Visa applicants from Mexico, in March 2006, immigrant numbers finally became available for applicants in the first preference category who submitted their applications on or before August 8, 1994. *Id.* Mexico has the longest wait time for family visa applicants because of the high volume of applications received from that country. *Id.*

⁸¹ *See, e.g.*, 8 USC § 1101 (2006); 8 USC § 1229(b) (2006).

⁸² National Immigration Law Center, *The DREAM Act, Basic Information*, *supra* note 32.

⁸³ National Immigration Law Center, *The Economic Benefits of the DREAM Act and the Student Adjustment Act* (February 2005), http://www.nilc.org/immlawpolicy/DREAM/Econ_Bens_DREAM&Stdnt_Adjst_0205.pdf. These

256 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 36]

California, Utah, Washington, New York, Oklahoma, Illinois, Kansas, and New Mexico have laws that provide in-state tuition to undocumented students.⁸⁴ At least twenty-one other states are considering similar legislation.⁸⁵ Unfortunately, this state legislation falls short of providing a long-term solution to the predicaments faced by undocumented youth because most of these laws do not provide financial aid and none provide a means for these youth to obtain legal status.⁸⁶

Texas and Oklahoma have laws that provide state financial aid to qualifying undocumented youth.⁸⁷ Gil Cedillo, a California state senator, recently introduced the California DREAM Act in the state Senate in February of 2005.⁸⁸ Like Texas and Oklahoma, the California DREAM Act would provide state financial aid to students that qualify for California's law that provides in-state tuition to certain undocumented students.⁸⁹ Although these state laws are significant in overcoming the financial hurdles that undocumented youth face in achieving higher education, the financial awards are often small and do not completely cover the cost of college tuition.⁹⁰ These laws also fall short of providing a comprehensive solution because they do not provide a means of legalization.⁹¹ Because the power to regulate immigration lies solely with the federal government, only a federal law would have the ability to provide undocumented students a means of legalization.⁹² The DREAM Act is a federal law that would provide conditional permanent residency, thereby making students eligible for financial aid.⁹³

States have been inconsistent in their treatment of undocumented college applicants in the college admissions process.⁹⁴ In some states, universities admit undocumented students and charge them in-state tuition while others outright refuse to admit students without legal

laws generally require that the student have attended a high school within the state for at least three years and have graduated from that high school. *See, e.g.*, Tx. Educ § 54.052 (2006); 70 Okl.St. Ann. § 3218.8 (2006); Cal.Educ.Code § 68130.5 (2006).

⁸⁴ Fisher, *supra* note 34. This is the number of states as of the date of publication of this Comment.

⁸⁵ *Id.* This is the number of states as of the date of publication of this Comment.

⁸⁶ *See, e.g.* Cal.Educ.Code § 68130.5 (2006).

⁸⁷ *See* Tx. Educ § 54.052 (2006); 70 Okl.St. Ann. § 3218.8 (2006).

⁸⁸ California Dream Act, S.B. 160 (Ca. 2005).

⁸⁹ Cal.Educ.Code § 68130.5 (2006).

⁹⁰ Julia C. Mead, *Ticket to Nowhere*, N.Y. TIMES, Jun. 20, 2004, at 1.

⁹¹ *See* Tx. Educ § 54.052 (2006); 70 Okl.St. Ann. § 3218.8 (2006).

⁹² 8 USC § 1001 (2006).

⁹³ DREAM Act, S. 2075, 109th Cong. § 4 (2005).

⁹⁴ *Tests illegals can't pass*, NEW JERSEY RECORD, Aug. 28 2005, at A1.

