2013

Latino Community Report

For the 130th General Assembly

Deferred Action for Childhood Arrivals

Eligibility, Demographics, and Implications for Ohio

Ohio | Latino Affairs Commission

Latino Community Report

*This Latino Community Report was composed by **Nolan Stevens**, J.D., Public Policy Officer at the Ohio Commission on Hispanic/Latino Affairs. OCHLA is mandated by Ohio law to advise the members of Ohio's General Assembly on the particular issues, challenges and opportunities facing their Hispanic constituents. Latino Community Reports are released three times per calendar year, and each cover a different topic.*

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36th Board of Commissioners, October 2012 – September 2013

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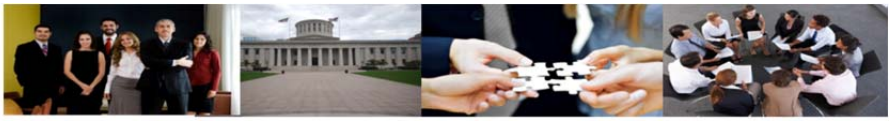

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1. Executive Summary

The report is a comprehensive analysis of the Deferred Action for Childhood Arrivals initiative and its implications for Ohio. It is divided into several sections, which cover, respectively: an introduction to DACA, a discussion of DACA eligibility requirements, an overview of the DACA application process, an exploration of the demographics of DACA recipients, and an analysis of the implications of Deferred Action for Ohio. Each section relies on laws, reports and analyses generated by myriad third parties, in addition to some original research. Hyperlinks in footnotes will take readers to source documents.

The initial section describes the basics of the program, including its origin and the benefits that approved applicants receive. Deferred Action for Childhood Arrivals is a form of prosecutorial discretion initiated by the U.S. Department of Homeland Security in June 2012. Recipients are lawfully present in the United States for renewable two-year periods, and receive work authorizations and Social Security Numbers. While it contemplates the same group of young undocumented immigrants, it is not the DREAM Act, because it does not provide a path to citizenship. It also is not an executive order, and it is not an amnesty.

The second section includes a summary of the eligibility requirements for Deferred Action. Applicants must meet age, duration of presence in the U.S. and education or military service requirements to be approved for the program. Further, applicants cannot have convictions for felonies or significant misdemeanors, or three or more other misdemeanors. The third section, which covers the application process, discusses the significant fees that DACA applicants pay, the background and biometrics checks to which they must submit, and the methods by which applicants prove identity, age, education and presence. The section includes information on the somewhat low application rate, as well as the high approval rate for those that do apply. Finally, the section mentions the potential for so-called “notario fraud”, wherein con artists victimize applicants in search of legal advice and assistance.

The report also discusses the demographic profile of the 1.9 million young immigrants that are or may be eligible to apply for Deferred Action. It includes discussions on state of residence, country of origin, English proficiency, age, economic indicators, employment and educational achievement. Many young immigrants that may one day be eligible for DACA currently are not – due to their age or due to their lack of educational attainment. Each group has subtly different demographic profiles. Finally, the section examines Ohio’s DACA-eligible population and contextualizes it with reference to the same population in other states.

The report then turns to the implications of DACA for Ohio. The primary question which arises when applying established Ohio law to a new class of immigrant is whether or not these young people will be eligible for state benefits and, if so, which ones. The report touches on many facets of this question while examining two specific benefits in close detail – driver’s licenses and in-state tuition for higher education. In both cases, Ohio has administratively decided to grant these benefits to DACA recipients. Also in both cases, pending legislation before the Ohio General Assembly would reverse those administrative policy decisions. The section also includes a brief rundown of the policy decisions that

other states have reached. The final section briefly looks ahead to the next likely policy reconciliation for DACA and Ohio law – professional licensure – and contextualizes Deferred Action within the broader national context of immigration reform. It also reminds legislators that the Public Policy Center at the Ohio Latino Affairs Commission is ready and available to serve Ohio's General Assembly as it crafts policies of import to Ohio Hispanics.

2. What is DACA?

DACA is an acronym that stands for Deferred Action for Childhood Arrivals. The name refers to a 2012 U.S. Department of Homeland Security (DHS) policy – *not* an executive order, as is frequently alleged - that reprioritizes deportations of undocumented immigrants. The initiative grants to certain young immigrants that meet the eligibility criteria and have clean criminal backgrounds a two-year deferral of action on their cases. That is, the United States will not pursue their deportation for two years. Further, approved applicants are considered "lawfully present" in the United States for the duration of their two years under DACA[1], and do not accrue unauthorized stay during that time. Approved applicants also receive an employment authorization document (EAD), commonly called a "work permit", that is valid for two years. They also receive an attendant Social Security Number and may have access to certain state-level benefits to which they lacked access prior to application. These two-year periods are renewable as long as DACA recipients maintain eligibility for the program.

It's important to pause briefly here to note that Deferred Action should not be confused with the "DREAM Act". The Development, Relief and Education of Alien Minors Act, for which "DREAM Act" stands, is a legislative proposal which was last before the Congress of the United States in December of 2010. While DACA and The DREAM Act both contemplate the same demographic – young undocumented immigrant students or soldiers that have clean criminal backgrounds – they operate in very different ways. The DREAM Act would have provided a path to citizenship, beginning with the provision of temporary residency for six years, during which a student could finish his or her education and apply for lawful permanent resident (LPR) status. Once an immigrant has been a legal permanent resident – green card holder - for a certain number of years, he or she can apply for full U.S. citizenship. DACA has no such path to citizenship, and indeed does not even grant an applicant a lawful immigration status. While DACA recipients do not accumulate unauthorized stay, their immigration status remains "unlawful". The executive branch probably cannot provide a path to citizenship – such a power rests only with Congress, which has not enacted the DREAM Act or comprehensive immigration reform. The DREAM Act passed the U.S. House of Representatives in 2010, but fell five votes short of the 60 required for cloture in the U.S. Senate.[2]

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[1] *"Frequently Asked Questions", U.S. Citizenship and Immigration Services, 1/18/2013.*
[2] *U.S. Senate Roll Call Votes, Second Session of the 111th Congress, 12/18/2010.*

As DACA grants no lawful immigration status, it is also not an "amnesty". Amnesty is an act by a sovereign authority forgiving a group of persons that could face trial but have not yet been convicted[3]. DACA grants a two-year reprieve from the accumulation of unauthorized stay, but does not contemplate potential future enforcement action against recipients. DACA also applies only to a very narrow group of undocumented immigrants. Eligibility requirements shave the pool of DACA applicants from the approximately 11 million undocumented immigrants[4] living in the United States, to about 1.9 million[5]. By contrast, President Reagan's signing of the Immigration Reform and Control Act in 1986 granted universal amnesty to more than three million undocumented immigrants.[6]

DACA is a form of prosecutorial discretion, which itself is a form of selective enforcement. Selective enforcement occurs when a law enforcement official exercises his or her own discretion in determining whether or not to pursue criminal charges against a given individual and under a certain set of facts. When police officers issue warnings to traffic violators, for example, or when county prosecutors decline to charge an individual they are both exercising selective enforcement. In the latter case, the county prosecutor is exercising prosecutorial discretion – exactly as a DHS attorney that declines to initiate a removal action against a given individual for immigration law violations does under the directives of DACA. While this is the easiest parallel to draw, immigration law is generally civil – not criminal – in nature. Prosecutorial discretion has long been recognized as a legitimate exercise of executive authority by U.S. courts[7].

Prosecutorial discretion is especially prominent due to its role in the recent administration of immigration law by the Department of Homeland Security. In June of 2011, Immigration and Customs Enforcement (ICE) – a branch of DHS - adopted an institutionalized prosecutorial discretion policy at the directive of the agency's leader. Called 'The Morton Memo' after then-ICE director John Morton, the policy authorized ICE agents to use prosecutorial discretion in apprehending and deporting undocumented immigrants.[8] As ICE lacks the resources to deport every undocumented immigrant that they encounter, the memo instructed ICE personnel to focus on criminal undocumented immigrants, and listed factors to consider in weighing whether or not to arrest and deport – including criminal record, duration of stay in the U.S., veteran status, family ties and others. The memo ends, however, with a clear statement that it's not to be construed to limit ICE's immigration enforcement capacities in any way, and that it creates no rights or expectations in undocumented immigrants. A year later, then-

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[3] *Bryan A. Gardner (ed.); 2009. Blacks Law Dictionary (9th ed.).*
[4] *"Undocumented Immigrants in the U.S.", Pew Research Center, 4/30/2009.*
[5] *"Deferred Action for Childhood Arrivals at the One Year Mark", Issue Brief #8, Migration Policy Institute, August, 2013.*
[6] *"Nation of Immigrants", Coutin, Susan Bibler. Cornell University Press, 2007.*
[7] *See "Criminal Procedure" §1.9(c) (3d ed. 2007) Wayne R. LaFave et al., ("There is universal agreement in the modern commentary as to the central role of discretionary authority in the administration of the criminal justice process.").*
[8] *"Memo on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens", ICE Director John Morton, 6/17/2011.*

Secretary Janet Napolitano announced the DACA program, as the latest evolution in prosecutorial discretion at the Department.

There were legal challenges to DACA, and its constitutionality is not universally accepted. A lawsuit filed by officials at ICE challenged both the Morton Memo and the Deferred Action initiative on the ground that it required them to violate federal immigration law[9]. In January, federal District Court Judge Reed O'Connor said in dicta that he would likely rule against the DACA program, but he instead dismissed the case on July 31 for lack of subject-matter jurisdiction, citing the dispute resolution terms of the Civil Service Reform Act.[10] While a comparatively small group of legal scholars have questioned DACA's constitutional legitimacy, it remains the law of the land.

