

## Background Brief: Immigration and International Students

The first iteration of the Development, Relief, and Education for Alien Minors (DREAM) Act was introduced on August 1, 2001, just a month before the United States would feel the impact of the September 11 terrorist attacks that would mark a cultural shift in the nation's view on immigration. After a decade without a legislative solution, the Obama Administration used executive authority to create the Deferred Action for Childhood Arrivals (DACA) program in 2012<sup>1</sup>, which acted as a compromise to providing a citizenship pathway by, as the name infers, deferring deportation through prosecutorial discretion for eligible undocumented individuals. Today the future of DACA is uncertain, following the September 2017 announcement of its rescission<sup>2</sup>, and the failure of the DREAM Act or similar legislation to advance through Congress.

The high-stakes immigration debate which has occurred in Congress in recent years follows a historical legislative arc in consideration of a pathway to citizenship for young undocumented individuals, along with a centuries' long debate of how restrictive United States' immigration policies should be overall. In recent years, the introduction, and often reintroduction, of exclusionary immigration policies, along with the removal of DACA, has led to an increased culture of fear at institutions of higher education amongst immigrant members of the community. Even among those who are themselves legal citizens, concern for friends and family members whose future is now rendered tenuous and uncertain is taking a toll. Promisingly, local and state level measures have largely worked to increase inclusivity and opportunities for immigrant students to access higher education, with certain exceptions which will be explained in the sections below.

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<sup>1</sup> U.S. Department of Homeland Security. (June 15, 2012). Memorandum re Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>

<sup>2</sup> U.S. Department of Homeland Security. (September 5, 2017). Memorandum re: rescission of the June 15, 2012 memorandum. <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>

## What is DACA?

DACA was created through an exercise of executive action, specifically when then-Secretary of Homeland Security Janet Napolitano issued a memorandum<sup>3</sup> to U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE) instructing them to utilize prosecutorial discretion for “certain young people who were brought to this country as children and know only this country as home.” Prosecutorial discretion is the power a government attorney has to decide whether or not to bring criminal charges in a given case. In DACA, Secretary Napolitano was instructing government agencies and officers who oversee immigration proceedings to defer action against persons who illegally entered the U.S. as minors through the actions and choices of their parents or other adults, who have come to be referred to as Dreamers.

Undocumented immigrants who arrived in the United States as minors and have lived here since at least 2007, and who meet a handful of additional criteria<sup>4</sup>, including not having been “convicted of a felony, significant misdemeanor, or three or more other misdemeanors,” may apply for DACA benefits. Benefits include deferred action in deportation proceedings, eligibility for work authorization, and access to higher education; benefits are granted for a 2-year period and may be renewed. Over 750,000 young people, frequently called Dreamers, have received DACA benefits since the program’s inception, based on data from USCIS<sup>5</sup>.

The genesis of DACA is important for at least two key reasons. First, as an exercise of executive action, it is subject to reversal by the same authority. The guidance is subject to judicial challenge and review, like all executive action, but can only be influenced by Congress through the passing of legislation. In fact, executive action undertaken in 2014 that would expand DACA protections and create a similar program for parents of U.S. citizens (Deferred Action for Parents of Americans (DAPA)), was challenged by 26 states<sup>6</sup>. A temporary injunction was issued by the United States Court of Appeals for the Fifth Circuit in New Orleans in February 2015

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<sup>3</sup> U.S. Department of Homeland Security. (June 15, 2012). Memorandum re Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>

<sup>4</sup> U.S. Citizenship and Immigration Services. (n.d.; archived). Consideration of Deferred Action for Childhood Arrivals (DACA). <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca>

<sup>5</sup> U.S. Citizenship and Immigration Services. (n.d.) Immigration and Citizenship Data, filtered by category: Deferred Action for Childhood Arrivals (DACA). <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-821d-deferred-action-childhood-arrivals>

<sup>6</sup> Office of the Attorney General of Texas. (December 3, 2014). Texas et. al. v. United States et. al.: Complaint for Declaratory and Injunctive Relief. Archived from the original on April 2, 2015 at <https://web.archive.org/web/20150402104146/https://www.texasattorneygeneral.gov/files/epress/files/20141203-Multi-stateImmigrationOrderLawsuit%281%29.pdf>

preventing the expanded program from going into effect. In June 2016, the Supreme Court announced a deadlocked decision<sup>7</sup>, leaving in place the lower court's injunction. DAPA was officially rescinded by the Trump administration in June 2017.<sup>8</sup>

Second, DACA confers no legal status and no path to citizenship, only temporary relief from deportation proceedings. For undocumented immigrants who have accrued significant unlawful time residing in the U.S., as many DACA eligible individuals have, there are significant barriers to obtaining citizenship, many requiring extended time residing outside the U.S. prior to re-entry, e.g., a 3-year or 10-year bar under Section 212 (a)(9)(B)<sup>9</sup> of the Immigration and Nationality Act, after which a green card<sup>10</sup> may be pursued. While time spent in the U.S. with DACA benefits does not add to accrued unlawful presence durations, it also does not reduce previous years of unlawful presence.

