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**Legally Present, But Not Yet Legal: The State Attorney General's Role in  
Securing Public Benefits for Childhood Arrivals**

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# LEGALLY PRESENT, BUT NOT YET LEGAL: THE STATE ATTORNEY GENERAL'S ROLE IN SECURING PUBLIC BENEFITS FOR CHILDHOOD ARRIVALS

John Goodwin\*

## ABSTRACT

*This article analyzes how six different states have responded to the Obama administration's "Deferred Action for Childhood Arrivals" policy, which grants qualified undocumented immigrants permission to stay in the United States for a renewable two-year period. While beneficiaries of this policy do not have legal citizenship status, they are considered "legally present" by the federal government, which prevents their deportation and allows them to obtain work authorization and a social security number. At the state level, legal presence is universally sufficient grounds to obtain a driver's license, and often is sufficient to be eligible for in-state tuition rates at public colleges. Ultimately, this article argues that state attorneys general, as enforcers of the public interest, are uniquely situated to secure these public benefits for legally present individuals in states where other executive branch officials have attempted to deny them.*

## I. INTRODUCTION

The Obama Administration's Deferred Action for Childhood Arrivals (DACA) policy directive has provided work-permit eligibility and temporary relief from deportation to over six hundred thousand undocumented aliens in its first seventeen months alone.<sup>1</sup> Although

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1 . U.S. Citizenship and Immigration Servs., Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012–2014 First Quarter (2014), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-06-02-14.pdf>.

the Department of Homeland Security (DHS) did not confer citizenship status upon DACA beneficiaries, there has still been a significant change in their relationship with the government. The effects of this shift are most prominent at the state level, where lawyers and policymakers have struggled to determine where DACA beneficiaries fit into the greater public community. No longer completely undocumented, but not quite lawful residents, they are stuck in the limbo of having “lawful presence” without “lawful status.”

This ambiguity raises the question of whether DACA beneficiaries should be entitled to state public benefits—primarily driver’s licenses and in-state tuition—that are available to citizens and residents, but generally off-limits to undocumented aliens.<sup>2</sup> The primary interpreters and enforcers on such matters of state law are the fifty state attorneys general. Though their specific subject matter jurisdiction may vary from state to state, all state attorneys general are designated as their states’ chief legal officers. They generally have the authority to issue legal opinions, institute civil suits, represent state agencies, and defend or challenge the constitutionality of legislative or administrative actions. State attorneys general have a responsibility to determine whether the web of federal and state law and policy permits DACA beneficiaries to receive public benefits in their state. They also must assess the validity of the governors’ and legislatures’ decisions on the treatment of DACA beneficiaries.<sup>3</sup>

Part II begins with a description of the “Deferred Action for Childhood Arrivals” policy directive. It then provides a brief overview of federal regulation of driver’s licenses and in-state tuition, as well as the statutory and common-law powers of state attorneys general. Part III surveys the various approaches that a representative sample of six states and their attorneys general have taken with regard to granting these public benefits to DACA beneficiaries.

Part IV addresses whether state public benefits should be extended to DACA beneficiaries. It concludes that, in the absence of state legislation expressly precluding this action, DACA beneficiaries should be entitled to state driver’s licenses and in-state tuition. It further argues that state attorneys general should seek to enforce DACA beneficiaries’ rights to receive driver’s licenses and in-state

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2. *The First Six Months of Deferred Action for Childhood Arrivals (DACA)*, Nat’l Immigration Law Ctr., <http://www.nilc.org/DACAsixmonths.html> (last updated Dec. 17, 2012).

3. See Marshall, *infra* note 34.

tuition by issuing affirmative legal opinions and refusing to defend gubernatorial and state agency policies contrary to such opinions. More specifically, it argues that the state attorney general's independence from gubernatorial control and common-law duty to protect the "public interest" requires her to defend DACA beneficiaries' rights to receive public benefits.

## II. BACKGROUND

### A. "Deferred Action for Childhood Arrivals" Memorandum

On June 15, 2012, Secretary of Homeland Security Janet Napolitano issued a memorandum entitled "Deferred Action for Childhood Arrivals," describing the Obama administration's new approach toward prosecutorial discretion in the immigration context.<sup>4</sup> Under the DACA guidelines, undocumented aliens residing in the United States may request a deferral of deportation, provided that they: (1) were under the age of thirty-one on June 15, 2012; (2) arrived in the United States before their sixteenth birthday; (3) have continuously resided in the United States since June 15, 2007; (4) are currently enrolled in or have graduated high school, or have been honorably discharged from the U.S. military; (5) have not been convicted of a felony, or significant misdemeanor; and (6) do not otherwise pose a threat to national security or public safety.<sup>5</sup> Applicants must present documents establishing physical presence and continuous residence in the United States, such as a passport with an admission stamp; school, hospital, military, or employment records; or title deeds or mortgages.<sup>6</sup>

Once U.S. Immigration and Customs Enforcement grants deferred action, they will postpone removal action against the approved individual for two years, subject to renewal.<sup>7</sup> A DACA

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4. Memorandum from Janet Napolitano, U.S. Sec'y of Homeland Sec., On Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

5. *Consideration of Deferred Action for Childhood Arrivals (DACA), U.S. Citizenship and Immigration Servs.*, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process> (last updated July 2, 2013) [hereinafter *DACA Consideration*].

6. *Id.*

7. *Frequently Asked Questions, U.S. Citizenship and Immigration Servs.*, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood->

beneficiary may, through a showing of financial necessity, receive an Employment Authorization Document (EAD), which serves as proof of legal permission to work in the United States.<sup>8</sup> Beneficiaries who obtain an EAD may also apply for a Social Security number through the Social Security Administration by presenting a certified document establishing age and identity.<sup>9</sup> Additionally, according to a clarification published by U.S. Citizenship and Immigration Services (USCIS) on January 18, 2013, DHS now considers DACA beneficiaries to be “lawfully present” in the United States during the full period of deferred action.<sup>10</sup> This is not to be confused with “lawful immigration status,” which is not conferred through a grant of deferred action. Lawful status is a formal designation granting permanent immigrant classification or another statutorily-prescribed classification.<sup>11</sup> While lawful presence is critical to an individual’s ability to seek lawful status in the future, it is subject to the discretion of the executive branch and does not confer the formal statutory guarantees associated with lawful status.<sup>12</sup> Lawful presence simply affirms that an individual has temporary permission to remain in the United States without any formal immigration classification.<sup>13</sup>

Deferred action is not a new concept—it was previously used to place humanitarian refugees on “non-priority” deportation lists—but it has never before been open to such a broad category of

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arrivals-process/frequently-asked-questions (last updated Jan. 18, 2013) [hereinafter *DACA FAQs*].

8. *Id.*

9. State-issued driver’s licenses are among the accepted documents, which makes them all the more desirable for a DACA beneficiary. *See* Social Sec. Admin., Social Security Number—Deferred Action for Childhood Arrivals, available at [http://www.ssa.gov/pubs/deferred\\_action.pdf](http://www.ssa.gov/pubs/deferred_action.pdf) (last visited July 1, 2014).

10. *See DACA FAQs, supra* note 7.

11. *Id.*

12. *See* 8 U.S.C. § 1182(a)(9)(B)–(C) (2013) (stating that accrual of 1 year of unlawful presence bars visa eligibility); *DACA FAQs, supra* note 7 (“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 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”)

13. *See* Daniel A. Arellano, Note, *Keep Dreaming: Deferred Action and the Limits of Executive Power*, 54 *Ariz. L. Rev.* 1139, 1142 (2012).

individuals.<sup>14</sup> In response to this grand expansion, DACA beneficiaries have begun to seek the two public benefits that other deferred action recipients already enjoy, and which usually accompany lawful presence in the United States:<sup>15</sup> *First*, eligibility for driver's licenses, without which many beneficiaries could not commute to work obtained through their EADs;<sup>16</sup> and *second*, in-state tuition at public universities, which would allow them to further improve their employment opportunities at an affordable rate.<sup>17</sup> As of November 2014, forty-five states (and Washington, D.C.) have allowed DACA beneficiaries to receive driver's licenses,<sup>18</sup> only three of which also extend the benefit generally to undocumented immigrants.<sup>19</sup> Nineteen states have granted in-state tuition to DACA beneficiaries.<sup>20</sup>

## B. Federal Regulation of State-Issued Driver's Licenses

Standards governing the issuance of driver's licenses have traditionally been a matter of state concern.<sup>21</sup> In May of 2005,

14. See, e.g., *Pasquini v. Morris*, 700 F.2d 658, 661 (11th Cir. 1983) (“Deferred action status, also known as ‘non-priority status,’ amounts to, in practical application, a reprieve for deportable aliens. No action (i.e., no deportation) will be taken by the INS against an alien having deferred action status.”) (internal citation omitted); see also *DACA FAQs*, *supra* note 7 (“DACA is one form of deferred action. The relief an individual receives under DACA is identical for immigration purposes to the relief obtained by any person who receives deferred action as an act of prosecutorial discretion.”).