In sum, DACA is a form of prosecutorial discretion employed by the U.S. Department of Homeland Security to de-prioritize the deportation of young immigrants that meet certain eligibility requirements. Acceptance grants the recipient renewable two-year work permits and the freedom from threat of deportation if circumstances relative to eligibility don't change. It is, to this point, a legitimate exercise of executive authority but it is *not* an executive order, is *not* amnesty and it is *not* the DREAM Act.

Young Ohio immigrants. Image courtesy of DREAMActivist Ohio.

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[9] *"Crane v. Napolitano", U.S. District Court for the Northern District of Texas, 7/31/2013. The suit was filed by Kris Kobach, Kansas Secretary of State, on behalf of ICE agent Christopher Crane. Secretary Kobach also heads the legal arm of the national non-profit Federation for American Immigration Reform (FAIR), which the Southern Poverty Law Center has classified as an anti-immigrant hate group ("Intelligence Files: FAIR", Southern Poverty Law Center).*

[10] *"Crane v. Napolitano", supra.*

3. Eligibility Requirements

Applicants for DACA must satisfy a number of eligibility requirements – many of which require proof to be furnished by the applicant. DACA applicants must be within a certain age range, must have entered the United States before a certain age and must have remained here ever since. They must be a student, graduate, soldier or veteran, must have a clean criminal record and, finally, must not pose a threat to national security or public safety. Essentially, the DACA applicant must prove age, presence, value to society and good character. Specifically, applicant must[11]:

1. Have been under the age of 31 as of June 15, 2012;
2. Have come to the United States before reaching his or her 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Have been physically present in the United States on June 15, 2012, and at the time of making his or her request for consideration of deferred action with USCIS;
5. Have entered without inspection before June 15, 2012, or his or her lawful immigration status must have expired as of June 15, 2012;
6. Must currently be in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, *or* be an active member of, or honorably discharged veteran of, the Coast Guard or armed forces of the United States; and
7. Have not been convicted of a felony, a significant misdemeanor, three or more other misdemeanors, and must otherwise not pose a threat to national security or public safety.

An applicant also cannot have a felony conviction - defined by federal immigration law as an offense for which the maximum term of incarceration is greater than one year - on their records. Likewise, DACA applicants cannot have a "significant misdemeanor" conviction on their records. Again, "misdemeanor" is defined according to federal law, and means any offense for which the maximum term of imprisonment is greater than five days but less than one year. Significant misdemeanors are those misdemeanors society generally considers more serious – burglary, sexual abuse or exploitation, domestic violence, drug distribution or trafficking, unlawful possession or use of a firearm or driving under the influence – regardless of the time served. It also includes any misdemeanor conviction, even outside the above-enumerated crimes, for which time actually served exceeds 90 days. Note that this must be time *actually* served. Suspended sentences are excluded.

More, an applicant for DACA cannot have three or more "non-significant misdemeanors" on his or her record. Non-significant misdemeanors are defined as those misdemeanors that don't involve the enumerated crimes above and for which time served does not exceed 90 days. In order to disqualify an applicant, these three "non-significant" misdemeanors must have arisen from different facts or

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[11] *"Consideration of Deferred Action for Childhood Arrivals Process", USCIS.*

circumstances. For example, if a young immigrant is convicted of three minor misdemeanors stemming from one criminal act, this alone will not automatically disqualify him. Finally, an applicant must not otherwise be a threat to national security or public safety. It's important to note that as Deferred Action lasts only for renewable two-year periods, and applicants must re-apply each time, any DACA applicants convicted for disqualifying crimes during their two-year Deferred Action periods likely will not be approved for the program upon reapplying.

It's critical to remember that DACA is entirely discretionary. USCIS has the authority to, in exceptional circumstances, approve an application with an ostensibly disqualifying conviction, for example, or if other eligibility requirements are unmet. Accordingly, some of the eligibility requirements may actually be more lax than they first appear. For example, some brief absences from the United States during the five-year qualifying period are not necessarily fatal to an applicant's chances. Also, expunged or juvenile convictions will not automatically disqualify an applicant. The eligibility requirements are fleshed out in much greater detail by the FAQ that USCIS maintains[12].

[12] *"Frequently Asked Questions", USCIS.*

4. Application Process

DACA applications – form I-821 (D) - are processed by USCIS, which began accepting applications on August 15, 2012. The agency reviews each application on a case-by-case basis, and decides whether or not the applicant will be granted Deferred Action. Even applicants that are in deportation proceedings or have received a final removal order can apply. In this case, an applicant need not have reached the age of 15.

In addition to that form, applicants must submit an I-765 application for work authorization and an attendant worksheet. As a part of the application process, DACA aspirants must submit to a background check and biometrics – fingerprinting and photographing. Applicants are also required to pay a significant fee - $380 dollars with the I-821(D) and another $85 fee for biometrics – a total of $465[13].

The application process can be fairly involved, as applicants must prove each of the facets of eligibility outlined above. USCIS maintains a list of documents which are acceptable proof for each element, but generally most presence requirements are proved through utility bills, school records and medical bills. If an application is denied, DHS generally will not use an applicant's information to initiate a removal proceeding - except when criminal activity or fraud is involved or in other exceptional circumstances. Likewise, information in an application exposing the undocumented status of an applicant's relative is not used for enforcement purposes.[14]

For as rigorous as the application process appears, the approval rate is extraordinarily high. Since the agency began accepting applications, USCIS has approved 455,455 applications of the 567,563 applications it has accepted nationwide, and have only denied 9,578[15]. The rest of the applications remain under review. The denial rate is only about 1.6%, but there may be a disproportionate number of denials among those cases still pending review. USCIS receives an average of 2,158 DACA applications per day, but that number has declined sharply from a high of 5,493 per day one year ago, in October 2012.[16] It is unclear why, exactly, the approval rate for the program is so high. Some critics question the approval process as a "rubber stamp", and accuse USCIS of lax standards in approving applications. Others suggest that the detailed and formulaic nature of the application, combined with the stakes involved and the prevalence of attorney filings, suggest that applicants are careful, and thus the applications are thorough and complete from the beginning. If an applicant is denied, there is no appeal process.

There is a significant potential for consumer fraud targeting potential DACA applicants. Many self-styled "notarios" will charge an applicant a great deal for filing his DACA application, when the truth is that the applicant may not need an attorney at all. In many parts of Latin America, "notarios" are public officials

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[13] *"Consideration of Deferred Action for Childhood Arrivals Process", supra.*
[14] *"Frequently Asked Questions", supra.*
[15] *"Deferred Action for Childhood Arrivals", September Monthly Report, USCIS.*
[16] *Id.*

Consideration *of* Deferred Action *for* Childhood Arrivals

Deferred Action for Childhood Arrivals allows certain individuals, who meet specific guidelines, to request consideration of deferred action from USCIS. Individuals who receive deferred action will not be placed into removal proceedings or removed from the United States for a specified period of time unless terminated. If you receive deferred action, you may be eligible for employment authorization. You may request deferred action for childhood arrivals if you meet the following guidelines:

Can I be considered?

Review guidelines

- You came to the United States before reaching your 16th birthday
- You have continuously resided in the United States since June 15, 2007, up to the present time
- You were under the age of 31 as of June 15, 2012
- You entered without inspection before June 15, 2012, or your lawful immigration status expired as of June 15, 2012
- You are currently in school, have graduated or obtained your certificate of completion from high school, have obtained your general educational development certification, or you are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States
- You have not been convicted of a felony, significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat
- You were present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS

JUNE 15

How do I file?

1. Collect documents as evidence you meet the guidelines
2. Complete USCIS Forms I-821D and I-765
3. Mail USCIS forms and fees (total $465)
4. Visit your local USCIS Application Support Center for a scheduled biometrics services appointment
5. Check the status of your request online (USCIS.gov)

www.uscis.gov/childhoodarrivals

U.S. Citizenship and Immigration Services

If you have questions about your request please call USCIS Customer Service at **1-800-375-5283** or 1-800-767-1833 (TDD)

with considerably broader official functions and capacities than our own notaries. For many new American immigrants, "notarios" are akin to "abogados" – attorneys. The Ohio Commission on Hispanic/Latino Affairs (OCHLA) worked with the Consumer Protection division in Attorney General DeWine's office to publish and circulate a bilingual press release and other messages in both English and Spanish warning the community to be wary of notario fraud in the wake of DACA's announcement.

In addition to warning Ohio Latinos of potential notario scams, OCHLA worked with prominent immigration attorneys around the state to host informational Q & A sessions for Ohio Latinos who were considering applying for DACA. The agency organized or attended sessions like these in Columbus, Cleveland and Dayton. The Commission recommends to all constituents considering applying for Deferred Action that they consult an immigration attorney before applying for the program.

5. Demographic Profile of DACA Recipients

The group of eligible DACA applicants is finite but uncertain. As applicants must have entered the U.S. by June 15th 2007 and must have lacked a lawful immigration status on June 15th, 2012 - no subsequent immigrants to the United States are eligible for DACA. Likewise, all undocumented immigrants 31 or older on June 15th, 2012 are not DACA-eligible. On the other hand, some undocumented immigrants are eligible for the program but lack the educational requirement, which they can rectify. Likewise, many children that will be eligible for the program have not yet reached the age at which they can apply – 15.