Dreamers face additional challenges on campus, particularly around affording college and participating in study abroad opportunities. Undocumented students are eligible to access higher education, but are not eligible for federal financial aid programs<sup>11</sup> and, depending on the laws of the state in which they reside, may be charged higher out-of-state tuition rates. Approval for travel outside the U.S. requires an extensive application process to be approved for advance parole<sup>12</sup>, which does not provide a guarantee of re-entry.<sup>13</sup>

## Uncertain Future for DACA Recipients

During his campaign and the first year of his administration, President Trump was inconsistent in statements regarding the continuation of DACA. While on the campaign trail, he pledged to end both DACA and DAPA<sup>14</sup>, though following his election, his position on DACA softened

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<sup>7</sup> SCOTUSblog. (n.d.) *United States v. Texas*. <http://www.scotusblog.com/case-files/cases/united-states-v-texas/>

<sup>8</sup> U.S. Department of Homeland Security. (June 15, 2017). Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful>

<sup>9</sup> Inadmissible aliens, 8 USC 1182: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-2006.html>

<sup>10</sup> U.S. Citizenship and Immigration Services. (n.d.) Green Card. <https://www.uscis.gov/greencard>

<sup>11</sup> U.S. Department of Education, Federal Student Aid. (February 2019). Financial Aid and Undocumented Students. <https://studentaid.ed.gov/sa/sites/default/files/financial-aid-and-undocumented-students.pdf>

<sup>12</sup> U.S. Citizenship and Immigration Services. (n.d.) I-131, Application for Travel Document. <https://www.uscis.gov/i-131>

<sup>13</sup> Immigrant Legal Resource Center. (2015). Travel for DACA Applicants (Advance Parole). [https://www.ilrc.org/sites/default/files/documents/advance\\_parole\\_guide.pdf](https://www.ilrc.org/sites/default/files/documents/advance_parole_guide.pdf)

<sup>14</sup> Valverde, M. (November 9, 2016). PolitiFact Sheet: Donald Trump's immigration plan. PolitiFact: <http://www.politifact.com/truth-o-meter/article/2016/nov/09/politifact-sheet-donald-trumps-immigration-plan/>

and he stated on multiple occasions that he wanted to “work something out”<sup>15</sup> for Dreamers. In June 2017 the Trump Administration announced the official rescission<sup>16</sup> of the DAPA program. While the DAPA program was never enacted due to legal challenges from several states that ended with a deadlocked decision from the Supreme Court in June 2016, the rescission signaled a possible similar fate for DACA. Three months later, in September 2017, the administration announced that DACA would be phased out over the course of six months, with a projected expiration date of March 5, 2018.

In February 2018, with the original March 5 expiration deadline quickly approaching, immigration advocates and the higher education community turned to the courts to seek protection for DACA recipients. Immigration advocates challenged the constitutionality of President Trump’s decision to end the DACA program and were successful in gaining injunctions from lower courts that allowed existing DACA recipients to re-apply for extension of their DACA protections. The Trump Administration urged the Supreme Court to expedite a ruling regarding the constitutionality of the expiration announcement. The justices declined<sup>17</sup>, allowing court injunctions which rose from the 2nd and 9th District Courts of Appeals to play out in federal court. These court injunctions prevented the program from terminating<sup>18</sup> and allowed current recipients to apply for renewal<sup>19</sup>.

While the Supreme Court has yet to issue a final ruling, in April 2018, the Federal District Court for the District of Columbia ruled<sup>20</sup> that the legal reasoning provided by the Trump Administration to support their decision to end the program was “virtually unexplained.” The DC District Court gave the Department of Homeland Security (DHS) 90 days to better explain the need for program termination. After the 90-day stay a more substantial reason was not provided by DHS and Federal Judge Bates ordered that DACA should be reinstated in August,

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<sup>15</sup> Kim, S. (December 7, 2016). Trump: ‘We’re going to work something out’ with Dreamers. Politico: <http://www.politico.com/story/2016/12/trump-dreamers-undocumented-immigrants-232301>

<sup>16</sup> U.S. Department of Homeland Security. (June 15, 2017). Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”). <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful>

<sup>17</sup> Montanaro, D. (February 26, 2018). Supreme Court Declines to Take DACA Case, Leaving It In Place For Now. NPR: <https://www.npr.org/2018/02/26/588813001/supreme-court-declines-to-take-up-key-daca-case-for-now>

<sup>18</sup> University of California Immigrant Legal Services Center. (May 18, 2018). Post-Northern District of California Injunction Frequently Asked Questions (FAQ). [https://www.sa.ucsb.edu/docs/default-source/dream-scholars-docs/2018\\_5\\_18-uc-center-daca-faqs\\_updated.pdf?sfvrsn=0](https://www.sa.ucsb.edu/docs/default-source/dream-scholars-docs/2018_5_18-uc-center-daca-faqs_updated.pdf?sfvrsn=0)

<sup>19</sup> Ali, D. (February 15, 2018). Can States Provide Access? Update on In-state Tuition Policies for Undocumented Students. NASPA: <https://www.naspa.org/rpi/posts/can-states-provide-access-update-on-in-state-tuition-policies-for-undocumen>

<sup>20</sup> Jordan, M. (April 24, 2018). U.S. Must Keep DACA and Accept New Applications, Federal Judge Rules. New York Times: <https://mobile.nytimes.com/2018/04/24/us/daca-dreamers-trump.html>

2018, and new applications should be allowed; however, this order was partially stayed by the DC court in the allowance of additional time allotted to DHS, postponing it from implementation at this time. While renewals continue, as allowed by other injunctions, new DACA applications are not currently being accepted.