15. Other public benefits may be available to DACA beneficiaries in some rare cases—for example, state-sponsored low-income healthcare in California—but driver's licenses and in-state tuition have dominated the political discourse regarding the law. See *Benefits Available for DACA Recipients in California*, Cal. Immigrant Policy Ctr., <https://org2.salsalabs.com/o/5009/images/CABenefitsforDACA.English.10.2013-3.pdf> (last updated Jan. 2014).

16. Are Individuals Granted Deferred Action under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for State Driver's Licenses?, Nat'l Immigration Law Ctr., <http://nilc.org/dacadriverslicenses.html> (last updated June 19, 2013) [hereinafter *Driver's Licenses*].

17. *Basic Facts about In-State Tuition for Undocumented Immigrant Students*, Nat'l Immigration Law Ctr., [www.nilc.org/basicfactsinstat.html](http://www.nilc.org/basicfactsinstat.html) (last updated Feb. 19, 2014) [hereinafter *In-State Tuition*].

18. See *Driver's Licenses*, *supra* note 16. All states except AK, AZ, ND, NE, and SD have confirmed that DACA beneficiaries are eligible for driver's licenses.

19. See *id.* These states are NM, WA, and UT.

20. See *In-State Tuition*, *supra* note 17. CA, CO, CT, HI, IL, KS, MD, MN, NE, NJ, NM, NY, OK, OR, RI, TX, UT, VA, and WA all have laws or regulations permitting undocumented immigrants who attended in-state high schools to receive in-state tuition.

21. See *United States v. Best*, 573 F.2d 1095, 1103 (9th Cir. 1978) (“[T]here is little question that licensing of drivers constitutes an integral portion of those

however, Congress passed the REAL ID Act, providing a set of unified federal standards.<sup>22</sup> The REAL ID Act requires, among other things, that driver's license applications contain "evidence of lawful status," which can include, *inter alia*, "approved deferred action status."<sup>23</sup> While state compliance with the Act is voluntary, failure to comply will eventually result in federal refusal to recognize a state's driver's licenses for identification purposes.<sup>24</sup> In spite of this, only twenty states have passed legislation meeting such requirements as of November 2014.<sup>25</sup>

### C. Federal Regulation of In-State Tuition

State law's traditional control over the conferral of in-state tuition at public universities has also come into conflict with acts of Congress: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>26</sup> In relevant part, IIRIRA states:

[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope)

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governmental services which the States and their political subdivisions have traditionally afforded their citizens." (citation omitted) (internal quotation marks omitted)).

22. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, § 201-07, 119 Stat. 231, 310-16 (2005) (to be codified at 49 U.S.C. § 30301) [hereinafter *REAL ID Act*].

23. *See id.* § 202(c)(2)(B)(viii).

24. Todd B. Tatelman, Cong. Res. Serv., RL 34430, The REAL ID Act of 2005: Legal, Regulatory, and Implementation Issues 1 (2008), available at <http://www.fas.org/sgp/crs/misc/RL34430.pdf>. DHS has granted a "temporary deferral" to non-compliant states, meaning that the federal government will continue to recognize their drivers' licenses for identification purposes for the time being. *See Countdown to Real ID*, Nat'l Conference of State Legislatures, (Feb. 7, 2014), <http://www.ncsl.org/research/transportation/count-down-to-real-id.aspx>.

25. *REAL ID Enforcement in Brief*, Dep't of Homeland Sec., <http://www.dhs.gov/real-id-enforcement-brief> (last updated Oct. 14, 2014) [hereinafter *REAL ID Enforcement*]. The 20 compliant states are: AL, CO, CT, DE, FL, GA, HI, IA, IN, KS, MD, NE, OH, SD, TN, UT, VT, WI, WV, and WY.

26. *See Vlandis v. Kline*, 412 U.S. 441, 445 (1973) (noting that "the appellees do not challenge, nor did the District Court invalidate, the option of the State to classify students as resident and nonresident students, thereby obligating nonresident students to pay higher tuition and fees than do bona fide residents. The State's right to make such a classification is unquestioned here.").

without regard to whether the citizen or national is such a resident.<sup>27</sup>

This effectively precludes an unlawfully-present immigrant from receiving in-state tuition unless that state also provides in-state tuition to out-of-state U.S. citizens.

The prohibition in PRWORA reaches more broadly: “[A]n alien who is not a qualified alien . . . is not eligible for any State or local public benefit.”<sup>28</sup> The act defines the term “State or local public benefit” to include “postsecondary education” benefits “for which payments or assistance are provided . . . by an agency of a State,”<sup>29</sup> and limits “qualified aliens” to permanent residents, asylees, refugees, Cuban and Haitian aliens, or those granted conditional entry.<sup>30</sup> There is, however, a stipulation that states may provide public benefits to aliens “who [are] not lawfully present” through affirmative enactment of a state law.<sup>31</sup> Together, IIRIRA and PRWORA create a framework that prevents aliens who lack legal presence from receiving in-state tuition in any of the fifty states.

#### D. Powers and Duties of the State Attorney General

The attorney general (AG) is an executive branch official, constitutionally prescribed and directly elected in forty-three states.<sup>32</sup> Almost all states designate her as their “chief legal officer,” with the authority to control affirmative and defensive state litigation and to advise the governor, legislature, and state agencies on legal matters.<sup>33</sup> While all fifty state governors control the executive branch

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27. 8 U.S.C. § 1623(a) (2012).

28. 8 U.S.C. § 1621(a) (2012).

29. 8 U.S.C. § 1621(c) (2012).

30. 8 U.S.C. § 1641(b) (2012).

31. 8 U.S.C. § 1621(d) (2012). (“A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.”)

32. The attorney general is appointed by the governor in five states (AK, HI, NH, NJ, and WY), selected by a secret ballot of the legislature in Maine, and appointed by the state supreme court in Tennessee. See Justin G. Davids, Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 Colum. J.L. & Soc. Probs. 365, 371, n.22 (2005).

33. See Nat’l Ass’n of State Attorneys Gen., *State Attorneys General: Powers and Responsibilities* 6 (Lynne M. Ross ed., 1990).

and are tasked with ensuring that the laws are faithfully executed,<sup>34</sup> forty-eight attorneys general serve free from gubernatorial control.<sup>35</sup>

Importantly, the state attorney general also retains the common-law power and duty to bring litigation in the public interest, even when the state is not otherwise a party.<sup>36</sup> This power is broad and deferential; as one court has explained: “[The state attorney general] may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest.”<sup>37</sup> The attorney general’s common-law powers and independence from gubernatorial control allow her to bring litigation disfavored by the governor<sup>38</sup> and even refuse to defend gubernatorial policies and state legislation she finds to be against the public interest.<sup>39</sup> Part II of this Note will closely analyze how different state attorneys general have utilized, or failed to utilize, their broad range of powers in responding to the federal DACA initiative. Specifically, Part II will focus on the six states in which the majority of public debate on the legal consequences of DACA has occurred: (1) Arizona, where all public benefits have been denied to DACA beneficiaries; (2) Nebraska, where only driver’s licenses have been denied; (3) Georgia, where only in-state tuition has

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34. See William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2442, 2449 (2006).

35. *Id.* at 2444. In Alaska and Wyoming, the attorney general serves entirely at the governor’s behest.

36. 7 Am. Jur. 2d Attorney General § 6. It is important to note, however, that some states have asserted that the attorney general may only act when statutorily empowered. See, e.g., *Blumenthal v. Barnes*, 804 A.2d 152, 165 (Conn. 2002) (holding that the Connecticut Attorney General lacks common-law powers).

37. *State ex. rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 (5th Cir. 1976) (holding that the Florida Attorney General has the right to initiate an antitrust action in federal court without explicit authorization from the governor); see also *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 471 (R.I. 2008) (holding that the Attorney General of Rhode Island has the common-law power to determine and represent the public interest); Mem. of Former Members of the Office of the Att’y Gen. of N.H. on H.B. 89, Docket No. 2011-0319 (May 23, 2011) (citing New Hampshire case law in support of the proposition that the Attorney General of New Hampshire has broad common-law powers to determine the public interest).

38. See, e.g., *State v. Tex. Co.*, 7 So. 2d 161, 162 (La. 1942) (holding that the attorney general “is not required to obtain the permission of the Governor or any other executive or administrative officer or board in order to exercise” her right to sue on behalf of the state); *State ex. rel. Bd. of Transp. v. Fremont, E. & M. V. R. Co.*, 35 N.W. 118, 120 (Neb. 1887) (holding that the attorney general could proceed with the prosecution of a case over the objections of the executive agency involved in the suit).

39. See Marshall, *supra* note 34, at 2461.

been denied; (4) North Carolina, where in-state tuition has been denied and where driver's licenses were temporarily denied; (5) Michigan, where driver's licenses were temporarily denied and where in-state tuition has been left to the discretion of each individual college system's Board of Regents; and (6) California, where state laws had previously granted driver's licenses and in-state tuition regardless of citizenship.

