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The Promise of *Plyler*: Public Institutional In-State Tuition Policies for Undocumented Students and Compliance with Federal Law

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The Promise of *Plyler*: Public Institutional In-State Tuition Policies for Undocumented Students and Compliance with Federal Law

Nancy B. Anderson*

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* Candidate for J.D., Washington and Lee University School of Law, May 2014. Thank you to Professor Joan Shaughnessy and the Editorial Board of the Washington and Lee Law Review for their guidance and assistance. Thank you also to my family and friends for their support and encouragement throughout law school and always.

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I. Introduction

While federal policymakers loudly combat the rapidly surging cost of higher education in the United States, consider a group of students who soundlessly remain outcasts: those who cannot establish their residency status in the United States. These students are ineligible recipients in the federal government's massive higher education funding push—the federal student aid programs—and therefore remain bereft of a resource relied upon by nearly half of the nation's undergraduate students.¹ Undocumented students thus face a prohibitive

1. See 20 U.S.C. § 1091(a)(5) (2012) (requiring a student be a U.S. citizen

complication to their education: operatively, the limitation concludes the education of many students once promisingly educated in the nation's public primary and secondary schools.²

In the past decade, states answered these concerns with legislation allowing such students to receive in-state tuition rates at public colleges and universities in the state regardless of residency status.³ A majority of states, however, do not have such laws, and the 2012 failure of the federal Development, Relief, and Education for Alien Minors (DREAM) Act,⁴ which aimed to alleviate the financial burden on undocumented students, levied additional urgency to resolve this limitation. With a nod to this pressure, public colleges and universities and state educational boards enacted institutional policies to provide in-state tuition to undocumented students without affirmative approval from the state legislature.⁵

This Note examines federal impediments to institutional or state policy delivered without affirmative state legislation. This Note argues that Section 411 of the federal Personal

or national to receive any funding under the federal student aid programs). In the most recent compilation of federal student aid data by the U.S. Department of Education, 47% of undergraduate students relied on the federal student aid programs to finance their education. *Fast Facts: Financial Aid*, NAT'L CENTER FOR EDUC. STAT. AT THE U.S. DEPT OF EDUC. (2009), <http://nces.ed.gov/fastfacts/display.asp?id=31> (last visited Nov. 10, 2013) (on file with the Washington and Lee Law Review).

2. See EDUCATORS FOR FAIR CONSIDERATION, THE CASE FOR UNDOCUMENTED STUDENTS IN HIGHER EDUCATION 4 (2010), http://e4fc.org/images/E4FC_The_Case.pdf (noting that only 61% of undocumented students who arrive before age fourteen go to college, compared to 76% of permanent legal residents and 71% of residents born in the United States). Nearly 65,000 to 80,000 undocumented students graduate from U.S. public high schools every year. *Id.* In *Plyler v. Doe*, the Supreme Court prohibited states from refusing primary and secondary public education to undocumented students. See 457 U.S. 202, 221 (1982) (prohibiting the state from charging tuition to those who cannot prove legal residency).

3. See *infra* Part II.A (discussing current state law).

4. See Comprehensive Immigration Reform Act of 2011, S. 1258, 112th Cong. (2012) (attempting to implement previous versions of the DREAM Act, but failing in the Senate). The DREAM Act, in its various iterations, aimed to grant temporary legal status to certain immigrant students and eliminate penalties to allow states to determine residency for the purposes of in-state tuition. See *id.* (containing the most recent DREAM Act provisions).

5. See *infra* Part II.B (examining institutional policies).

Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),⁶ in its own right, poses no bar to institutional policy of this nature because it plainly does not encompass reduced tuition in its prohibitions. In addition, this Note considers that potential violations of Section 411 are not justiciable in a federal suit from a private plaintiff because the provision carries no private right of action, faces prohibitive sovereign immunity and standing obstacles, and lacks momentum as a constitutional issue. Finally, this Note argues that Section 411 is feasibly justiciable in state court within, notably, a state consumer protection lawsuit brought by a state attorney general.

Part II summarizes current state law, including states in which there is affirmative legislation providing in-state tuition rates to undocumented students and states in which there is affirmative legislation denying in-state tuition rates for such students.⁷ This Part looks closely at institutional policies in states in which the legislature has not spoken on the issue—particularly Rhode Island, Michigan, and Colorado⁸—and explores how these policies operate and conform to existing law in other states.⁹

Part III discusses federal statutory obstacles to institutional policy issued without affirmative state legislation. In particular, this Part studies Section 411 of PRWORA as the vital test to such institutional policy while recognizing the bearing of Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)¹⁰ as a useful corollary to the institutional policy discussion provoked by Section 411.¹¹ This Part considers

6. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 411, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 8 U.S.C. § 1621 (2012)).

7. See *infra* Part II.A (discussing the existing state law).

8. In August 2013, the Colorado legislature did pass a law granting in-state tuition to undocumented students. See *infra* Part II.B.3 (discussing the Colorado law). The Colorado example, however, remains illustrative.

9. See *infra* Part II.A. (discussing the policies in Rhode Island, Colorado, and Michigan).

10. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 505, Pub. L. No. 104-208, 110 Stat. 3009-672 (codified at 8 U.S.C. § 1623 (2012)).

11. See *infra* Part III.A–B (examining Section 505 and Section 411).

that the incorporation of “postsecondary education” as a prohibited state or local public benefit under Section 411 was not meant to include reduced tuition, but instead was meant to encompass only state grants and scholarships.¹² Including reduced tuition as a prohibited benefit is inconsistent with existing case law examining Section 411, congressional intent in enacting Section 411, and the Supreme Court’s assessment of public education in *Plyler v. Doe*¹³ and *Grutter v. Bollinger*.¹⁴

Part IV observes that neither the federal government nor the federal courts will police potential violations of Section 411 because there is no indication any federal agency has enforced the provision in the sixteen years since its enactment, the provision lacks a federal private right of action, and the provision harbors sovereign immunity and standing limitations in federal court. Further, this Part concludes that any constitutional claims are substantively weak.¹⁵ Part V argues that, despite these challenges in federal court, a state attorney general could force consideration of the federal statute through a state claim under state consumer protection law to protect the integrity of both public universities and state citizens.¹⁶

II. In-State Tuition Law and Policy

A. Current State Law

Three states explicitly ban undocumented students from receiving in-state tuition rates at public colleges and universities: Arizona, Georgia, and Indiana.¹⁷ South Carolina prohibits

12. See *infra* Part III.B (discussing the interpretation of Section 411).

13. 457 U.S. 202 (1982).

14. 539 U.S. 306 (2003).

15. See *infra* Part IV (discussing the justiciability limitations in federal court).

16. See *infra* Part V (examining the possibility of a state law claim exploring Section 411).

17. See ARIZ. REV. STAT. ANN. § 15-1803(B) (2012) (“[A] person who was not a citizen or legal resident of the United States or who is without legal immigration status is not entitled to classification as an in-state student.”); GA. CODE ANN. § 20-3-66(d) (2012) (“Noncitizen students shall not be classified as in-

undocumented students from enrolling in public institutions at all,¹⁸ and Alabama forbids undocumented students from enrolling in state two-year institutions.¹⁹ Fifteen states employ laws affirmatively granting eligibility for in-state tuition rates at public colleges and universities: California, Colorado, Connecticut, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Mexico, New York, Oklahoma, Oregon, Texas, Utah, and Washington.²⁰ Many of the remaining state legislatures have considered bills modifying tuition-rate policy for undocumented students,²¹ but legislation of this nature is politically charged and

state for tuition purposes unless the student is legally in this state and there is evidence to warrant consideration of in-state classification as determined by the board of regents.”); IND. CODE § 21-14-11-1(1) (2012) (“An individual who is not lawfully present in the United States is not eligible to pay the resident tuition rate that is determined by the state educational institution.”); *see also* Laura A. Hernandez, *Dreams Deferred—Why In-State College Tuition Rates Are Not a Benefit Under the IIRIRA and How This Interpretation Violates the Spirit of Plyler*, 21 CORNELL J. L. PUB. & POL’Y 525, 556–60 (2012) (surveying state laws denying in-state tuition benefits for undocumented students).

18. *See* S.C. CODE ANN. § 59-101-430 (2012) (“An alien unlawfully present in the United States is not eligible to attend a public institution of higher learning in this State.”).

19. *See* ALENE RUSSELL, AM. ASSOC. OF STATE COLLS. AND UNIVS., STATE POLICIES REGARDING UNDOCUMENTED COLLEGE STUDENTS: A NARRATIVE OF UNRESOLVED ISSUES, ONGOING DEBATE, AND MISSED OPPORTUNITIES 4 (2011), <http://www.aascu.org/WorkArea/DownloadAsset.aspx?id=4524> (describing the Alabama prohibition on in-state tuition for the state’s public two-year colleges).

20. *See Undocumented Students: State Action*, NAT’L CONF. OF ST. LEGISLATURES (July 2013), <http://www.ncsl.org/research/education/undocumented-student-tuition-state-action.aspx> (last visited Nov. 10, 2013) (describing states that currently have laws affirmatively granting in-state tuition to undocumented students) (on file with the Washington and Lee Law Review). In Oklahoma, the legislature amended its law to allow the Oklahoma Board of Regents to decide whether to grant in-state tuition to undocumented students; currently, the Board still allows it. *Id.* In 2013, Colorado, Minnesota, and Oregon joined the ranks of states with legislation affirmatively granting in-state tuition to undocumented students. *Id.*

21. *See* RUSSELL, *supra* note 19, at 2 (noting that, as of 2011, 32 states have considered or passed in-state tuition legislation). The number of state legislatures grappling with this issue unceasingly seesaws. In 2013, 23 state legislatures considered bills to improve access to higher education for undocumented students, including legislatures that previously struck down such legislation. NAT’L IMMIGRATION LAW CTR., STATE BILLS ON ACCESS TO EDUCATION FOR IMMIGRANTS 2013 1, 1–6 (2013).

therefore notably difficult to enact, often languishing in the hands of lawmakers.²²

Laws providing in-state tuition rates for undocumented students are also controversially received—public disagreement is nearly guaranteed, and legal challenge often awaits. For example, Maryland lawmakers passed a bill in 2011 allowing undocumented students to receive in-state tuition rates.²³ Governor Martin O'Malley's ratifying signature incited a public petition condemning the law and sending it to a voter's referendum for its reckoning; the law survived the popular vote in November 2012, after over a year of controversy.²⁴ Similarly, Wisconsin Governor Scott Walker revoked Wisconsin's 2009 legislative tuition break in his 2011 budget after significant public disagreement over the law's enactment.²⁵ In 2002, the Virginia attorney general issued an opinion forbidding public colleges and universities from enrolling undocumented students

22. See, e.g., Tim Hoover, *Illegal Immigrant Tuition Break Fails Again in Colorado House*, DENVER POST (Apr. 26, 2012), http://www.denverpost.com/breakingnews/ci_20481859/illegal-immigrant-tuition-break-fails-again-colorado-house (last visited Nov. 10, 2013) (describing the repeated failure of the Colorado tuition bill) (on file with the Washington and Lee Law Review). The Colorado General Assembly made six attempts at a legislative in-state tuition break before passing the 2013 bill. *Id.*; see also RUSSELL, *supra* note 19, at 4 (describing legislative attempts to pass laws granting in-state tuition); NAT'L IMMIGRATION LAW CTR., *supra* note 21, at 1–8 (detailing the progress of 2013 legislation aimed at tuition laws for undocumented students).

23. S.B. 167, 431st Gen. Assemb., Reg. Sess. (Md. 2011), <http://mgaleg.maryland.gov/2011rs/bills/sb/sb0167e.pdf>; see also Ann E. Marimow, *Gov. Martin O'Malley Signs Immigrant Tuition Bill Into Law in Maryland*, WASH. POST (May 20, 2011), http://www.washingtonpost.com/local/politics/gov-martin-omalley-signs-immigrant-tuition-bill-into-law-in-maryland/2011/05/10/AFNNz8jG_story.html (last visited Nov. 10, 2013) (describing the enactment of Maryland S.B. 167) (on file with the Washington and Lee Law Review).

24. See *Unofficial 2012 Presidential General Election Results for All State Questions*, MD. ST. BD. OF ELECTIONS (Nov. 28, 2012, 8:56:01 PM), http://elections.state.md.us/elections/2012/results/general/gen_qresults_2012_4_00_1.html (last visited Nov. 10, 2013) (reporting the tuition measure as passed) (on file with the Washington and Lee Law Review).

