



June 9, 2016 **Internal copy/DRAFT**

VIA EMAIL AND U.S. MAIL

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**Re: Loma Linda University's Policy Regarding Students with Deferred Action
for Childhood Arrivals Immigration Status**

Dear Mr. Hart, Mr. Jackson, Ms. Martinez, and Mr. Hansen:

We are deeply concerned by Loma Linda University's ("LLU") policy of excluding young immigrants who have been granted permission to live and work in the United States under the federal Deferred Action for Childhood Arrivals ("DACA") program. On April 27, 2016, LLU informed Veronica Velasquez that although she had been admitted to LLU's doctorate of physical therapy program, she would not be allowed to start or attend the program, scheduled to commence on June 20, 2016, because she is a DACA recipient.

LLU's DACA policy is unlawful and rests upon several mistaken assumptions.

Excluding students like Veronica Velasquez from LLU simply because they have been granted deferred action under DACA discriminates based on alienage in violation of 42 U.S.C. § 1981. LLU's policy is partly justified by an assertion that students without immigration status cannot obtain professional licenses, but California prohibits state licensing boards from denying

licensure to an applicant based on his or her citizenship status or immigration status. Cal. Bus. & Prof. Code § 135.5. LLU also states that DACA is only valid for one year, although it is valid for renewable two-year periods. Further, DACA constitutes permission to remain in the United States, provides a lawful means to work, and is subject to extensive background checks. Finally, LLU justifies its policy on the basis that DACA students are not eligible for many types of financial assistance, but students like Ms. Velasquez are eligible for private loans and may have other means of affording their education.

LLU's policy is not only discriminatory and unlawful, it is ill-advised. It prevents eligible students like Ms. Velasquez—who have worked hard and want to make a meaningful contribution to their families and the community—from achieving their educational and professional dreams. We urge LLU to cease its unlawful and discriminatory policy denying enrollment to students with DACA immediately.

I. Background

A. DACA.

The DACA program, announced by the Department of Homeland Security in 2012, allows certain immigrants who came to the United States as children and are present in the country without a formal immigration status to remain in the country under “deferred action.” These immigrants are eligible to obtain “deferred action” from the federal government upon meeting specific criteria such as the attainment of a high school diploma and passing a rigorous background check, which includes a criminal record background check. Persons granted deferred action under DACA may stay in the United States for a renewable period of two years, are shielded from removal proceedings during that time, and may be granted federal employment authorization and a Social Security number.

Young immigrants receiving deferred action under DACA, like Ms. Velasquez, were brought to the United States at an early age by their families in hope that they could have a better life in the United States. They have overcome many obstacles and worked diligently in order to succeed in school, to help their families, and to enrich their communities with their individual abilities. As the President of the United States has recognized, these young immigrants “are Americans in their heart, in their minds, in every single way but one: on paper.” He explained, “it makes no sense” to deport “[t]hese [] young people who study in our schools, they play in our neighborhoods, they’re friends with our kids, they pledge allegiance to our flag.”¹

B. Veronica Velasquez’s Admission and Subsequent Denial of Enrollment at LLU when LLU learns she is a recipient of DACA.

1 President Barack Obama, Remarks on Immigration Reform, 2012 DAILY COMP. PRES. DOC. 1 (June 15, 2012), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201200483/pdf/DCPD-201200483.pdf>.



Ms. Velasquez is a senior at California State University, San Bernardino. She will graduate on June 18, 2016, with a Bachelor of Science in Kinesiology. When she was ten, her family fled threats to their freedom in Saudi Arabia, where her father had worked for over twenty years for the American Embassy. Since arriving in the United States, Ms. Velasquez has worked hard in school. Inspired by Bill Nye the Science Guy's whacky experiments, she focused her efforts in the sciences. She pulled all-nighters studying anatomy and physiology because she was fascinated by the human body and its capacity for resilience. In college, Ms. Velasquez found her calling during a physical therapy internship. She saw her passion for science and for helping people during difficult times come together in her dream profession. Ms. Velasquez also views a career in physical therapy as a means to help her mother, who works three jobs, support the family.

In October 2012, Ms. Velasquez applied for DACA. After successfully completing the extensive DACA application process—including being fingerprinted and passing a criminal background check—she received DACA on March 21, 2013. She was also granted a work permit that allows her to work lawfully in the United States, as well as a Social Security number. After two years, Ms. Velasquez successfully renewed her DACA status, which is valid until July 5, 2017 and is subject to renewal.