2006] *EDUCATION FOR UNDOCUMENTED YOUTH* 257

status.⁹⁵ The inconsistent treatment of undocumented youth among the states creates uncertainty among administrators and confuses students regarding their opportunities for achieving higher education.⁹⁶ Even if there was consistency with the states, undocumented students would still have difficulty attending college due to their limited access to financial aid.⁹⁷

IIRIRA's prohibition on the provision of federal financial aid to undocumented students makes financial resources for these students difficult to find.⁹⁸ University administrators in some states jump through hoops to piece together enough financial aid for undocumented students to attend college.⁹⁹ These dedicated administrators search for grants, scholarships, and other donations that do not condition eligibility on permanent legal residency or United States citizenship.¹⁰⁰ Nevertheless, even when private institutions offer a generous grant to a student, that student may not be able to make up the remaining difference, however small, without access to other sources of aid.¹⁰¹ Furthermore, some financial aid offices are less likely to offer loans to undocumented students because they are unsure of these students' ability to repay them without work authorization after graduation.¹⁰²

Statistics have also shown that even when in-state tuition is available, many undocumented students do not take advantage of the opportunity because of their ineligibility for financial aid.¹⁰³ In some cases, students are unaware of the availability of in-state tuition or of the scarcity of financial resources until their senior year of high school.¹⁰⁴ By their senior year it is often too late for many of these students to prepare for college financially or academically.¹⁰⁵

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Julia C. Mead, *Ticket to Nowhere*, N.Y. TIMES, Jun. 20, 2004, at 1.

¹⁰⁰ *Id.*

¹⁰¹ Catherine Hausman and Victoria Goldman, *Great Expectations*, N.Y. TIMES, Apr. 8, 2001, at 26. For example, in 2001 Syracuse University, a private university in New York, was able to offer \$21 million in merit-based institutional scholarships. *Id.* That same year, a year's tuition at Syracuse, including room and board, totaled \$31,000. The most generous grant offered by the school amounted to \$24,000, and though liberal, still left the student with a \$7,000 gap to fill. *Id.*

¹⁰² *Id.*

¹⁰³ See <http://hatch.senate.gov> (last visited October 21, 2005); see also Fisher, *supra* note 34.

¹⁰⁴ Interview with SAHE member, Student Advocates for Higher Education, in San Jose, Cal. (Sept. 27, 2005). SAHE is a student group at San Jose State University in San Jose, California. *Id.*; see also www.geocities.com/ab540students. SAHE is composed of both legal residents and undocumented students who advocate for the educational rights of the undocumented. *Id.*

¹⁰⁵ *Id.*

258 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 36]

The DREAM Act would help to overcome undocumented students' financial hurdles by allowing students access to federal financial aid.¹⁰⁶ With the DREAM Act, universities would be confident that immigrant students receiving loans could repay them after graduation because the Act would grant work authorization through its provision of conditional permanent residency.¹⁰⁷ In addition, as a federal law the DREAM Act would result in more uniform treatment of undocumented students among the states because federal laws apply to all states.¹⁰⁸ The DREAM Act would, therefore, provide a comprehensive solution to significant problems faced by undocumented youth in achieving higher education.

III. CONSIDERING THE SPECIAL NEEDS OF UNDOCUMENTED CHILDREN

The DREAM Act could provide the only way for young people like Sindy to stay in the United States legally and avoid removal.¹⁰⁹ Pursuing an asylum claim or a private bill might allow Sindy more time to complete high school and graduate from college, yet her options for employment upon college graduation would be limited.¹¹⁰ Without qualifying for a form of immigration relief, Sindy would remain undocumented and lack work authorization upon college graduation.¹¹¹ Additionally, when Sindy's case is finally decided, she could still be sent back to Guatemala despite her financial investments in her education and her contributions to society.¹¹² Such a result is not sensible or fair, nor is it in Sindy's best interest.

The United States's immigration policy has traditionally failed to consider the special impact of immigration laws upon immigrant children.¹¹³ Such failure can be partially attributed to the fact that the United States is the only country in the world besides Somalia that has

¹⁰⁶ Congressional Budget Office, Cost Estimate January 20, 2004, S. 2075, available at <http://www.cbo.gov/showdoc.cfm?index=4981&sequence=0&from=6>.

¹⁰⁷ DREAM Act, S. 2075, 109th Cong. § 4 (2005).

¹⁰⁸ U.S. Const. Art. VI. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

¹⁰⁹ Joan Ryan, *Say Farewell to Sindy -- and to logic*, S.F. CHRONICLE, Sept. 8, 2005, at B1; see also Interview with Mark Silverman, *supra*, note 11.