### III. STATE TREATMENT OF DACA BENEFICIARIES

#### A. Arizona

One month after DHS disseminated its "Deferred Action for Childhood Arrivals" memorandum, Governor Janice Brewer of Arizona issued an executive order addressing the status of DACA beneficiaries under Arizona state law.<sup>40</sup> Pointing to Arizona Revised Statutes §§ 1-502 and 28-3153, Governor Brewer declared that childhood arrivals are not entitled to any public benefits granted by the state of Arizona because their deferral does not grant them "lawful or authorized status."<sup>41</sup> She also ordered state agencies to take all expedient measures necessary to ensure that DACA beneficiaries do not receive state identification and taxpayer-funded benefits.<sup>42</sup>

Arizona Revised Statute § 1-502 addresses eligibility for state public benefits, using the same definition of "public benefit" as PRWORA.<sup>43</sup> It requires each person who applies for a public benefit to submit at least one document "demonstrating lawful presence in the United States . . ." from a list of eleven, including a "United States citizenship and immigration services employment authorization document. . . ." <sup>44</sup> Section 28-3152 lays out the guidelines for issuance of Arizona driver's licenses, declaring that the Arizona Department of Transportation shall not issue a driver's license until it has "proof satisfactory that the applicant's presence in the United States is authorized under federal law."<sup>45</sup> The law then permits the Department director to adopt any rules necessary to

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40. Exec. Order No. 2012-06, 18 Ariz. Admin. Reg. 2237 (Aug. 15, 2012), available at [http://www.azsos.gov/public\\_Services/Register/2012/36/governor.pdf](http://www.azsos.gov/public_Services/Register/2012/36/governor.pdf) [hereinafter *Brewer E.O.*].

41. *See id.*

42. *See id.*

43. Ariz. Rev. St. Ann. § 1-502(Ii) (2010).

44. Ariz. Rev. St. Ann. § 1-502(Aa)(7) (2010).

45. Ariz. Rev. St. Ann. § 28-3153(Dd) (2008).

verify an applicant's legal presence and provide a temporary driver's permit pending verification.<sup>46</sup>

On November 29, 2012, the Arizona Dream Act Coalition (ADAC) filed a complaint in federal court targeting Governor Brewer's executive order.<sup>47</sup> ADAC represented a group of individual plaintiffs who received deferred action under DACA, but were subsequently denied driver's licenses. After obtaining a job through DACA employment authorization, these individuals were now unable to drive to work.<sup>48</sup> In the complaint, ADAC pointed out that Arizona would routinely grant driver's licenses to any deferred action recipient with an EAD prior to the DACA program, and in fact continues to grant driver's licenses to most traditional deferred action recipients to this day, excluding only DACA beneficiaries.<sup>49</sup> Such action could not be squared, ADAC argued, with the USCIS declaration that DACA relief is identical for immigration purposes to the relief obtained by any other deferred action recipient.<sup>50</sup>

ADAC raised two claims: (1) that the Arizona policy violated the Supremacy Clause of the United States Constitution because federal immigration law preempts Governor Brewer's executive order;<sup>51</sup> and (2) that the policy violated the Equal Protection Clause of the Fourteenth Amendment, as Arizona treats similarly situated deferred action recipients differently with regard to driver's license issuance.<sup>52</sup>

In evaluating ADAC's Equal Protection argument on a motion to dismiss, the court found that there was a likelihood of success on

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46. *Id.*

47. Complaint for Declaratory and Injunctive Relief, *Ariz. Dream Act Coal. v. Brewer*, 945 F.Supp.2d 1049 (D. Ariz. 2013) (No. CV12-02546 PHX DGC) 2013 WL 5279121 (Sept. 17, 2013) at \*1.

48. *Id.* at \*4.

49. *Id.* at \*8. Traditionally, deferred action has been used for humanitarian refugees. *See Pasquini, supra* note 14.

50. Complaint for Declaratory and Injunctive Relief, *Ariz. Dream Act Coal. v. Brewer*, 945 F.Supp.2d 1049 (D. Ariz. 2013) (No. CV12-02546 PHX DGC) 2013 WL 5279121 (Sept. 17, 2013) at \*7.

51. *Id.* at \*10.

52. *Id.* at \*11. In a May 16, 2013 order, the District Court granted Arizona's motion to dismiss the Supremacy Clause claim, reasoning that Secretary Napolitano's DHS memorandum lacks the "force of law" required to preempt a conflicting state regulation. *Ariz. Dream Act Coal. v. Brewer*, 945 F.Supp.2d 1049 (D. Ariz. 2013) (order denying preliminary injunction, and granting in part and denying in part motion to dismiss). The court additionally found that Arizona's policy concerns only issuance standards for driver's licenses, not the "arrest, prosecution, or removal of aliens," and is therefore not preempted by federal immigration policy. *Id.* at 1059.

the merits under a rational basis standard of review. District Judge David G. Campbell wrote:

The record suggests that the State's policy was adopted at the direction of Governor Brewer because she disagreed with the Obama Administration's DACA program . . . The Court recognizes that a governor may legitimately disagree with the federal government on policy and political matters, and certainly has the right to voice those disagreements. But the Court cannot conclude that such views constitute a rational basis for treating similarly situated people differently with respect to driver's licenses.<sup>53</sup>

Even so, the Court went on to deny a preliminary injunction, reasoning that the plaintiffs had failed to establish a likelihood of irreparable harm.<sup>54</sup> On appeal, however, the Ninth Circuit reversed and remanded with instructions that the district court enter a preliminary injunction, pending trial, to prevent Arizona from "enforcing any policy by which the Arizona Department of Transportation refuses to accept Plaintiffs' Employment Authorization Documents, issued to Plaintiffs under DACA, as proof that Plaintiffs are authorized under federal law to be present in the United States."<sup>55</sup>

Governor Brewer's executive order triggered a separate round of litigation on the subject of in-state tuition. On June 25, 2013, Arizona Attorney General Thomas Horne filed suit in state court against the Maricopa County Community College District (MCCCD) for providing in-state tuition to DACA beneficiaries who otherwise met the District's residency requirement.<sup>56</sup> In his complaint, Horne

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53. *Id.* at 28–9.

54. *Id.* at 36. ("Although one Plaintiff has stopped driving because of the DACA program and instead commutes a significant distance to work by light rail and bus, that inconvenience does not constitute irreparable injury.")

55. *See* *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). The Court cited the likelihood that Arizona's policy would limit DACA beneficiaries' professional careers by denying them the ability to drive to work as evidence of irreparable harm: "Plaintiffs' lack of driver's licenses has prevented them from applying for desirable entry-level jobs, and from remaining in good jobs where they faced possible promotion." *Id.* at 1068.

56. *See* Mary Beth Faller, *Maricopa Community Colleges Sued Over In-State Tuition for Migrants*, *azcentral.com* (June 26, 2013), available at [www.azcentral.com/community/scottsdale/articles/20130626maricopa-community-colleges-sued-in-state-tuition-migrants.html](http://www.azcentral.com/community/scottsdale/articles/20130626maricopa-community-colleges-sued-in-state-tuition-migrants.html) (noting that the in-state tuition rate for MCCCD is \$78 per credit-hour, while out-of-state tuition costs over four times as much, at \$317 per credit-hour).

cited PRWORA's provision limiting state public benefits to "qualified aliens" unless a state affirmatively passes a law broaching that limitation.<sup>57</sup> He also cited Proposition 300, a 2006 referendum approved by 71% of Arizona voters, which prohibits certain aliens from receiving in-state tuition rates.<sup>58</sup> Codified in relevant part as Arizona Revised Statutes §§ 15-803 and 15-1825, Proposition 300 states that, "in accordance with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, a person . . . who is without lawful immigrant status is not entitled to classification as an in-state student."<sup>59</sup>

In their answer, the MCCC Board argued that PRWORA did not define "state or local public benefits" to include in-state tuition rates and therefore was inapplicable to the action at hand.<sup>60</sup> They further denied that Proposition 300 prevented DACA beneficiaries from classification as in-state students. According to the Board, the referendum intended to bring Arizona law into accord with IIRIRA, which only applies to aliens "not lawfully present."<sup>61</sup> Since the term "without lawful status" is not defined in the Arizona state law, and "lawful presence" and "lawful status" are used interchangeably in state (but not federal) law, the MCCC Board argued that Proposition 300, like IIRIRA, applied only to immigrants lacking "lawful presence" according to its federal definition. This argument was bolstered, the Board claimed, by the fact that the Arizona legislature subsequently determined in Arizona Revised Statute § 1-502 that holders of USCIS EADs were eligible for in-state tuition.<sup>62</sup>

MCCC had accepted EADs as proof of in-state tuition eligibility since the adoption of Proposition 300 in 2006. It did not change its practice when DACA expanded the group of individuals able to obtain EADs.<sup>63</sup> Attorney General Horne has nonetheless continued with the prosecution. His office has also begun an

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57. Complaint at \*2, *Ariz. v. Maricopa Cnty. Comty. Coll. Dist. Bd.*, No. CV2013-009093, 2013 WL 3379209 (Ariz. Super. June 25, 2013).