25. See NAT'L CONF. OF STATE LEGISLATURES, *supra* note 20 (noting the Wisconsin revocation); see also STATE OF WIS. 2011–13 EXEC. BUDGET 12 (2011), http://www.doa.state.wi.us/debf/pdf_files/bib1113.pdf (describing Governor Scott Walker's budget plan revoking the in-state tuition availability).

or granting in-state tuition to undocumented students.²⁶ Thus, laws providing a reduced tuition rate to undocumented students are difficult to enact and difficult to sustain because of the divided political climate and public opposition they foster. Because of these barriers, a majority of states remain without legislation, and hundreds of universities remain without legislative guidance.

B. Shifting Toward Institutional Policy

The difficulty of formal legislative enactment affords an opening to accommodate undocumented students living in the state. In systems where a nonlegislative body has the power to make tuition classifications, that body can adjust the tuition rate for this category of students. Similar tuition classifications exist throughout public higher education. The most straightforward and common division is between in-state and out-of-state legal residents²⁷—the legality of that classification is generally undisputed, and the Supreme Court legitimated the state's interest in providing a reduced tuition rate to its bona fide

26. See Memorandum from Alison P. Landry, Assistant Att'y Gen., Commonwealth of Va. Office of the Att'y Gen. on Immigration Law Compliance Update (Sept. 5, 2002), <http://www.schev.edu/adminfaculty/immigrationmemo9-5-02apl.pdf> (stating the Virginia attorney general's opinion that Virginia public colleges and universities should not enroll undocumented students). The U.S. District Court for the Eastern District of Virginia invalidated the state attorney general's position in 2004. See *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 605 (E.D. Va. 2004) (finding the attorney general's position that undocumented students may not be enrolled based on federal law invalid). After the state's attorney general said enrollment alone violated IIRIRA and PRWORA, the court concluded that enrollment alone is not within the definition of "benefit" under either statute. *Id.*

27. See, e.g., *Fees, Tuition, and Estimated Budget 2013-2014*, UNIV. OF CAL. AT L.A. UNDERGRADUATE ADMISSIONS (last updated May 15, 2013), <http://www.admissions.ucla.edu/prospect/budget.htm> (last visited Nov. 10, 2013) (listing the different tuition rates for in-state residents and nonresidents) (on file with the Washington and Lee Law Review); *Tuition, Fees, & Estimated Cost of Attendance*, UNIV. OF VA. OFF. OF UNDERGRADUATE ADMISSION (last updated Oct. 12, 2013, 6:22 AM), <http://www.admission.virginia.edu/admission/tuition> (last visited Nov. 10, 2013) (detailing the different cost of attendance for residents of Virginia and nonresidents) (on file with the Washington and Lee Law Review).

residents.²⁸ Universities, however, often make less publicized tuition classifications as well. For example, tuition reciprocity agreements allow some out-of-state residents to receive a reduced rate at public universities in neighboring states; this rate is generally available only to an out-of-state student whose home state is a party to the reciprocity agreement, foreclosing the reduced rate to other out-of-state students.²⁹ These arrangements allow out-of-state residents to pay reduced rates at public institutions in neighboring states that are parties to the agreement; often, the reduced rate is 150% of the in-state rate.³⁰ In some states, this arrangement consists of a simple agreement with a neighbor state that allows students in each state to pay in-

28. See *Martinez v. Bynum*, 461 U.S. 321, 325–33 (1983) (“A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents.”). In *Martinez*, the Court clarified that the meaning of residence can vary, but a policy may certainly consider both “physical presence and intention to remain” without violating the Equal Protection Clause. See *id.* at 327–30 (finding tuition policy favoring residents constitutional).

29. See, e.g., *Western Undergraduate Exchange*, W. INTERSTATE COMM’N FOR HIGHER EDUC., <http://www.wiche.edu/wue> (last visited Nov. 10, 2013) (explaining the tuition reciprocity system) (on file with the Washington and Lee Law Review). There are four major tuition-reciprocity systems in the United States: the Western Interstate Commission for Higher Education, Western Undergraduate Exchange (WICHE–WUE), the Southern Regional Education Board Academic Common Market (SREB), the New England Board of Higher Education Tuition Break program (NEBHE), and the Midwestern Higher Education Compact (MHEC). *Id.*; *Academic Common Market*, S. REGIONAL EDUC. BOARD, http://www.sreb.org/page/1304/academic_common_market.html (last visited Nov. 10, 2013) (explaining the SREB system) (on file with the Washington and Lee Law Review); *Regional Student Program Tuition Break*, NEW ENG. BOARD OF HIGHER EDUC., <http://www.nebhe.org/programs-overview/rsp-tuition-break/overview/> (last visited Nov. 10, 2013) (describing the NEBHE tuition break program) (on file with the Washington and Lee Law Review); *Midwest Student Exchange Program*, MIDWESTERN HIGHER EDUC. COMPACT, <http://msep.mhec.org/> (last visited Nov. 10, 2013) (describing the MHEC tuition break program) (on file with the Washington and Lee Law Review).

30. See, e.g., *Western Undergraduate Exchange*, W. INTERSTATE COMMISSION FOR HIGHER EDUC., <http://www.wiche.edu/wue> (last visited Nov. 10, 2013) (“Students who are residents of WICHE states are eligible to request a reduced tuition rate of 150% of resident tuition at participating two- and four-year college programs outside of their home state.”) (on file with the Washington and Lee Law Review).

state tuition rates at public universities of the other state.³¹ Similarly, many public universities charge a different rate for different programs of study at the university.³² The law abides these classifications and universities regularly utilize them.

Given these accepted categories, the existence of a tuition classification alone is not enough to render a tuition classification for undocumented students unlawful. Accordingly, institutions have begun offering reduced tuition rates for undocumented students.³³ Institutional policy tends to mirror the terms stipulated in existing state laws, which are reasonably consistent: the student must (1) have attended a state high school for three years or graduated from a state high school;³⁴ (2) be registered with or currently enrolled in a state college or university; and

31. See, e.g., *Tuition Reciprocity*, MINN. OFF. OF HIGHER EDUC., http://www.ohe.state.mn.us/mPg.cfm?pageID=813&1534-D83A_1933715A=1d7188c51_3e76f1f094bf8d1b85694f136c2f9e1 (last visited Nov. 10, 2013) (explaining that Minnesota has reciprocity agreements with Wisconsin, North Dakota, South Dakota, one institution in Iowa, and the Canadian province of Manitoba) (on file with the Washington and Lee Law Review).

32. See, e.g., *Tuition Costs, Fall/Spring 2013–2014*, UNIV. OF TEX. AT AUSTIN, <http://www.utexas.edu/tuition/costs.html> (last visited Nov. 10, 2013) (showing different tuition rates depending on undergraduate program of study) (on file with the Washington and Lee Law Review); *CU-Boulder Full-Time Tuition and Fees by School/College and Year*, UNIV. OF COLO. AT BOULDER OFF. OF PLAN., BUDGET, & ANALYSIS (last updated Aug. 26, 2012), <http://www.colorado.edu/pba/budget/tuitionfees/tuitfee.HTML> (last visited Nov. 10, 2013) (listing variable tuition rates by program of study and residency) (on file with the Washington and Lee Law Review).

33. See, e.g., *Understanding Metropolitan State University of Denver's Colorado High School/GED Non-resident Tuition Rate*, OFF. OF THE PRESIDENT, METRO. STATE UNIV. OF DENVER, <http://www.msudenver.edu/president/chsged/> (last visited Nov. 10, 2013) [hereinafter *MSU Nonresident Rate Memorandum*] (explaining the university's new in-state tuition policy for undocumented students) (on file with the Washington and Lee Law Review); S.B. 12-015, 68th Gen. Assemb., 2d Reg. Sess. (Colo. 2012), http://www.leg.state.co.us/CLICS/CLICS2012A/csl.nsf/fsbillcont3/3DA9CD12AA62452F87257981007E06CA?Open&file=015_01.pdf (including the language of the failed ASSET bill).

34. In some variations, the law requires that the student also lived in the state with a parent or guardian while attending that high school. See, e.g., TEX. EDUC. CODE ANN. §§ 54.052(a)(3), 54.053(3) (2012) (classifying as a resident a person who graduated from a public or private high school in Texas or received the equivalent of a high school diploma, and maintained a residence continuously in Texas for three years preceding the date of graduation).

(3) sign an affidavit certifying he is currently seeking legal residency status or will do so as soon as he is eligible.³⁵ These laws have withstood some legal challenge in state courts,³⁶ and, though questioned and controversial, their terms have proceeded legally unscathed for the last decade. In this framework, three notable efforts to reduce tuition for undocumented students in the absence of state legislation affirmatively reducing that tuition merit further mention.³⁷

35. See, e.g., CAL. EDUC. CODE § 68130.5 (West 2001) (listing the requirements for in-state tuition for a student who cannot prove legal residency in California); N.Y. EDUC. LAW § 6301(5) (2002) (defining “resident” for tuition classification purposes). A student qualifies for in-state tuition under California law if he or she (1) attended a California high school for three or more years; (2) graduated from a California high school or received the equivalent GED; (3) is registered or currently enrolled in a California community college, a California state university, or a University of California institution; and (4) signed a statement with the college or university stating he or she will apply for legal residency as soon as he is eligible. CAL. EDUC. CODE § 68130.5. In New York, the resident definition includes a student who (1) attended a New York high school for two or more years, graduated, and applied to attend a City University of New York (CUNY) institution within five years or (2) attended a New York state program for the GED exam preparation and applied to attend a CUNY institution within five years; and (3) filed an affidavit stating the student has applied or will apply for legal residence. N.Y. EDUC. LAW § 6301(5). See also ALEJANDRA RINCON, THE COLLEGE BD., REPOSITORY OF RESOURCES FOR UNDOCUMENTED STUDENTS 2–39 (2012), http://professionals.collegeboard.com/profdownload/Repository-Resources-Undocumented-Students_2012.pdf (summarizing legal requirements in each state granting in-state tuition to undocumented students).

36. See, e.g., *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 864 (Cal. 2010) (upholding California’s in-state tuition for undocumented students law).

37. Arizona and Massachusetts are also struggling with this controversy; however, both tie reduced-tuition eligibility to eligibility under the federal Deferred Action for Childhood Arrivals (DACA) law, which defers deportation enforcement for individuals who meet certain criteria, and allows them to receive work permits. In November 2012, Massachusetts Governor Deval Patrick directed the Massachusetts Department of Higher Education to offer the in-state rate to undocumented students eligible for work permits in Massachusetts. See Kevin Robillard, *Report: Mass. to Offer In-State Tuition to Illegal Immigrants*, POLITICO (last updated Nov. 19, 2012, 12:10 PM), <http://www.politico.com/news/stories/1112/84040.html> (last visited Nov. 10, 2013) (announcing the Massachusetts policy) (on file with the Washington and Lee Law Review). Because these laws implicate federal law for the eligibility determination and therefore raise different legal questions, this Note will focus on examples that do not employ that implication.

1. *Rhode Island Board of Governors*

The Rhode Island Board of Governors for Higher Education (the Board) is the regulatory agency responsible for running the three public institutions in Rhode Island: the Community College of Rhode Island, Rhode Island College, and the University of Rhode Island.³⁸ The Rhode Island General Assembly failed to pass its 2010 bill proposing to exempt undocumented students from paying nonresident tuition.³⁹ In its wake, the Board voted to adopt an amendment to its residency policy, which sets tuition rates at the public institutions in Rhode Island. The amendment allows certain undocumented students to receive the in-state tuition rate at its public universities, effective Fall 2012.⁴⁰ The policy amendment defines “resident” to require that:

The student has attended an approved Rhode Island high school for three (3) or more years and continues to live in Rhode Island; and [t]he student has graduated from an approved Rhode Island high school or received a high school equivalency diploma from the state of Rhode Island; and [i]f the student is not a U.S. citizen and/or does not have lawful immigration status, he or she has filed an affidavit with the institution stating that the student has filed an application for lawful immigration status, or will file such an application as soon as he or she is eligible to do so. The failure of a student to file an application for lawful immigration status as soon as he or she is eligible will result in a forfeiture of in-state tuition rates in the future.⁴¹

The requirements mirror both the language of state law in other states and the failed Rhode Island bill.⁴² Despite public criticism,

38. See R.I. GEN. LAWS § 16-59-4 (2006) (describing the responsibilities of the Board).

39. H.B. 7172, 2010 Gen. Assemb., Reg. Sess. (R.I. 2010).

40. See R.I. Bd. of Governors for Higher Educ., Meeting Minutes of Sept. 26, 2011, at 5–7 (Sept. 26, 2011), <http://www.ribghe.org/pdfs/2b050712.pdf> (voting to adopt the new residency policy granting in-state tuition to undocumented students in Rhode Island); R.I. Bd. of Governors for Higher Educ., Residency Policy (Effective Fall 2012) 1–2 [hereinafter R.I. Residency Policy], <http://www.ribghe.org/residency1for2012.pdf> (allowing an undocumented student to receive in-state tuition and fees upon satisfying certain requirements).