In response to the DC District Court ruling, Texas and six other states filed a preliminary injunction<sup>21</sup> on the DACA program in May 2018, stating that their former lawsuit to end the program had not been met due to court injunctions prolonging its existence. The Injunction was aimed at halting the program on July 23, 2018; however, on August 31, 2018 Judge Hanen issued an order<sup>22</sup> denying the preliminary injunction given the number of individuals that would be impacted by the end of DACA. Since August 2018, the court has required that further discovery is necessary to move the case forward, meaning that both parties need to conduct additional investigation before the lawsuit may progress.

In November 2018, the administration made a rare decision to file a petition for “certiorari before judgement” requesting a review of the decision to terminate DACA by the Supreme Court of the United States (SCOTUS) before final decisions are made on any of these preliminary injunctions. SCOTUS chose not to review the case in January 2019, leaving DACA recipients eligible to continue receiving benefits from the program and USCIS continuing to accept application renewals<sup>23</sup>.

## Enhanced Enforcement Measures

Aside from actions related to DACA, the Trump Administration launched into immigration enforcement measures with a running start in 2017, releasing two executive orders, one focused on border security<sup>24</sup> and the other on domestic enforcement,<sup>25</sup> and supporting

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<sup>21</sup> National Immigration Law Center. (February 7, 2019). Status of Current DACA Litigation.

<https://www.nilc.org/issues/daca/status-current-daca-litigation/>

<sup>22</sup> National Immigration Law Center. (August 31, 2018). Texas et. al. v. United States et. al.: Interlocutory Appeal Order. <https://www.nilc.org/wp-content/uploads/2018/08/Texas2-v-US-interlocutory-appeal-order-2018-08-31.pdf>

<sup>23</sup> U.S. Citizenship and Immigration Services. (n.d.; archived). Renew Your DACA.

<https://www.uscis.gov/archive/renew-your-daca>

<sup>24</sup> White House. (January 27, 2017). Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States. <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/>

<sup>25</sup> White House. (January 25, 2017). Executive Order: Border Security and Immigration Enforcement Improvements. <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/>

Department of Homeland Security (DHS) memos<sup>26,27</sup> of implementation in February. Since then, the White House and DHS Secretary Kirstjen M. Nielsen have continued to work to enforce these measures, despite a number of legal challenges. The changes implemented by the two executive orders and subsequent DHS memos focused on requiring greater cooperation by local police forces with ICE officers. The January 2017 executive order reinstated the Secure Communities Program, ended by the Obama Administration, which increased required cooperation with ICE by local communities by requiring local jurisdictions to crosscheck fingerprints of individuals who have been arrested against DHS databases for indication that someone may be subject to removal proceedings.<sup>28</sup> Additionally, ICE issued twice the number of detainers, a request for law enforcement to hold someone who has been arrested for possible immigration violations, in 2017 than the year before.<sup>29</sup>

After the issuance of the memos, the 115th Congress introduced a number of bills that would reinforce the White House's efforts to increase immigration enforcement actions and funding for a United States-Mexico border wall. While several bills were introduced that would speed up the hiring process of additional border control and ICE officials, they did not progress. The Anti-Border Corruption Reauthorization Act of 2017, HR 3004<sup>30</sup>, or "Kate's Law," would increase the mandatory minimum sentences for immigrants convicted of crimes who reentered the United States illegally after deportation. Kates Law passed out of the House on June 29, 2017, but did not move forward in the Senate.

Congressional budget debates in December 2017 through February of 2018, hinged on a number of key issues, but coming to a compromise on immigration, specifically between the White House's desire for greater immigration enforcement and growing public and bipartisan policymaker pressure to implement a permanent legislative solution for DACA recipients and Dreamers was most noticeable. Ultimately, lawmakers could not come to an agreement on the

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<sup>26</sup> U.S. Department of Homeland Security. (February 20, 2017). Memorandum re Enforcement of the Immigration Laws to Serve the National Interest.

[https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf)

<sup>27</sup> U.S. Department of Homeland Security. (February 20, 2017). Memorandum re Implementing the President's Border Security and Immigration Enforcement Improvements Policies.

[https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf)

<sup>28</sup> American Immigration Council. (November 29, 2011). Secure Communities: A Fact Sheet.

<https://www.americanimmigrationcouncil.org/research/secure-communities-fact-sheet>

<sup>29</sup> U.S. Immigration and Customs Enforcement. (n.d.). Fiscal Year 2017 ICE Enforcement and Removal Operations Report. <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf>

<sup>30</sup> H.R. 3004 (115), Kate's Law. <https://www.congress.gov/bill/115th-congress/house-bill/3004>

stringent compromise, built on a four-point plan spearheaded by President Trump<sup>31</sup>, even after the issue prompted Democrats to force a government shutdown over the issue.