In August 2015, Ms. Velasquez applied to LLU's School of Allied Health Professions doctorate of physical therapy program. On April 19, 2016, she received the news she had been waiting for: based on the merits of her application, LLU had accepted her. Ms. Velasquez was thrilled, and shortly thereafter she accepted LLU's offer of admission, and LLU accepted her deposit.

But on April 27, 2016, LLU sent Ms. Velasquez an email stating that due to LLU's "official policy on DACA students" she would not be allowed to attend LLU. *See Attachment A* (Email from Ms. Esther Guerpo to Ms. Veronica Velasquez). Having already attended two institutes of higher education without any issues (California State University, San Bernardino and Riverside City College), and having been granted deferred action and work authorization by the federal government, this news came as a shock.

On May 31, 2016, Ms. Velasquez spoke with Martin Aguirre, Director of International Student and Scholar Services at LLU who confirmed that LLU had a policy preventing students with DACA from matriculating at LLU.

C. Loma Linda University's DACA Policy.

LLU's April 27, 2016 email provided that "the Director of International Student Services . . . has confirmed that unfortunately due to your DACA status we will not be able to allow you to begin the [Doctorate of Physical Therapy] program until your status has changed to



U.S. Citizen or Permanent Resident.” The email went on to state that LLU “does not allow undocumented and/or unlawfully present international students to matriculate (i.e., start one of our programs) for a number of reasons”: (1) DACA students are “disqualified from matriculating due to the background check and my immigration status check”; (2) “Being a religious-sponsored institution, we require legal/lawful status that covers the duration of the program of study. Since DACA approval does not grant lawful status and is only good for one year at a time . . . these two issues disqualify DACA’s for matriculate[ion] on these two issues.”; (3) because LLU is a “private, parochial university,” and thus certain forms of financial aid are not available, DACA students would have to finance their studies through private financial aid, work, or their own financial means; and (4) for “ethical reasons, LLU does not believe it is fair to take DACAs’ money with no assurance that they will qualify . . . to take licensure boards.”

II. LLU’s Policy Regarding Students with DACA Violates 42 U.S.C. § 1981.

Not only does LLU’s exclusion of DACA recipients rest on mistaken assumptions, but the policy also violates federal civil rights law. Section 1981 of the federal Civil Rights Act of 1866 prohibits private actors from discriminating against people on the basis of alienage. The law provides: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens” 42 U.S.C. § 1981(a). It is well-established that Section 1981 bars discrimination on the basis of alienage. *See e.g., Graham v. Richardson*, 403 U.S. 365, 377 (1971) (“The protection of this statute has been held to extend to aliens as well as to citizens.”); *Takahashi v. Fish & Game Commn.*, 334 U.S. 410, 419–20 (1948) (explaining that Section 1981 protects “‘all persons’” from policies “bearing unequally upon them either because of alienage or color”); *Sagana v. Tenorio*, 384 F.3d 731, 740 (9th Cir. 2004), *as amended* (Oct. 18, 2004).

As amended by the Civil Rights Act of 1991, Section 1981 prohibits both public and private actors from discriminating on the basis of alienage. The plain text of the revised statute provides that the rights protected by the statute are “protected against impairment by *nongovernmental* discrimination *and* impairment under color of State law.” § 1981(c) (emphasis added).² *See Anderson v. Conboy*, 156 F.3d 167, 180 (2d Cir. 1998) (Section 1981 “provides a claim against private discrimination on the basis of alienage.”). Since the 1991 amendment to Section 1981, courts in the Ninth Circuit have held that Section 1981 prohibits private alienage discrimination. *See Jimenez v. Servicios Agricolas Mex, Inc.*, 742 F. Supp. 2d 1078, 1087 (D. Ariz. 2010); *Zhang v. Ma Labs, Inc.*, 2005 WL 889724 *1 (N.D. Cal. Apr. 15, 2005) (holding that Section 1981 encompassed private discrimination on the basis of alienage).

² The enactment of § 1981(c) resolved a circuit split as to whether Congress intended Section 1981 to prohibit private alienage discrimination. *See Chacko v. Texas A&M University*, 960 F. Supp. 1180, 1191 (1997) (citing *Cheung v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 913 F. Supp. 248, 251 (S.D.N.Y. 1996). *Compare Duane v. GEICO*, 37 F.3d 1036, 1040 (4th Cir. 1994) (pre-1991 amendment, the statute prohibited private alienage discrimination) with *Bhandari v. First Nat’l Bank of Commerce*, 887 F.2d 609 (5th Cir. 1989) (pre-1991 amendment, the statute did not prohibit private alienage discrimination).