41. R.I. Residency Policy, *supra* note 40, at 1–2.

42. See H.B. 7172, 2010 Gen. Assemb., Reg. Sess. (R.I. 2010) (listing the

there has been no legal challenge to the Rhode Island policy to date, and the policy is currently in effect.⁴³

2. Michigan: The University of Michigan

In 2013, the University of Michigan became the most recent institution to offer in-state tuition to undocumented students without the affirmative signature of the state legislature. Like Rhode Island, the Board of Regents for the University of Michigan passed a measure allowing in-state tuition for undocumented students who (1) attended high school in Michigan for at least 3 years, (2) attended middle school in Michigan for 2 years prior to high school, and (3) matriculated at the University of Michigan within 28 months of graduating from a Michigan high school.⁴⁴ Michigan has no state law affirmatively providing these benefits, and the measure only affects tuition at the University of Michigan; other state schools still charge the out-of-state rate to undocumented students.⁴⁵

3. Colorado: Metropolitan State University of Denver

Prior to the 2013 Colorado legislation affirmatively providing in-state tuition to undocumented students, Metropolitan State University of Denver (MSU) implemented an institutional policy providing in-state tuition. Its policy, however, remains

proposed requirements for an undocumented student seeking in-state tuition); *supra* Part II.A (describing the requirements from existing state law).

43. See Tina Susman, *Rhode Island Gives In-State Tuition to Illegal Immigrant Students*, L.A. TIMES, Sept. 27, 2011, at 9, available at <http://latimesblogs.latimes.com/nationnow/2011/09/rhode-island-approves-in-state-tuition-for-children-of-.html> (explaining public controversy over the Rhode Island policy).

44. UNIV. OF MICH. REGENTS, GUIDELINES FOR IN-STATE TUITION 7 (2013), [http://www.vpcomm.umich.edu/pa/key/documents/INSTATETUITIONGUIDELINE S.pdf](http://www.vpcomm.umich.edu/pa/key/documents/INSTATETUITIONGUIDELINE%20S.pdf).

45. See Aaron Guggenheim, *Regents Pass Measure to Provide In-State Tuition for Undocumented Immigrants and Veterans*, MICH. DAILY (July 18, 2013), <http://www.michigandaily.com/news/regents-pass-measures-provide-state-tuition-undocumented-immigrants-and-veterans> (last visited Dec. 11, 2013) (discussing the recently enacted University of Michigan policy) (on file with the Washington and Lee Law Review).

illustrative of a controversial institutional policy that explicitly eliminates direct state subsidies that would typically be included in an in-state tuition rate. MSU is a public university in Colorado serving nearly 23,000 students.⁴⁶ When the Colorado legislature failed to pass its in-state tuition for undocumented students bill⁴⁷ for the sixth time, the MSU Board of Trustees voted to adopt an institutional policy providing a discounted tuition rate to students who live in Colorado but cannot prove lawful presence, effective August 2012.⁴⁸ Without this policy, such students would be permitted to enroll, but would be treated as out-of-state residents paying the full out-of-state tuition rate. The policy, however, allows the students to pay less than the full out-of-state tuition rate, though they still pay more than a resident of Colorado who is classified as in-state based on proof of lawful presence.⁴⁹ In other words, undocumented students are not paying the same rate as either an in-state resident or an out-of-state resident—they fall within a separate classification altogether. A legal Colorado resident attending MSU pays \$4,304 per academic year (two semesters); an out-of-state student attending MSU pays \$15,985.20 per academic year.⁵⁰ An undocumented student taking advantage of the nonresident tuition policy pays \$7,157.04 per academic year.⁵¹

The variation in the rates results from overt exclusion of all direct per-student state stipends from the rate for undocumented students.⁵² The state typically subsidizes part of the in-state rate

46. See *About MSU Denver*, METRO. ST. UNIV. OF DENVER, <http://www.msudenver.edu/about/> (last visited Nov. 10, 2013) (describing the structure of Metropolitan State University Denver) (on file with the Washington and Lee Law Review).

47. See S.B. 12-015, 68th Gen. Assemb., 2d Reg. Sess. (Colo. 2012), http://www.leg.state.co.us/CLICS/CLICS2012A/csl.nsf/fsbillcont3/3DA9CD12AA62452F87257981007E06CA?Open&file=015_01.pdf (outlining Colorado's most recent failed tuition bill, ASSET).

48. See *MSU Nonresident Rate Memorandum*, *supra* note 33 (allowing students who cannot prove legal residence in Colorado but attended high school in the state to receive in-state tuition).

49. See *id.* (explaining the tuition classifications at MSU).

50. *Id.*

51. *Id.*

52. See Memorandum from Stephen M. Jordan, President, Metro. State

through these stipends, resulting in a charge reduction to bona fide residents. Thus, MSU's undocumented student-rate calculation begins with the \$4,304 charged to in-state residents, then adds back and charges the student the exact amount of state stipends, including \$1,860, \$342.04, and \$650.60, totaling \$7,157.04.⁵³

Like the Rhode Island policy, MSU's requirements for undocumented students seeking to utilize this residency classification follow the pattern set by existing state law and the failed Colorado bill. The student must have (1) attended a Colorado high school for at least three years; (2) graduated from a Colorado high school or completed a GED in Colorado; and (3) submitted an affidavit that certifies he is in good legal standing and is seeking or intends to seek lawful status when he is eligible.⁵⁴

Univ. of Denver, to Members of the Joint Budget Comm. (June 19, 2012), <http://www.msudenver.edu/media/content/presidentofficeof/6-20-12%20JBC%20Memo.pdf> [hereinafter Joint Budget Comm. Memorandum] (describing MSU's deliberate exclusion of state stipends from the calculation). Colorado public universities are unique in receiving three direct per-student stipends from the state for each resident to whom they grant in-state tuition—the College Opportunity Fund (COF), the Fee-for-Service (FFS) subsidy, and the capital contribution allocation. See Memorandum from Dianne E. Ray, CPA, State Auditor, to Members of the Legislative Audit Comm. 4 (Oct. 12, 2011), [http://www.leg.state.co.us/OSA/coauditor1.nsf/All/A0A7A668C004B5118725793A0079854C/\\$FILE/HE%20ENTERPRISE%20MEMO%20-%20102111.pdf](http://www.leg.state.co.us/OSA/coauditor1.nsf/All/A0A7A668C004B5118725793A0079854C/$FILE/HE%20ENTERPRISE%20MEMO%20-%20102111.pdf) (describing the state stipends in Colorado). COF is a state-funded voucher for in-state students attending state universities of which students must authorize disbursement on their behalf, currently at a rate of \$62.00 per credit hour. See *College Opportunity Fund (COF) Stipend*, COLO. DEP'T OF HIGHER EDUC., <http://highered.colorado.gov/Finance/COF/> (last visited Nov. 10, 2013) (describing the COF system in Colorado) (on file with the Washington and Lee Law Review). The purpose of this voucher system is to eliminate a tuition cap imposed by the Colorado Taxpayer's Bill of Rights (TABOR) by allowing a public university to be classified as an enterprise and thus gain exemption from TABOR. See Ray, *supra*, at 6 (describing the benefits of enterprise status). Finally, the school also receives the FFS and capital contribution in the amounts of \$342.04, and \$650.60, respectively. Joint Budget Comm. Memorandum, *supra*, at 4.

53. See Joint Budget Comm. Memorandum, *supra* note 52, at 4 (detailing the deliberate exclusion of state stipends from the nonresident rate calculation).

54. See *MSU Nonresident Rate Memorandum*, *supra* note 33 (describing the requirements imposed under MSU's nonresident policy).

At the request of the Colorado Community Colleges, Colorado Attorney General John W. Suthers reviewed MSU's policy. In June 2012, that office issued an opinion stating MSU's policy violates federal law and risks federal funds to the state.⁵⁵ The opinion reasoned that discounted tuition is a "public benefit" within the meaning of Section 411 of PRWORA, and that MSU therefore may not provide it without legislative approval.⁵⁶ The institution moved forward with the policy despite the negative opinion and enrolled students under the new rate beginning in August 2012.⁵⁷

III. Federal Statutory Obstacles to Institutional Policy

Because Congress has plenary power over immigration issues, institutional policies affecting undocumented students implicate federal law.⁵⁸ Two federal statutes bear on this issue: Section 505 of IIRIRA,⁵⁹ and Section 411 of PRWORA.⁶⁰ While Section 505 is peripherally implicated, institutional policies raise particular concerns under Section 411.⁶¹

55. See Op. Colo. Att'y Gen. No. 12-04 AG Alpha No. HE CO AGBDU (June 19, 2012) (finding the university's policy in violation of Section 411 of the Personal Responsibility and Work Opportunity Reconciliation Act).

56. See *id.* (discussing reduced tuition as a public benefit); see also *infra* Part III.B.1 (discussing the interpretation of "state or local public benefit" under Section 411).

57. See Anthony Cotton, *Metro State Tuition Plan Gives Some Hope, Leaves Others Fuming*, DENVER POST (Aug. 24, 2012), http://www.denverpost.com/news/ci_21387731/metro-state-tuition-rate-plan-gives-some-hope (last visited Sept. 1, 2013) (describing reactions to Metro State University's new tuition plan for undocumented students) (on file with the Washington and Lee Law Review).

58. See, e.g., *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C. (2012)).

59. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 505, Pub. L. No. 104-208, 110 Stat. 3009-672 (codified at 8 U.S.C. § 1623).

60. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 411, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 8 U.S.C. § 1621).

61. See *infra* Part III.B (describing the challenges to institutional policy raised by PRWORA).

A. IIRIRA Section 505

Section 505 of IIRIRA provides that an alien not lawfully present in the United States shall not:

[B]e 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.⁶²

This provision presents two challenges to law or policy granting in-state tuition to an undocumented student.

First, Section 505 raises the possibility of a federal preemption challenge to any state law or policy granting a tuition rate to an undocumented student on the basis of residency.⁶³ In 2010, however, the California Supreme Court ruled that attendance at a high school in the state is “not the functional equivalent of residency,”⁶⁴ and therefore dismissed the preemption challenge because the law simply did not award a benefit on the basis of residency.⁶⁵ No other legal challenge under Section 505 gained momentum on the merits, and states still generally follow the California model.⁶⁶ In fact, the Colorado attorney general explicitly declined to consider Section 505 when evaluating MSU’s tuition policy, noting that the California Supreme Court upheld the approach.⁶⁷ Thus, awarding in-state

62. 8 U.S.C. § 1623(a).

63. See, e.g., *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 864 (Cal. 2010) (challenging state law granting in-state tuition as preempted by Section 505).

64. *Id.*

65. See *id.* at 861 (noting the statute’s “criteria are not the same as residence, nor are they a de facto or surrogate residency requirement”).

66. See *supra* Part II.B (describing the structure of in-state tuition laws). Other claims for violations of Section 505 have been dismissed for lack of standing. See, e.g., *Day v. Bond*, 500 F.3d 1127, 1135 (10th Cir. 2007) (dismissing on justiciability grounds).

67. See Op. Colo. Att’y Gen. No. 12-04 AG Alpha No. HE CO AGBDU (June 19, 2012) (“Metro State’s proposal . . . seeks to avoid IIRIRA’s specific prohibition by administering the tuition discount [based] . . . upon three years’ attendance and graduation from high school here. This approach was upheld in California, and it is not necessary to question it in this Opinion.”)(footnotes

tuition on the basis of attending high school in the state continues to proceed unharmed, though no federal court has spoken on the issue.