A similar stalemate occurred in both April and June 2018, when immigration votes came to the floor of the Senate and House, respectively, in another attempt to create a permanent solution for eligible undocumented individuals. In both instances, the policies proposed by Republican leadership proved, once again, too restrictive to gain enough bipartisan votes to secure passage. The June House debates coincided with a highly publicized zero tolerance policy effort to crackdown on unlawful immigrant crossings of the United States and Mexico border that resulted in displacing children from their parents upon arrival into the United States. Even that highly visible issue, however, failed to result in a compromise. The Border Security and Immigration Reform Act (HR 6136<sup>32</sup>) would have left 82% of the estimated 3.6 million Dreamers out of a pathway to citizenship, stepped-up enforcement and legal immigration restrictions, and would not have ended the zero tolerance policy which continued to cause family separations despite an Executive Order<sup>33</sup>, touted to have ended the policy, signed by President Trump on June 20.

In the fall of 2018, the House and the Senate were able to agree upon appropriations funding differences in FY19 Labor-Health and Human Service-Education (Labor-H) appropriations bill (H.R. 6157)<sup>34</sup> and send the bill, along with the FY19 Defense appropriations bill, in a minibus spending package to the desk of President Trump with a level of Congressional efficiency unprecedented in this administrative cycle. President Trump signed the massive spending bill, which, along with two other minibus bills, funded the federal government for the 2019 fiscal year. The legislation also contained a continuing resolution to provide several measures with temporary funding through December 7. The passage of the Labor-H bill before the end of the fiscal year secured funding for the Department of Education, including federal financial aid programs, that had been conditional upon the budget impasse the year before.

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<sup>31</sup> Bryan, B. (January 31, 2018). Here's the 4-part immigration plan Trump outlined during the State of the Union. Business Insider: <http://www.businessinsider.com/trump-immigration-plan-daca-citizenship-path-border-wall-funding-2018-1>

<sup>32</sup> H.R. 5136 (115), Border Security and Immigration Reform Act of 2018. <https://www.congress.gov/bill/115th-congress/house-bill/6136/text>

<sup>33</sup> White House. (June 20, 2018). Executive Order: Affording Congress an Opportunity to Address Family Separation. <https://www.federalregister.gov/documents/2018/06/25/2018-13696/affording-congress-an-opportunity-to-address-family-separation>

<sup>34</sup> H.R. 6157 (115), Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019. <https://www.congress.gov/bill/115th-congress/house-bill/6157/actions>

While higher education funding remained secure, temporarily funded measures, such as the Violence Against Women Act (VAWA),<sup>35</sup> which includes campus violence prevention grants, and the Farm Bill,<sup>36</sup> which determines Supplemental Nutrition Assistance Program (SNAP) eligibility, relied on compromises reached during the 2018 Congressional lame duck session. In December 2018, border wall funding was once again drawn into a funding stalemate. In the beginning months of 2019, VAWA was left to expire, and the government experienced a historic government shutdown as Congress and the Trump administration were unable to reach a compromise for 35 days.<sup>37</sup> Afterward, a three-week temporary funding compromise was reached that reopened government agencies effected by the shutdown on January 25, 2019 and a final 2019 fiscal year appropriations bill was passed on February 15, 2019.

These enhanced enforcement measures, and the failed efforts by Congress to reach a compromise over the past several years, continue to contribute to heightened concerns on campus regarding the wellbeing of immigrant students, faculty, and staff. A large contributor to this concern remains in the inability for Congress to reach a permanent solution for DACA recipients, who have felt strain since September 2017 regarding the possible expiration of the program.

## Public Charge

In October 2018, DHS published a Notice of Proposed Rulemaking (NPRM) in the federal register titled “Inadmissibility on Public Charge Grounds.”<sup>38</sup> The proposed rule would make it difficult for immigrants receiving a wide array of public benefits to receive a green card, and according to a Center for Law and Social Policy (CLASP) factsheet using American Community Survey (ACS) data, the rule, if passed could impact 26 million United States residents.<sup>39</sup>

A version of the public charge being considered by DHS was leaked in June 2018. In response, the Migration Policy Institute (MPI) put out a report noting “chilling effects” of the rule through an analysis of welfare reform efforts in the 1990s. MPI concluded that the rule would have a resounding impact, discouraging immigrants from accessing public assistance benefits for which

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<sup>35</sup> H.R. 6545 (115), Violence Against Women Reauthorization Act of 2018. <https://www.congress.gov/bill/115th-congress/house-bill/6545/text?format=txt>

<sup>36</sup> H.R. 2 (115), Agriculture Improvement Act of 2018. <https://www.congress.gov/bill/115th-congress/house-bill/2>

<sup>37</sup> Brufke, J. (February 16, 2019). Congress allows Violence Against Women Act to lapse. The Hill:

<https://thehill.com/homenews/house/430304-congress-allows-violence-against-women-act-to-lapse>

<sup>38</sup> U.S. Citizenship and Immigration Services. (October 10, 2018). Proposed Rule: Inadmissibility on Public Charge Grounds. <https://www.regulations.gov/document?D=USCIS-2010-0012-0001>

<sup>39</sup> Protecting Immigrant Families. (October 2018). WHO Would Be Harmed by Trump’s “Public Charge” Proposal? Center for Law and Social Policy:

[https://www.clasp.org/sites/default/files/publications/2018/10/2018\\_whowouldbeharmed.pdf](https://www.clasp.org/sites/default/files/publications/2018/10/2018_whowouldbeharmed.pdf)

they are eligible, regardless of immigration status.<sup>40</sup> The final draft of the rule does not include federal student loans or education-related financial assistance under the public benefits listed; however, based on the anticipated effects, the rule will permeate the higher education community regardless, creating additional barriers for immigrant students, faculty, staff, and their families.