Counting undocumented immigrants is a dubious process, even for the U.S. Census Bureau. There are about 11.9 million undocumented immigrants in the United States[17]. According to estimates from the Migration Policy Institute, about 1.9 million of those immigrants are, or could become, eligible for Deferred Action for Childhood Arrivals[18]. Of that group, three distinct subgroups have emerged: those presently eligible for Deferred Action, those eligible for Deferred Action except that they lack the education or military service component, and those who may be eligible for Deferred Action except that they have not yet reached their 15th birthday.

Given these estimates, the pool of presently eligible potential DACA applicants was made up of 1.09 million young people,[19] but only about 49% had applied when MPI released their report a year into the program.[20]Given the benefits of application and the high approval rate, at first it appears curious that so many potential applicants have not applied. In fact, however, there are several factors that could deter application. As the MPI report suggests, difficulty paying the significant application fees, an inability to prove one's identity, presence or age, concern over potentially disqualifying criminal offenses and fear of exposure for themselves and family members may all play a role in chilling applications. Alternatively,

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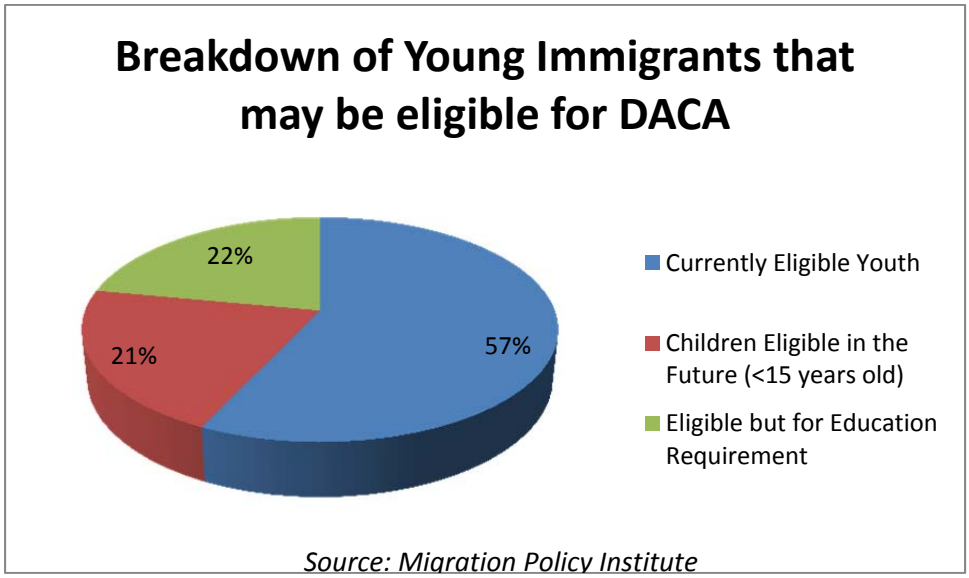
[17] *"Undocumented Immigrants in the U.S."*, *supra.*
[18] *"Deferred Action for Childhood Arrivals at the One Year Mark"*, *supra.*
[19] *Id.*
[20] *Id.*

as anyone can apply for Deferred Action as a defense to removal proceedings, some young immigrants – especially the youngest who are not yet members of the workforce - may simply be waiting to apply until they have to.



*Originally published by the Migration Policy Institute. MPI is an independent, nonpartisan think tank in Washington, DC, dedicated to the study of the movement of people worldwide. (**www.migrationpolicy.org**).*

The plurality of young immigrants that have applied hail from California and Texas, which together are home to 44% of potential DACA applicants and 45% of actual applicants thus far[21]. Application rates vary dramatically by state – Florida and New York trail Texas and California considerably, while rates in Georgia and North Carolina, which both have comparatively small undocumented immigrant populations, are among the highest in the country[22]. One explanation for disparate application rates could be state policies affecting the ease with which an undocumented immigrant can enter the workforce – Georgia, for example, requires all employers to use the federal employment eligibility verification system "E-Verify", making work even harder to find without work authorization.

Of the almost two million young immigrants that ultimately could be eligible to apply for Deferred Action, the overwhelming majority originate from Latin America, particularly Mexico[23]. Immigrants from Mexico, Honduras and other Central American countries also lead in application rates[24]. While youth from Mexico, El Salvador, Guatemala and Honduras account for 68% of the currently-eligible population, they make up 85% of those that have applied for DACA. Seventy-seven per cent (77%) of all approved

[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

applications are for young immigrants originally born in Mexico[25]. Application rates are much lower, curiously, among youth originally from the Dominican Republic and from Asian countries.

Origin Country	Currently Eligible Population	Share of all Currently Eligible Youth	Applications Accepted for Processing	Application Rate
Mexico	637,000	59%	409,000	64%
El Salvador	47,000	4%	21,000	45%
Guatemala	29,000	3%	13,000	47%
Honduras	24,000	2%	14,000	58%
Korea	22,000	2%	7,000	33%
Philippines	22,000	2%	4,000	16%
Columbia	19,000	2%	5,000	28%
Dominican Republic	17,000	2%	2,000	14%

*Originally published by the Migration Policy Institute. MPI is an independent, nonpartisan think tank in Washington, DC, dedicated to the study of the movement of people worldwide. (**www.migrationpolicy.org**).*

As youth is an eligibility requirement for application, most among the currently-eligible DACA population have demographic profiles indicative of their ages. About 24% of those currently eligible are enrolled in K-12 education, while the remainder already have their high school diploma or GED (44%), or are enrolled in or have had some level of college education (32%)[26]. An estimated 60% are fully bilingual, with 9% speaking *only* English; the remainder identified as limited English proficient (LEP), with 10% indicating that they struggle considerably with the English language[27]. Males outnumber females (55% - 45%) among the currently-eligible population, 55% of whom work and 11% of whom have minor children of their own. 35% of those currently eligible for Deferred Action have incomes placing them below the federal poverty line (FPL).

In addition to those already eligible to apply for Deferred Action, there are around 423,000 young immigrants[28] that would be eligible to apply for DACA but lack a high school diploma or its equivalent, and are not enrolled in school. These young people will become eligible to apply for DACA if they return to school or enroll in a GED program. This group is - compared to those currently-eligible –more dominated by men (64%) than women, poorer (42% below FPL), more likely to work (71%), more likely to have children (31%) and more than twice as likely to struggle with English (69% LEP)[29].

The barriers between this second group and the educational attainment they require to be eligible for Deferred Action are significant[30]. These young people are largely workforce participants, and many have

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[25] *DACA September Report, USCIS, supra.*
[26] *"Deferred Action for Childhood Arrivals at the One Year Mark", supra.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

children of their own. These concerns likely make it difficult to attend classes in pursuit of a GED, as these young people would have to arrange for childcare and time off from work, in addition to transportation. Second, this group is largely LEP. Anecdotally, GED programs offered in Spanish or for LEP students are relatively rare, at least in Ohio, even if applicants can take the GED exam itself in Spanish. Finally, for a group that's this statistically poor, the tuition costs for otherwise-appropriate GED courses sometimes add one more obstacle to pursuing educational eligibility.

Finally, there are those children who are not yet age-eligible to apply for Deferred Action, but who one day may be eligible. There are an estimated 392,000 children nationwide in this group, and almost half of them will soon become eligible to apply – 49% are age 12-15[31]. In addition to reaching the application age, these children will ultimately have to complete their high school educations to remain eligible for DACA. This group also faces barriers to attaining DACA eligibility. Twenty-seven per cent (27%) are LEP[32], and though some will grow in English proficiency as they continue in school many will remain LEP throughout high school, and the majority of these students are Hispanic. Both Hispanic[33] and LEP[34] student graduation rates lag considerably behind the national averages. Finally, more than half – 57% - of these children live below the FPL, and a full 84% are from families earning less than 200% of the FPL. The negative correlation between poverty and educational attainment is well documented[35].

Ohio ranks 30th among U.S. states and territories with 3,019 accepted applications and 2,291 approvals[36]. The Migration Policy Institute estimates that there are between 10,000 and 20,000 young immigrants in Ohio that may ultimately be eligible for DACA[37]. Applying these nationwide eligibility and application rate estimates to an estimated population of 10,000 to 20,000 eligible immigrants in Ohio, there are 5,700 to 11,400 young people presently eligible for Deferred Action, while 2,200 to 4,400 lack the educational component of eligibility and another 2,100 to 4,200 children are not yet 15 years old but will become eligible to apply upon reaching that age. With these figures, there is no certain difference between national application rates and application rates in Ohio – somewhere between 26% and 53% of those eligible now have applied for the program. With the national application rate closer to the high end of that spread at 49%, it is possible that Ohioans are less-likely to have applied for the program than young immigrants in other states.

Notably, those states with relatively large, established and dominant Mexican populations – California and Texas – have the highest application rates while those with more diverse immigrant populations – Florida, New York and others – have lower rates. Approximately 82.5% of California's 14 million

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[31] *Id.*
[32] *Id.*
[33] *Drop-Out Rate Fast Facts, National Center for Education Statistics, U.S. Department of Education.*
[34] *Regulatory Adjusted Cohort Rate, Limited English Proficient: 2010-2011, Ed Data Express, U.S. Department of Education.*
[35] *See, e.g., "The Impact of Poverty on Educational Outcomes for Children", H.B. Ferguson, S. Bavaird, M.P. Mueller, Paediatric Child Health. 2007 October; 12(8): 701–706.*
[36] *DACA September Report, USCIS, supra.*
[37] *"Relief from Deportation: Demographic Profile of DREAMers Potentially Eligible under the Deferred Action Policy", Migration Policy Institute, August 2012. http://www.migrationpolicy.org/pubs/fs24_deferredaction.pdf.*

Hispanics are of Mexican descent[38] while the Hispanic populations of Florida and New York are dominated by Cubans and Puerto Ricans respectively[39]. Puerto Ricans, of course, are full U.S. citizens and thus not immigrants, and not contemplated by Deferred Action. Ohio's Hispanic population is somewhere in the middle – Mexicans make up the largest group of Ohio Hispanics at around 50%, but Ohio also has the 10th largest Puerto Rican population in the country[40], concentrated mostly in Lorain and Cleveland. It could be that Ohio's DACA application rate lags the national rate at least partially due to the diversity of Ohio's immigrant population. Large, well-established and ethnically homogenous immigrant – not simply Hispanic - communities like those of Mexicans in California could provide an easier structure for awareness of Deferred Action and its application steps than the smaller, more diverse and more isolated communities of Ohio immigrants.