58. *Id.*

59. Ariz. Rev. St. 15-1803(b).

60. Defendant's Answer at 2, *Ariz. v. Maricopa Cnty. Comty. Coll. Dist. Bd.*, No. CV2013-009093 (Ariz. Super. July 27, 2013).

61. *Id.*

62. *Id.* at 3.

63. *Id.* at 4.

investigation into Pima Community College, another school accepting DACA EADs as proof of legal presence for in-state tuition.<sup>64</sup>

## B. Nebraska

Shortly after Brewer delivered her executive order, Nebraska Governor Dave Heineman issued a statement of his own, declaring:

President Obama's deferred action program to issue employment authorization documents to illegal immigrants does not make them legal citizens . . . The State of Nebraska will continue its practice of not issuing driver's licenses, welfare benefits, or other public benefits to illegal immigrants unless specifically authorized by Nebraska statute.<sup>65</sup>

An earlier Nebraska law had removed citizenship status from the list of criteria for paying in-state tuition rates, meaning that DACA beneficiaries were already able to take advantage of that benefit.<sup>66</sup>

Mayra Saldana, a 24-year old DACA beneficiary who obtained an EAD but was subsequently turned away by the Nebraska DMV, brought a challenge to Heineman's driver's license policy in federal district court.<sup>67</sup> Attorney General Jon Bruning's office defended the governor's position. As in the Arizona Dream Act Coalition case, Saldana alleged that Nebraska's policy of denying driver's licenses to DACA beneficiaries violated the Supremacy and Fourteenth Amendment Equal Protection clauses of the United States Constitution.<sup>68</sup> Unlike Arizona, however, Nebraska is fully compliant with the REAL ID Act. Saldana thus alleged that Governor Heineman's position conflicted with the language of that Act.

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64. See Letter from Leslie Kyman Cooper, Education Unit Chief, Office of the Arizona Attorney General, to Jeffrey Silvyn, General Counsel, Pima Community College (Oct. 24, 2013), available at <http://www.pima.edu/press-room/news-releases/2013/docs/state-arizona-tuition-undocumented-immigrants.pdf>.

65. L.B. 239 allows undocumented immigrants to pay in-state tuition at public universities provided they graduate from a Nebraska high school, live in the state for three years, and pledge to seek permanent legal status. See *Nebraska Follows Arizona: No Benefits for "Deferred" Immigrants*, Thomson/Reuters, Aug. 18, 2012, available at [www.newsmax.com/Newsfront/Nebraska-Arizona-deferred-immigrants/2012/08/18/id/448988](http://www.newsmax.com/Newsfront/Nebraska-Arizona-deferred-immigrants/2012/08/18/id/448988).

66. Leg. B. 239, 99<sup>th</sup> Leg., Reg. Sess. (Neb. 2006).

67. Complaint at \*3, *Saldana v. Lahm*, No. 13-3108, 2013 WL 3859089 (D. Neb. July 3, 2013).

68. *Id.*

Specifically, she claimed that REAL ID allows for evidence of “approved deferred action status” to satisfy the requirement of proof of legal status necessary for the issuance of a driver’s license.<sup>69</sup>

In response to the attorney general’s motion to dismiss, Chief Judge Laura S. Camp of the District of Nebraska found a likelihood of success on the merits for the Equal Protection claim.<sup>70</sup> As in the Arizona Dream Act Coalition case, the court could determine no rational basis for disparate treatment of regular deferred action recipients and DACA beneficiaries.<sup>71</sup> Unlike the Ninth Circuit, though, Chief Judge Camp did not find “irreparable harm” sufficient to justify a preliminary injunction.<sup>72</sup> With regard to Saldana’s claim that Nebraska’s policy conflicted with the REAL ID Act, the court held that REAL ID simply establishes minimum standards for the issuance of driver’s licenses and that states are free to impose additional requirements.<sup>73</sup> The court did not find it necessary to address whether Saldana, who lacked “lawful status” for the purposes of federal immigration laws, possessed “lawful status” for the purposes of the REAL ID Act.<sup>74</sup>

Nebraska Revised Statute § 60-484.05 allows for the issuance of a temporary driver’s license to any applicant who demonstrates that “his or her lawful presence in the United States is temporary.”<sup>75</sup> In specifying appropriate documentation to demonstrate such presence, it refers to § 60-484.04, which requires an applicant to present “valid documentary evidence that he or she has lawful status in the United States,” including a USCIS EAD.<sup>76</sup> Much like Arizona, Nebraska state law does not define “legal presence” or “legal status,” and appears to refer to both interchangeably and without regard to their definitions in the federal immigration context.

### C. Georgia

In 2005, the Georgia State Legislature passed a law allowing individuals with deferred action status to receive driver’s licenses.

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69. *Saldana v. Lahm*, 2013 WL 5658233, at \*4 (D.Neb. Oct. 11, 2013) (order denying preliminary injunction, and granting in part and denying in part motion to dismiss).

70. *Id.* at \*7. (Chief Judge Camp also dismissed Saldana’s Supremacy Clause claim).

71. *Id.* at \*6.

72. *Id.* at \*7.

73. *Id.* at \*5.

74. *Id.*

75. Neb. Rev. Stat. § 60-484.05(1) (2011).

76. Neb. Rev. Stat. § 60-484.04(2)(e) (2011).

According to the Georgia Department of Driver Services, possession of a USCIS EAD is sufficient to establish lawful presence for a driver's license.<sup>77</sup> In the wake of the 2012 DHS memorandum, Georgia Attorney General Samuel Olens opined that DACA beneficiaries with an EAD fall within the scope of the current law.<sup>78</sup>

The attorney general took a different stance, however, when it came to public education benefits. The Board of Regents, the governing body for Georgia's public universities, quickly determined that DACA beneficiaries could not qualify for in-state tuition or even admission to the state's top five schools, treating them in the same manner as other undocumented aliens.<sup>79</sup> A group of DACA beneficiaries sued the Board to force a change in the policy, and Attorney General Olens stepped in to defend it.<sup>80</sup>

Georgia law vests the full control and management of the state's university system in the Board of Regents.<sup>81</sup> With respect to tuition, Section 20-3-66 declares that "[n]oncitizen students 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."<sup>82</sup> In 2010, the Board of Regents adopted the following policies:

A person who is not *lawfully present* in the United States shall not be eligible for admission to any University System institution which, for the two most recent academic years, did not admit all academically qualified applicants.<sup>83</sup>

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77. See Georgia Department of Driver Services, *Information for Non-US Citizens*, [www.dds.ga.gov/drivers/DLdata.aspx?con=1741471757&ty=dl](http://www.dds.ga.gov/drivers/DLdata.aspx?con=1741471757&ty=dl) (last updated July 17, 2012).

78. See Jeanne Bonner, *Hit the Road, Not the Books*, Georgia Public Broadcasting (Sept. 2, 2013), [www.gpb.org/news/2013/09/02/hit-the-road-not-the-books](http://www.gpb.org/news/2013/09/02/hit-the-road-not-the-books).

79. See Jeanne Bonner, *State Rejects College Ban Lawsuit*, Georgia Public Broadcasting (Oct. 8, 2013), [www.gpb.org/news/2013/10/08/state-rejects-college-ban-lawsuit](http://www.gpb.org/news/2013/10/08/state-rejects-college-ban-lawsuit).

80. See Greg Land, *"No Recourse" to Question State Regs, Judge Says*, Daily Report (June 16, 2014), <http://www.dailyreportonline.com/id=1202659371605/No-Recourse-to-Question-State-Regs-Judge-Says?slreturn=20141006172428>. On June 16, 2014, the case against the Board was dismissed on sovereign immunity grounds, but the attorney for the DACA beneficiaries vowed to appeal. *Id.*

81. Ga. Code Ann. § 20-3-51 (2008).

82. Ga. Code Ann. § 20-3-66(d) (2008).

83. Georgia Board of Regents Policy Manual, § 4.1.6: *Admission of Persons Not Lawfully Present in the United States* (2013). The only schools falling under this policy are the top five academically ranked state institutions in Georgia.

Each University System institution shall verify the lawful presence in the United States of every successfully admitted person applying for resident tuition status. . . . Any student requesting to be classified as an in-state student for tuition purposes will be required to provide verification of their *lawful presence* in the United States in order to be classified as an in-state student.<sup>84</sup>

Despite USCIS's insistence that DACA beneficiaries have legal presence in the United States, the Board of Regents determined that its current policy bars DACA beneficiaries from in-state tuition or admission to the top five state universities.