Second, Section 505 raises questions about the interpretation of the term “postsecondary education benefit.” The Department of Homeland Security (DHS), responsible for administering Section 505,⁶⁸ clarified that enrollment in a public institution of higher education alone is not a benefit encompassed by Section 505.⁶⁹ As such, enrolling undocumented students does not violate these provisions, but DHS has issued no further clarifications. The legislative history surrounding Section 505 is similarly inconclusive. A conference report for an unenacted predecessor bill to Section 505 indicates that “postsecondary education benefit,” as defined in that bill, was meant to include in-state tuition.⁷⁰ *Martinez v. Regents of the University of California*⁷¹ concluded, however, that while the committee report for this unenacted bill could reasonably apply to Section 505 because it included the same language, it did not reliably show Congress

omitted)).

68. See 8 U.S.C. § 1103(a)(1) (2012) (conferring enforcement of “this chapter and all other laws relating to the immigration and naturalization of aliens” on the Secretary of Homeland Security).

69. See Letter from U.S. Dep’t of Homeland Sec. Office of Immigration and Customs Enforcement to Jim Hackenberg, *Raleigh News and Observer* (May 9, 2008) (explaining that it is the school’s decision whether to enroll undocumented students); Letter from Sheriff Jim Pendergraph, Exec. Dir., Office of State and Local Coordination, U.S. Dep’t of Homeland Sec., to Thomas J. Ziko, Special Deputy Att’y Gen., N.C. Dep’t of Justice (July 9, 2008) (stating DHS’s position that admission to a public university is not one of the benefits regulated by Section 505 and Section 411). This position is consistent with case law finding enrollment alone is not a benefit as defined in IIRIRA or PRWORA. See *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 605 (E.D. Va. 2004) (“Simply put, access to public higher education is not a benefit governed by PRWORA.”).

70. H.R. REP. NO. 104-828, at 240 (1996) (Conf. Rep.) (“This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education.”). IIRIRA was proposed as its own bill (H.R. 2202 in the 104th Congress), but ultimately implemented as part of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009. The conference report accompanying the enacted bill does not elaborate on the meaning of this provision. See H.R. REP. NO. 104-863 (1997) (Conf. Rep.).

71. 241 P.3d 855 (Cal. 2010).

intended to prohibit states from allowing unlawful aliens to pay nonresident tuition.⁷² The report, the court reasoned, imposed a strict prohibition and therefore simplified actual statutory language that was “not absolute, but qualified,”⁷³ and therefore the statutory language itself prevailed.⁷⁴ Thus, enrollment alone is not a benefit under Section 505, but law and policy sidestep the remaining interpretive issues surrounding “postsecondary education benefit” altogether by tying in-state tuition rates to attendance at a high school in the state rather than residency in that state. Handled as such, the reduced rate is no longer a residency-based benefit, thereby removing it from the scope of Section 505 without regard for the reach of “postsecondary education benefit.”

B. PRWORA Section 411

Section 411 of PRWORA provides that an alien who does not fall within any exception “is not eligible for any state or local public benefit.”⁷⁵ The thrust of this provision is to exclude any undocumented individual from receiving any assistance that falls within the meaning of “state or local public benefit.”⁷⁶ Section

72. *Id.* at 865.

73. *Id.*

74. *See id.* (“Some legislators might have supported section 1623’s plain language qualifying the prohibition but not have supported the committee report’s seemingly absolute language. Section 1623’s actual language prevails, not the committee report’s.”).

75. 8 U.S.C. § 1621(a) (2012). Classes of individuals excepted from these provisions are (1) qualified aliens under 8 U.S.C. § 1641, which includes lawfully present aliens; (2) nonimmigrant aliens under 8 U.S.C. § 1101, which includes ambassadors and diplomats; and (3) aliens paroled into the United States under 8 U.S.C. § 1182.

76. In another provision employing language similar to Section 411, PRWORA also precludes such an alien from receiving federal public benefits. *See id.* § 1611 (“[A]n alien who is not a qualified alien . . . is not eligible for any Federal public benefit.”). Tuition rates are classified by the state, so the federal public benefit definition is not directly applicable. *See id.* § 1611(c) (“Federal public benefit means . . . any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided . . . by an agency of the United States or by appropriated funds of the

411(c) defines “state or local public benefit” to include “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,”⁷⁷ and “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit,”⁷⁸ or “any other similar benefit for which payments or assistance are provided . . . by an agency of a State or local government or by appropriated funds of a State or local government.”⁷⁹

Section 411 also permits the state to affirmatively legislate to allow eligibility for the otherwise prohibited benefits listed in the section.⁸⁰ Because of this exception, the remaining provisions of Section 411 do not bind any state that passes a law permitting an undocumented student to receive in-state tuition. Thus, the “state or local public benefit” definition is not implicated in discussions of the fifteen states that have laws affirmatively permitting in-state tuition to undocumented students.⁸¹

The definition is relevant, however, to institutional policies in states in which there is no affirmative legislation. In other words, if a reduced tuition rate is considered a “public benefit” within this definition, an institution enacting its own policy granting such a rate to an undocumented student would be in violation of federal law. If a reduced tuition rate is outside the definition of “public benefit,” an institution could offer that rate on its own and maintain compliance with Section 411.

United States.”).

77. *Id.* § 1621(c)(1)(A).

78. *Id.* § 1621(c)(1)(B).

79. *Id.* PRWORA *excepts* from this definition assistance for health care items needed for emergency medical treatment; short-term emergency disaster relief; public health assistance for immunizations and related testing for symptoms of communicable diseases; and certain programs specified by the Attorney General that deliver in-kind services, do not condition the provision of assistance on the amount of assistance or the cost of assistance on the individual’s income or resources, and are necessary for the protection of life or safety. *Id.* § 1621(b).

80. *Id.* § 1621(d).

81. *See supra* Part II.A (exploring current state law).

1. *The Text of Section 411 Indicates Reduced Tuition Is Not a “State or Local Public Benefit”*

Though Section 411 includes the term “postsecondary education” in its list of forbidden benefits,⁸² the scope of the term is unclear.⁸³ Contextually, the term harbors two possible interpretations: first, it could be understood broadly to include any and all possible assistance flowing from a postsecondary education institution, or, second, it could be understood to include only certain categories of assistance. For instance, a postsecondary education benefit could include enrollment in a public institution, reduced tuition at a public institution, state grant aid toward a public institution, or any combination of these. Both courts and the executive branch, however, carved out enrollment in a public institution from the meaning of “postsecondary education benefit” by excluding it under Section 505 and Section 411,⁸⁴ suggesting that courts and the executive branch consider various aspects of postsecondary education to be severable, distinct units, some of which may fall within the statutory definition and some of which may not. As such, postsecondary education benefits under Section 411 could reasonably apply only to a subset of—and not to all—postsecondary education-related remunerations.

82. 8 U.S.C. § 1621(c)(1)(B) (2012).

83. Very little case law exists on this provision. See *infra* Part III.B.2 (discussing the case law examining Section 411).

84. See *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 605 (E.D. Va. 2004) (“Simply put, access to public higher education is not a benefit governed by PRWORA.”); *McPherson v. McCabe*, No. 5:04-CT-990-FL, 2007 WL 4246582, at *4 (E.D.N.C. Apr. 10, 2007) (finding decisions on enrolling undocumented students in higher education within the school’s discretion because it is not a benefit within the federal statute and therefore not preempted by federal law); *Sanchez v. Hall*, No. 5:10-CT-3027-D, 2011 WL 6369821, at *3 (E.D.N.C. Dec. 19, 2011) (following *McPherson* and allowing the institution to decide whether to enroll undocumented students); U.S. Dep’t of Homeland Sec. Office of Immigration and Customs Enforcement, *supra* note 69 (explaining it is the school’s decision whether to enroll undocumented students); Pendergraph, *supra* note 69 (explaining admission to a public university is not a benefit encompassed by IIRIRA); see also *supra* Part III.A (discussing interpretation of Section 505).

Section 411 specifies that any benefit similar to those listed—including retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, and unemployment benefits⁸⁵—would also be prohibited under this provision. Critically, however, receiving the full benefit of reduced tuition differs from the other listed items in that it requires a significant financial contribution from the recipient to fulfill it. For example, at MSU in Colorado, an undocumented student receiving this “benefit” would still pay nearly \$29,000 out-of-pocket for a four-year degree and receive no direct monetary contribution from the state.⁸⁶ An individual recipient of retirement, welfare, health, disability, or public or assisted housing may pay no out-of-pocket monetary amount at all in the same period, but that individual may receive significant and direct monetary contributions from the state.

This distinction suggests reduced tuition is a different type of benefit; in fact, the postsecondary education benefit most similar to the listed benefits is state grant aid.⁸⁷ In the academic year prior to the enactment of Section 411, states awarded \$2.9 billion in grant aid from state funds to postsecondary education students.⁸⁸ This number excludes loan amounts that must be

85. 8 U.S.C. § 1621(c)(1)(B) (2012).

86. See *MSU Nonresident Rate Memorandum*, *supra* note 33 (detailing that the rate for the special category of nonresidents is \$7,157.04 per academic year); *supra* Part II.B.3 (discussing MSU’s policy).

87. For an example of an available state grant program, see *Helping Outstanding Pupils Educationally (HOPE) Program*, GA. STUDENT FIN. COMMISSION, <http://www.gsfc.org/gsfnew/HopeProgramm.CFM?sec=3> (last visited Nov. 10, 2013) (describing the financial assistance available under the HOPE scholarship program) (on file with the Washington and Lee Law Review).

88. NAT’L ASS’N OF STATE STUDENT GRANT & AID PROGRAMS (NASSGAP), TABLE 1: TOTAL GRANT AID AWARDED BY STATE GRANT PROGRAMS, 1995–96, 27TH ANNUAL SURVEY ON STATE-SPONSORED STUDENT FINANCIAL AID, *available at* <http://www.nassgap.org/viewrepository.aspx?categoryID=3>. This figure includes both need-based and merit-based aid. *Id.* The amount of state grant aid disbursed has steadily increased over the past forty years, in part due to the introduction of the federal Leveraging Educational Assistance Partnership (LEAP) program, which appropriates federal funds to assist states in providing grant aid. See 20 U.S.C. § 1070c(a) (2012) (describing the incentives authorized by LEAP); John J. Cheslock & Rodney P. Hughes, *Differences Across States in Higher Education Finance Policy* 4–5 (Ctr. for the Study of Higher Educ., Pa. State Univ., Working Paper No. 5, 2011),

repaid to the state; it is exclusively grant aid for which the student must repay nothing. For the 2010–2011 academic year, this figure was \$9.2 billion.⁸⁹ State grant aid, then, is a significant state expenditure requiring no monetary contribution from the student; this differs greatly from reduced tuition, for which the state provides no direct monetary contribution and the significant expenditure comes from the student.

These state grant funds come directly from state coffers. In Georgia, for example, the Helping Outstanding Pupils Educationally (HOPE) grant program is funded entirely by revenue from the Georgia lottery.⁹⁰ In contrast, any expenditure toward reduced tuition is indirect, coming from a blend of private and state funds that run the institution.⁹¹ For instance, in 2011, four-year public institutions of higher education saw, on average, over 40% of their educational operating revenue come from privately paid tuition, with the remainder derived from state support and other sources.⁹² Reduced tuition, then, is not directly paid by the state as state grants are; rather, loss resulting from reduced tuition is an amalgam of private funding and indirect state support that is not clearly allocable to state funds because operation of the institution is not fully state-supported.

In other words, the difference between state grant aid and reduced tuition is dollar-for-dollar actual loss. Though an undocumented student pays less at an in-state rate than he would pay at an out-of-state rate, analogy of the amount lost by

available at <http://www.ed.psu.edu/educ/cshe/working-papers/WP%235> (describing increases in state grant aid over the past few decades).

89. NAT'L ASS'N OF STATE STUDENT GRANT & AID PROGRAMS, TABLE 1: TOTAL GRANT AID AWARDED BY STATE GRANT PROGRAMS, 2010–11, 42ND ANNUAL SURVEY ON STATE-SPONSORED STUDENT FINANCIAL AID, available at <http://www.nassgap.org/viewrepository.aspx?categoryID=3>.

90. See GA. STUDENT FIN. COMMISSION, *supra* note 87 (describing the HOPE scholarship program as fully funded by revenue from the Georgia state lottery).