Public comment on the Public Charge NPRM closed on December 10, 2018 and over 265,000<sup>41</sup> comments were received. DHS will have to respond to substantive comments and consider potential costs of the rule before releasing a final rule.

## Sanctuary Jurisdictions

While the authority of DHS and ICE does not stop at the campus border, schools, churches, and hospitals are considered “sensitive locations”<sup>42</sup> where DHS and ICE officials should generally avoid enforcement actions. Nonetheless, students who are undocumented and not DACA recipients, or who are registered under DACA but who are believed to have violated one or more of the terms of the program, may be identified and taken into custody by federal agents in other locations.

In efforts to ease concerns among immigrants and undocumented students, faculty, and staff, several campuses have borrowed from some cities and counties and declared themselves sanctuary campuses<sup>43</sup>, a term that has no clear legal standing and which may open campuses to federal or state sanctions. The January 2017 *Executive Order: Enhancing Public Safety in the Interior of the United States*<sup>44</sup>, first tried to limit sanctuary jurisdictions by authorizing federal agencies to “ensure that jurisdictions that fail to comply with applicable Federal [immigration] law do not receive Federal funds, except as mandated by law,” though is

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<sup>40</sup> Batalova, J., Fix, M., and Greenberg, M. (June 2018). Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use. Migration Policy Institute:

<https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>

<sup>41</sup> U.S. Citizenship and Immigration Services. (October 10, 2018). Proposed Rule: Inadmissibility on Public Charge Grounds. <https://www.regulations.gov/document?D=USCIS-2010-0012-0001>

<sup>42</sup> U.S. Immigration and Customs Enforcement. (n.d.) FAQ on Sensitive Locations and Courthouse Arrests. <https://www.ice.gov/ero/enforcement/sensitive-loc>

<sup>43</sup> Deruy, E. (November 22, 2016). The Push for Sanctuary Campuses Prompts More Questions than Answers. The Atlantic: <https://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274/>

<sup>44</sup> White House. (January 25, 2017). Executive Order: Enhancing Public Safety in the Interior of the United States. <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>

remains unclear what authority the executive order grants and whether or how it would apply to campuses as opposed to cities, counties, or states.

## In-State Tuition Policies

One of the primary ways in which states can respond to an uncertain federal outlook is through inclusive in-state tuition legislation. In this context, exclusive policies refer to those which either explicitly attempt to restrict in-state tuition options for undocumented individuals, or to ban them from admission entirely, while inclusive policies increase financial feasibility and access.

There are many sound economic and public good incentives to provide in-state tuition to undocumented immigrants for states. As detailed in a 2010 data-driven study by Stella M. Flores of Vanderbilt University<sup>45</sup>, foreign-born students in states with in-state tuition policies, in this case, specifically Latinx/a/o students who represent a significant portion of undocumented students, are more likely to enroll in college than those in states without these policies in place. Efforts to increase college enrollment for marginalized students may increase the economic wealth of the state<sup>46</sup> and support efforts to close the gap in high school graduation rates.<sup>47</sup> Further, in-state tuition access for undocumented students increases college affordability for these students, which has been an issue widely connected to college completion rates for racial minorities.<sup>48</sup>

Opponents of state-based in-state tuition policies argue that undocumented students without a work permit through the DACA program have little chance of finding work after graduation. Proponents, however, argue that the DREAM Act, or a policy like it that offers a pathway for citizenship for Dreamers, will eventually pass, especially in light of the positive impacts immigrants bring to the local economy<sup>49</sup> and the role of immigrant teachers in the classroom<sup>50</sup>.

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<sup>45</sup> Flores, S. (2010). State Dream Acts: The Effect of In-state Resident Tuition Policies and Undocumented Latino Students. *The Review of Higher Education*, Winter 2010, v33, n2, pp. 239-283. Retrieved from:

<http://lawprofessors.typepad.com/files/flores2010-1.pdf>

<sup>46</sup> Bergeron, D. and Martin, C. (February 19, 2015). Strengthening Our Economy Through College For All. Center for American Progress:

<https://www.americanprogress.org/issues/education/reports/2015/02/19/105522/strengthening-our-economy-through-college-for-all/>

<sup>47</sup> Associated Press. (May 3, 2017). Low-Income and Minority Students Continue to Lag in High School Graduation Rates. *Fortune*: <http://fortune.com/2017/05/03/high-school-graduation-rates-minorities/>

<sup>48</sup> Wellman, M. (March 7, 2017). Report: The race gap in higher education is very real. *USA Today*:

<http://college.usatoday.com/2017/03/07/report-the-race-gap-in-higher-education-is-very-real/>

<sup>49</sup> Groeger, L. (July 19, 2017). The Immigration Effect. *ProPublica*: <https://projects.propublica.org/graphics/gdp>

<sup>50</sup> Startz, D. (March 16, 2017). Immigrant teachers play a critical role in American schools. *Brookings Institution*: <https://www.brookings.edu/blog/brown-center-chalkboard/2017/03/16/immigrant-teachers-play-a-critical-role-in-american-schools/>

While immigration policy is typically considered within the responsibilities of the federal government, tuition at state postsecondary institutions falls squarely within state jurisdictions. The 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act<sup>51</sup> (IIRIRA) specifically denied state residency status to undocumented individuals in section 505, which reads:

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

However, states have argued that in attempting to stipulate tuition requirements, the federal policy infringes on a fundamental right of the states,<sup>52</sup> and a number of states have instituted policies which determine state residency regardless of immigration status, using instead location of high school attendance as the primary indicator.