¹¹⁰ Fisher, *supra* note 34.

¹¹¹ *Id.*

¹¹² 8 USC § 1227 (2006).

¹¹³ Bien, *supra* note 30, at 810.

2006] *EDUCATION FOR UNDOCUMENTED YOUTH* 259

not yet ratified the Convention on the Rights of the Child (“CRC”).¹¹⁴ The United Nations first adopted the CRC in 1989 and it is the first international treaty to provide special protections for the rights of children.¹¹⁵ The CRC requires that the “best interests of the child” be the primary consideration of states in all actions concerning children, including those undertaken by public or private welfare institutions, courts of law, administrative authorities, and legislative bodies.¹¹⁶ Although the CRC is the most widely ratified human rights treaty in history, the United States refuses to ratify it.¹¹⁷ Therefore, IIRIRA’s restrictions on undocumented children’s access to post-secondary education benefits are unaffected by the CRC.¹¹⁸ Because the DREAM Act would eliminate the harsh restrictions imposed on immigrant children’s access to higher education, its passage would bring the United States closer to compliance with international human rights standards for the treatment of children.¹¹⁹

The United States Bureau of Citizenship and Immigration Services (“USCIS”) has acknowledged that the CRC is a significant source of guidance in the development of procedures for child asylum seekers.¹²⁰ The USCIS has become increasingly responsive to international and domestic pressure to expand protections for child asylum seekers.¹²¹ Courts have also recognized the potential influence of the CRC’s “best interest of the child standard” on the application of immigration laws.¹²² Although the 9th Circuit declined to invalidate an Immigration Judge’s ruling on the basis that his application of the law violated the CRC’s standards for the treatment of children, the court recognized that the CRC might be considered “customary international law.”¹²³

The proposed Unaccompanied Alien Child Protection Act of 2005 (“UACPA”) also reflects Congress’s awareness of the unique needs of

¹¹⁴ *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

¹¹⁵ *Bien*, *supra* note 30, at 810.

¹¹⁶ Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448.

¹¹⁷ *Id.* at 811.

¹¹⁸ 74 Am. Jur. 2d *Treaties* § 35 (1989).

¹¹⁹ DREAM Act, S. 2075, 109th Cong. (2005).

¹²⁰ *Bien*, *supra* note 30, at 819.

¹²¹ *Id.*

¹²² *Cabrera-Alvarez v. Gonzalez*, 423 F.3d 1006 (9th Cir. 2005).

¹²³ *Id.* at 1013. In this case, Petitioner argued that the Immigration Judge should have interpreted the extreme hardship requirement for cancellation of removal in compliance with the CRC’s best interest of the child standard. *Id.* at 1007. The 9th Circuit ruled that even if the CRC were considered customary international law, the way the judge applied the law in petitioner’s case did not violate the CRC. *Id.* at 1013. Customary international law is defined as international law that derives from the practice of states and is accepted by them as legally binding. *Black’s Law Dictionary* (8th ed. 2004).

260 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 36

immigrant children.¹²⁴ Senator Diane Feinstein introduced the UACPA in the Senate in January 2005.¹²⁵ Representative Zoe Lofgren of California introduced an identical bill in the House of Representatives in March 2005.¹²⁶ The primary objective of the UACPA is to establish procedures for immigration officers who find an unaccompanied undocumented child at a United States land border or port of entry.¹²⁷ The UACPA would direct the Secretary of Homeland Security to provide immigration officers with specific training on guidelines for the treatment of these children.¹²⁸ Additionally, the UACPA would exempt unaccompanied undocumented children from certain removal and asylum provisions.¹²⁹ The UACPA evidences the awareness of at least some members of Congress that undocumented children merit unique protections. This awareness must be evoked upon Congress's reconsideration of the DREAM Act.