#### D. North Carolina

Following Secretary Napolitano's memorandum, the North Carolina Department of Motor Vehicles announced that it would not issue driver's licenses to DACA beneficiaries until the state attorney general determined whether they were qualified under North Carolina law.<sup>85</sup> On January 17, 2013, Attorney General Roy Cooper's office issued a legal opinion answering that question in the affirmative.<sup>86</sup> North Carolina law requires proof of residency in the state and a valid social security number to apply for a driver's license.<sup>87</sup> In the absence of a social security number, an applicant may present "valid documentation issued by, or under the authority of, the United States government that demonstrates the applicant's legal presence of limited duration in the United States."<sup>88</sup> Pointing to all of the factors required to become a DACA beneficiary—continuous residence in the United States for five years, possession of a high school diploma, lack of criminal history—and the fact that beneficiaries are entitled to apply for EADs and social security numbers, the attorney general determined that they are legally

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84. Georgia Board of Regents Policy Manual, § 4.3.4: *Verification of Lawful Presence* (2013) (emphasis added). "Lawful presence" is not defined in the policy manual. *Id.*

85. See Anne Blythe & Bruce Siceloff, *Attorney General Says Immigrants Eligible for NC Driver's Licenses*, NewsObserver.com (Jan. 18, 2013).

86. See Letter from Grayson Kelley, Chief Deputy Attorney Gen., N.C. Dep't of Justice, to J. Eric Boyette, Acting Comm'r, N.C. Div. of Motor Vehicles (Jan. 17, 2013) [hereinafter *NC AG Opinion*], available at [http://www.wral.com/asset/news/local/2013/01/17/11992902/AG\\_letter\\_to\\_DMV\\_on\\_DACA\\_licenses.pdf](http://www.wral.com/asset/news/local/2013/01/17/11992902/AG_letter_to_DMV_on_DACA_licenses.pdf).

87. N.C. Gen. Stat. §20-7(b1) (2013).

88. See *NC AG Opinion*, *supra* note 88.

present in the United States for the purposes of federal immigration law, and eligible to apply for a North Carolina driver's license.<sup>89</sup>

The attorney general's opinion helpfully spelled out the "recognized legal distinction in immigration law" between lawful status and presence: "lawful status" is a formal designation granting individuals permanent immigrant status, temporary permission to remain in the United States for specified purposes, or other statutorily-prescribed classifications. In contrast, "lawful presence" refers to a grant of permission to remain in the United States without any formal immigration classification. By approving an undocumented immigrant's temporary presence in the United States, deferred action establishes "lawful presence" for the entire period of deferral.<sup>90</sup> One day after the dissemination of Attorney General Cooper's opinion, USCIS updated its "Frequently Asked Questions About DACA" to further clarify this point.<sup>91</sup>

The attorney general's opinion only explicitly addressed the issue of driver's licenses, but it helped clarify the law on North Carolina postsecondary education benefits as well. The North Carolina State Board of Community Colleges Code (SBCCC) imposes significant restrictions on applications from undocumented immigrants, but it defines "undocumented immigrant" as "any immigrant who is not lawfully present in the United States."<sup>92</sup>

While individuals with DACA classification could now apply to college in North Carolina, the State Residence Committee determined that they still did not qualify for in-state tuition rates.<sup>93</sup> Residency requirements for in-state tuition are left to the Committee's discretion, and the current guidelines dictate that a non-U.S. citizen must have a USCIS visa, permanent resident card, or refugee status in order to receive in-state tuition.<sup>94</sup> These requirements rise to the level of "lawful status," which DACA beneficiaries do not possess.<sup>95</sup> While driver's licenses are now

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89. *See id.*

90. *See id.*

91. *See DACA FAQs*, *supra* note 7 (containing Jan. 18, 2013 notice clarifying that DACA beneficiaries are lawfully present in the United States).

92. 1D N.C. State Board of Community Colleges Code § 400.2(b) (2012).

93. *See id.*

94. *See* The University of North Carolina and North Carolina Community Colleges, North Carolina State Residence Classification Manual (Fall 2011), *available at* [http://registrar.sites.unc.edu/files/2012/06/Residence\\_Manual\\_Aug\\_2010.pdf](http://registrar.sites.unc.edu/files/2012/06/Residence_Manual_Aug_2010.pdf).

95. On Jan. 22, 2014, Attorney General Cooper's office issued an advisory opinion making a substantially similar argument. *See* Letter from Alexander McC. Peters, Senior Deputy Attorney General, and Kimberly D. Potter, Special

available to DACA beneficiaries in North Carolina, in-state tuition remains out of reach.

#### E. Michigan

Upon the implementation of DACA, Michigan Secretary of State Ruth Johnson instructed her branch workers that childhood arrivals were not entitled to receive driver's licenses, pointing to the USCIS declaration that "deferred action does not provide an individual with legal status." Conflating "legal status" with "legal presence," her office determined that DACA beneficiaries were unable to provide "documents demonstrating . . . legal presence in the United States" as required by Michigan law governing the issuance of licenses.<sup>96</sup> One Michigan, an immigrant advocacy organization, then filed suit, claiming that the Secretary's policy was based on an erroneous interpretation of federal law and raising Supremacy Clause and Equal Protection arguments.<sup>97</sup>

When USCIS updated its "Frequently Asked Questions About DACA" on January 18, 2013, Secretary Johnson's office took note and changed its stance, mooted the lawsuit.<sup>98</sup> Johnson characterized USCIS' update as a reversal of policy, not a clarification: "The feds now say they consider these young people to be lawfully present while they participate in the DACA program," she said in a press conference, "so we are required to issue driver's licenses and identification cards."<sup>99</sup>

The authority to determine tuition rates in Michigan is far less centralized than the authority over driver's licenses. The state constitution establishes a Board of Regents for each public college and university, and each Board has complete control over residency

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Deputy Attorney General, North Carolina Department of Justice, to The Hon. Marcus Brandon, Representative, North Carolina General Assembly, *available at* <http://www.wral.com/asset/news/state/nccapitol/2014/01/23/13322333/Brandon-Rep-Marcus-1-22-2014.pdf> (claiming that the North Carolina residency requirements would have to change in order for DACA beneficiaries to receive in-state tuition).

96. Jonathan Oosting, *Federal Program Allows Some Illegal Immigrants to Work, But They Won't Be Able to Drive in Michigan*, MLive (Nov. 20, 2012), [http://www.mlive.com/politics/index.ssf/2012/10/federal\\_program\\_allows\\_some\\_il.html](http://www.mlive.com/politics/index.ssf/2012/10/federal_program_allows_some_il.html).

97. Complaint, *One Mich. v. Johnson*, 2012 WL 6822175 (E.D. Mich. 2012) (No. 2:12CV-15551).

98. *See State to Issue Driver's Licenses to Qualified Deferred Action Program Participants After Federal Government Reversal*, Michigan Department of State (Feb. 1, 2013), [www.michigan.gov/sos/0,4670,7-127--294244--rss,00.html](http://www.michigan.gov/sos/0,4670,7-127--294244--rss,00.html).

99. *See id.*

requirements for in-state tuition.<sup>100</sup> Many schools, such as Michigan State, require proof of “legal status” for in-state tuition, excluding DACA beneficiaries.<sup>101</sup> On July 19, 2013, though, the Regents of the University of Michigan voted to grant anyone who attended a Michigan middle school and high school the ability to obtain in-state tuition, regardless of immigration status.<sup>102</sup>

#### F. California

At the time that DHS promulgated its “Deferred Action for Childhood Arrivals” memorandum, California law required that an applicant present a valid social security number to obtain a license.<sup>103</sup> While most DACA beneficiaries are eligible for Social Security numbers, some are not. In order to receive an SSN, a beneficiary must first demonstrate financial need, which some cannot do. Governor Jerry Brown and the California legislature passed a bill within two months of DACA’s implementation to relax that requirement.<sup>104</sup> On September 30, 2012, Brown signed A.B. 2189 into law, allowing DACA beneficiaries who are unable to obtain a Social Security number to receive a California license.<sup>105</sup>

The DACA memorandum had no impact on California’s already-permissive in-state tuition laws. In 2001, the California legislature passed Assembly Bill 540, granting any student the right to pay in-state tuition at California colleges and universities regardless of citizenship status.<sup>106</sup> All that a student needs to do to

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100. M.C.L.A. Const. Art. 8 § 5.

101. See, e.g., *Out-of-State Tuition Requirements*, Michigan State University Office of the Registrar, [www.reg.msu.edu/roinfo/notices/Residency.aspx](http://www.reg.msu.edu/roinfo/notices/Residency.aspx) (last visited Dec. 20, 2013).

102. See Javier Contreras, *Victory! The University of Michigan Grants In-State Tuition to DREAMers*, American Civil Liberties Union Blog of Rights (July 19, 2013), <https://www.aclu.org/blog/immigrants-rights/victory-university-michigan-grants-state-tuition-dreamers>. The Washtenaw Community College Board of Trustees followed suit shortly thereafter, although it limited the extension of in-state tuition to DACA beneficiaries. See Kellie Woodhouse, *WCC Approves In-State and In-District Tuition for Some Unauthorized Immigrants*, MLive (July 24, 2013), <http://www.annarbor.com/news/washtenaw-community-college-approves-offering-in-state-and-in-district-tuition-rates-to-some-unauth/>.