Federal-level uncertainty around DACA has thus far had not had a significant impact on state-level legislation, but there have been a few instances where the DACA rescission has affected local policy. Undocumented students in the state of Georgia, already one of a small handful of states with exclusive in-state tuition policies for undocumented students<sup>53</sup>, have met yet another setback to inclusive policymaking due to the DACA rescission. Georgia Senate Bill 492 (GA SB 492),<sup>54</sup> passed in 2008, explicitly denies in-state tuition to undocumented individuals attending public colleges or universities, and in 2010, the University of Georgia Board of Regents adopted an admissions policy<sup>55</sup> which bans select schools from admitting undocumented students entirely. Immigration advocates have been in support of inclusive policies such as the 2001 House Bill 1810 (GA HB 1810)<sup>56</sup> and 2011 House Bill 59 (GA HB 59), but

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<sup>51</sup> U.S. Citizenship and Immigration Services. (September 30, 1996). Pub. L. 104-208: Illegal Immigration Reform and Immigrant Responsibility Act of 1996. <https://www.uscis.gov/sites/default/files/ocomm/ilink/0-0-0-10948.html>

<sup>52</sup> Konet, D. (September 11, 2007). Unauthorized Youths and Higher Education: The Ongoing Debate. Migration Policy Institute: <http://www.migrationpolicy.org/article/unauthorized-youths-and-higher-education-ongoing-debate>

<sup>53</sup> uLEADnet.org. (n.d.) National Map. National Forum on Higher Education for the Public Good: <https://uleadnet.org/issue/map>

<sup>54</sup> GA SB 292 (2007-2008): HOPE scholarships; add accrediting entity to the definition of the term eligible high school. <http://www.legis.ga.gov/legislation/en-US/display/20072008/SB/492>

<sup>55</sup> Hebel, S. (October 13, 2010). Georgia Regents Ban Illegal Immigrants From Selective Public Colleges. The Chronicle of Higher Education: <https://www.chronicle.com/article/Georgia-Regents-Ban-Illegal/124903>

<sup>56</sup> GA HB 1810 (2001-2002): HOPE scholarships; eligibility; undocumented immigrants. <http://www.legis.ga.gov/Legislation/en-US/display/20012002/HB/1810>

these bills failed to make headway in the state legislature. In spring of 2017, DACA recipients sought in-state tuition eligibility<sup>57</sup> with the Georgia Court of Appeals, but after the DACA rescission, the Court of Appeals reversed a lower court decision to allow in-state tuition due to DACA no longer having “the force and effect of a federal law.”<sup>58</sup>

Other states that stand at risk of losing in-state tuition inclusivity advancement are those with policies that primarily extend specifically to DACA recipients. A 2017 policy analysis conducted by Amy Nunez, and Gretchen Holthaus of Indiana University<sup>59</sup> found that three states currently have inclusive policies that solely extend to DACA recipients, such as New Jersey (S 2479),<sup>60</sup> which currently requires that undocumented students must meet DHS eligibility criteria and apply for or have already retained DACA status. Upon the expiration of DACA, as with any policy using DACA as a measure of eligibility, the policy would need to be amended to continue to be inclusive of undocumented students moving forward.

Since the start of 2019, NASPA’s policy and advocacy team has seen movement on nine bills across six states regarding in-state tuition for undocumented immigrants. All nine of the bills are inclusive measures that would extend tuition assistance to immigrant and undocumented individuals. Introduced in January 2019, Pennsylvania Senate Bill 35<sup>61</sup> and Maryland House Bill 262 are both standard in-state tuition legislation that exempt undocumented in-state residents from paying out-of-state tuition. Additionally, Maryland House Bill 118<sup>62</sup> would make undocumented residents specifically eligible for Senatorial and Delegate Scholarships available in the state of Maryland. Legislation has been introduced in Virginia to expand in-state tuition eligibility to those who have applied for permanent residency (VA SB 1640).<sup>63</sup> Arizona Senate Bill 1217,<sup>64</sup> introduced in February 2019, would amend a current measure that requires a form of identification to receive all public benefits including access to public education. The measure

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<sup>57</sup> Bandlamudi, A. (June 16, 2017). DACA Students Argue for In-state Tuition to Ga. Court of Appeals. WABE: <https://www.wabe.org/daca-students-argue-state-tuition-ga-court-appeals/>

<sup>58</sup> Redmon, J. (October 25, 2017). Georgia Appeals Court rules against DACA recipients seeking in-state tuition. Atlanta Journal Constitution: <http://www.ajc.com/news/breaking-news/georgia-appeals-court-rules-against-daca-recipients-seeking-state-tuition/XEjG4sWyPbMLk1mbatoEYO/>

