

STATEMENT OF
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BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND
BORDER SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AT A HEARING ENTITLED
“S. 952, DEVELOPMENT, RELIEF, AND EDUCATION FOR
ALIEN MINORS (DREAM) ACT OF 2011”

PRESENTED
JUNE 28, 2011

Chairman Durbin, Ranking Member Cornyn, and members of the Subcommittee. Thank you for the opportunity to submit this testimony. My name is Professor Michael A. Olivas. I am the William B. Bates Distinguished Chair in Law at the University of Houston Law Center, where I teach both higher education law and immigration law. I am among the longest-serving teachers in the U.S. law professoriate in both these fields, having taught both subjects since 1982. I have written regularly about both fields, and particularly in the overlapping specialty of undocumented college students. My forthcoming book on *Plyler v. Doe*, NO UNDOCUMENTED CHILD LEFT BEHIND, will be published in late Fall by NYU Press, and it will be the first full length, single-authored book on the subject of undocumented school children and college students. In addition, I assisted in the drafting of the Texas statute enacting residency tuition for the State's undocumented students (the first such legislation in the US, in 2001), have assisted in writing such statutes adopted in six other states, have litigated cases in this area, and have served as an expert witness in several states' litigation.

Having seen the close encounters on the previous DREAM Act votes, I can only hope that this time your efforts will prove successful. In several venues, I have predicted that this important legislation would be enacted, as it had bipartisan support over almost its entire life, at least to this point, a compelling legislative history (including attaching it to a Pentagon budget resolution), and an even more compelling human narrative. I have been wrong. However, at the end of the day, many courageous if foolhardy students revealed themselves or had their immigration status made public, putting them and worse, their families, in a dangerous and insecure position. While some have received deferred

action or are in a legal limbo, a number have been removed or deported to countries they have never known. As I have written in several places, we currently have the worst of all worlds: students who act in the only way known to them—one in a long tradition of civil action for the disadvantaged, and an Administration that has refused to make a formal policy to defer action on them, pending the DREAM Act or comprehensive immigration reform. Sec. Napolitano’s assurances that such students are a “low priority” for removal are not the same as a fairly-administered and transparent policy on such relief. Thus, the newspapers are filled with stories about uneven enforcement, accidental revelations in the context of drivers’ licenses or traffic stops, and heartbreaking conditions.

Plyler v. Doe, the watershed 1982 Supreme Court decision that enabled these students to enroll in public K-12 schools, did not directly affect the condition of the children when they graduated, but more than a dozen states have enacted statutes to provide resident tuition, and a number of courts have upheld the statutes against restrictionist challenges. While the usual political dynamics have also restricted some students in a handful of states to be banned from public colleges, virtually all the major immigrant-receiving states have acted affirmatively to provide services and enable these innocent students to attend college. The premise is, of course, that the adults will someday act to provide comprehensive immigration reform and provide a pathway for these students, who will be at the front of the line. As recently as this year, three states have acted to provide new status and opportunities, including your own state, Senator Durbin. I am pleased that both my adopted state of Texas and my home state of New Mexico have acted to make college possible for undocumented students, many of whom

have overcome long and daunting odds to achieve at the very highest levels of their institutions. In fact, the status of many of them became evident when they won an academic award or robotic championship, or moved to post-baccalaureate success, only to encounter problems with licensing and state professional authorities or bar membership practices. If Congress enacts the DREAM Act, we will mobilize to work with these students as they navigate the practice and licensing protocols.

Table One: State Legislation Allowing Undocumented College Students to Establish Residency, 2011 (by Statute)

Texas, H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001) [amended by S.B. 1528, 79th Leg., Reg. Sess. (Tex. 2005)]; TEX. EDUC. CODE ANN. § 54.052

California, A.B. 540, 2001-02 Cal. Sess. (Cal. 2001); CAL. EDUC. CODE §68130.5

Utah, H.B. 144, 54th Leg., Gen. Sess. (Utah 2002); UTAH CODE ANN. § 53B-8-106

New York, S. B. 7784, 225th Leg., 2001 NY Sess. (NY 2002); N.Y. EDUC. LAW §355(2)(h)(8)

Washington, H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003); WASH. REV. CODE ANN § 28B. 15.012

Oklahoma, S.B. 596, 49th Leg., 1st Reg. Sess. (OK 2003) [financial assistance provisions rescinded, Oklahoma Taxpayer and Citizen Protection Act of 2007 (H.B. 1804)]; OKLA. STAT. ANN. TIT. 70, § 3242

Illinois, H.B. 60, 93rd Gen. Assemb., Reg. Sess. (Ill. 2003); 110 ILL. COMP. STAT. ANN. [amended by S.B. 2085, 97th Gen. Assemb., Reg. Sess. (Ill. 2011); 110 ILL. COMP. STAT. ANN.]

Kansas, H.B. 2145, 2003-2004 Leg., Reg. Sess. (KS 2004); K.S.A. §76-731a

New Mexico, S.B. 582, 47th Leg. Reg. Sess. (2005); N.M.STAT. ANN. §21-1-1.2

Nebraska, L.B. 239, 99th Leg. 1st Sess. (Neb. 2006); NEB REV. STAT. ANN. § 85-502

Wisconsin, 2009 Assembly Bill 75 (2009 WISCONSIN ACT 28); WIS. STAT. § 36.27

Maryland, S.B. 167, 2011 Leg., Reg. Sess. (Md. 2011); MD. CODE ANN. § 15-106.8

Connecticut, H.B. 6390, 2011 Leg., Reg. Sess. (Conn. 2011); CONN. GEN. STAT. § 10a-29

(source: Michael A. Olivas, NO UNDOCUMENTED CHILD LEFT BEHIND, NYU Press, forthcoming, 2012)