91. See STATE HIGHER EDUC. EXEC. OFFICERS (SHEEO), STATE HIGHER EDUCATION FINANCE, FISCAL YEAR 2011, at 22 (2012), http://www.sheeo.org/sites/default/files/publications/SHEF_FY11.pdf (examining the sources of revenue at public institutions of higher education).

92. *Id.* at 21.

reducing tuition to the amount lost by paying a state grant award leans on the assumption that an undocumented student would still attend that school if required to pay out-of-state tuition, and that assumption is doubtful.⁹³

Once paid, then, the cost deducted from state funds for a state grant is fixed, but the price tag on reduced tuition is less clear. The state would not necessarily lose the difference between out-of-state tuition and reduced tuition because there is no guarantee that the student would attend the state university if charged the full out-of-state rate, and there is no guarantee the money toward the reduction came from state funds. Congress's purpose in including "postsecondary education" as a prohibited benefit under Section 411, then, could reasonably be to protect the sizeable, certain expenditure of state grants and scholarships, and not reduced tuition.

2. Case Law Evaluating Section 411 Supports This Interpretation

Very few courts have studied the meaning of Section 411. *Martinez v. Regents of the University of California*⁹⁴ raised questions about the specific interpretation of "state or local public benefit" as it relates to in-state tuition classifications within Section 411, but the court did not decide the issue because the California law at issue fell within the Section 411 exception allowing the state to affirmatively legislate to provide any benefit.⁹⁵ Again, courts agree that enrollment alone is not a benefit encompassed by Section 411.⁹⁶ The few other courts to

93. See LATINO POLICY INST., THE EFFECTS OF IN-STATE TUITION FOR NON-CITIZENS: A SYSTEMATIC REVIEW OF THE EVIDENCE 10 (2011), <http://rwu.edu/sites/default/files/lpi-report.pdf> (noting that there is a 31% increase in noncitizen enrollment in states where in-state tuition is offered to undocumented students). In addition, noncitizens are statutorily ineligible for all federal student aid programs administered by the U.S. Department of Education, limiting the most popular and accessible avenues to fund higher education. 20 U.S.C. § 1091(a)(5) (2012) (requiring a student be a U.S. citizen or national to receive any funding under the Title IV programs).

94. 241 P.3d 855 (Cal. 2010).

95. See *id.* at 867–68 (concluding that the state had legislated to affirmatively provide the benefit, thus bringing the case within Section 411(d)).

96. See *supra* note 84 and accompanying text (discussing enrollment falling

interpret Section 411 recognize a difference between direct, need-based state expenditures and assistance to which the individual is contributing, though these cases deal with specific issues in individual states that do not directly answer the in-state tuition question.⁹⁷ In *Department of Health v. Rodriguez ex rel. Melendez*,⁹⁸ the Florida District Court of Appeals found the Brain and Spinal Cord Injury program, which is wholly funded by the state,⁹⁹ to be within the definition of “state or local public benefit” and, therefore, unavailable to illegal immigrants without affirmative state legislation.¹⁰⁰ Similarly, a New York state court found funds from the state food stamp program unquestionably a public benefit under Section 411.¹⁰¹

outside the public benefit definition).

97. Most courts to consider questions surrounding Section 411 do not decide the meaning of “state or local public benefit.” See, e.g., *Martinez*, 241 P.3d at 867–68 (concluding that the state had legislated to affirmatively provide the benefit, thus bringing the case within the exception in Section 411(d) and rendering the other provisions of Section 411 irrelevant); *Pimentel v. Dreyfus*, 670 F.3d 1096, 1111 (9th Cir. 2012) (denying the plaintiff’s request for a preliminary injunction because the plaintiff either lacked standing or would not succeed on the merits, rather than deciding the interpretation of Section 411); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 675 F.3d 802, 816 (5th Cir. 2012) (deciding the ordinance in question aimed only at targeting the presence of illegal aliens and therefore infringed on the federal authority over immigration and the conduct of foreign affairs, rather than deciding the statutory interpretation question); *Garcia v. Dicterow*, No. G039824, 2008 WL 5050358, at *7 (Cal. Ct. App. Nov. 26, 2008) (dismissing the § 1621 complaint on agency grounds without deciding whether the benefit in question fell within the statutory definition).

98. 5 So.3d 22 (Fla. Dist. Ct. App. 2009) (per curiam).

99. See *Brain and Spinal Cord Injury Program*, FLA. DEP’T OF HEALTH, <http://www.floridahealth.gov/diseases-and-conditions/brain-and-spinal-cord-injuries/index.html> (last visited Nov. 10, 2013) (describing the Brain and Spinal Cord Injury Program) (on file with the Washington and Lee Law Review). The program is funded through traffic-related fines, surcharges for driving or boating under the influence, fees on temporary license tags, and a percentage of fees from the motorcycle specialty tag. *Id.*

100. See *Rodriguez*, 5 So.3d at 25 (finding BSCI funding within the definition of state or local public benefit, and not within any of the statutory exemptions).

101. See *City of New York v. Stone*, 782 N.Y.S.2d 430, 431 (N.Y. App. Div. 2004) (finding disbursement of food stamps to illegal immigrants a violation of Section 411).

In contrast, the California Court of Appeals reasoned in *County of Alameda v. Agustin*¹⁰² that the state's order requiring child support payments and the state's provision of child support collection services to an illegal immigrant are *not* "state or local public benefit[s]."¹⁰³ Child support payments and child support collection services, the court reasoned, are not similar to any of the benefits listed in Section 411(c)(1)(B).¹⁰⁴ The court found this dissimilarity because the source of child support payments ordered by the state was ultimately private.¹⁰⁵ More importantly, the court distinguished child support services provided by the state from the other benefits listed in Section 411(c)(1)(B):

The benefits specifically listed in section 1621 . . . are all either direct income support payments or services intended to meet the daily needs of disadvantaged persons. Significantly, such payments and services are continuing, or potentially continuing benefits, intended to provide ongoing public support for the recipients as long as required. Child support collection services are quite different . . . these services are intended to help recipients support themselves . . . child support collection services return to the local agency considerably more funds than they cost.¹⁰⁶

The court in *Rajeh v. Steel City Corporation*¹⁰⁷ similarly found workers' compensation funds outside the definition of "state or local public benefit" because workers' compensation "operates as a balance of mutual compromise between the interests of the employer and the employee,"¹⁰⁸ in contrast to the listed benefits, which "are either means for the government to assist people with economic hardships until they are able to financially manage on their own . . . or are an earned benefit,

102. No. A115092, 2007 WL 2759474, at *3 (Cal. Ct. App. Sept. 24, 2007).

103. *Id.*

104. *See id.* (explaining that child support services and payments fall outside the definition of "state or local public benefit").

105. *See id.* ("Child support payments clearly do not fall into this category . . . they are payments made by private individuals. The fact that the County might assist in their collection does not change the private source of the payments.").

106. *Id.*

107. 813 N.E.2d 697 (Ohio Ct. App. 2004).

108. *Id.* at 707.

such as retirement.”¹⁰⁹ Thus, these courts drew a distinction between benefits that are direct, need-based payments aimed at public support and benefits that aim to increase self-sufficiency through indirect state support. Like reduced tuition, both child support payments and services and workers’ compensation funds derive from an amalgam of sources, not directly from the state.

3. Denying Reduced Tuition Under Section 411 Is Inconsistent with Congressional Intent

Construing Section 411 as an impediment to reduced tuition is also inconsistent with congressional intent in enacting PRWORA. Congress codified its purpose: to further national immigration policy emphasizing self-sufficiency, such that “aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and resources.”¹¹⁰ Access to higher education through reduced tuition, a situation in which the student is contributing financial resources and receiving no direct payment from the state, is an important means to this self-sufficiency. As the Supreme Court has long noted, “education prepares individuals to be self-reliant and self-sufficient participants in society.”¹¹¹ Education is “providing the basic tools by which individuals might lead economically productive lives,”¹¹² thereby promoting reliance on individual capability rather than public resources. Limiting access to education in this way, then, violates Congress’s intent to promote self-sufficiency because it confines what the law views as fundamental to accomplish both self-reliance and productive participation in society.

109. *Id.*

110. 8 U.S.C. § 1601(1)–(2) (2012).

111. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

112. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

*4. Denying Reduced Tuition Under Section 411 Is Inconsistent
with the Supreme Court's View of Public Education*

The Court has uniquely valued public education and explicitly distinguished it from other types of social welfare, particularly in two bellwether cases. In *Plyler v. Doe*,¹¹³ the Supreme Court recognized the value of providing fundamental education, even to children in the United States illegally.¹¹⁴ Considering both a Texas statute withholding funds from local public districts for the primary and secondary education of children not legally admitted into the United States and a particular school district's attempt to charge such students tuition, *Plyler* underscored the consequences of denying a public education to undocumented students.¹¹⁵

First, the Court recognized lax enforcement of immigration laws produced a substantial population of illegal immigrants, which "raises the specter of a permanent caste of undocumented resident aliens, encouraged by some reason to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents."¹¹⁶ This possibility, the Court reasoned, "presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law."¹¹⁷ In addition, the Court noted, though all persons in the country unlawfully are subject to deportation, "there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to

113. *See id.* In *Plyler*, the Court examined the claim that the Texas statute violated the Equal Protection Clause. *Id.* at 202. The Court determined that the Equal Protection Clause extends even to those in the United States illegally. *Id.* at 210–12. The Court concluded Texas did not demonstrate any legitimate state interest served by instituting this statute, and the law, therefore, violated the Equal Protection Clause. *Id.* at 224–30.

114. *See id.* at 230 ("It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.").

115. *See id.* at 202 (describing the Texas statute under consideration).

116. *Id.* at 218–19.

117. *Id.* at 219.

become a citizen.”¹¹⁸ Because deportation is discretionary with the federal government, a state cannot determine with certainty that an undocumented child will absolutely be deported, and “[i]t would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.”¹¹⁹ It is Congress, the Court noted, that possesses plenary authority over immigration; the state may only act when its action mirrors federal objectives and furthers a legitimate state goal, and even the judiciary greatly defers to Congress.¹²⁰

Second, the Court also noted that because of the critically important nature of public education, putting this entire class of individuals under the enduring disability of unequal education violates well-settled principles governing the nature of education:

Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹²¹

It is this importance, the Court reasoned, that indicates education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”¹²² Rather, it is of “supreme importance,”¹²³ and critical to society, because “[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”¹²⁴ The enduring disability imposed on this particular class by denial of education to children brought illegally into the country by their parents is unwarranted, according to the Court: “the children who are plaintiffs . . . can affect neither their

118. *Id.* at 226.

119. *Id.*

120. *Id.* at 226 (quoting *DeCanas v. Bica*, 424 U.S. 351, 351 (1976)), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

121. *Id.* at 223 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

122. *Id.* at 221.

123. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1920).

124. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

parents' conduct nor their own status."¹²⁵ Though undocumented status is the product of concededly unlawful action and therefore not an absolutely immutable characteristic, burdening these children with the conduct of adults "does not comport with fundamental conceptions of justice."¹²⁶ Given this, the Court found that "[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries."¹²⁷

Because of the unique status of education and the entrustment of immigration power to the federal government, the Court found no sufficient justification to withhold education without clear indication from Congress that national immigration policy intends it:

We are reluctant to impute to Congress the intention to withhold from those children, for so long as they are present in this country . . . access to a basic education. In other contexts, undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education.¹²⁸

Thus, *Plyler* prevented the state from eroding congressional immigration policy by limiting access to education without clear congressional approval because education is, by its nature, fundamentally distinct from other social benefits.

Though *Plyler* speaks of primary and secondary education, the Court, in *Grutter v. Bollinger*,¹²⁹ recognized the value of

125. *Id.* at 220.

126. *Id.*

127. *Id.* at 230.

128. *Id.* at 226.

129. *See Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003) ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals." (quoting *Plyler*, 457 U.S. at 221)).

educational access existing more keenly in public higher education. *Grutter* noted that “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”¹³⁰ Further, “[e]nsuring that public institutions are open and available to all segments of American society . . . represents a paramount government objective,” and “nowhere is the importance of such openness more acute than in the context of higher education.”¹³¹ The Court concluded that “[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.”¹³² *Grutter* thus repeats the quintessence of *Plyler* by underlining the essential social value of access and openness in postsecondary education.