103. Cal. Veh. Code § 12801 (West 2014).

104. See Patrick McGreevey & Anthony York, *Gov. Acts on Deportation, License Bills*, L.A. Times, Oct. 1, 2012, [articles.latimes.com/2012/oct/01/local/la-me-brown-bills-20121001](http://articles.latimes.com/2012/oct/01/local/la-me-brown-bills-20121001).

105. 2012 Cal. Legis. Serv. Ch. 862 (A.B. 2189).

106. See True Shields, *AB 540 Lawsuit May Go to Supreme Court*, The Daily Californian (June 11, 2011), available at [www.dailycal.org/2011/06/01/ab-540-lawsuit-may-go-to-supreme-court/](http://www.dailycal.org/2011/06/01/ab-540-lawsuit-may-go-to-supreme-court/).

qualify for resident tuition is attend and graduate from a California high school, then sign an affidavit stating that they will seek to obtain legal status in the near future.<sup>107</sup> A group of U.S. citizens paying nonresident tuition challenged the bill in state court on the grounds that it violated IIRIRA and PRWORA. In November of 2010, the California Supreme Court held that A.B. 540 did not violate either of the federal in-state tuition laws.<sup>108</sup> IIRIRA, the Court said, only prevents unlawfully-present immigrants from receiving postsecondary education benefits on the basis of residence within a state. A.B. 540, on the other hand, awards in-state tuition based on criteria other than residence—namely, attendance at and graduation from a California high school.<sup>109</sup> The court also found that A.B. 540 fits within PRWORA’s exception for laws passed after August 22, 1996 affirmatively granting eligibility for postsecondary education benefits to unlawfully present immigrants.<sup>110</sup> The case was appealed to the Supreme Court, which denied certiorari in February 2011.<sup>111</sup> Over a year before DACA, undocumented immigrants in California were already able to receive in-state tuition.

#### IV. ANALYSIS OF LEGAL CLAIMS

##### A. Denial of Driver’s Licenses

Federal law provides little justification for denying driver’s licenses to DACA beneficiaries. Though the REAL ID Act imposes minimal requirements for the issuance of driver’s licenses, it is not at all clear that those minimal requirements include “legal status” in the formal immigration law meaning of the term.<sup>112</sup> While the text of REAL ID requires “evidence of legal status” for the issuance of a license, it then stipulates that such a requirement may be satisfied by proof of “approved deferred action status.”<sup>113</sup> As explained by USCIS, a grant of “deferred action status” is a grant of legal presence, not legal status.<sup>114</sup> In the immigration law context, then, REAL ID must

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107. *See id.*

108. *Martinez v. Regents of the Univ. of Cal.*, 50 Cal.4th 1277, 855 (2010).

109. *Id.* at 1290.

110. *Id.* at 1294.

111. *Id.*, cert. denied, 131 S.Ct. 2961 (2011).

112. *Saldana v. Lahm*, 2013 W.L. 5658233 at \*4 (D.Neb. 2013) (order denying preliminary injunction, and granting in part and denying in part motion to dismiss).

113. *See REAL ID Act*, *supra* note 22, § 202(c)(2)(B)(viii).

114. *See DACA FAQs*, *supra* note 7.

be read as mandating a showing of “legal presence,” which DACA beneficiaries possess. On top of this, only twenty-one states are compliant with the REAL ID Act.<sup>115</sup>

Both Georgia and Nebraska state law allow for the issuance of a driver’s license to anyone demonstrating lawful presence in the United States.<sup>116</sup> Georgia, a state deemed fully compliant with REAL ID,<sup>117</sup> currently grants driver’s licenses to anyone with deferred action status, including DACA beneficiaries.<sup>118</sup> Though Nebraska has chosen not to do so, its additional requirements are solely the product of gubernatorial policy rather than legislative codification.<sup>119</sup>

There are also strong constitutional arguments against denying driver’s licenses to DACA beneficiaries. While courts in Arizona and Nebraska threw out Supremacy Clause arguments, they found a likelihood of success on the merits for Equal Protection claims.<sup>120</sup> Both courts reviewed the treatment of DACA beneficiaries under the permissive “rational basis” standard of review and failed to find any basis for treating them differently from the recipients of other types of deferred action.<sup>121</sup> In Arizona, the court considered several potential rationales for denying driver’s licenses to DACA beneficiaries, including gubernatorial disagreement with federal policy, potential state liability for unlawfully issuing licenses, the difficulty involved with issuing an estimated 80,000 new licenses, and the possibility of having to cancel licenses if the DACA program were discontinued.<sup>122</sup> The court found that denying licenses was not rationally related to any of these interests.<sup>123</sup> As of February 14, 2013, only 14,938 beneficiaries had applied for driver’s licenses, negating concerns about an immense toll on state resources.<sup>124</sup> Many

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115. See *REAL ID Enforcement*, *supra* note 25.

116. See Ga. Code Ann. § 40-5-21.1 (2014); see also Neb. Rev. St. § 60-484.04(2) (2014).

117. See *REAL ID Enforcement* *supra* note 25.

118. See *Information for Non-US Citizens*, Georgia Department of Driver Services, [www.dds.ga.gov/drivers/DLdata.aspx?con=1741471757&ty=dl](http://www.dds.ga.gov/drivers/DLdata.aspx?con=1741471757&ty=dl) (last updated July 17, 2012).

119. See *Nebraska Follows Arizona: No Benefits for “Deferred” Immigrants*, Thomson/Reuters, Aug. 18, 2012, [www.newsmax.com/Newsfront/Nebraska-Arizona-deferred-immigrants/2012/08/18/id/448988](http://www.newsmax.com/Newsfront/Nebraska-Arizona-deferred-immigrants/2012/08/18/id/448988).

120. See *id.*; see also *Arizona Dream Act Coal. v. Brewer*, 945 F.Supp.2d 1049, 1077–78 (D.Ariz. May 16, 2013) (order denying preliminary injunction, and granting in part and denying in part motion to dismiss).

121. *Saladana*, 2013 WL 5658233, at \*6; *Ariz. Dream Act Coal.*, 945 F.Supp.2d at 1070–72.

122. *Ariz. Dream Act Coal.*, 945 F.Supp.2d at 1072.

123. See *id.* at 1072.

124. *Id.* at 1072.

aliens have been deported while carrying valid Arizona licenses in the past, yet Arizona has not found it necessary to cancel those licenses.<sup>125</sup> In addition, the Arizona Department of Transportation could not identify any instances of state liability for issuing licenses to individuals potentially lacking legal presence.<sup>126</sup> The court in Nebraska did not go into such depth, but reached the same conclusion.<sup>127</sup>

According to the law of every state surveyed in this note, “legal presence” is the sole immigration-based requirement for the issuance of a driver’s license. The same is true for most states not surveyed, as demonstrated by the fact that forty-five states now willingly grant driver’s licenses to DACA beneficiaries.<sup>128</sup>

There are compelling policy rationales behind these grants. The ability to drive will help beneficiaries attain and keep employment. An influx of insured drivers lowers insurance costs for everyone, and increased licensing correlates with increased road safety.<sup>129</sup> Additionally, the temporary nature of deferred action can be, and has been in many states, managed by issuing temporary licenses.<sup>130</sup> In short, both the legal and practical arguments weigh in favor of allowing DACA beneficiaries to apply for driver’s licenses.

## B. Denial of In-State Tuition

The case for denying in-state tuition to DACA beneficiaries is stronger than the case for denying driver’s licenses. IIRIRA places an effective deterrent on extending residency-based benefits to certain undocumented immigrants by forcing a state that does so to grant the same benefit to all U.S. citizens.<sup>131</sup> States may get around this requirement, however, by basing in-state tuition eligibility on criteria

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125. *Id.* at 1072.

126. *Id.* at 1071–72.

127. *See* Saldana v. Lahm, 2013 W.L. 5658233 at \*6 (D.Neb. 2013) (order denying preliminary injunction, and granting in part and denying in part motion to dismiss).

128. *See* *Driver’s Licenses*, *supra* note 16.

129. *See* Kari E. D’Ottavio, Comment, *Deferred Action for Childhood Arrivals: Why Granting Driver’s Licenses to DACA Beneficiaries Makes Constitutional and Political Sense*, 72 Md. L. Rev. 931, 962–66 (2013).

130. *See, e.g.*, Neb. Rev. St. § 60-484.05(1) (2013) (only allowing temporary drivers licenses to be issued to applicants whose documentation shows temporary lawful status in the United States); Ga. Code Ann. § 40-5-21.1(a) (2014) (providing for temporary drivers licenses to those who show documentation of “lawful presence . . . under federal immigration law”).