6. What does DACA mean for Ohio?

Deferred Action for Childhood Arrivals created a new category of Ohioans. These are non-citizens, non-permanent residents that also are not quite undocumented immigrants, as the term is traditionally applied, anymore. Ohio law is largely well established regarding its undocumented immigrant population. Ohio citizens are, generally speaking, eligible for most state benefits in Ohio. Undocumented immigrants, with very few exceptions, are *not* eligible for state benefits. They cannot apply or Ohio driver's licenses, unemployment benefits, residency for tuition purposes, professional licenses from state boards or other state benefits. The challenge for the state is in deciding how to treat these young people that have been approved for DACA. Will they be eligible for some state benefits, as citizens and lawful permanent residents are? Or will they remain ineligible for state benefits under Ohio law? In the year since DACA's inception, this question has come to the forefront with two specific Ohio benefits: driver's licenses and residency for in-state tuition in higher education – and is nearing resolution with a third - professional licensure.

Driver's Licenses for DACA Recipients?

Shortly after USCIS began approving DACA applications in late 2012, many young Ohio immigrants that had been approved for the program took their EADs to their local branches of the Ohio Bureau of Motor Vehicles. They sought Ohio driver's licenses, which previously had been a benefit denied to undocumented immigrants. The response they received at BMV branches around the state varied wildly, and it wasn't until the end of March that the Bureau of Motor Vehicles issues a statewide directive on issuing licenses to DACA recipients.

The Bureau of Motor Vehicles requires a Social Security Number (SSN), among other identification documentation, for applicants to be eligible for Ohio driver's licenses. Prior to Deferred Action for

[38] *2010 U.S. Census, American Community Survey, U.S. Census Bureau.*
[39] *Id.*
[40] *Id.*

Deferred Action for Childhood Arrivals

		Month													Cumulative Totals
		Aug-12*	Sep-12	Oct-12	Nov-12	Dec-12	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	
Intake	Accepted	48,051	104,369	112,656	71,108	44,815	31,028	30,251	29,689	25,950	22,215	17,485	15,986	13,960	567,563
	Rejected	1,909	3,463	3,566	2,385	1,571	1,378	1,288	1,261	1,157	1,011	784	715	674	21,162
	Total received	49,960	107,832	116,222	73,493	46,386	32,406	31,539	30,950	27,107	23,226	18,269	16,701	14,634	588,725
	Average accepted/day	3,696	5,493	5,121	3,555	2,241	1,478	1,592	1,414	1,180	1,010	874	727	635	2,158
Biometrics	Scheduled	18,616	105,439	98,430	87,037	42,062	42,678	30,128	32,453	27,064	23,394	16,852	16,668	15,137	555,958
Case Review	Under review	0	29,747	106,758	152,244	172,535	153,370	132,093	116,509	100,492	73,259	72,290	62,643	49,083	-
	Approved	0	1,687	28,100	47,923	48,077	50,198	45,530	46,950	45,169	51,883	34,998	29,881	25,059	455,455
	Denied	0	0	6	15	72	162	247	803	1,038	1,406	1,563	2,112	2,154	9,578

*August data from August 15 - August 31, 2012
Please note: The report reflects the most up-to-date estimate available at the time the report is generated.
Data Queried: September 10, 2013 Report Created: September 11, 2013
Date range: August 15, 2012 - August 31, 2013
Systems: Biometrics Capture Systems, CIS Consolidated Operational Repository (CISCOR)
USCIS Office of Performance and Quality (OPQ)

Beginning in April 2013, the Deferred Action for Childhood Arrivals reporting period has changed from a mid-month to an end-of-month cycle. In addition, beginning with the April 2013 report, the reports will include updates to data previously reported based on the availability of data as DACA progresses.

Deferred Action for Childhood Arrivals

Top Countries of Origin	Accepted to Date	Approved to Date
MEXICO	433,318	350,056
EL SALVADOR	21,638	16,950
HONDURAS	14,608	10,719
GUATEMALA	14,234	10,720
SOUTH KOREA	7,504	6,760
PERU	7,374	6,360
BRAZIL	6,136	4,985
COLOMBIA	5,622	4,616
ECUADOR	5,386	4,454
PHILIPPINES	3,682	3,203
ARGENTINA	3,431	2,885
JAMAICA	2,998	2,024
INDIA	2,870	2,331
VENEZUELA	2,532	2,005
DOMINICAN REPUBLIC	2,374	1,751
TRINIDAD AND TOBAGO	2,246	1,655
BOLIVIA	1,672	1,422
COSTA RICA	1,660	1,376
URUGUAY	1,564	1,288
PAKISTAN	1,459	1,133

Residence	Accepted to Date	Approved to Date
CALIFORNIA	161,624	134,857
TEXAS	93,277	72,408
ILLINOIS	31,404	27,469
NEW YORK	30,160	23,265
FLORIDA	23,988	17,673
ARIZONA	20,252	16,733
NORTH CAROLINA	19,876	15,989
GEORGIA	18,497	14,433
NEW JERSEY	16,407	13,530
COLORADO	12,520	9,487
WASHINGTON	12,129	9,557
NEVADA	9,274	7,168
VIRGINIA	9,029	7,083
OREGON	8,029	6,660
MARYLAND	7,266	5,801
INDIANA	7,079	5,451
UTAH	6,764	5,405
MASSACHUSETTS	6,053	4,540
TENNESSEE	5,779	4,276
WISCONSIN	5,262	4,182
KANSAS	4,941	3,919
OKLAHOMA	4,783	3,893
SOUTH CAROLINA	4,674	3,786
MICHIGAN	4,482	3,480
MINNESOTA	4,468	3,534
NEW MEXICO	4,217	3,089
PENNSYLVANIA	4,045	3,110

Residence	Accepted to Date	Approved to Date
ARKANSAS	3,786	3,052
CONNECTICUT	3,606	2,932
OHIO	3,019	2,291
ALABAMA	2,972	2,313
MISSOURI	2,459	2,003
NEBRASKA	2,453	1,960
IDAHO	2,259	1,781
KENTUCKY	2,178	1,716
IOWA	2,020	1,630
LOUISIANA	1,420	1,070
MISSISSIPPI	1,054	852
DELAWARE	1,031	838
RHODE ISLAND	904	701
DISTRICT OF COLUMBIA	532	388
WYOMING	434	337
NEW HAMPSHIRE	263	202
HAWAII	247	181
SOUTH DAKOTA	169	134
PUERTO RICO	139	73
WEST VIRGINIA	75	58
VIRGIN ISLANDS	64	30
ALASKA	57	42
NORTH DAKOTA	42	24
MAINE	32	22
MONTANA	32	23
NOT REPORTED	21	11
GUAM	16	13

*All fields with less than ten or a blank in the state field are included in the field 'not reported'.

Please note: The report reflects the most up-to-date estimate available at the time the report is generated.

Data Queried: September 10, 2013 Report Created: September 11, 2013
Date range: August 15, 2012 - August 31, 2013
Systems: CIS Consolidated Operational Repository (CISCOR)
USCIS Office of Performance and Quality (OPQ)

Childhood Arrivals, the lack of a Social Security Number prevented young undocumented immigrants from obtaining Ohio licenses. With approval for the program, however, applicants receive an EAD and eligibility to apply for a Social Security Number, rectifying this.

Initially, individual branches denied or issued licenses to these new applicants at their own local discretion. The Commission knows anecdotally, for example, that branches in Cleveland and Cincinnati were not issuing licenses while branches in Toledo were. Some branches in Columbus issued licenses and some refused. This confusion prompted advocacy from the immigrant community leadership for a statewide policy declaring that DACA recipients be eligible to receive Ohio driver's licenses. On March 29, 2013 the Ohio Bureau of Motor Vehicles announced that DACA recipients would be eligible for Ohio driver's licenses after submitting to a final identity verification step with national immigration databases. These licenses are non-renewable and expire with a recipient's DACA status. When the young immigrant's Deferred Action status is reapproved, he or she can obtain another license from the BMV.

Most DACA-approved students still cannot obtain their licenses as minors. The information that the BMV requires from parents of minors seeking licenses – a government-issued ID - is not typically available for those with undocumented parents[41], and the vast majority of DACA recipients have parents that are also undocumented immigrants. As it stands, DACA applicants generally must wait until they reach the age of 18 to successfully apply for an Ohio license.

Driver's Licenses: Potential Legislation

Ohio joins nearly every other state in the country in deciding to grant licenses to DACA recipients. They remain ineligible for licenses only in Arizona and Nebraska[42]. Proponents of these policies note that, in most cases, the SSN and EAD are all the state requires to grant licenses, and that the natural response should have been to grant licenses to this new group that had the requisite documents. Others argued that with work authorizations, they will require transportation, and that it was far better to train them and ensure their competence behind the wheel than to risk untrained drivers using Ohio's roads.