Congress must be responsive to the needs of undocumented children and protect their right to pursue higher education through passage of the DREAM Act.¹³⁰ IIRIRA's current restrictions on education and the denial of immigration relief to immigrant youth leave them fated to become America's next underclass.¹³¹ Because section 1623 of IIRIRA is detrimental to the development and advancement of undocumented children, it violates the CRC's "best interests of the child" standard and must be repealed by the DREAM Act.¹³²

IV. OPPOSING ARGUMENTS CONSIDERED AND POTENTIAL BENEFITS PRESENTED

Despite widespread support for the DREAM Act, opposition to the Act's passage and general anti-immigrant sentiment still exist.¹³³ Critics insist that the DREAM Act will entice immigrant families to move to the

¹²⁴ Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005), *see also* H.R. 1172, 109th Cong. (2005).

¹²⁵ Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005).

¹²⁶ Unaccompanied Alien Child Protection Act of 2005, H.R. 1172, 109th Cong. (2005).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ DREAM Act, S. 2075, 109th Cong. § 4 (2005).

¹³¹ Thomas R. Ruge & Angela D. Iza, Article, *Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Immigration Status*, 15 *IND. INT'L & COMP. L. REV.* 257, 275 (2005).

¹³² *See, e.g.*, 8 USC § 1623 (2006).

¹³³ Judith Golub, *Immigration Reform Post-9/11*, 13 *U.S.-MEX. L.J.* 9, 17-18 (2005); *see also* <http://www.fairus.org>.

2006] *EDUCATION FOR UNDOCUMENTED YOUTH* 261

United States illegally so that their children can receive educational benefits and attain legal status.¹³⁴ Critics also argue that allowing undocumented students access to America's higher education system will be too costly to implement and strain a system already filled to capacity.¹³⁵ Others believe that the DREAM Act's provisions offering higher education benefits and legalization to undocumented youth would reward illegal activity.¹³⁶ Each of these common criticisms reflects a misunderstanding of the DREAM Act's long-term effects and is insufficient for opposing the Act's passage.¹³⁷ Ultimately, allowing undocumented children to pursue higher education and legalize their status in the United States benefits American society.¹³⁸

A. THE DREAM ACT'S EFFECT ON ILLEGAL IMMIGRATION

Passage of the DREAM Act would not encourage new immigrants to come to the United States because it would not apply to them.¹³⁹ The Act would specifically limit eligibility to immigrants who have been physically present in the United States for a continuous period of not less than five years immediately preceding the date of the bill's enactment.¹⁴⁰ This means that an immigrant who entered the United States in the last five years or plans to immigrate illegally in the future would be ineligible to apply for relief under the DREAM Act.¹⁴¹ If the DREAM Act would not benefit new immigrants, it will not entice them to enter the United States illegally.

Even if the DREAM Act applied to new immigrants, studies have shown that access to public benefits is not a factor in an individual's decision to immigrate to the United States.¹⁴² Welfare has been studied as a public benefit to determine its effect on immigration.¹⁴³ This study reveals that the population of immigrants has grown four times faster in

¹³⁴ Andrew Stevenson, Note, *Dreaming of an Equal Future for Immigrant Children: Federal and State Initiatives to Improve Undocumented Students' Access to Postsecondary Education*, 46 ARIZ. L. REV. 551, 572 (2004).

¹³⁵ See <http://www.fairus.org>.

¹³⁶ *Id.*

¹³⁷ See *infra*, notes 140-205.

¹³⁸ National Immigration Law Center, Basic Facts about In-state Tuition for Undocumented Immigrant Students (July 2005), http://www.nilc.org/immlawpolicy/DREAM/in-state_tuition_basicfacts_052405_rev.pdf.

¹³⁹ See <http://hatch.senate.gov>.

¹⁴⁰ DREAM Act, S. 2075 109th Cong. § 4(a)(1) (2005).

¹⁴¹ See <http://hatch.senate.gov>.

¹⁴² National Immigration Law Center, Facts about Immigrants (July 2004), http://www.nilc.org/immspbs/research/pbimmfacts_0704.pdf.

¹⁴³ *Id.*

262 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 36]

areas that do not have generous “social safety nets” for immigrants as opposed to areas where welfare benefits are more generous.¹⁴⁴ The Supreme Court has also found that immigrants come to the United States seeking employment benefits and not educational benefits.¹⁴⁵ Because the potential to receive public benefits is not a draw for immigrants, it is unlikely that the educational benefits provided by the DREAM Act would entice an individual to immigrate to the United States illegally.