131. 8 U.S.C. § 1623(a) (1996).

other than residency (as California did with A.B. 540).<sup>132</sup> On top of that, IIRIRA's limitations facially do not extend to DACA beneficiaries because the law only applies to aliens "not lawfully present."<sup>133</sup>

PRWORA bans all aliens from receiving "postsecondary education" benefits, drawing a carve-out only for "qualified aliens."<sup>134</sup> The definition of "qualified alien" contains no explicit mention of deferred action. This absence, however, is not decisive. The term "qualified aliens" includes aliens "paroled into the United States . . . for a period of at least 1 year,"<sup>135</sup> which can be done by the attorney general "in his discretion . . . on a case-by-case basis for urgent humanitarian reasons or significant public benefit."<sup>136</sup> Grants of deferred action are similar: they last for a minimum of two years and are acts of prosecutorial discretion determined on a case-by-case basis.<sup>137</sup> Whether there is a "significant public benefit" at hand is a matter of policy decided by the executive branch. DACA beneficiaries may be considered "paroled into the United States," and therefore "qualified aliens" exempt from PRWORA.

The opt-out provision of PRWORA—allowing for affirmative enactment of a state law granting public benefits—also contains evidence that the entire Act may not apply to DACA beneficiaries:

A State may provide that an alien who is *not lawfully present* in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.<sup>138</sup>

The implication of this provision is that lawfully present aliens are already eligible for state public benefits. If they were not, PRWORA would set up an illogical situation in which Congress has authorized States to enact laws affirmatively granting benefits to unlawfully present aliens, but has prohibited the same action with respect to lawfully present aliens.

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132. See *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 859–60 (2010).

133. 8 U.S.C. § 1623(a) (1996).

134. 8 U.S.C. § 1621 (1996).

135. 8 U.S.C. § 1641(b)(4) (1996).

136. 8 U.S.C. § 1182(d)(5)(A) (1956).

137. See *DACA FAQs*, *supra* note 7.

138. 8 U.S.C. § 1621(d) (emphasis added).

Lastly, PRWORA may not even apply to in-state tuition rates.<sup>139</sup> According to a theory advanced by Professor Michael Olivas of the University of Houston Law Center, the term “postsecondary education benefits” should be limited to monetary benefits, such as scholarships or financial aid, and not status benefits, such as residency status for in-state tuition.<sup>140</sup> The definition of benefits under PRWORA includes the rider “for which payments or assistance are provided,” lending support to the theory that Congress only intended to cover monetary benefits.<sup>141</sup> The law also refers to the “amount, duration, and scope” of benefits—terms which more aptly describe money than status.<sup>142</sup>

State law on in-state tuition rates for public universities varies much more widely than state law on driver’s licenses. California and Nebraska are among a handful of states with laws granting in-state tuition to all undocumented immigrants, inclusive of DACA beneficiaries.<sup>143</sup> The affirmative nature of those laws eliminates any lingering concern about PRWORA’s applicability. In states like Georgia, Michigan, and North Carolina, where residency requirements are committed to various Boards of Regents, the regulations promulgated by those boards will likely determine if DACA beneficiaries can obtain in-state tuition or not. In North Carolina, the Residency Committee has adopted an explicit requirement of “legal status,” so “legal presence” is of no help to childhood arrivals.<sup>144</sup> In Michigan, each university has its own Board of Regents, so DACA beneficiaries will only be eligible for in-state tuition at those schools whose boards have approved a “legal presence” standard.<sup>145</sup> In Georgia, however, the Board of Regents governing all public universities has already adopted a “legal presence” standard. Its refusal to consider DACA beneficiaries for in-

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139. See Defendant’s Answer at 2, *Ariz. v. Maricopa County Community Coll. District Bd.*, No. CV2013-009093 (Ariz. Super. 2013).

140. See María Pabón López & Gerardo R. López, *Persistent Inequality: Contemporary Realities in the Education of Undocumented Latina/o Students* 65–66 (2010).

141. 8 U.S.C. § 1621(c)(1)(B).

142. 8 U.S.C. § 1623(a).

143. See Leg. of Neb. 239, 99th Leg., 2nd Sess. (Neb. 2006); 2006 Cal. Legis. Serv. Ch. 814 (4874)(West 2006).

144. See *The University of North Carolina and North Carolina Community Colleges, North Carolina State Residence Classification Manual* (Fall 2011), available at [http://registrar.sites.unc.edu/files/2012/06/Residence\\_Manual\\_Aug\\_2010.pdf](http://registrar.sites.unc.edu/files/2012/06/Residence_Manual_Aug_2010.pdf).

145. See M.C.L.A. Const. Art. 8, § 5.

state tuition therefore lacks grounding in both federal and state law.<sup>146</sup>

In Arizona, the Governor has issued an executive order preventing DACA beneficiaries from receiving in-state tuition.<sup>147</sup> The executive order cites Arizona state law as authority, but the particular law cited only requires “legal presence” for the receipt of state public benefits.<sup>148</sup> Another state law, Proposition 300, ostensibly limits “in-state student” classification to those with “lawful immigration status,” but it does so by directly referring to IIRIRA, which actually only refers to “lawful presence.”<sup>149</sup> Arizona state law does not define lawful status, and the terms “status” and “presence” are used interchangeably within state law. It is unlikely that Arizona voters passed a law preventing aliens who are lawfully present from receiving in-state tuition, given that their stated reference point does no such thing.<sup>150</sup> The strongest argument for denying in-state tuition eligibility to DACA beneficiaries then becomes the executive order itself, meaning that such denial is simply a policy decision of the current administration. However, since other non-DACA recipients of deferred action are still allowed to qualify for in-state tuition, the executive order would be subject to the same Equal Protection challenge as Arizona’s driver’s license policy, and would likely fail.

In order to obtain deferred action under DACA, an immigrant must have grown up in the United States, avoided criminal conduct, and graduated from a U.S. high school—factors that mitigate many of the fears of allowing them to apply for in-state tuition.<sup>151</sup> States allowing undocumented immigrants to pay in-state tuition have seen, on average, a thirty-one percent increase in that population’s college attendance rate, as well as a fourteen percent decline in undocumented high school dropouts.<sup>152</sup> The long-term benefits of increased education among state residents include a boon to that state’s economy that more than offsets the taxpayer subsidy involved

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146. See Ga. Board of Regents Policy Manual, § 4.3.4: Verification of Lawful Presence (2013).

147. See *Brewer E.O.*, *supra* note 40.

148. Ariz. Rev. St. Ann. § 1-502(a)(7) (2002).

149. Ariz. Rev. St. Ann. 15-1803(b) (2014).

150. Admittedly, Arizona voters may have intended Proposition 300 to prohibit in-state tuition rates for anyone without a visa. The text of the legislation that was passed, however, cannot be construed in such a way when read within the existing web of federal and state law.

151. See *DACA Consideration*, *supra* note 5.

152. See Katherine Mangan, *In-State Tuition for Illegal Immigrants Can Be a Plus for Both States and Students*, *The Chronicle of Higher Education* (May 18, 2011), [chronicle.com/article/In-State-Tuition-for-Illegal/127581/](http://chronicle.com/article/In-State-Tuition-for-Illegal/127581/).

in expanding reduced tuition eligibility.<sup>153</sup> In the absence of legislation explicitly preventing lawfully present immigrants from qualifying for in-state tuition, the weight of law and policy favors extending the benefit.

### C. Role of the State Attorney General

The state attorney general is uniquely situated to ensure DACA beneficiaries receive those public benefits to which they are entitled. As explained in Part I, the state attorney general represents the “public interest” of the state, not the executive branch officials of the state.<sup>154</sup> While both attorneys general and governors have loyalty to political parties and the constituents who elected them, governors lack the attorney general’s common-law duty to represent the public as a whole.<sup>155</sup> This “divided executive” model of state government sets up the attorney general as an intra-branch check on the governor, allowing her to oppose gubernatorial policies that conflict with the broadly-defined “public interest.”<sup>156</sup>

While a state governor may feel no obligation to extend public benefits to DACA beneficiaries, state attorneys general should do so if they find the extension of such benefits to be within the public interest. Unlike other undocumented immigrants, the federal government has approved the presence of DACA beneficiaries in the United States.<sup>157</sup> They are members of the population subject to state attorney general jurisdiction, and attorneys general should step forward when their interests are unjustly infringed upon.

There are strong policy considerations weighing in favor of extending public benefits to DACA beneficiaries, should an AG wish to take them into account. But, as evidenced by the actions of the governors of Arizona and Nebraska, there are also policy considerations in favor of denying public benefits. Ultimately, the attorney general is the chief *legal* officer of the state, and should take the initiative to enforce the law in her state when other executive branch officials violate it to the detriment of the public interest—regardless of the policy justifications put forth by those officials.<sup>158</sup>

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153. *See id.*

154. *See* 7 Am. Jur. 2d Attorney General § 6.

155. *See* Marshall, *supra* note 34, at 2450.

156. *See id.* at 2461.

157. *See DACA FAQs, supra* note 7.

158. *See* Nat’l Ass’n of State Attorneys Gen., State Attorneys General: Powers and Responsibilities 6 (Lynne M. Ross ed., 1990).

Following the analysis in sections A and B of this Part, a state attorney general will find that denying driver's licenses to DACA beneficiaries raises serious constitutional issues and has no basis in federal or state law. In all of the states surveyed in this Note—and in every state where “legal presence” is the sole immigration-related criterion for the receipt of a driver's license—the state attorney general has a duty to protect the right of DACA beneficiaries to obtain a license. The attorneys general of Georgia and North Carolina have recognized this duty and acted upon it; the attorneys general of Arizona and Nebraska have refused to critically examine the policies of their respective governors, shirking their duty to protect the public interest.