Ambiguity consumes Section 411, and presumptively aligning reduced tuition with the social welfare benefits listed in Section 411 thus strays from the clear line drawn by the Court to divide such access to education from social welfare benefits.¹³³ Interpreting this uncertainty to functionally deny public education collaterally undercuts *Plyler* and *Grutter* by disregarding the search for clear congressional intent before imposing such a disability. As noted in *Plyler*, there is no guarantee of deportation until it occurs, and the state has no justifiable interest in creating an undereducated subclass by denying an essential postsecondary education. Including reduced tuition as a prohibited benefit under Section 411, then, hastily distorts the language of the statute, discounts congressional intent, and neglects the Supreme Court’s high regard for openness in public education.

130. *Id.* at 331.

131. *Id.* at 331–32 (quoting Brief for United States as Amicus Curiae Supporting Petitioner, 539 U.S. 306 (2003)).

132. *Id.* at 332.

133. *See supra* Part III.B.1 (discussing the uncertainty in Section 411).

IV. Federal Courts Will Not Hear a Section 411 Claim

There is no indication that any federal agency has taken enforcement action under either Section 505 or Section 411.¹³⁴ As such, private lawsuits remain an appealing avenue for enforcement proceedings,¹³⁵ but nonjusticiability in federal court further complicates the interpretive hitch to Section 411: federal courts will likely never hear a claim from a private plaintiff under Section 411. First, the statute itself carries no private right of action.¹³⁶ Second, a private plaintiff is limited both by a state university's immunity from suit under the Eleventh Amendment and by the lack of a particularized injury to support standing.¹³⁷ Finally, constitutional claims to tuition classifications are only successful in limited circumstances, none of which are present here.¹³⁸

134. See Brief in Opposition at 27, *Martinez v. Regents of the Univ. of Cal.*, No. 10-1029 (Cal. Apr. 18, 2011) (noting that no agency has enforced these provisions). In addition, the Washington Legal Foundation filed formal complaints with DHS in 2005 requesting enforcement action under Section 505; to date, no action has been taken. See *Case Detail: In re In-State Tuition for Illegal Aliens*, WASH. LEGAL FOUND., http://www.wlf.org/litigating/case_detail.asp?id=366 (last visited Nov. 10, 2013) (noting the lack of DHS action) (on file with the Washington and Lee Law Review).

135. See, e.g., *Day v. Bond*, 500 F.3d 1127, 1127 (10th Cir. 2007) (dismissing plaintiff's federal law challenge to a state's in-state tuition law for a lack of standing and lack of private right of action); Anthony Cotton, *Tom Tancredo Group Plans Suit Over Immigrant Tuition at Metro*, DENVER POST (June 27, 2012), http://www.denverpost.com/breakingnews/ci_20945697/tom-tancredo-group-plans-suit-over-immigrant-tuition (last visited Nov. 10, 2013) (discussing an imminent lawsuit in Colorado) (on file with the Washington and Lee Law Review). To date, no federal court has heard a challenge on the merits to a policy granting in-state tuition to undocumented students.

136. See *infra* Part IV.A (explaining the lack of a private right of action under Section 411).

137. See *infra* Part IV.B (discussing the sovereign immunity limitations to a Section 411 suit).

138. See *infra* Part IV.C (discussing the likely failure of constitutional challenges to tuition classifications).

*A. Statutory Enforcement of Personal Rights**1. Implied Private Rights of Action and § 1983 Claims*

A plaintiff may attempt to enforce the statutory right under the statute itself or under 42 U.S.C. § 1983, which provides redress for deprivation of rights under color of law,¹³⁹ but neither provides real answer to an aggrieved plaintiff. The “fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.”¹⁴⁰ For a private plaintiff to sue under the provisions of Section 411, then, there must be an implied private right of action in its provisions. A § 1983 analysis differs in that, although the statute must still carry a private right of action, it need not carry a private remedy because § 1983 itself carries one, which Congress has explicitly authorized in the statutory text.¹⁴¹ Determining whether a private right exists at all, however, does not differ in its analysis in actions seeking relief through an implied private right of action or under § 1983.¹⁴² In other words, if there is no clear evidence Congress intends to create new individual rights under a statute, “there is no basis for a private suit, whether under § 1983 or under an implied private right of action.”¹⁴³ If there is clear evidence Congress intended to create a private right under a federal statute, that right is presumptively

139. See 42 U.S.C. § 1983 (2012)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

140. Cannon v. Univ. of Chicago, 441 U.S. 677, 668 (1979).

141. See Gonzaga v. Doe, 536 U.S. 273, 284–85 (2002) (describing the difference between a § 1983 analysis and an implied private right of action analysis).

142. See *id.* (“A court’s role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context.” (citation omitted)).

143. *Id.* at 286.

enforceable under § 1983, but it may not be enforceable under the terms of the statute without indication of a remedy.¹⁴⁴

In determining whether there is an implied private right of action, the Supreme Court focuses on congressional intent.¹⁴⁵ As such, the finding of a private right of action depends primarily on the construction of the statute itself.¹⁴⁶ Importantly, the statute must demonstrate congressional intent in explicit rights-creating terms.¹⁴⁷ The text must be “phrased in terms of the person benefited,”¹⁴⁸ with an “*unmistakable focus* on the benefited class.”¹⁴⁹ In addition, even if the statute has such rights-creating terms, the plaintiff still must show intent to “create not just a private *right*, but also a private *remedy*.”¹⁵⁰ Consequently, because of separation of powers concerns and judicial hesitancy to make law without clear congressional authorization, courts rarely find implied private rights of action.¹⁵¹

144. See *id.* (discussing the requirements of an implied private right of action and § 1983 claims).

145. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) (noting congressional intent is the most important factor in a private right of action analysis). The Court’s analysis formerly focused on a four-part test: (1) legislative intent; (2) the consistency of the remedy with the underlying purposes of the legislative scheme; (3) whether the plaintiff was a member of the class for whose benefit the statute was enacted; and (4) whether the cause of action is one traditionally relegated to state law. See *Cort v. Ash*, 422 U.S. 66, 66 (1975) (outlining the test for implied private right of action cases), *overruling recognized by* *Thompson v. Thompson*, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) (“It could not be plainer that we effectively overruled the *Cort v. Ash* analysis in [*Touche Ross*].”). The Court now focuses on congressional intent, treating the other factors as indicia of that intent. See *Touche Ross*, 442 U.S. at 575

[T]he Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action . . . the first three factors . . . are ones traditionally relied upon in determining legislative intent.

146. See *Touche Ross*, 442 U.S. at 568 (“The question of the existence of a statutory cause of action is, of course, one of statutory construction.”).

147. See *Gonzaga v. Doe*, 536 U.S. 273, 283–84 (2002) (requiring the statute contain language showing enforceable rights).

148. *Cannon v. Univ. of Chicago*, 441 U.S. 668, 692 n.13 (1979).

149. *Id.* at 691 (emphasis added).

150. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (emphases added).

151. See *id.* at 286 (“Without [statutory intent], a cause of action does not

2. *Application to Other Cases Indicates No Implied Private Right of Action Under Section 411*

Because the analysis used when searching for a personal right is the same whether the court is looking for an implied private right of action in the statute itself or a private right of action under § 1983, precedent considering both private rights of action and § 1983 is relevant. Generally, these cases examine whether various statutes evince congressional intent to confer a private right of action. For example, in *Cannon v. University of Chicago*,¹⁵² the Supreme Court found that Title IX of the 1972 Education Act Amendments to the Higher Education Act,¹⁵³ in mirroring Title VI of the 1964 Civil Rights Act,¹⁵⁴ carried an implied private right of action. In relevant part, Title IX reads: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.”¹⁵⁵ Because Congress intended both statutes to prevent the use of federal funds to support discriminatory programs and to “provide individual citizens effective protection against [these] practices,”¹⁵⁶ only a private right of action could accomplish the latter.¹⁵⁷ Thus, the

exist, and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”); *see also* Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court’s Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 294–96 (1996) (discussing Supreme Court rulings on implied private rights of action); Bradford C. Mank, *Using § 1983 to Enforce Title VI’s Section 602 Regulations*, 49 U. KAN. L. REV. 321, 353–57 (2001) (noting the Supreme Court rarely finds implied private rights of action).

152. 441 U.S. 677, 668 (1979).

153. Higher Education Act of 1965, tit. IX, Pub. L. No. 89-329, 79 Stat. 1219, *amended by* Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681–88 (2012)). Much of *Cannon*’s reasoning stems from Title IX’s similarity to Title VI, for which many lower courts had already found a private right of action and remedy. *See Cannon*, 441 U.S. at 694–98 (discussing the history of Title IX’s similarities to Title VI).

154. Civil Rights Act of 1964, tit. VI, Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2).

155. 20 U.S.C. § 1681(a).

156. *Cannon*, 441 U.S. at 704.

157. *See id.* at 706 (discussing the legislature’s purpose in enacting Title IX).

Court found sufficient congressional intent to find a private cause of action. The Court noted¹⁵⁸ several examples of statutory rights-creating language that implicate a private cause of action—“no person shall be denied the right to vote”;¹⁵⁹ “[e]mployees shall have the right to organize and bargain collectively through representatives”;¹⁶⁰ “[a]ll citizens of the United States shall have the same right.”¹⁶¹ In each example, a right is conferred directly on a class of persons, demonstrating sufficient congressional intent.

*Gonzaga v. Doe*¹⁶² demonstrates nonrights-creating language. In *Gonzaga*, the Supreme Court concluded the Family Educational Rights and Privacy Act (FERPA)¹⁶³ lacked personal rights-conveying language in its nondisclosure of educational records provisions.¹⁶⁴ The statute under consideration reads “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization.”¹⁶⁵ *Gonzaga* reasoned that FERPA did not convey personal rights either under the statute itself or § 1983 because it had no rights-creating language, addressed itself to the Secretary of Education rather than individuals on whom it purportedly conferred enforceable rights, and employed a focus on institutional policy and practice, rather than on individual instances of disclosure.¹⁶⁶ *Gonzaga* distinguished the rights-creating text of Title IX from the nonrights-creating text of FERPA because Title IX used

158. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979) (discussing examples of rights-creating language).

159. *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969).

160. *Tunstall v. Bhd. of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944).

161. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

162. 536 U.S. 273 (2002).

163. 20 U.S.C. § 1232(g) (2012).

164. See *Gonzaga*, 536 U.S. at 276 (discussing the FERPA claims at issue).

165. 20 U.S.C. § 1232(g)(b)(1).

166. See *Gonzaga*, 536 U.S. at 287–89 (finding no personal right under FERPA).

“individually focused terminology” such as “[n]o person shall,” while FERPA speaks only to the Secretary of Education, “directing that [n]o funds shall be made available.”¹⁶⁷ This focus is “two steps removed” from the interests of individual students.¹⁶⁸

Similarly, in *Day v. Bond*,¹⁶⁹ the U.S. Court of Appeals for the Tenth Circuit found no private right of action under Section 505 of IIRIRA.¹⁷⁰ The Tenth Circuit found the text lacked rights-creating language showing congressional intent, reasoning that the provision imposed a “limit on the authority of postsecondary educational institutions” rather than affording a benefit to an individual.¹⁷¹ Further, the provision “addresses itself to the institutions affected and their authority to provide benefits to illegal aliens, not to the class of nonresident citizens who incidentally benefit from its provisions.”¹⁷² “The focus is [a step] removed from the interests of individual students and parents and clearly does not confer the sort of ‘*individual* entitlement’ that is enforceable under § 1983” or an implied private right of action.¹⁷³ Like FERPA in *Gonzaga*, the Tenth Circuit reasoned, the provision here speaks to institutional policy and practice and employs an aggregate focus that cannot “give rise to individual rights.”¹⁷⁴

167. *Id.* at 287.

168. *Id.*

169. 500 F.3d 1127 (10th Cir. 2007).

170. 8 U.S.C. § 1623 (2012); *see also supra* Part III.A (examining Section 505 of IIRIRA). Section 505 reads:

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 . . . 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. 8 U.S.C. § 1623.

171. *See Day*, 500 F.3d at 1139 (finding that the statute lacked requisite congressional intent).

172. *Id.*

173. *Id.* (citations omitted).

174. *Id.* (citations omitted).