Finally, legalization programs generally do not influence immigration patterns.¹⁴⁶ Congress passed the Immigration Reform and Control Act (“IRCA”) in 1986, which granted legalization to over three million undocumented immigrants.¹⁴⁷ The IRCA is a much more expansive program than the DREAM Act and applies to many more immigrants, yet it did not increase the number of people apprehended at the United States-Mexico border before, during, or after its passage.¹⁴⁸ The DREAM Act would not encourage illegal immigration because it would be more narrowly drafted and would apply to a much narrower class of individuals than the IRCA.¹⁴⁹ Because public benefits do not attract illegal immigrants, the DREAM Act would not apply to new immigrants; as the IRCA did not influence immigration patterns, the DREAM Act would not encourage illegal immigration.

B. THE INHERENT UNFAIRNESS IN PUNISHING CHILDREN FOR THEIR PARENTS’ CHOICES

Over twenty years ago, the United States Supreme Court ruled that denying the children of illegal immigrants an elementary education is a violation of the Fourteenth Amendment’s Equal Protection Clause and therefore unconstitutional.¹⁵⁰ The *Plyler* Court stated that although persuasive arguments could be made in support of denying benefits to those choosing to enter the United States illegally, such arguments did not apply with equal force to the minor children of those individuals.¹⁵¹

¹⁴⁴ *Id.*

¹⁴⁵ *Plyler v. Doe*, 457 U.S. 202 at 229 (1982).

¹⁴⁶ Pia M. Orrenius and Madeline Zavodny, *Do Amnesty Programs Encourage Illegal Immigration? Evidence from IRCA*, Research Department Working Paper 0103, Federal Reserve Bank of Dallas, Oct. 2001, available at <http://www.dallasfed.org/research/papers/2001/wp0103.pdf>.

¹⁴⁷ *Id.*; see also Pub.L. 99-603 (Nov. 6, 1986).

¹⁴⁸ Pia M. Orrenius and Madeline Zavodny, *Do Amnesty Programs Encourage Illegal Immigration? Evidence from IRCA*, Research Department Working Paper 0103, Federal Reserve Bank of Dallas, Oct. 2001, available at <http://www.dallasfed.org/research/papers/2001/wp0103.pdf>.

¹⁴⁹ DREAM Act, S. 2075, 109th Cong. (2005).

¹⁵⁰ *Plyler*, 457 U.S. 202; see also U.S. Const. Amend. IV.

¹⁵¹ *Plyler*, 457 U.S. at 219-220.

Plyler emphasized that the children of undocumented immigrants are not responsible for acquiring their status as undocumented immigrants.¹⁵² Accordingly, the Court proclaimed that it is inherently unfair to specifically target undocumented children through legislation that denies them a free public education.¹⁵³ This rationale applies with equal force to the potential beneficiaries of the DREAM Act.

The DREAM Act would require that applicants enter the United States before the age of sixteen.¹⁵⁴ Thus it would be highly likely that when eligible DREAM Act applicants entered the country, they took no part in their parents' decision to immigrate illegally.¹⁵⁵ *Plyler* held that "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with *fundamental conceptions of justice*."¹⁵⁶ IIRIRA's restriction on educational access punishes the children of undocumented immigrants much like the Texas legislation that was declared unconstitutional in *Plyler*.¹⁵⁷ The denial of education at any level to an undocumented child is a violation of the fundamental conceptions of justice set forth in *Plyler*.¹⁵⁸

The *Plyler* Court emphasized the social, economic, intellectual, and psychological toll, as well as the obstacle to individual achievement suffered when undocumented children are deprived of an elementary education.¹⁵⁹ By refusing to ignore the costs borne by our nation in denying select groups the means to absorb the values and skills upon which our social order rests, the Court highlighted the societal benefits of providing an education to undocumented children.¹⁶⁰ The Court did not distinguish education at its various levels in addressing the social benefits of an educated populace.¹⁶¹ Since *Plyler*, higher education has become increasingly important to the achievement of financial success.¹⁶² Because the achievement of higher education offers similar, if not greater social benefits than the achievement of a high school education, *Plyler's* rationale should extend to protect undocumented

¹⁵² *Id.* at 220.