Opponents of granting DACA recipients licenses are concerned about several implications for the program – primarily the potential cost of granting these licenses and the principle of state sovereignty. In their view, the State of Ohio should decide to whom it will grant licenses, and ought not follow the federal government's creation of a new class of immigrant. Likewise there are studies that outline the annual "costs" of undocumented immigrants to the State and to Ohio taxpayers, and note that granting state benefits to DACA recipients is likely only to encourage further immigration by undocumented people. While such a policy could indeed engender migration of DACA recipients from other states that deny them driver's licenses, only two such states exist – Arizona and Nebraska – and for potential migrant DACA recipients in those states, Ohio is a geographically remote destination. Further, because DACA eligibility rests on presence in the United States on June 15th, 2007, the pool of those eligible for

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[41] *Call to Ohio Bureau of Motor Vehicles Driver's License Information Center, 10/30/13.*

[42] *Overview Table of State Driver's License Requirements for Individuals Granted Deferred Action Under the Deferred Action for Childhood Arrivals (DACA) Policy, National Immigration Law Center, April 2013.*

the program is finite, and does not include undocumented immigrants that have arrived in the U.S. recently.

House Bill 114, introduced by Representative Matt Lynch[43] was written as a direct response to the BMV's policy announcement, and restricts eligibility for Ohio licenses to certain delineated groups of non-citizens, excluding recipients of Deferred Action. Hearings for House Bill 114 took place before the House Transportation, Public Safety and Homeland Security Committee during this spring's session. On the opposite side, two bills are pending before the legislature that would specifically codify that DACA recipients *are* eligible to receive Ohio driver's licenses – Senate Bill 62, from Senate Minority Leader Kearney and Senators Tavares and Lehner, and House Bill 155 from House Assistant Minority Whip Ramos and Representative Reece[44]. These bills were referred to the Senate State Government Oversight and Reform Committee and the House Transportation, Public Safety and Homeland Security Committee, respectively. The latter committee also heard sponsor testimony from Representatives Reece and Ramos on their bill.

In sum, the question of whether or not DACA grantees are eligible for Ohio licenses has largely been solved administratively. Pending legislation may alter their eligibility either toward easier access to licenses – by codifying eligibility specifically or stream-lining the process for minors, or it may instead alter Ohio law to deny them eligibility. It will be up to the General Assembly to decide the wisest course for Ohio, but current law and policy allow DACA recipients to receive Ohio driver's licenses.

In-State Tuition for DACA recipients?

While Ohio was weighing whether or not to grant licenses to DACA recipients, a second question materialized regarding the interaction of Deferred Action and Ohio law. Many sought a ruling on whether these young people would be eligible to be classified as Ohio residents for the purposes of calculating tuition at Ohio public colleges and universities. Prior to the advent of Deferred Action, Ohio's public institutions of higher education either declined to admit undocumented students outright, or charged undocumented students international student tuition rates – often at double the in-state rate or more[45]. This changed on July 29th, when the Ohio Board of Regents announced that Ohio's DACA recipients that meet the other residency requirements *will* be eligible to be classified as Ohio residents and pay in-state tuition.

The question arises from applying extant Ohio law to DACA recipients. Residency determination guidelines are found in Ohio Revised Code §3333.31[46]. The statute states that residency will be determined according to rules promulgated by the Board of Regents, and in fact grants the Chancellor and the Board of Regents broad authority in determining residency. The statute also notes that

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[43] *Representative Lynch is an ex-officio Commission serving on OCHLA's board.*
[44] *Representative Ramos and Senator Tavares also serve as ex-officio OCHLA Commissioners.*
[45] *See included table on tuition rates for in-state and international students.*
[46] *In the following section, the Ohio statute is quoted and, for illustrative purposes, critical words and phrases are emphasized. Note that all means of emphasizing certain portions of the text – bolded letters, italics and underlines – are not textually differentiated in the Ohio Revised Code or Ohio Administrative Code.*

MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

March 19, 2013

Nolan Stevens
Latino Affairs Commission
Riffe Center – 18th Floor
77 South High Street
Columbus, OH 43215-6108

Dear Nolan:

Thank you for contacting my office regarding the Bureau of Motor Vehicles (BMV) granting of driver's licenses to immigrants who provide the appropriate documents.

In June 2012, the federal government implemented the Deferred Action for Childhood Arrivals initiative. The initiative does not specifically address driver's licenses, but it does authorize an individual to be present in the United States and allows that individual to be assigned a social security number and a work permit. With these documents and any other documents normally required by the BMV, an individual can provide the BMV with the information necessary to receive a driver's license.

It appears that the BMV would have to accept driver's license applications from individuals that fall under the Deferred Action for Childhood Arrivals initiative because they can provide all of the information necessary.

I encourage any citizen who is concerned about a law or policy to contact their legislators and voice that concern. As Attorney General, I do not have the authority to introduce or vote on legislation.

Again, I appreciate receiving your comments. If my office can ever be of assistance to you in the future, please feel free to contact us.

Very respectfully yours,

Mike

MIKE DEWINE
Ohio Attorney General

"resident" does not mean here what it might mean in common usage, or in other parts of the revised code. Instead, the statute says;

> *The term "resident" for these purposes shall not be equated with the definition of that term as it is employed elsewhere under the laws of this state and other states, and shall not carry with it any of the legal connotations appurtenant thereto. Rather, except as provided in divisions (B) and (D) of this section, for such purposes,* ***the rule promulgated under this section shall have the objective of excluding from treatment as residents those who are present in the state primarily for the purpose of attending a state-supported or state-assisted institution of higher education,*** *and may prescribe presumptive rules, rebuttable or conclusive, as to such purpose based upon the source or sources of support of the student, residence prior to first enrollment, evidence of intention to remain in the state after completion of studies, or such other factors as the chancellor deems relevant.*[47]

While the statute provides broad authority to the Board of Regents, it goes on to enumerate scenarios in which residency must or must not be granted. For example, section (B) grants residency to veterans and their families if the veteran has been killed in action or was honorably discharged by the military and has established domicile in Ohio by the beginning of the academic term. Likewise, another section prohibits the Board of Regents from denying residency to the spouse or dependent child of any Ohioan who has established domicile in the state and works full time[48]. Of particular interest for DACA recipients in Ohio is section (D), the "forever buckeye" provision. So-named because it provides for in-state tuition for graduates of Ohio high schools regardless of whether they have left Ohio since their graduation, the statute says[49];

> *(1) The rules of the chancellor for determining student residency* ***shall grant residency*** *status to a person who, while a resident of this state for state subsidy and tuition surcharge purposes, graduated from a high school in this state or completed the final year of instruction at home as authorized under section 3321.04 of the Revised Code, if the person enrolls in an institution of higher education and establishes domicile in this state, regardless of the student's residence prior to that enrollment.*
>
> *(2) The rules of the chancellor for determining student residency shall not grant residency status to an alien if the alien is not also an immigrant or a nonimmigrant.*

Finally, an analysis of the statute as it applies to DACA recipients requires some definitions. The statute defines the following terms;

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[47] *Ohio Rev. Code §3333.31(A).*
[48] *Ohio Rev. Code §3333.31(B) & (C).*
[49] *Ohio Rev. Code §3333.31 (D) 1 & 2.*

MEDIA RELEASE

Bureau of Motor Vehicles

Ohio Bureau of Motor Vehicles • Mike Rankin, Registrar
www.ohiobmv.com

OHIO DEPARTMENT OF PUBLIC SAFETY
John Kasich, Governor Thomas P. Charles, Director

FOR IMMEDIATE RELEASE **March 29, 2013**

OHIO BMV TO BEGIN ISSUING TEMPORARY DRIVER LICENSES TO QUALIFIED DACA GRANTEES

Additional Federal Database Check Will Guard Against Fraud

COLUMBUS – Today the Ohio Bureau of Motor Vehicles (BMV) instructed the state's Deputy Registrars to begin issuing temporary driver licenses to qualified Deferred Action for Childhood Arrivals (DACA) grantees, but only after first confirming applicants' immigration documents via the U.S. Citizen and Immigration Services (USCIS) database. The extra security steps are designed to combat fraud or the use of counterfeit documents. BMV's decision was established after reviewing guidance expressed by Ohio Attorney General Mike DeWine that DACA grantees are eligible for temporary driver licenses under Ohio law.

The BMV's instructions to Deputy Registrars will ensure consistent procedures are followed statewide when issuing the temporary licenses. Confirmation of applicants' immigrant documents will be made via the federal government's immigration database to verify their authenticity. Upon verification of applicants' documents they will be issued a non-renewable/temporary license valid for the time period of their work authorization issued by USCIS, not to exceed two years.

The federal government allows DACA grantees to work in the U.S. during the two-year length of their DACA status. Individuals are eligible for DACA status if: they arrived in the U.S. before the age of 16; have no criminal history; are currently in school; have graduated from high school or received a general education development (GED) certificate; have been honorably discharged from the Coast Guard or Armed Forces of the United States; and are under the age of 31.

Currently 37 other states also issue temporary drivers licenses to DACA grantees. Ohio is one of the few states to take the extra step of also confirming applicants' immigration documents through the federal government's database.

To view a summary of the Deputy Registrar directive, click here:
http://www.publicsafety.ohio.gov/links/save-3-29-13.pdf

(E) As used in this section[50]:

(1) "Dependent," "domicile," "institution of higher education," and "residency officer" have the meanings ascribed in the chancellor's rules adopted under this section.

(2) "Alien" means a person who is not a United States citizen or a United States national.

(3) "Immigrant" means an alien who has been granted the right by the United States bureau of citizenship and immigration services to reside permanently in the United States and to work without restrictions in the United States.