In-state tuition is a closer issue, but a state attorney general should find no legal basis for denying in-state tuition eligibility to DACA beneficiaries unless there is a state law expressly precluding such action. In North Carolina, then, a state attorney general has little room to act, as in-state tuition eligibility is left to the Residency Committee, which has determined that “legal status” is required. In Michigan, an attorney general can only protect the right to in-state tuition at those schools whose Boards of Regents have approved a “legal presence” standard.

In any state where there is a law or regulation granting in-state tuition to all lawfully present persons, or in any state where there is no immigration-related requirement for in-state tuition whatsoever, the state attorney general should defend the right of DACA beneficiaries to qualify. In California and Nebraska, where laws grant all undocumented immigrants in-state tuition eligibility, there is little controversy or need for attorney general involvement. In Georgia, however, the attorney general has a duty to enforce the Board of Regents' own policy allowing “lawfully present” individuals—including DACA beneficiaries—to qualify for in-state tuition and admission to the top five Georgia schools. The Attorney General of Arizona likewise has a duty to break with his governor and follow Arizona law. As noted in Section B of this Part, the law at issue simply brings Arizona into compliance with IIRIRA and doesn't remove lawfully present individuals' eligibility.

The most effective way for an attorney general to extend state public benefits to DACA beneficiaries is through the issuance of a legal opinion, as demonstrated by the attorney general of North Carolina, Roy Cooper.<sup>159</sup> State attorneys general have the authority

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159. It should be noted that in April 2014, the Attorney General of Virginia, Mark Herring, also used a legal opinion to ensure that DACA beneficiaries in

to issue legal guidance to executive agencies to clarify areas of confusion. State agencies will often wait for such an opinion before taking action, or change their behavior to conform to such an opinion once issued.<sup>160</sup> In North Carolina, Attorney General Cooper's opinion helped clarify the law on legal presence not only for the Department of Motor Vehicles, but also for the State Board of Community Colleges.<sup>161</sup> The attorney general of Michigan could have followed this lead; instead, he took no action in the face of clear executive branch confusion over the meaning of "legal status." Fortunately for the DACA beneficiaries of Michigan, USCIS ultimately assumed his responsibility and clarified the relevant law for the Michigan Secretary of State.<sup>162</sup>

In Arizona and Nebraska, where governors expressly oppose extending public benefits to DACA beneficiaries, a legal opinion would not be sufficient. Governors wield a great deal of control over state agencies, and department heads will follow gubernatorial policy over an attorney general opinion lacking the force of law. In these situations, the attorney general should refuse to defend the gubernatorial policies at issue from citizen challenges, such as those brought by the Arizona Dream Act Coalition or Mayra Saldana. The attorney general is not the governor's lawyer, and does not have to agree with the governor in every instance.<sup>163</sup> Attorneys general should explain to their governor that they have an ethical obligation not to defend policies they do not believe to be legal or in the public interest. While this may be a politically unlikely course of action if both officials are from the same party, it is nevertheless the duty of

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Virginia are entitled to in-state tuition. See Laura Vozzella & Pamela Constable, *Virginia Attorney General Declares "Dreamers" Eligible for In-State Tuition*, Wash. Post, Apr. 29, 2014, available at [http://www.washingtonpost.com/local/virginia-politics/virginia-attorney-general-declares-dreamers-eligible-for-in-state-tuition/2014/04/29/ed594aea-cfb0-11e3-b812-0c92213941f4\\_story.html](http://www.washingtonpost.com/local/virginia-politics/virginia-attorney-general-declares-dreamers-eligible-for-in-state-tuition/2014/04/29/ed594aea-cfb0-11e3-b812-0c92213941f4_story.html). Herring opined that domiciliary intent is the primary requirement for in-state tuition in Virginia, and any legally present individual who can provide documentation to support objective indicia of domiciliary intent is eligible to receive in-state tuition rates. See *id.*

160. See Peter Heiser, Jr., *The Opinion Writing Function of Attorneys General*, 18 Idaho L. Rev. 10, 25 (1982).

161. See *NC DACA Opinion*, *supra* note 88.

162. See *State to Issue Driver's Licenses to Qualified Deferred Action Program Participants After Federal Government Reversal*, Michigan Department of State (Feb. 1, 2013), [www.michigan.gov/sos/0,4670,7-127--294244--rss,00.html](http://www.michigan.gov/sos/0,4670,7-127--294244--rss,00.html).

163. See Marshall, *supra* note 34, at 2444.

the attorney general, as a government lawyer, to put the public interest first and foremost.<sup>164</sup>

More dramatically, the attorney general can and should bring affirmative litigation on behalf of the state against agencies that unjustly deny public benefits to DACA beneficiaries, such as the Georgia Board of Regents.<sup>165</sup> And in the forty-five states currently granting driver's licenses—and the eighteen states currently granting in-state tuition—to DACA beneficiaries, the attorney general should defend these policies if and when they are challenged in court.

## V. CONCLUSION

The “Deferred Action for Childhood Arrivals” policy has opened up a world of possibilities for undocumented immigrants brought into the United States as children, including temporary relief from deportation and the prospect of employment sanctioned by law. The most essential benefit conferred on these individuals, however, is federal approval of their presence in the United States. Under existing law, this “legal presence” is all that is needed to obtain a driver's license, and, in many states, to be eligible for in-state tuition—two public benefits that are taken for granted by most citizens, but are huge advances in quality of life for undocumented immigrants. Unfortunately for DACA beneficiaries, a few states have held out against the general trend of extending benefits to those qualified under the new program. The attorneys general of these states have both the power and the duty to counter other state officials and ensure that childhood arrivals receive the benefits to which they are now entitled.

DACA is a temporary program; it was designed as a lesser alternative measure when the federal DREAM Act legislation fell just

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164. For examples of state attorneys general refusing to defend gubernatorial policies, see Juliet Eilperin, *State Officials Balk at Defending Laws they Deem Unconstitutional*, Wash. Post, July 18, 2013; see also *Nebraska Attorney General Refuses to Defend State's Abortion Screening Law*, Fox News (Aug. 18, 2010), available at <http://www.foxnews.com/politics/2010/08/18/nebraska-attorney-general-refuses-defend-states-abortion-screening-law/>.

165. For an example of a state attorney general suing his own executive branch, see LeRoy Standish, *Salazar Sues Over Redistricting Plan*, Colorado Community Media (May 21, 2003), available at <http://coloradocommunitymedia.com/stories/Salazar-sues-over-redistricting-plan,120444>.

short of passage in 2010.<sup>166</sup> As USCIS has made clear, comprehensive immigration reform is still necessary to create a pathway to permanent legal status for DACA beneficiaries.<sup>167</sup> For now, though, legal presence is a giant step forward for undocumented immigrants brought into this country through no fault of their own. State attorneys general must ensure that the benefits accompanying such presence are not lost to the people who need them most.

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166. See Elise Foley, *DREAM Act Vote Fails in Senate*, Huffington Post (Dec. 18, 2010), available at [www.huffingtonpost.com/2010/12/18/dream-act-vote-senate\\_n\\_798631.html](http://www.huffingtonpost.com/2010/12/18/dream-act-vote-senate_n_798631.html).

167. See *DACA FAQs*, *supra* note 7.

## APPENDIX 1.0: SUMMARY OF STATE DACA TREATMENT

<b>JURISDICTION</b>	<b>Are DACA Beneficiaries Entitled to Driver's Licenses?</b>	<b>AG Action on Driver's Licenses</b>	<b>Are DACA Beneficiaries Entitled to In-State Tuition?</b>	<b>AG Action on In-State Tuition</b>
<b>Federal</b>	Entitled in states compliant with REAL ID Act; No prohibition in states not compliant with REAL ID	N/A	No entitlement, but no prohibition under IIRIRA or PRWORA	N/A
<b>Arizona</b>	Entitled under state law allowing DLs for those with "legal presence"	Enforcing ban	No prohibition	Enforcing ban
<b>California</b>	Explicitly entitled by statute	N/A	Explicitly entitled by statute	N/A
<b>Georgia</b>	Entitled under state law allowing DLs for those with "legal presence"	Issued opinion clarifying law	Explicitly entitled under Board of Regents policy guide	Defending ban implemented by Board of Regents
<b>Michigan</b>	Entitled under state law allowing DLs for those with "legal presence"	Did nothing until USCIS clarified the law, forcing Secretary of State to issue DLs	Dependent on the decision of each Board of Regents of various university systems	N/A
<b>Nebraska</b>	Entitled under state law allowing DLs for those with "legal presence"	Enforcing ban	Explicitly entitled by statute	N/A
<b>North Carolina</b>	Entitled under state law allowing DLs for those with "legal presence"	Issued opinion clarifying law	Explicitly prohibited by North Carolina residency laws	Issued opinion clarifying law