<sup>59</sup> Núñez, A. and Holthaus, G. (n.d.) In-state Tuition for Undocumented Students: A Policy Analysis. <https://scholarworks.iu.edu/journals/index.php/jiuspa/article/download/23697/29414>

<sup>60</sup> NJ SB 2479 (215). [http://www.njleg.state.nj.us/2012/Bills/S2500/2479\\_11.HTM](http://www.njleg.state.nj.us/2012/Bills/S2500/2479_11.HTM)

<sup>61</sup> PA SG 35 (2019-2020): An Act amending the act of March 10, 1949 (P.L.30, No.14), known as the Public School Code of 1949, providing for in-State tuition for undocumented individuals. <https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2019&slnd=0&body=S&type=B&bn=35>

<sup>62</sup> MD HB 118 (2019): Higher Education – Senatorial and Delegate Scholarships – In-state Tuition. [http://mgaleg.maryland.gov/2019RS/fnotes/bil\\_0008/hb0118.pdf](http://mgaleg.maryland.gov/2019RS/fnotes/bil_0008/hb0118.pdf)

<sup>63</sup> VA SB 1640 (2019). <https://legiscan.com/VA/bill/SB1640/2019>

<sup>64</sup> AZ SB 1217 (2019): <https://legiscan.com/AZ/text/SB1217/id/1920459>

would create an affordable tuition rate for all qualifying Arizona state residents regardless of immigration status.

New York introduced its own state-based version of a DREAM Act (NY S 1250),<sup>65</sup> which would expand New York's in-state tuition benefits to substantive financial assistance through the New York DREAM fund commission. The bill passed both the Senate and the Assembly on January 23, 2019 and will be signed into law by Governor Andrew Cuomo. The bill is expected to affect an estimated 146,000 students previously ineligible to receive financial aid under federal and state law.<sup>66</sup>

## Enhanced Visa Restrictions

Since the release of January 2017 executive order "Enhancing Public Safety in the Interior of the United States"<sup>67</sup> there have been efforts within both DHS and USCIS with an emphasis on lawful enforcement of existing visa policies. This has resulted in increasingly restrictive limitations added onto already restrictive visa policies. In April 2017, the Trump Administration issued Executive Order 13788 "Buy American, Hire American,"<sup>68</sup> which pushed the Departments of State, Justice, Labor, and Homeland Security to protect the interests of U.S. workers and to prevent fraud and abuse in the immigration system. "Buy American, Hire American" also encouraged reforms to the H-1B visa program such that that skilled temporary worker visas were to be awarded to the most-skilled, or highest paid beneficiaries. As a result, there has been a significant increase in challenges to H-1B visa petitions and proposed changes by USCIS.<sup>69</sup> One proposed change to the visa program in 2019 would prioritize graduates with U.S. master's degrees, potentially driving up the number of these visas given to preferred individuals to 16% of H-1B visa-holders, and providing fewer opportunities for equivalent degree-holders from outside the U.S.<sup>70</sup>

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<sup>65</sup> NY SB 1250 (2019-2020): New York State DREAM Act. <https://www.nysenate.gov/legislation/bills/2019/S1250>

<sup>66</sup> Goldbaum, C. (January 23, 2019). Dream Act is Approved in N.Y. to Aid Undocumented Students, in Rebutal to Trump. New York Times: <https://www.nytimes.com/2019/01/23/nyregion/dream-act-bill-passed.html>

<sup>67</sup> White House. (January 25, 2017). Executive Order: Enhancing Public Safety in the Interior of the United States. <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>

<sup>68</sup> White House. (April 18, 2017). Presidential Executive Order on Buy American and Hire American. <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/>

<sup>69</sup> Torbati, Y. (September 20, 2017). Trump administration red tape tangles up visas for skilled foreigners, data shows. Reuters: <https://www.reuters.com/article/us-usa-immigration-employment-insight/trump-administration-red-tape-tangles-up-visas-for-skilled-foreigners-data-shows-idUSKCN1BV0G8>

<sup>70</sup> Semotiuk, A. (January 2, 2019). Recent Changes to the H1B Visa Program and What is Coming in 2019. Forbes: <https://www.forbes.com/sites/andysemotiuk/2019/01/02/recent-changes-to-the-h1b-visa-program-and-what-is-coming-in-2019/#35c6adf04a81>

Since the start of 2018, there have also been proposals for increased vetting for visa holders. In March 2018, the State Department proposed changes for nonimmigrant visas which would affect 710,000 immigrant visa applicants and 14 million non-immigrant visa applicants, including those who want to come to the U.S. for business or education. In the past, social media, email, and phone number, were only required for those applicants identified for extra scrutiny, around 65,000 people per year. If the new requirements are approved by the Office of Management and Budget (OMB), applications for all visa types would require the applicant to provide the number of social media account names they have held over the span of the last five years. NASPA and 12 other higher education associations opposed this new proposal in a letter led by the American Council on Education<sup>71</sup>. The expanded collection of personal information will prove excessively burdensome in the visa application process and hinder the competitiveness of the U.S. in higher education and science, technology, engineering, and math (STEM) research by deterring international talent.