¹⁵³ *Id.*

¹⁵⁴ DREAM Act, S. 2075, 109th Cong. § 4 (2005).

¹⁵⁵ *Id.*

¹⁵⁶ *Plyler*, 457 U.S. at 220. (emphasis added).

¹⁵⁷ 8 USC § 1623 (2006).

¹⁵⁸ *Plyler*, 457 U.S. at 220.

¹⁵⁹ *Id.* at 221.

¹⁶⁰ *Id.*

¹⁶¹ *Plyler*, 457 U.S. at 203.

¹⁶² Nyhan, Paul, *College Divide Threatens to Keep the Poor in Poverty*, SEATTLE POST INTELLIGENCE, September 27, 2005, at A1, available at <http://seattlep-i.com>.

264 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 36]

students' access to higher education.¹⁶³ By limiting this access, IIRIRA denies society the benefits described in *Plyler* and denies these youth the means to absorb the values and skills upon which our social order continues to rest.¹⁶⁴ The DREAM Act proposes to repeal this unjust effect.¹⁶⁵

Not only does the policy of *Plyler* support passage of the DREAM Act, but it also supports the conclusion that the Act would not reward illegal activity.¹⁶⁶ According to the Supreme Court, undocumented children are not responsible for the decisions of their parents.¹⁶⁷ As demonstrated through individuals such as Sindy, the DREAM Act would benefit a small group of exceptional individuals deserving of legalization by virtue of their hard work, ability to contribute to society, and absence of fault in acquiring their undocumented status.¹⁶⁸ As *Plyler* pointed out, until undocumented youth are given the opportunity to advance in society by way of educational achievement, it will be difficult for them to raise the level of esteem in which society holds them.¹⁶⁹ The DREAM Act provides the opportunity for the advancement of immigrant youth that *Plyler* intended to preserve.¹⁷⁰

C. THE IMPACT OF THE DREAM ACT ON HIGHER EDUCATION

In 2004, the Congressional Budget Officer ("CBO") issued its cost estimate for implementation of the DREAM Act of 2003. The CBO estimated that the DREAM Act would increase direct spending for the student loan, Food Stamp, and Medicaid programs by \$90,000,000 over ten years.¹⁷¹ This estimate was based the ten-year period from 2004 to 2014.¹⁷² In accordance with their estimates, the CBO concluded that the DREAM Act would cause an insignificant increase in direct spending for

¹⁶³ *Plyler*, 457 U.S. at 203. "[p]ublic education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage: the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement." *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ DREAM Act, S. 2075 109th Cong. (2005).

¹⁶⁶ *Id.* at 202.

¹⁶⁷ *Id.*

¹⁶⁸ Joan Ryan, *Say Farewell to Sindy -- and to logic*, S.F. CHRONICLE, Sept. 8, 2005, at B1.

¹⁶⁹ *Plyler*, 457 U.S. at 222.

¹⁷⁰ *Id.* at 203.

¹⁷¹ Congressional Budget Office, Cost Estimate January 20, 2004, S. 2075, available at <http://www.cbo.gov/showdoc.cfm?index=4981&sequence=0&from=6>. The Food Stamp and Medicaid programs are social welfare programs available only to legal permanent residents or United States citizens.

¹⁷² *Id.*

2006] *EDUCATION FOR UNDOCUMENTED YOUTH* 265

these programs during its first year of enactment.¹⁷³ Therefore, despite arguments to the contrary, according to the CBO, implementation of the DREAM Act would not be prohibitively costly.¹⁷⁴

The CBO concluded that the DREAM Act would have a negligible effect on federal spending.¹⁷⁵ In drawing this conclusion, the CBO assumed that undocumented students would be less likely than other students to participate in federal student loan programs for fear of exposing the presence of other undocumented family members.¹⁷⁶ Nevertheless, those who do would apply for relief under the DREAM Act would have access to financial resources that would not otherwise be available.¹⁷⁷ In addition, the CBO predicted that approximately 13,000 undocumented students would enroll in higher education under the DREAM Act during the 2004 to 2005 academic year.¹⁷⁸ The CBO concluded that the DREAM Act would make approximately 46,000 college students eligible for adjustment of status to conditional permanent residency over the 2004 to 2014 period.¹⁷⁹