*(4**) "Nonimmigrant" means an alien who has been granted the right by the United States bureau of citizenship and immigration services to reside temporarily in the United States.***

As section E suggests, "domicile" is defined in the attendant Ohio Administrative Code §3333-1-10 as "a person's permanent place of abode, ***so long as the person has the legal ability under federal and state law to reside permanently at that abode"***[51]. "Resident", meanwhile, is defined as "any person who maintains a twelve-month place or places of residence in Ohio, ***who is qualified as a resident to vote in Ohio and receive state public assistance***, and who may be subjected to tax liability under section 5747.02 of the Revised Code, provided such person has not, within the time prescribed by this rule, declared himself or herself to be or allowed himself or herself to remain a resident of any other state or nation for any of these or other purposes".

The sections in the Ohio Administrative Code flesh out the residency determination process, and augment the Board of Regents with significant discretion and autonomy in granting residency. It is critical that the Ohio Administrative Code sections attendant to the relevant Revised Code section were never updated to reflect the "forever buckeye" provision. Accordingly, those sections that conflict with the statutory language are at least outdated, and may perhaps be invalid. Along with the definitions of domicile and resident in the Board's residency rules, the Administrative Code section enumerates several factors that the Board of Regents can consider in determining residency. Of particular note are the following sections[52];

(D) Additional criteria which may be considered in determining residency may include but are not limited to the following:

(1) Criteria evidencing residency:

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[50] *Ohio Revised Code §3333.31 (E).*
[51] *Ohio Administrative Code §3333-1-10 (B)(4).*
[52] *Ohio Administrative Code §3333.31 (D).*

MIKE DEWINE
★ OHIO ATTORNEY GENERAL ★

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May 23, 2013 [redacted]

Dr. Ronald E. Abrams, President
Ohio Association of Community Colleges
175 S. Third St, Suite 560
Columbus, OH 43215

Re: Deferred Action for Childhood Arrivals and In-State Tuition Rates

Dear Dr. Abrams:

You have requested an informal opinion regarding the development of a policy on aliens living within the state and in-state tuition rates, specifically as it relates to certain individuals who are the beneficiaries of federal "deferred action" under the "Deferred Action for Childhood Arrivals" ("DACA") program.

Section 3333.31 of the Ohio Revised Code prohibits the rules of the Chancellor of the Ohio Board of Regents to grant residency status, for purposes of obtaining in-state tuition rates, to any alien enrolled in Ohio public colleges, unless the alien is either an immigrant or nonimmigrant.

As defined by section 3333.31 of the Ohio Revised Code:

> "Immigrant" means an alien who has been granted the right by the United States bureau of citizenship and immigration services to reside permanently in the United States and to work without restrictions in the United States.
>
> "Nonimmigrant" means an alien who has been granted the right by the United States bureau of citizenship and immigration services to reside temporarily in the United States.

It should be noted that the statute specifically excludes from a grant of residency status those students who are within the state "primarily for the purpose of attending a state-supported or state-assisted institution of higher education", and therefore the definition of "nonimmigrant" does not apply to those aliens who have been granted a visa specifically to attend one of the enumerated schools.

On June 15, 2012, the Department of Homeland Security ("DHS") released a memorandum allowing certain aliens to request consideration for deferred action, which is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. Pursuant to the memorandum, those individuals who are eligible for deferred action under this program are generally those aliens not currently over the age of thirty who were brought to the United States without documentation as children under the age of sixteen, who meet other criteria as set forth by DHS. The memorandum stated that a person with a deferred action

determination is not granted lawful status while remaining in the United States, which leads to the question of whether or not such a person is an "immigrant" or "nonimmigrant" under Ohio law.

On January 18, 2013, DHS updated the frequently asked questions in the "Deferred Action for Childhood Arrivals" section on its website and clarified that while a person with a deferred action determination under this program does not have a lawful status, the individual is authorized by the Department to be present in the United States and "therefore, considered by DHS to be lawfully present during the period deferred action is in effect." The individual is also eligible to receive employment authorization for the period of deferred action upon the demonstration of economic necessity. The initial deferred action grant of two years may be renewed upon successful completion of a process which will be determined at a later date.

Since a childhood arrival with a deferred action determination permits the individual to be present in the United States during the deferred action period, the individual has the right to reside temporarily in the United States. Therefore, such individual is a nonimmigrant as defined in section 3333.31 of the Ohio Revised Code and is eligible to be classified as a resident for purposes of in-state tuition rates, if the individual meets the other criteria set forth in the rules of the Board of Regents.

There may be other individuals who were not brought here as undocumented children but who may be the beneficiary of a "deferred action" determination pursuant to other federal authority. While this opinion does not address those situations, it should be noted that in a recent case from Arizona regarding DACA beneficiaries and the denial of drivers' licenses, Judge David G. Campbell of the U.S. District Court for the District of Arizona stated, in a decision denying a Motion for Preliminary Injunction, that a policy which permits the issuance of a driver's license to some immigrants who have been granted "deferred action" under various federal statutory provisions but requires denial of licenses for those immigrants who are DACA beneficiaries would likely fail on federal equal protection grounds. This analysis would likely be applicable as well to the in-state tuition issue.

Please note that this is my opinion as your counsel, and not a formal opinion of the Attorney General. Should you have any questions regarding any of the above, please feel free to call my office.

Sincerely,

Susan M. Sheffield

Susan M. Sheffield
Associate Assistant Attorney General
Youngstown Regional Office

(a) If a person is subject to tax liability under section 5747.02 of the Revised Code;
(b) If a person qualifies to vote in Ohio;
(c) If a person is eligible to receive Ohio public assistance ;
(d) If a person has an Ohio's driver's license and/or motor vehicle registration.

(2) Criteria evidencing lack of residency:

(a) If a person is a resident of or intends to be a resident of another state or nation for the purpose of tax liability, voting, receipt of public assistance, or student loan benefits (if the student qualified for that loan program by being a resident of that state or nation);

(b) If a person is a resident or intends to be a resident of another state or nation for any purpose other than tax liability, voting, or receipt of public assistance (see paragraph (D)(2)(a) of this rule).

(3) For the purpose of determining residency for tuition surcharge purposes at Ohio's state-assisted colleges and universities, ***an individual's immigration status will not preclude an individual from obtaining resident status if that individual has the current legal status to remain permanently in the United States.***

In-State Tuition: Applying Ohio Law

Taken in sum, considerations from the statute augmented by the administrative rules could be summed up as a list of factors to consider, as follows:

1. Whether the prospective student has established domicile in Ohio, meaning a place where the person has the legal right to abide permanently at that abode, and;
2. Whether the student has graduated from an Ohio high school , and;
3. Whether the student is either a citizen, an “immigrant” or a “non-immigrant”, and;
4. Whether the student qualifies to vote in Ohio, is subject to Ohio tax liability, has an Ohio driver’s license and qualifies to receive public assistance, those all indicate residency status, and;
5. Whether the student is in Ohio but plans to be a resident of another state or nation for any reason, indicating non-resident status, and;
6. Whether the student is in Ohio solely for the financial benefit of in-state tuition, which is the stated intent of the rules of the Board of Regents in determining residency - to exclude those students that are - and;
7. In considering all of these factors, the Board of Regents has broad discretion to make residency determinations.

With these confusing, even contradictory considerations for determining residency status, it is no small surprise that colleges and universities across Ohio responded much as branches of the Ohio Bureau of Motor Vehicles did in the face of the driver’s license controversy – with confusion. Prior to the announcement from the Board of Regents on July 29, 2013, some schools in Ohio had begun

implementing admissions protocols to accommodate DACA students at in-state rates, while others awaited a decision from the Board of Regents. In all cases, the application of the state's residency guidelines to DACA recipients was of critical importance. As the law is applied to DACA recipients living in Ohio, the determination on residency was somewhat murky.

Certainly the easiest path to residency for these students will fall under the "forever buckeye" provision installed in the code in the budget passed by the 129th General Assembly. DACA recipients living in Ohio *must* graduate from high school or risk ineligibility for the program. Likewise, it is very clear from the plain meaning of the statute that DACA recipients qualify for the "forever buckeye" provision of the statute as "non-immigrant" aliens. DACA is run though USCIS – the United States Citizenship and Immigration Services – as the statute contemplates, and DACA recipients are granted a temporary lawful presence in the United States. Finally, as DACA-approved young immigrants have largely grown up in Ohio, it is unlikely that they harbor plans to be a resident in another state or nation – any more than any other Ohio citizen that graduates high school and pursues higher education.

Establishing domicile, however, is a trickier question. It initially appears - by the qualifications found in the Ohio Administrative Code on the definition of the word "domicile" - that DACA students may lack domicile. DACA students do not have the absolute, permanent right to live in their Ohio homes – their status remains illegal and the lawful presence they are granted by DACA lasts only for two years, at which point they must re-apply. On the other hand, the open-ended, indefinite renewability of Deferred Action creates an opportunity to argue that DACA *does* grant them a functionally permanent right to live at their Ohio abodes. While the two-year periods require reapplication, and there is no guarantee of re-approval, other prospective students have something less than an absolute legal right to reside *permanently* at their Ohio addresses.

Among the enumerated factors favorable to a determination of residency, DACA students can claim some, but not all, of them. As noted above, they are eligible for Ohio driver's licenses, and indeed many already carry them. They are also subject to tax liability, and with their EADs will be increasingly likely to have legitimate jobs, rather than continuing to participate in the shadow labor market that is so often frequented by undocumented immigrants. They are not, however, qualified to vote in Ohio. Only citizens can vote, and DACA status falls well short of citizenship. Likewise, they do not qualify for public assistance benefits. For all state-administered benefits that rely on the federal means test in gauging eligibility, undocumented immigrants – including DACA recipients – are ineligible to apply[53]. While the individual states have the power to expand or contract eligibility for immigrant groups, Ohio is one of just five states that further restricts access to public assistance for immigrants – notably even for lawful permanent residents (LPR's)[54].