At this point, I wish to express my support and enthusiasm for the legislation under consideration. I do not wish to quibble over the details, although as I do the

immigration math on the proposed conditional permanent residence provisions, it would be well over a dozen years before some of these students would reach eligibility for U.S. citizenship, even those who posed no evidentiary problems, residency problems, or other of the many impediments that I found when I helped coordinated the various training and technical assistance in the 1986 IRCA efforts in Houston, the country's fourth-largest city. I urge your Subcommittee to take more testimony on these 1986 issues that arose, some of which persisted for several decades, and to make findings concerning the inevitable mistakes that some of these students made as they might have unknowingly received a benefit or status for which they were not eligible, or made paperwork mistakes. They should not be punished further for the harsh life that being undocumented in the United States can visit upon them. It will particularly important to preserve the post-baccalaureate professional licensing opportunities that these students will have, and that minor paperwork or verification not be allowed to preclude their eventual ability to become lawyers, teachers, architects, or medical professionals. That said, I support the overall efforts evident in this initiative, and will assist in any way that would be useful and appropriate.

There is one specific response I have, concerning the proposed repeal of Sec. 505 (8 U.S.C. 1623). While this very issue has vexed states and several courts, I urge its consideration, with editing, to clarify the problems that have arisen with 1623 and its companion provision, Sec. 505 (8 U.S.C. 1621). Here is the proposed repeal language, which I take from the useful URL your office has helpfully posted on its website:

http://durbin.senate.gov/public/index.cfm/files/serve?File_id=d15181fd-e37b-4ad6-9ca3-c5b2850c140c [at p. 24]:

SEC. 9. HIGHER EDUCATION ASSISTANCE

(b) RESTORATION OF STATE OPTION TO DETERMINE 13 RESIDENCY FOR PURPOSES OF HIGHER EDUCATION 14 BENEFITS —

**15 (1) IN GENERAL.—Section 505 of the Illegal
16 Immigration Reform and Immigrant Responsibility
17 Act of 1996 (8 U.S.C. 1623) is repealed.**

While a number of thoughtful persons believe that this repeal would simplify matters, doing so without clarifying Sec. 1621 would not convey to the states that residency tuition is purely a state status, one that Congress has no role in determining. Moreover, it is the provisions of 1621 that have been problematic. If the DREAM Act were to pass tomorrow, states that wished to allow in-state tuition to the undocumented would still need to enact a statute to do so—irrespective of 1621 and 1623. I have incorporated the 1621 and 1623 provisions here, and have bolded the amendments I would make. As is evident, simply repealing 1623, as the draft of the “DREAM Act of 2011,” S. 952, proposes, creates mischief by not adjusting 1621, as appropriate. [My suggestions for additions and deletions are bolded.]

IIRIRA, CHAPTER 14--RESTRICTING WELFARE AND PUBLIC BENEFITS FOR ALIENS

§ 1621. Aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits

(a) In general

Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not--

(1) a qualified alien (as defined in section 1641 of this title),

- (2) a nonimmigrant under the Immigration and Nationality Act, or
- (3) an alien who is paroled into the United States under section 212(d)(5) of such Act for less than one year, is not eligible for any State or local public benefit (as defined in subsection (c) of this section) [or
- (4) an alien granted the eligibility of residency tuition by a state statute and financial assistance as defined by applicable federal or state law]

(b) Exceptions

Subsection (a) of this section shall not apply with respect to the following State or local public benefits:

- (1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in section 1396b(v)(3) of Title 42) of the alien involved and are not related to an organ transplant procedure.
- (2) Short-term, non-cash, in-kind emergency disaster relief.
- (3) Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.
- (4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety.

(c) "State or local public benefit" defined

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means--

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, **[DELETE postsecondary education]**, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

(2) Such term shall not apply--

[DELETE: (A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association

approved in Public Law 99-239 or 99-658 (or a successor provision) is in effect;]

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Secretary of State, after consultation with the Attorney General; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

(1) Such term does not include any Federal public benefit under section 1611(c) of this title.

(d) State authority to provide for eligibility of illegal aliens for State and local public benefits

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.

[ADD: (e) Any alien provided relief under this section may be determined to be eligible for state residency tuition, state postsecondary financial assistance, and professional licensure, should the state institution, agency, or licensing authority deem the alien otherwise eligible. Nothing in this section is intended to limit the relief that may be deemed appropriate by such legislature or authority.]

[ADD: (f) no provision of this section shall affect students who are non-immigrants, whether or not they are required to maintain a foreign domicile.]

[DELETE: § 1623. Limitation on eligibility for preferential treatment of aliens not lawfully present on basis of residence for higher education benefits

(a) In general

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

(b) Effective date

This section shall apply to benefits provided on or after July 1, 1998.]

The suggestions I have made to amend 1621 and 1623 are derived from experiences that have arisen since 1996, when they were enacted in two companion pieces of federal legislation, and which have been evident in cases (federal and state), institutional practices, licensing issues, and in immigration and nationality law, the venue where all these twists and turns end. I believe that the DREAM Act would not be a silver bullet, and would still require state law and licensing practices to align. But at the present, we have the worst of all worlds, and no good pathways for the students who find themselves in this situation due to no fault of perfidy of their own. We also have great unevenness on the part of states, at least in part due to the complex and counterintuitive issues presented in this area.

Thank you again for your diligence in this pathway, and I stand with other immigration advocates and scholars to promise that if the DREAM Act is signed into law, we will do everything we can to assist in its fair and generous implementation. These young adults are our family members, and deserve the same opportunities as our native-born children. Moreover, we need them and their talents, so evident in their many achievements in the face of prevailing headwinds.

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(Note: This testimony is solely my own, and no endorsement is attributed to the University of Houston or the University of Houston Law Center)