Day further noted, but did not decide, that other provisions in the immigration code may be similarly limited.¹⁷⁵ In 8 U.S.C. § 1103(a)(1), the statute provides that “[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens.”¹⁷⁶ The Tenth Circuit viewed this provision, combined with the lack of rights-creating language in Section 505 itself, as further evidence that Congress contemplated federal, not private, enforcement.¹⁷⁷

3. *The Text of Section 411 Indicates No Private Right of Action*

Like IIRIRA Section 505, PRWORA Section 411 frames its prohibition by limiting the authority of institutions to provide specified benefits to illegal aliens.¹⁷⁸ Section 411 provides that an unqualified alien “is not eligible for any State or local public benefit.”¹⁷⁹ In addressing itself to institutions rather than individual citizens who may incidentally benefit from the prohibitions, Section 411 lacks the rights-creating language and individually focused terminology that suggest congressional intent to impose a private right of action. As in *Gonzaga*, Section 411 speaks to institutional policy and practice, directing that institutions not make benefits available to unqualified aliens.¹⁸⁰ The provision confers no specific right directly on a class of persons. Further, as in *Day*, 8 U.S.C. § 1103(a)(1) suggests administration and enforcement of the provision lies with DHS, not with private citizens.¹⁸¹ Combined with the lack of rights-

175. *See id.* (“We do not conclude that private rights are not conferred under other provisions of the immigration code.”).

176. *Id.*

177. *See id.* (discussing § 1103(a)(1) in combination with § 1623).

178. *Compare* 8 U.S.C. § 1621 (2012) (providing that an unqualified alien “is not eligible for any State or local public benefit”), *with id.* § 1623 (“[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit.”).

179. *Id.* § 1621.

180. *See supra* notes 162–68 and accompanying text (discussing *Gonzaga*).

181. 8 U.S.C. § 1103(a)(1).

creating language in Section 411 itself, it seems Congress did not intend private enforcement.

B. Sovereign Immunity and Standing Limitations

A private plaintiff suing a state university in federal court will also be limited by the state university's sovereign immunity. The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."¹⁸² The Supreme Court has held this bars private citizen suits against state governments in federal and state court without their consent.¹⁸³ With some exceptions, state universities are considered arms of the state for Eleventh Amendment purposes.¹⁸⁴

In *Ex Parte Young*,¹⁸⁵ the Court limited the sovereign immunity doctrine by allowing a state official to be sued in federal court for ongoing violation of federal law as long as the

182. U.S. CONST. amend. XI.

183. See *Alden v. Maine*, 527 U.S. 706, 754 (1999) (finding that state governments maintain their sovereignty in both federal and state courts for claims arising under federal law).

184. See Adam D. Chandler, *How (Not) to Bring an Affirmative-Action Challenge*, 122 YALE L.J. ONLINE 85, 91–97 (2012) (noting state universities are generally arms of the state for Eleventh Amendment purposes). The Supreme Court has never directly spoken on whether a state university is an arm of the state. See Kelly Knivila, *Public Universities and the Eleventh Amendment*, 78 GEO. L.J. 1723, 1726 n.12 (1990) (describing the lack of Supreme Court precedent on this question). Whether a state university is an "arm of the state" for sovereign immunity purposes is often a question of state law and the financial independence afforded to the university; however, most courts still conclude that a state university is an arm of the state. See, e.g., *Lewis v. Univ. of Tex. Med. Branch at Galveston*, 665 F.3d 625, 630 (5th Cir. 2011) (concluding the university was an arm of the state); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 546–50 (3d Cir. 2007) (finding the University of Iowa immune as a state agency).

185. 209 U.S. 123 (1908). In *Young*, the Court concluded that a state official enforcing an unconstitutional legislative enactment is in conflict with the authority of the Constitution, and therefore "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 159.

state is not the real party in interest.¹⁸⁶ The state is considered the real party in interest, however, when the “action is in essence one for the recovery of money from the state,”¹⁸⁷ in which case the state is entitled to invoke Eleventh Amendment sovereign immunity even if the nominal defendants are state officials. Recently, the Court reiterated the force of *Young* by confirming courts need only determine whether “[the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.”¹⁸⁸ An action permitted by *Young*, then, requires *prospective* relief; the state cannot be sued for retrospective damages without its consent.¹⁸⁹ Though the Court recently found no bar to a state suing itself,¹⁹⁰ sovereign immunity remains prohibitive for a private plaintiff suing an arm of the state.

A private plaintiff, then, would be limited to prospective injunctive relief and prohibited from seeking retrospective damages, and it is unclear what injunctive relief a private plaintiff would have standing to pursue. Article III standing requires a plaintiff in federal court to show concrete and particularized injury-in-fact, a causal connection between the injury and the challenged conduct, and a likelihood that the

186. *See id.* (allowing a state official to be sued in federal court for ongoing violations of federal law); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (“The Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest.” (citations omitted)).

187. *Ford Motor Co. v. Dep’t of Treasury of State of Ind.*, 323 U.S. 459, 464 (1945); *see also Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (confirming the state is effectively the real party in interest if the suit is one for payment from the state treasury).

188. *Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002) (citation omitted).

189. *See Edelman*, 415 U.S. at 676 (“[A] federal court’s remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the state treasury.” (citations omitted)).

190. *Va. Office of Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1639 (2010). In *Stewart*, the Court permitted a suit by a state agency against another state agency, finding it no different than a private plaintiff suing the state agency. *See id.* (“[T]he limits we have recognized reflect the principle that ‘the general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought.’” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984))).

injury will be redressed by a favorable decision.¹⁹¹ An out-of-state resident suing to enforce Section 411 would have to show ongoing threat of future injury. First, no such plaintiff could show that any money spent on an undocumented student would go to him but for the violative policy—an out-of-state resident would never receive in-state tuition regardless of whether undocumented students receive in-state tuition. Further, a claim that future out-of-state students shoulder any financial burden for the tuition reduction for undocumented students is, at best, a speculative showing when university operating revenue is a mix of funds generally employed for the benefit of all students.¹⁹² The Tenth Circuit similarly rejected out-of-state resident Equal Protection Clause challenges to an in-state tuition policy for lack of standing because the injuries were too speculative, could not be attributed to the university's in-state tuition policy, and were not redressable by the court because these plaintiffs would never receive in-state tuition.¹⁹³

C. Constitutional Claims

A constitutional challenge under Section 411 similarly lacks force. First, though the provision could implicate the Equal Protection Clause,¹⁹⁴ the Supreme Court has rejected Equal Protection Clause challenges to residency-based tuition classifications provided the classification is uniformly applied and based on physical presence and intent to remain.¹⁹⁵ The Court

191. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (noting that the irreducible constitutional minimum for standing is injury-in-fact, causation, and redressability).

192. See *supra* notes 90–92 and accompanying text (discussing the sources of university operating revenue); see also *Day v. Bond*, 500 F.3d 1127, 1132–35 (10th Cir. 2007) (rejecting the plaintiff's claims for lack of standing).

193. See *Day*, 500 F.3d at 1132–35 (dismissing the case for lack of standing).

194. See U.S. CONST. amend. XIV § 1 (“No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

195. See *Martinez v. Bynum*, 461 U.S. 321, 325–33 (1983) (permitting residency-based tuition classifications); see also *supra* note 28 and accompanying text (discussing challenges to tuition classifications).

placed certain limits on tuition classifications, including prohibiting an irrebuttable presumption of nonresidence.¹⁹⁶ The Court recognized the state's legitimate interest in giving preferential treatment to bona fide residents.¹⁹⁷ In other words, the tuition classification alone is not a constitutional violation. Further, as in *Day*, plaintiffs bringing constitutional claims would struggle to show a sufficiently particularized personal stake to demonstrate standing.¹⁹⁸ Because every challenge to in-state tuition rates for undocumented students is restricted by the aforementioned justiciability obstacles, there is no indication any federal court would ever reach any constitutional question.

*V. A Possible Challenge: State Attorney General Enforcement of
Section 411 Under State Consumer Protection Law*

Because Section 411 carries no private right of action and faces sovereign immunity and standing issues, it is unlikely a private plaintiff could successfully maintain a lawsuit in federal court under Section 411. State courts, however, bear no comparable constraint. As such, enforcement of, for example, a state consumer protection law incorporating Section 411 as an ingredient presents a legitimate vehicle for attempted enforcement. The importance of consumer protection in education is on the rise. First, the surge of the for-profit education sector¹⁹⁹

196. See *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (finding an irrebuttable presumption of nonresidence violative of the Due Process Clause). In *Vlandis*, the state of Connecticut established a student's residency for tuition purposes conclusively and irreversibly at the time of admission. *Id.* at 443. The Court found that denying a student the opportunity to present evidence of residency because of a presumption of nonresidency violated the Due Process Clause of the Fourteenth Amendment. *Id.*

197. See *id.* at 453 (recognizing a state has a legitimate interest in maintaining the quality of its public institutions and treating its residents preferentially).

198. See *Day v. Bond*, 500 F.3d 1127, 1132–35 (10th Cir. 2007) (dismissing claims from out-of-state residents under the Equal Protection Clause for lack of standing); *supra* Part IV.B (discussing lack of standing).

199. For-profit education generally refers to schools that operate for profit and typically offer programs with job-specific training, such as secretarial school or cosmetology school. See Patrick F. Linehan, Note, *Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 GEO. L.J. 753,

and the rapid increase in federal and state aid to such institutions²⁰⁰ in the past decade brought heightened attention to aggressive recruiting and marketing tactics.²⁰¹ This attention brings stories of fraud, misrepresentation, and manipulation of consumers, which have not escaped the focus of federal and state leaders, and state attorneys general have initiated investigations into these tactics.²⁰² For example, Kentucky Attorney General Jack Conway filed a state lawsuit in July 2011 alleging Daymar College, a for-profit college, deceived and misled students.²⁰³ Illinois Attorney General Lisa Madigan filed a similar lawsuit against Westwood College in 2012, claiming the college misrepresented its criminal justice program.²⁰⁴

Although the for-profit sector currently bears the burden of this attention, the spirit signals a shift toward increasing protection of consumers and their investment in higher education at a time when students are increasingly borrowing more money and increasingly defaulting on their loans.²⁰⁵ In this context,

756 (2001) (describing the nature of proprietary schools); *see also* 34 C.F.R. § 600.5 (2012) (defining “proprietary institution of higher education” for federal student aid purposes).

200. *See* THOMAS L. HARNISCH, AM. ASSOC. OF STATE COLLEGES AND UNIVS., CHANGING DYNAMICS IN STATE OVERSIGHT AT FOR-PROFIT COLLEGES 2 (2012), http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/Policy_Matters/Changing%20Dynamics%20in%20State%20Oversight%20of%20For-Profit%20Colleges.pdf (describing the increase in for-profit education).

201. *See* Linehan, *supra* note 199, at 756–63 (describing the recruiting and marketing tactics of proprietary schools).

202. *See id.* at 763–74 (discussing misrepresentation and manipulation at proprietary schools). *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES (2010) (discussing examples of fraud uncovered in a GAO investigation into for-profit colleges).

203. *See* HARNISCH, *supra* note 200, at 4 (discussing the state attorney general investigation into Daymar College).

204. *See id.* (describing the state attorney general lawsuit against Westwood College).

205. *See National Student Loan Two-Year Default Rates*, FED. STUDENT AID, U.S. DEPT OF EDUC., <http://www2.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html> (last visited Nov. 10, 2013) (listing national cohort default rates since 1987) (on file with the Washington and Lee Law Review). The Department of Education measures default rates as the percentage of borrowers

then, any college or university, including a state public university, could reasonably expect scrutiny for its treatment of consumers.

A. Consumer Protection Law Generally

Consumer protection law in the United States is a combination of federal and state law.²⁰⁶ The Federal Trade Commission enforces the primary federal consumer protection statute, the Federal Trade Commission Act (FTCA), which prohibits unfair or deceptive business practices that affect commerce.²⁰⁷ In addition, numerous federal laws regulate specific industries.²⁰⁸ Like their federal counterparts, state consumer protection laws prohibit unfair and deceptive trade practices.²⁰⁹ Though they vary considerably from state to state, there are some consistent themes. First, each state's general consumer protection act is typically some version of the Unfair and Deceptive Acts and Practices Statute (UDAP).²¹⁰ Most prohibit false, unfair, or deceptive trade practices and confer enforcement power on the state attorney general.²¹¹ Substantively, many states simply include a general prohibition against deceptive and unfair conduct, though some states list specific prohibited conduct.²¹²

who enter repayment in a fiscal year and default by the end of the next fiscal year. *Id.* The most recently issued national default rate (for fiscal year 2010) was 9.1%—a steady increase from 5.9% in fiscal year 2000. *Id.*

206. See Edward M. Crane, Nicholas J. Eichenseer & Emma S. Glazer, *U.S. Consumer Protection Law: A Federalist Patchwork*, 78 DEF. COUNS. J. 305, 306 (2011) (discussing the nature of consumer protection law in the United States).