Some lawful permanent residents, specifically those with a two-year probationary period, are a useful parallel for comparison to DACA recipients. Lawful permanent residents are immigrants that have applied for their green cards, which will issue after a two-year probationary period, during which the individual is granted legal presence in the United States and a work permit. At the expiration of these two years, which were designed to combat immigration fraud, the immigrant will become a full LPR. These probationary periods are most common with marriage-or-business-based immigrant visas. Recipients of probationary lawful permanent residence have lawful presence, as DACA recipients do, for

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[53] *Overview of Immigrant Eligibility for Federal Programs, National Immigration Law Center, rev. 10/2011.*
[54] *Id.*

Ohio | **Board of Regents**
University System of Ohio

John R. Kasich, Governor
John Carey, Chancellor

Memorandum

To: University System of Ohio General Counsels

From: Michelle Chavanne, Assistant General Counsel, Ohio Board of Regents

Date: July 31, 2013

Subject: In-State Tuition Rates/Residency determinations for students under the Deferred Action for Childhood Arrival program (DACA)

After careful review and consultation with various stakeholders, and upon the advice of the Attorney General for the State of Ohio, section 3333.31 of the Ohio Revised Code does not preclude a student with an approved request for deferred action under DACA from being classified a resident of Ohio for purposes of obtaining an in-state tuition rate at an Ohio public college or university. Therefore, residency determinations for DACA students are to be evaluated under Administrative Rule 3333-1-10, which sets forth situations in which a person is a resident under (B)(1) or is deemed a resident under paragraphs (C) and (E).

The determination process should follow the same procedures that are applied to other students by examining the length of residence in Ohio, reviewing the criteria evidencing residency and reviewing the criteria evidencing lack of residency as provided under paragraph (D) of the rule.

Questions may be addressed to Michelle Chavanne, Assistant General Counsel, Ohio Board of Regents, at 614.644.1988 or mchavanne@regents.state.oh.us.

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those two years but they also have lawful *status*, which DACA does not grant. Lawful permanent residents would qualify as "immigrants" under the forever buckeye provision, for example, rather than "non-immigrants", and may have graduated from Ohio high schools, will pay taxes and will have driver's licenses. Like DACA recipients however, they cannot vote and they may not meet the literal requirements for domicile outlined in the Ohio Administrative Code. Also like DACA recipients, lawful permanent residents during their two-year probationary period are not eligible for most state benefits and do not have a right to live at their Ohio abodes *permanently* – if, at the end of their two year period, USCIS declines to remove the conditions on their lawful permanent residency, they lose their status and become undocumented, just like a DACA recipient whose application is not reapproved.

It's important to note here that when the Ohio Administrative Code is seemingly at odds with the Ohio Revised Code, the statute controls[55]. Here, DACA students are eligible under the plain meaning of the statute in the Ohio Revised Code. While the Ohio Administrative Code makes the question of residency less-clear, those rules were never updated to reflect the changes with the "forever buckeye" provision. When statute conflicts with attendant administrative regulations, the statute prevails, and the administrative law provisions are void.

Comparing DACA students to LPR students is useful. Without exception, lawful permanent residents living in the State of Ohio – even if their LPR status is presently probationary – pay in-state rates to attend Ohio's public schools. This is a class of immigrants that cannot vote, and has a tenuous claim to domicile as it is defined in the OAC – exactly like DACA recipients. In this context, it becomes easier to see why the Board of Regents might have taken the course they did. They may have noted that the qualified voter requirement was not always followed in residency determinations, and that domicile for LPRs was murky as well. DACA students closely mirror conditional lawful permanent residents, and the Board found no reason to treat them differently for tuition purposes. They likely also considered the primacy of the statute over the administrative regulations – as the "forever buckeye" clause in the statute mandates a determination of residency for DACA recipients, and the questions arise from the administrative rules – most notably on domicile and eligibility to vote.

Also of note is the policy behind the Board's rules as stated in the statute – the rules were intended to exclude from residency those that were in Ohio solely to attend school. A percentage of DACA recipients don't even speak their native languages. Many have lived most of their lives in Ohio. As a group, they do not fit the profile of those that the statute is designed to exclude from residency. More, advisory opinions from Attorney General DeWine's office indicated that DACA students *were* in fact eligible for in-state tuition under Ohio law. Finally, the statute is written to grant significant authority for the Board of Regents to make and execute its own rules on determining residency. The Board has done so here, and has ruled that DACA recipients are eligible for in-state tuition.

In-State Tuition: Financials for DACA Recipients and Ohio

Prior to the Board's ruling, higher education was not a reasonable option for the great majority of Ohio's DACA-eligible population. They were charged, if they were admitted at all, out-of-state or international tuition rates at Ohio schools. Among all Ohio public institutions of higher learning - 22 community

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[55] *Texas v. United States, 497 F.3d 491 (5th Cir. Tex. 2007).*

colleges and 13 four-year institutions – annual tuition for out-of-state or international students is 99% higher than in-state rates. This averages an additional almost $6,300 per year in tuition surcharges[56]. At some schools it's even higher – Columbus State charges international students 166% more, and Ohio State charges international students 167% more. To put college even further from plausibility, DACA recipients remain ineligible for federal and state financial aid. With no loans or public scholarships available to them, and forced to pay out-of-state or international tuition, college simply was not possible for many Ohioans with Deferred Action.

It is difficult to quantify the fiscal impact of the Board's decision for Ohio. Subsidizing the degrees that DACA recipients will earn through the provision of the state share of instruction (SSI), *will* require some taxpayer resources. The average difference between in-state tuition and out-of-state or international tuition at Ohio's public institutions of higher learning is $6,298.43 per year, but after that the variables are far more nebulous. For example, the variation in estimates on the size of Ohio's DACA-eligible population will make any attempted math suspect – the best and only estimate, from MPI, is between 10,000 and 20,000 potential applicants. Second, it would be impossible to compute an accurate college attendance rate for DACA students. If their ages are spread out evenly between the youngest – at six years old – and the oldest at 31, about half of them are already out of high school and past the critical time in their lives when most young people decide whether or not to go to college. It's also difficult to judge college enrollment trends in the coming years. More and more students are choosing two-year institutions, for example, which have much smaller differences (in dollars) between in-state and out-of-state tuition rates. Finally, there's no way to accurately judge college tuition rates and SSI values 16 years from now. As the youngest DACA-eligible Ohioans are six years old (because they must have been present in the U.S. in 2007), the cost in subsidized education for DACA-eligible Ohioans will be borne over the next 16-20 years or so.

Further clouding the determination of fiscal impact, there also will be some economic benefit to the state. Ohio taxpayers that are productive and employed are very valuable to the state's economy – not just in revenue for the state but in helping to create and maintain business-sustaining markets. DACA-approved Ohioans will likely pay more in taxes than their undocumented peers who, while they do pay some taxes, are more likely to be employed "under the table", and therefore less likely to pay taxes as a group. DACA recipients will have work permits and, therefore, will be much more likely to have legitimate employment. Their undocumented friends and families will likely continue to be employed

[56] *See included table on Ohio school tuition rates.*

Institution	Annual In-State Tuition	Annual International Tuition	Difference
The University of Akron	$9,734.40	$18,783.60	$9,049.2 (93%)
Kent State University	$9,816	$17,776	$7,960 (81%)
Cleveland State University	$9,448.80	$12,628.32*	$3,179.52 (37%)
Youngstown State University	$7,899.36	$13,899.36	$6,000 (76%)
Shawnee State University	$6,876.24	$11,990.16	$5,113.92 (73%)
Miami University	$13,266	$29,056	$15,790 (119%)
The University of Cincinnati	$10,784	$25,816	$15,032 (139%)
The University of Toledo	$7,863.84	$16,983.84	$9,120 (116%)
Bowling Green State University	$10,606	$17,914	$7,308 (69%)
Wright State University	$8,542	$16,546	$8,004 (94%)
Ohio University	$10, 380	$19,344	$8,964 (86%)
The Ohio State University	$10,010	$26,776	$16,716 (167%)
Central State University	$6,058.00	$13,510.00	$7,452 (123%)
Averages - Four-Year Schools	$9,242.05	$19,032.91	$9,790.86 (106%)

**For non-transfer students. Rate is higher for transfer students*

Community Colleges**	Annual In-State Tuition***	Annual International Tuition***	Difference
Belmont College	$2,448	$4,872	$2,424 (99%)
Central Ohio Technical College	$4,296	$7,056	$2,760 (64%)
Cincinnati State Technical and Community College	$3,487.20	$6,974.40	$3,487.20 (100%)
Clark State Community College	$3,264	$6,096	$2,832 (87%)
Columbus State Community College	$3,182.40	$8,458.32	$5,275.92 (166%)
Cuyahoga Community College	$3,082.56	$5,894.16	$2,811.60 (91%)
Eastern Gateway Community College	$2,736	$4,176	$1,440 (53%)
Edison Community College	$3,294.96	$6,102.72	$2,807.76 (85%)
Hocking College	$4,290	$8,580	$4,290 (100%)
Lakeland Community College	$3,148.80	$6,858	$3,709.20 (117%)
Lorain County Community College	$3,284.40	$6,516	$3,231.60 (98%)
Marion Technical College	$3,984	$5,904	$1,920 (48%)
Noth Central State College	$3,114	$6,228	$3,114 (100%)
Northwest State Community College	$3,504	$6,864	$3,360 (96%)
Owens Community College	$3,590.40	$6,808.80	$3,218.40 (90%)
Rhodes State College	$3,764.64	$8,281.28	$4.516.64 (120%)
Rio Grande Community College	$4,117.92	$20,510****	$16,392.08 (398%)
Sinclair Community College	$2,707	$5,353	$2,646 (98%)
Southern State Community College	$4,088	$7,706	$3618(89%)
Stark State College	$3,606.00	$5,790	$2,184 (61%)
Terra Community College	$3,845	$4,813	$968 (25%)
Washington State Community College	$3,264	$6,528	$3,264 (100%)
Average - Community Colleges	$3,464	$6,470	$3,006 (87%)

