

29 April 2014

Hon. John J. Goger
Judge, Fulton County Superior Court
136 Pryor Street, Room 8A
Atlanta, GA 30303

RE: Immigration Professor Amicus Curiae Brief: DACA Beneficiary Georgia College Students v. University System of Georgia's Board of Regents, Case No: 2014 CV 243077

Dear Judge Goger:

The undersigned immigration professors have signed this letter in their personal capacities, and their institutional affiliations are solely for identification purposes, not endorsement purposes. All views expressed herein are their own. None have received compensation in this matter, and none are formally involved in the *Olvera* litigation, except in this *amicus* role.

The University of Georgia Board of Regents (BOR) Response to the legitimate claims of Deferred Action for Childhood Arrivals (DACA) recipients has been to cite selectively from its Manual, ignoring the material reclassification of these would-be students, and denying that DACA has conferred the requisite "Lawful Presence" upon them. By this legerdemain, Georgia hopes that the Court will not read the entirety of the Frequently Asked Questions (FAQ) that the US CIS has issued and that set out the predicate federal classification that all states, including Georgia, must employ when determining the eligibility of non-citizens for residency status or reclassification. The BOR concedes that its Policy Manual governs the classification and reclassification of these intending students, but it mischaracterizes and misunderstands the exact legal transformation that USCIS has allowed student recipients by conferring DACA, which has reconstituted their formerly-undocumented status to the Board's own requirement—LAWFUL PRESENCE. It accomplishes this sleight of hand by tiptoeing up to the appropriate language but not citing it in its entirety, and then denies that the exact legal character of these students meets the durational/domiciliary test for Georgia residency, provided that they have resided in the state with this status for 12 months. In addition, it diminishes the real import of DACA by suggesting that it is neither relevant nor applicable.

Here is the BOR response (at 3-4):

The Board of Regents has adopted a Policy Manual to govern the operations of both the Board and the member institutions of the University System of Georgia. Defendants have properly determined that the decision by USCIS to delay deportation proceedings against an individual for a two year term does not alter the lack of legally recognized immigration status of the Plaintiffs, nor does

the exercise of prosecutorial discretion confer any rights, privileges, or recognition upon the Plaintiffs other than an acknowledgement that deportation will be delayed by a period of up to two years from the date of issuance of the I-797. The deferred action granted under the auspices of the two intra-agency employment memoranda issued within the Department of Homeland Security ("DHS"), the parent agency of US CIS, does nothing more than acknowledge that an individual can delay deportation proceedings if an individual meets certain criteria established by DHS, the prosecutorial agency. *See* DHS, FREQUENTLY ASKED QUESTIONS ABOUT DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2012), available at <http://www.dhs.gov/deferred-action-childhood-arrivals> (Q 1: Answer-Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion.). The decision to exercise prosecutorial discretion does not grant any rights, privileges, or status to Plaintiffs beyond the determination that neither USCIS nor DHS will actively seek the deportation of an individual granted deferred action during the two year period [4] from the date of issuance of the I-797. *Id.* (Q7: Answer- Deferred action is a form of prosecutorial discretion that does not confer lawful permanent resident status or a path to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.).

However, the entire FAQ No. 1 is inconveniently specific for the BOR position, as the Board mistakes lawful STATUS—not mentioned or anticipated by Georgia law or BOR Policies—with lawful PRESENCE, which is the language of its residency policy, as conceded by the Board in its response Brief. Reading the entire FAQ makes short work of the Board's position (bolded in red), and makes it clear that it does much more than the *de minimis* effect the Board contends DACA confers (it contends that DACA “does nothing more than acknowledge” delay of deportation):

Q1: What is deferred action?

A1: Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. For purposes of future inadmissibility based upon **unlawful presence**, an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect. **An individual who has received deferred action is authorized by the Department of Homeland Security (DHS) to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect.** However, deferred action does not confer **lawful status** upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.

Nowhere in its reply brief does the BOR acknowledge this bolded language, which is the proper and controlling nomenclature—in DACA and in the Georgia regulation 4.3.4 (Verification of Lawful Presence). The BOR appears to anticipate that others will not read the full DACA information, or even its first point, and that others will also confuse the different status designations “lawful status” with “lawful presence.” However, the requirement is clear, and simply wishing it were otherwise does not make

that difference disappear. Here is the actual and full requirement, taken from the BOR Policy Manual:

4.3.2.3 Non-Citizens

A non-citizen student shall not be classified as in-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. Lawful permanent residents, refugees, asylees, or other eligible noncitizens as defined by federal Title IV regulations may be extended the same consideration as citizens of the United States in determining whether they qualify for in-state classification. .
(emphasis added)

4.3.3 Tuition Differential Waivers

See [Section 7.3.4 of this Policy Manual](#) for instances in which an institution may waive the differential between in-state and out-of-state tuition.

4.3.4 Verification of Lawful Presence

Each University System institution shall verify the lawful presence in the United States of every successfully admitted person applying for resident tuition status, as defined in [Section 7.3](#) of this Policy Manual, and of every person admitted to an institution referenced in [Section 4.1.6](#) of this Policy Manual.

As can be readily seen, there is linkage between 4.3.2.3 and the core 4.3.4, which cites law presence, such as that conferred by DACA. The examples of refugees and asylees is helpful, as neither of those categories is a lawful permanent resident and the unmentioned Deferred Action criteria are specifically elaborated in 4.3.4. Other groups that might plausibly fit into this lawfully present grouping would be refugees, asylees, Temporary Protected Status persons (such as Somalis, at the present), and others with Advanced Parole and the like—all permanently residing while in that status, under color of law. While Georgia might not have anticipated that there would ever be large numbers of DA recipients, its Policy language clearly allows them to form the requisite intent and residence.

We urge the Court to read this in its clear and intended meaning and characterize these students properly as holding the DACA lawful presence. Should they not be renewed (which the Board makes a big point, although the Obama Administration has already begun to set out the renewal process), their eligibility would also expire, the same way that students who received residency and then moved to Florida and continued school enrollment would lose their residency status: once earned, Georgia residence would only continue as long as they continued to hold all the earmarks of residency. The chimerical removal of DACA from DACA participation would, like any other disqualifying characteristic, render them ineligible. That this might occur—a concededly unlikely executive action, once granted—cannot be used as a scare tactic to refuse to extend their Georgia residential status in the first place.

In a nutshell, DACA recipients who can meet the durational requirement while in DACA status are clearly qualified to receive resident tuition status. It is not federal law that grants them this eligibility, but Georgia law and policy on their face. We urge the Court to order their eligibility, as applied. This is simple arithmetic, and the only fair reading possible.

Sincerely,

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