In addition, some DREAM Act applicants will not need financial aid, as they may decide to join the military after graduating from high school rather than pursue higher education. Joining the military will afford these youth conditional legal residency under the DREAM Act and will not require financial aid.¹⁸⁰ The DREAM Act would also apply retroactively to students who have already satisfied the requirements for adjustment of status under the Act at the time it is passed.¹⁸¹ These applicants could petition the Secretary of Homeland Security for permanent resident status without first becoming a conditional permanent resident.¹⁸² For example, if an undocumented student graduates from college before the DREAM Act is passed, this student will no longer need financial aid but could still use the Act to attain legal status.¹⁸³ This method likewise would not pose additional costs to federal spending for financial aid.

While it is true that implementation of the DREAM Act would

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ National Immigration Law Center, *The Economic Benefits of the DREAM Act and the Student Adjustment Act*, *supra* note 83.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ DREAM Act, S. 2075, 109th Cong. § 4 (2005).

¹⁸¹ DREAM Act, S. 2075, 109th Cong. § 6 (2005).

¹⁸² *Id.*

¹⁸³ *Id.*

266 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 36]

increase government spending for certain programs, admitting undocumented youth to universities will actually increase school revenues.¹⁸⁴ Although in-state tuition is a discount compared to the out-of-state tuition rate, the money paid by undocumented students attending college represents income that the school would not otherwise receive.¹⁸⁵ Because the DREAM Act would increase the number of undocumented students able to enroll in college, more of these students will attend college and thus represent new income to the school.¹⁸⁶ Consequently, according to the CBO's cost estimates of the DREAM Act and the boost these students will provide to school revenues, the Act would not be prohibitively costly to implement.¹⁸⁷

D. SOCIETAL BENEFITS OF THE DREAM ACT

Undocumented students testify that their awareness that they will have limited opportunities for advancement after high school deters them from making the effort required to succeed in or graduate from high school.¹⁸⁸ These sentiments have a negative impact on the high school drop-out rate, especially for Latinos, since many new immigrants come from Mexico and Latin America.¹⁸⁹ The high school drop-out rate for Latinos is more than twice the overall national average.¹⁹⁰ In 2000, the overall high school drop-out rates for sixteen to nineteen-year-olds was ten percent, while Latinos maintained a twenty-one percent drop-out rate.¹⁹¹

Passage of the DREAM Act would reduce drop-out rates because the DREAM Act would serve as an incentive for undocumented youth to complete high school.¹⁹² One incentive provided by the DREAM Act would be the opportunity to attain conditional legal permanent residency by completing high school.¹⁹³ Another incentive would be the possibility of attaining legal permanent residency by joining the military for two

¹⁸⁴ National Immigration Law Center, Basic Facts about In-state Tuition for Undocumented Minors, *supra* note 138.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* notes 186-210 and accompanying text.

¹⁸⁸ Interview with SAHE member, *supra* note 104.

¹⁸⁹ PEW Hispanic Center Fact Sheet, Latino Teens Staying in High School: A Challenge for all Generations (January 2004), <http://pewhispanic.org/files/factsheets/7.3.pdf>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² National Immigration Law Center, The Economic Benefits of the DREAM Act and the Student Adjustment Act, *supra* note 83.

¹⁹³ DREAM Act, S. 2075, 109th Cong. § 4 (2005).