***Many community colleges offer discounts for residents of certain counties in Ohio. Those discounts are not included here*

****For students taking two semesters with 12 credit hours*

*****Out-of-state students can only apply at Rio Grande University, a private school*

Average - All Ohio Public Schools	$6,353.03	$12,751.46	$6,298.43 (99%)

"under the table", and subjected to workplace abuse, in the shadow labor market. More, Ohio already spends thousands, if not millions, to educate DACA-eligible undocumented students in K-12 education. The state is required to provide free primary and secondary public education under a decision of the U.S. Supreme Court in *Plyler v. Doe*.[57] When these students choose to live in other states which provide better opportunities to young immigrants, Ohio loses both bright young leaders *and* the significant dollars it has invested in their education. By providing in-state tuition to DACA recipients, Ohio is investing in a group of young people who will be more affluent and much more likely to remain in Ohio if the state aids their education. With uncertain costs offset by uncertain financial boons, determining sound state policy on treating its young immigrant population is difficult.

States all over the country are wrestling with similar decisions. While the overwhelming majority grant driver's licenses to DACA recipients, far fewer have announced that DACA students will be granted in-state tuition. Presently, 16 states grant in-state tuition to *all* undocumented students.[58] Those states are: California, Colorado, Connecticut, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Texas, Utah, and Washington[59]. Among these 16, California and Texas – which have the largest populations of undocumented immigrants - were the first to institute this policy. Ohio is not among them. Ohio only grants in-state tuition to a small subset of the state's undocumented student population – those that have applied for and received Deferred Action – while these 16 states grant in-state tuition to *all* undocumented immigrant students. Typically, these policies require the prospective student to complete a given number of years at a state high school, to graduate and to sign an affidavit indicating their intention to file for legal immigration status as soon as is possible[60]. In Maryland's case, undocumented immigrants are eligible for in-state tuition only at community colleges.

A few states explicitly deny in-state tuition to undocumented students. Arizona, Georgia and Indiana all explicitly prohibit undocumented immigrants from paying in-state tuition rates. In Indiana's case, prospective students must be "legally present" to receive in-state tuition benefits. This is equivalent to Ohio's current policy – only DACA grantees, who are legally present, receive in-state tuition, but not undocumented immigrants as a whole. Two states go even further. In Alabama and South Carolina, undocumented students are denied admission to state institutions of higher learning – they cannot attend, even if they were to pay international tuition rates. Notably, these are five of the six states, along with Utah, that enacted laws similar to Arizona's SB 1070. Most of the provisions in SB 1070 were invalidated by the Supreme Court of the United States, but provisions allowing state and local law enforcement to investigate immigration status were upheld, pending review and elucidation by the state's own courts[61].

In-State Tuition: Potential Legislation

In this context of confusion, but with state law indicating eligibility, the Ohio Commission on Hispanic/Latino Affairs issued a resolution on the issue on May 7, 2013. The resolution calls on the Ohio Board of Regents and Ohio institutions of higher education to admit DACA recipients at in-state rates in

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[57] *Plyler v. Doe, 457 U.S. 202, June 1982.*
[58] *National Conference of State Legislators, July 2013.*
[59] *Id.*
[60] *Id.*
[61] *Arizona v. United States, 132 S. Ct. 2492, 183. June 2012.*

Ohio | Latino Affairs Commission

John Kasich, Governor
Lilleana Cavanaugh, MBA, Director

2013~2014
36th Board of Commissioners

Michael Florez, Chair
Cincinnati

Isabel Framer, Vice Chair
Copley

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Cleveland

Richard Romero
Lorain

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Lorain

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Toledo

Dan Ramos
State Representative
56th District ~ Lorain County

Christina Hagan
State Representative
50th District ~ Stark County

Gayle Manning
State Senator
13th District ~ Huron, Lorain

Charleta Tavares
State Senator
15th District ~ Franklin (Part)

Resolution No. 2013-01

on Deferred Action for Childhood Arrivals, 5/7/2013

WHEREAS the June 2012 Deferred Action for Childhood Arrivals policy announced by the U.S. Department of Homeland Security provides temporary lawful presence and work permits to thousands of young Ohio immigrants, and;

WHEREAS under the current Ohio Revised Code §3333.31 and Ohio Administrative Code §3333-1-10, DACA recipients qualify as "non-immigrant aliens"- residents for tuition subsidy and surcharge purposes, and

WHEREAS there are approximately 1,555 recipients of DACA living in in Ohio (1), and;

WHEREAS more than 85% of young immigrants eligible for DACA are Latinos (2), and;

WHEREAS Ohio public institutions of higher learning do not presently grant in-state tuition to recipients of DACA, and;

WHEREAS those Ohio colleges and universities that admit DACA students admit them as international students, whose tuition rates are typically two-or-three-times higher than rates for in-state students (3), and;

WHEREAS this failure to comply with Ohio law is harming Ohio Latinos by making higher education financially impossible for them, and;

WHEREAS this has caused many of the state's brightest young people to look for education and employment outside the state of Ohio, and;

WHEREAS the state of Ohio has already invested thousands of dollars into the primary and secondary education of these same students, and;

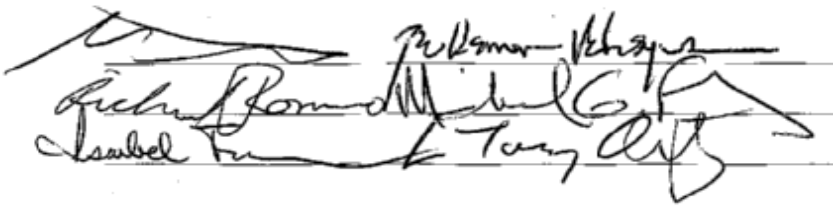
WHEREAS, the flow of bright young Ohio graduates out of the state to pursue higher education elsewhere harms Ohio's economic, educational and workforce development, and;

WHEREAS this "brain drain" results in a loss for the state of thousands of dollars invested in the education of each one of these students, and

WHEREAS the Ohio Commission on Hispanic/Latino Affairs is statutorily obligated to advise state government on particular issues impacting Ohio Latinos (4); therefore be it

RESOLVED THAT:

The Ohio Commission on Hispanic/Latino Affairs calls upon the Ohio Board of Regents and Ohio's public institutions of higher learning to work with recipients of DACA to comply fully with state and federal law and grant DACA recipients that have graduated from Ohio schools residency for purposes of in-state tuition. This should be done in order to maximize Ohio's return on investment, to augment Ohio's economic recovery by keeping some of our brightest young minds in Ohio, and to uphold the principles of fairness and justice.



1—USCIS Monthly Report, April 10 2013
2—"Up to 1.7 million unauthorized immigrant youth may benefit from new deportation rules", Pew Hispanic Center, August 14 2012
3—See, e.g. Tuition and Fees for the 2012-2013 academic year at the Ohio State University, Columbus State Community College
4—O.R.C. §121.32

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accordance with state and federal law. Since that resolution was passed, the Board of Regents has adopted this policy but, like the question of driver's licenses, the issue is not yet well-settled. House Bill 254 – introduced by Representatives Lynch and Wetherford - was introduced in August 2013, and would specifically delineate those categories of non-citizens that would be eligible for in-state tuition rates, *excluding* DACA recipients. This legislation is functionally similar to the legislation introduced on driver's licenses, and has been referred for consideration by the House Education Committee.

7. Conclusion – A Look Ahead

Controversies surrounding driver's licenses and college tuition for this new category of immigrants are likely only part of the reconciliation Ohio faces. The Deferred Action program created, almost overnight, a new category of Ohioan that extant Ohio law had not contemplated. The implications are very broad, and the policy debate on these and other questions regarding the state's treatment of DACA recipients will likely continue.

The next issue to create questions about how DACA fits with state law probably concerns professional licensure. Ohio's boards and commissions that grant professional licenses are each guided by statutory eligibility guidelines. Federal law will also likely play a role in this debate. Governor Kasich's administration is actively examining these statutes, and the topic is beyond the purview of this report as it has not yet been resolved. OCHLA will issue a follow-up to this report once an initial administrative or legislative resolution has been reached.

It is also not clear that DACA is a permanent solution, or that the question of immigration reform has been settled in Washington. While immigration reform has stalled at the federal level, pressure for reform is maintaining intensity. For example, eight members of Congress were arrested in October for participating in an immigration rally on the national mall earlier this month.[62] For now, however, Deferred Action may remain a reality for the State of Ohio for the foreseeable future.

To that end, the Ohio Latino Affairs Commission is prepared to conduct research or provide clarification on this issue upon any legislator's request. The Commission stands ready to respond to its statutory mandate to advise legislators and Ohio's government on critical issues that impact Hispanic Ohioans.

[62] *"Eight members of Congress arrested in push for immigration reform", ABC News, October 8, 2013.*