207. 15 U.S.C. § 45(a) (2012).

208. See, e.g., Graham-Leach-Bliley Act, 12 U.S.C. § 1841 (prohibiting any one institution from acting as any combination of investment bank, commercial bank, or insurance company); Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 301–399 (regulating the safety and marketing of food).

209. See Crane, *supra* note 206, at 326 (describing state consumer protection laws).

210. See NAT'L CONSUMER LAW CTR., INC., CONSUMER PROTECTION IN THE UNITED STATES 2 (2009) (discussing the UDAP statutes).

211. See Crane, *supra* note 206, at 327 (explaining commonalities among state consumer protection laws).

212. See NAT'L CONSUMER LAW CTR., INC., *supra* note 210, at 11 (discussing

Most state statutes do not require proof the wrongdoer had fraudulent knowledge or intent.²¹³ Most states do require a private plaintiff show he relied on the false representations associated with the deceptive practice.²¹⁴ States often exercise these powers consistently with their federal counterparts.²¹⁵ Critically, unlike the federal consumer protection statutes, state UDAP statutes confer a private right of action; with some exception, they allow consumer lawsuits for actual damages, injunctive relief, and, in some states, punitive damages.²¹⁶

B. Relationship to Violations of Federal Law in Higher Education

When a student enrolls in a state public university, that student is relying on the school's representations. With most universities, that student is relying on, for example, the institution's accreditation. An accrediting agency²¹⁷ is a nongovernmental educational association that ensures the quality of education or training offered by the institutions or programs they accredit, as well as the financial and

prohibited practices under UDAP statutes).

213. See *Consumer Protection Handbook*, 2004 A.B.A. SEC. ANTITRUST LAW 71 (discussing the scope of state consumer protection statutes).

214. See *id.* at 72 (explaining the reliance requirement).

215. See Crane, *supra* note 206, at 327 (“[T]he FTC and state enforcement officials often coordinate their efforts in the areas of consumer education, identity theft, telemarketing, and other national consumer protection issues.”).

216. See *id.* (expressing the conferral of a private right of action under UDAP statute).

217. Public universities are generally accredited at the institutional level by one of six regional accreditors: Middle States Commission on Higher Education, the New England Association of Schools and Colleges, the North Central Association of Colleges and Schools of the Higher Learning Commission, the Northwest Commission on Colleges and Universities, the Southern Association of Colleges and Schools, or the Western Association of Schools and Colleges Accrediting Commission. See generally COUNCIL FOR HIGHER EDUC. ACCREDITATION (CHEA), RECOGNIZED ACCREDITING ORGANIZATIONS (AS OF SEPTEMBER 2012), http://www.chea.org/pdf/CHEA_USDE_AllAccred.pdf (listing the regional accrediting agencies). In addition, other accrediting agencies can be either institutional or programmatic, the latter authorizing only specific programs such as law or medicine. See CHEA, THE VALUE OF ACCREDITATION 2 (2010), http://www.chea.org/pdf/Value%20of%20US%20Accreditation%2006.29.2010_buttons.pdf (describing the nature of accrediting agencies).

administrative integrity.²¹⁸ To this end, accrediting agencies employ a complex set of standards and requirements for institutions seeking accreditation, and institutions seeking to maintain already-acquired accreditation.²¹⁹ Title IV of the Higher Education Act of 1965,²²⁰ which makes available various federal loan and grant programs to students, requires an institution be accredited to participate.²²¹ The U.S. Department of Education, which administers Title IV, does not itself accredit universities as a condition of Title IV eligibility; rather, the Secretary publishes a list of reliable accreditors and defers to those accreditors on questions of institutional quality to determine Title IV eligibility.²²²

Accreditation, then, is valuable to both an institution and its students. First, it is an assurance of the quality of the education offered—a lack of accreditation often indicates a lack of quality. Accordingly, a student's degree is more valuable from an accredited institution than an unaccredited institution. Second, it is the key to a major source of revenue for both institutions and students: federal student aid. Without accreditation, an institution and its students lose access to federal loans and grants.²²³

Accreditation standards broadly require integrity, and often explicitly require compliance with federal and state law to attain

218. See 34 C.F.R. § 602.1 (2012) (explaining why the Secretary of Education approves accrediting agencies).

219. See generally MIDDLE STATES COMM'N ON HIGHER EDUC., CHARACTERISTICS OF EXCELLENCE IN HIGHER EDUCATION: REQUIREMENTS OF AFFILIATION AND STANDARDS FOR ACCREDITATION (2006), <http://www.msche.org/publications/CHX-2011-WEB.pdf> (detailing requirements for accreditation).

220. Higher Education Act of 1965, tit. IV, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1070–1099 (2012)).

221. See 34 C.F.R. § 600.4(a)(5)(i) (2012) (defining an institution of higher education as accredited). Accredited means “[t]he status of public recognition that a nationally recognized accrediting agency grants to an institution or educational program that meets the agency’s established requirements.” *Id.* § 600.2.

222. See *Accreditation in the United States*, U.S. DEP’T OF EDUC. (last updated Sept. 20, 2013), <http://www2.ed.gov/admins/finaid/accred/accreditation.html#Overview> (last visited Nov. 10, 2013) (describing the role of accrediting agencies) (on file with the Washington and Lee Law Review).

223. See *supra* note 221 and accompanying text.

that integrity. For example, the Middle States Commission on Higher Education (Middle States) requires every institution “compl[y] with all applicable government (usually Federal and state) policies, regulations, and requirements.”²²⁴ The New England Association of Schools and Colleges requires institutions to “observe the spirit as well as the letter of applicable legal requirements.”²²⁵ The Higher Learning Commission of the North Central Association requires “the organization understand[] and abide[] by local, state, and federal laws and regulations applicable to it.”²²⁶ Integrity within the accreditation context, then, encompasses compliance with any and all applicable law. An egregious example of breach of this integrity by violating federal law arose in 2012, when Middle States warned Pennsylvania State University (Penn State) that its accreditation was in jeopardy for the university’s failure to comply with federal and state law in connection with the Jerry Sandusky scandal.²²⁷

Because Section 411 lacks decisive interpretive guidance, a state public university granting in-state tuition to illegal immigrants risks violation of Section 411. If that university is found to violate Section 411, it is in violation of federal law,

224. MIDDLE STATES COMM’N ON HIGHER EDUC., *supra* note 219, at xii.

225. NEW ENGLAND ASS’N OF SCH. AND COLLS., STANDARDS FOR ACCREDITATION (2011), http://cihe.neasc.org/standards_policies/standards/standards_html_version#standard_eleven (last visited Nov. 10, 2013) (on file with the Washington and Lee Law Review).

226. HIGHER LEARNING COMM’N OF THE N. CENTRAL ASS’N, COMMISSION POLICIES 16 (2012), *available at* <http://www.ncahlc.org/Policy/commission-policies.html> (last visited Nov. 10, 2013) (on file with the Washington and Lee Law Review).

227. *See* Letter from R. Barbara Gitenstein, Chair, Middle States Comm’n on Higher Educ. Exec. Comm., to Dr. Rodney A. Erickson, President, The Pa. State Univ. (Aug. 8, 2012), http://www.psu.edu/vpaa/pdfs/middle%20states/middle_states_notification_8-6-12.pdf (notifying Penn State its accreditation was in jeopardy based on the university’s failure to comply with applicable government policies in the Jerry Sandusky scandal). The university’s accreditation was later reinstated following institutional self-studies and the implementation of new procedures. *See* Laura Nichols, *Middle States Takes Penn State off ‘Warning List,’ Accreditation Intact*, STATECOLLEGE.COM (Nov. 16, 2012), <http://www.statecollege.com/news/local-news/middle-states-takes-penn-state-off-warning-list-accreditation-intact-1182146/> (last visited Nov. 10, 2013) (describing the removal of Penn State’s accreditation warning) (on file with the Washington and Lee Law Review).

breaching the integrity of the institution, and consequently risking its accreditation. A university risking its accreditation is risking the value of a degree from its institution—a degree from an unaccredited university is worth less than a degree from an accredited university. If a student enrolls believing a university is accredited and consciously maintaining its accreditation, a knowing violation of federal law that risks that accreditation would markedly betray the expectations of that student. In other words, representation that a university is an accredited institution inheres a representation of ongoing compliance with federal law; risking violation of Section 411 corrupts this representation.

C. The State Attorney General as an Enforcement Mechanism

With some variation, enforcement of a consumer protection statute can occur in two ways: (1) the state attorney general can institute an investigation and civil lawsuit against an offender, or (2) a private plaintiff can sue the offender for violating the consumer protection law. Attorneys general are uniquely situated law officers. First, in forty-three states, the attorney general is a popularly elected official.²²⁸ Though state constitutions and statutes define the responsibilities of attorneys general, state attorneys general may usually exercise their power and authority as the public interest requires.²²⁹ As such, state attorneys general often have the ability to defend or challenge state agency actions in court, even though the state agency is often the attorney general's client.²³⁰ When state attorneys general decide to

228. See Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2002 (2001) (discussing the election of the state attorneys general).

229. See, e.g., *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 271 (5th Cir. 1976) (“The Attorney General has the power and it is his duty among the many devolving upon him by the common law to prosecute all actions necessary for the protection and defense of the property and the revenue of the state.” (quotations omitted)).

230. See NAT'L ASS'N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 57 (Emily Myers & Lynne Ross, eds., 2d ed. 2007) (describing the relationship of the state attorneys general to state agencies).

challenge agency action they find unlawful, however, they will often appoint special counsel to represent the agency.²³¹ Because the state attorneys general are charged with enforcement and protection of the public good, they often have broader enforcement power than the available consumer remedies.²³²

The state attorneys general are thus in the ideal position to force interpretation of this statute under state consumer protection law. First, given the increasing value placed on consumer protection in education,²³³ state attorneys general may take increasing notice of potential violations. Public universities are devised as operating in the public good, “promot[ing] the general welfare of the citizenry,”²³⁴ and “dedicated to the service of [the state] and its people.”²³⁵ Public universities, then, are uniquely situated in a position of public scrutiny; as such, their integrity is paramount. As the chief law enforcement officer in the state, the state attorney general aims to protect the integrity of public universities and the interests of state consumers through the enforcement of state consumer protection laws, even against another state agency in the same state. Potentially violating federal law and consequently risking accreditation poses a major hazard to the expectations of consumers—a degree from a school that represented itself as an accredited institution but ends up unaccredited is a much different investment than a degree from a school that complies with federal law and maintains its accreditation.

231. See *id.* at 58 (“In situations where the Attorney General believes the agency’s actions conflict with the public interest, the Attorney General may appoint special counsel for the agency and seek to protect the public interest through intervention in the suit or institution of separate proceedings against the agency.”).

232. See *Consumer Protection Handbook*, *supra* note 213, at 81–83 (describing the enforcement capabilities of state attorneys general).

233. See *supra* Part V (discussing the increased role of consumer protection law in education).

234. *Mission and Public Character*, PA. ST. UNIV., <http://www.psu.edu/this-is-penn-state/leadership-and-mission/mission-and-character> (last visited Nov. 10, 2013) (on file with the Washington and Lee Law Review).

235. *History & Mission*, UNIV. OF N.C., <http://www.northcarolina.edu/about/mission.htm> (last visited Nov. 10, 2013) (on file with the Washington and Lee Law Review).

Because federal nonjusticiability plagues Section 411, then, the statute is only justiciable as an element of a state law claim. In this regard, the state attorney general, charged with the enforcement of consumer protection statutes, could feasibly force a court to consider the statute to protect consumer investment in education by interpreting Section 411 at a time when student borrowing and debt is climbing. Because of the unique position of state attorneys general and the availability of a state forum, challenging Section 411 under state consumer protection law is a viable passage.

VI. Conclusion

Section 411 presents no bar to institutional policy providing in-state tuition to undocumented students. First, in-state tuition is not a benefit contemplated by the provision's prohibition. Second, no private plaintiff can sue under the provision itself because it lacks a private right of action, is limited by the university's sovereign immunity, and does not have a legitimate constitutional issue. The rights encompassed by Section 411 are only justiciable as an ingredient of a state law issue, which may be a viable claim under state consumer protection law.