In May 2018, a policy memo released by USCIS resulted in changes to the way international students on F, J, and M visas could accrue unlawful presence in an effort to reduce the number of visa overstays. While the memo was introduced as a method to crackdown on visa violators, higher education advocates question the usefulness of such a punitive policy, pointing out that international students and scholars primarily travel to the U.S. in an effort to learn and share knowledge.<sup>72</sup> Under the former policy, unlawful presence only accrued if a nonimmigrant visa-holder were admitted for a specified time frame, as opposed to for a specified purpose such as pursuit of education, or if a clear violation has been indicated in a formal finding by DHS. The former policy also began to accrue unlawful presence only after the issuance of a formal notice, while the current policy begins to accrue the day following a status violation regardless of notice.

Under the new policy, instituted in August 2018, visa-holders are given 180 days from the day after they complete the purpose of their visit, or retroactively once a visa violation occurs, before facing a potential bar from reentry from three to ten years. Initial backlash to the policy, led to a revised memo that halts accrual of unlawful presence for F, J, and M visa-holders in the

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<sup>71</sup> American Council on Education. (May 15, 2018). Comments to State Department on Social Media Proposal for Nonimmigrant Visas. <http://www.acenet.edu/news-room/Pages/Comments-to-State-Department-on-Social-Media-Proposal-for-Nonimmigrant-Visas.aspx>

<sup>72</sup> Redden, E. (May 15, 2018). Violate Your Student Visa? You're Not Welcome Here. Inside Higher Ed: <https://www.insidehighered.com/news/2018/05/15/proposed-policy-presents-new-risks-international-students-accused-violating-terms>

case of a pending renewal app.<sup>73</sup> However, even the revised policy holds serious implications for international students. In October 2018 four institutions filed a lawsuit against the DHS.<sup>74</sup> The lawsuit detailed several ways students could easily inadvertently lose status, including failing to update their address, failing to maintain a minimum course load, or having an error in their records, creating cause for concern for students, the higher education community, and overall competitiveness in the global economy. More than 60 colleges signed onto an amicus brief filed in November 2018 supporting the lawsuit.<sup>75</sup>

The fall 2018 regulatory agenda announced that a Notice of Proposed Rulemaking (NPRM) is scheduled for fall 2019 on a fixed “duration of status” for F1 visa holders, which would create a cap on authorized stay for international students.<sup>76</sup> This has never been done before. Reasoning behind a proposed maximum period of stay hinges on concerns raised, like those in the lawsuit mentioned above, for students to inadvertently violate visa status without specific dates for their authorized periods of stay.

The idea that students should be given a maximum period of stay is likely to be met with extensive pushback, but it comes on the heels of a policy restriction specifically targeted at Chinese grad students. In June 2018 the State Department began limiting the duration of nonimmigrant visas in certain fields from five years to one year as an enhanced security measure against widespread intellectual property theft by the Chinese government.<sup>77</sup> Chinese students make up the largest share of international students at institutions of higher education. The move prompted at least one institution, the University of Illinois in Urbana-Champaign, to invest in an insurance plan to secure itself against a potential tuition drop from the loss of

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<sup>73</sup> U.S. Citizenship and Immigration Services. (August 9, 2018). Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants. <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf>

<sup>74</sup> Redden, E. (October 25, 2018). Legal Challenge to “Unlawful Presence” Policy. Inside Higher Ed: <https://www.insidehighered.com/news/2018/10/25/colleges-sue-stop-policy-makes-it-easier-international-students-accrue-unlawful>

<sup>75</sup> Schwartz, N. (January 3, 2019). More Than 60 Colleges Back Lawsuit Against Unlawful Presence Policy. Education Dive: <https://www.educationdive.com/news/more-than-60-colleges-back-lawsuit-against-unlawful-presence-policy/545114/>

<sup>76</sup> Office of Management and Budget, Office of Information and Regulatory Affairs. (Fall 2018). Establishing a Maximum Period of Authorized Stay for F-1 and Other Nonimmigrants. <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1653-AA78>

<sup>77</sup> Yoon-Hendricks, A. (July 25, 2018). Visa Restrictions on Chinese Students Alarm Academia. New York Times: <https://www.nytimes.com/2018/07/25/us/politics/visa-restrictions-chinese-students.html>

Chinese student enrollment.<sup>78</sup> NASPA is supportive of necessary security against intellectual property theft, however it's uncertain if reducing visa duration is an effective solution.

## About NASPA

NASPA – Student Affairs Administrators in Higher Education is the leading association for the advancement, health, and sustainability of the student affairs profession. Student affairs is a critical component of the higher education experience, collaborating with colleagues across institutions of higher education to offer students valuable learning opportunities, meaningful social engagements, and safe and inclusive environments. NASPA's Public Policy Agenda is grounded in a commitment to ensuring opportunity for all institutional members' students and a belief that higher education is a great benefit to both individuals and society.

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<sup>78</sup> Bothwell, E. (November 29, 2018). Insuring Against Drop in Chinese Students. Inside Higher Ed via Times Higher Education: <https://www.insidehighered.com/news/2018/11/29/university-illinois-insures-itself-against-possible-drop-chinese-enrollments>