2006] *EDUCATION FOR UNDOCUMENTED YOUTH* 267

years or attending college for two years.¹⁹⁴ In addition, the DREAM Act would require the Attorney General to grant a stay of removal for undocumented students over the age of twelve who are enrolled in primary or secondary schools.¹⁹⁵ The Attorney General could retract this stay of removal if the immigrant did not remain enrolled in a primary or secondary school, which serves an added incentive for students to remain in school.¹⁹⁶ Thus the DREAM Act would motivate youth to complete high school and potentially advance to college. If more students were to graduate from high school as a result of the DREAM Act, this would increase tax revenues and reduce government expenses.¹⁹⁷

If undocumented youth complete high school, continue onto college, and go on to become professionals, their fiscal contribution to society would increase.¹⁹⁸ By becoming professionals, their incomes would increase, stimulating spending and investment.¹⁹⁹ Youth who currently become involved in the criminal justice system due to their lack of alternatives could find alternatives to crime through the DREAM Act.²⁰⁰ Immigrant youth would be able to participate in the regular workforce rather than work as day laborers or domestic servants.²⁰¹ This data makes clear that the DREAM Act would not only benefit undocumented youth, but would benefit society as a whole.

In most cases, the government makes a substantial investment in the education of undocumented children because their access to elementary education is constitutionally protected.²⁰² It defies logic for the government to deny these students access to higher education when they will pay for such education with their own money.²⁰³ Although students may obtain a federal loan through the DREAM Act, like any other loan, students remain obligated to repay it. After investing in several years of public education for undocumented youth, it is wiser for the government to benefit from young peoples' financial investment by increasing their ability to contribute to the economy through the achievement of higher

¹⁹⁴ DREAM Act, S. 2075, 109th Cong. § 5 (2005).

¹⁹⁵ DREAM Act, S. 2075, 109th Cong. § 7 (2005).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ National Immigration Law Center, Economic Benefits of the DREAM Act and the Student Adjustment Act, *supra* note 83.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Jennifer Galassi, Comment, *Dare to Dream? A Review of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 24 CHICANO-LATINO L. REV. 79, 87 (2005).

²⁰³ Raphael Lewis, *In-State Tuition Not a Draw for Many Migrants*, THE BOSTON GLOBE, Nov. 9, 2005.

268 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 36

education.

V. CONCLUSION

The DREAM Act's provision of federal financial aid to undocumented students would put college within the financial reach of high-achieving youth who could not otherwise afford college tuition.²⁰⁴ By providing undocumented youth with conditional permanent residency, the Act would offer legal status to young immigrants who might never attain such status due to the intricacy and rigidity of current immigration law.²⁰⁵ The DREAM Act would be a comprehensive solution that would avoid depriving the United States of the benefit of thousands of bright young minds each year based on immigration status and would allow youth the opportunity for societal advancement. Because of the DREAM Act's unique impact upon children, Congress must give special attention the Convention on the Rights of the Child and the special needs of undocumented children.²⁰⁶ Congress must pass legislation to minimize the barriers to higher education that approximately 60,000 undocumented youth face each year.²⁰⁷ If America truly values an educated populace and equal opportunity, we must allow innocent undocumented children to become legal residents and pursue higher education in our country.

SUSANA GARCIA*

²⁰⁴ Fisher, *supra* note 34.

²⁰⁵ See generally ILRC Staff Attorneys, *A Guide for Immigration Advocates*, Vol. I & II (2004).

²⁰⁶ See *supra* notes 110-133 and accompanying text.

²⁰⁷ National Immigration Law Center, *DREAM Act: Basic Information*, *supra* note 32.

* J.D. Candidate, Golden Gate University School of Law, San Francisco, CA, May 2007; B.A., Chicano Studies and B.A., Communication, University of California, Santa Barbara, Santa Barbara, CA. I would like to thank Attorney Mark Silverman for helping me focus my topic and providing me the opportunity to work with some of the people referred to in my Comment. I would also like to thank the members of SAHE for helping me truly understand the need importance and the need for passage of the DREAM Act. I would also like to thank Professor Falstrom for assisting me with my legal thinking. I am also greatly appreciative of my many editors, Dominic Porrino, Todd Handler, and Kathleen Kunzman, as well as the rest of the Golden Gate Law Review Editorial Board for their valuable suggestions, feedback, and encouragement throughout this process. Thank you also to Michael Vidmar for his thorough cite checking efforts. Last but certainly not least, I would like to thank my family and best friends for their support, understanding, and faith in the success of this project.