Individuals who are undocumented are protected from alienage discrimination by Section 1981. In *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948), the Supreme Court held that an “alien” is a “person” under Section 1981 by reading it in light of the Fourteenth Amendment, in recognition that the language of Section 1981 was based in part on that Amendment. In *Plyer v. Doe*, 457 U.S. 202 (1982), the Supreme Court held that for purposes of the Fourteenth Amendment, “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.” *Id.* at 210. *See also, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“[The Fourteenth Amendment’s] provisions are universal in their application, to *all persons* within the territorial jurisdiction.”) (emphasis added). Accordingly, because undocumented persons are undoubtedly “persons” within the meaning of both Section 1981 and the Fourteenth Amendment, they are clearly protected by Section 1981’s prohibition on discrimination. *See, e.g., Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 547 (M.D. Pa. 2007) (“aliens, regardless of their status under the immigration laws, are persons under section 1981”), *aff’d in part, vacated in part on other grounds*, 620 F.3d 170 (3d Cir. 2010), *cert. granted, judgment vacated on other grounds sub nom. City of Hazleton, Pa. v. Lozano*, 563 U.S. 1030 (2011), and *aff’d in part, rev’d in part on other grounds*, 724 F.3d 297 (3d Cir. 2013).

Notably, the courts have made clear that policies which, like LLU’s, discriminate against a subset of noncitizens constitute discrimination based on alienage. *See Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977) (making clear that classifications that discriminate between classes of noncitizens are nonetheless classifications based on alienage, explaining that “[t]he important points are that [the classification] is directed at aliens and that only aliens are harmed by it”); *Graham*, 403 U.S. at 376, 376 (same); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1065 n.4 (9th Cir. 2014) (characterizing discrimination against DACA recipients who were treated differently than other noncitizens as alienage discrimination).

Finally, Section 1981 clearly prohibits discrimination by private schools. *Runyon v. McCrary*, 427 U.S. 160, 172–73 (1976); *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Est.*, 416 F.3d 1025, 1027 (9th Cir. 2005), *rev’d in part on other grounds*, 470 F.3d 827 (9th Cir. 2006); *see also Pouyeh v. U. of Alabama/Dept. of Ophthalmology*, 66 F. Supp. 3d 1375, 1382 (N.D. Ala. 2014) (recognizing the availability of an alienage discrimination claim against a university in regard to a discriminatory admissions policy, but dismissing the claim as plead). Section 1981 also applies to discrimination by private, religious schools. *Fiedler v. Marumsco Christian Sch.*, 631 F.2d 1144, 1150 (4th Cir. 1980); *Brown v. Dade Christian Schs., Inc.*, 556 F.2d 310, 312 (5th Cir. 1977).

Accordingly, by excluding students like Ms. Velasquez admission simply because of her status as a DACA recipient, LLU violates Section 1981’s prohibition on alienage discrimination.³

³ LLU’s DACA policy may also violate California’s Unruh Civil Rights Act, Cal. Civ. Code § 51, *et. seq.*, which prohibits discrimination on the basis of “immigration status.” Cal. Civ. Code § 51(a); *see also Stevens v. Optimum Health Inst.–San Diego*, 810 F. Supp. 2d 1074, 1088 (S.D. Cal. 2011) (holding religious school violated



III. To the Extent that LLU Also Denies Enrollment to Individuals without DACA who are Undocumented, or Individuals who are not Citizens or Lawful Permanent Residents, this Policy or Practice also Violates 42 U.S.C. § 1981.

For the same reasons that LLU’s policy regarding DACA students violates Section 1981 of the federal Civil Rights Act, any LLU policy restricting enrollment to U.S. Citizens or Lawful Permanent Residents, or denying undocumented students entry into LLU also violates Section 1981. LLU’s email provides that Ms. Velasquez will not be allowed to begin LLU’s physical therapy program until her “status has changed to U.S. Citizen or Permanent Resident.” It also states that LLU “does not allow undocumented and/or unlawfully present international students to matriculate.” As detailed above, refusing enrollment to a certain subset of noncitizens based upon their immigration status constitutes discrimination on the basis of alienage. *Supra*, Part II.

IV. LLU’s Policy Rests on Several Misconceptions Regarding DACA Recipients

A. Under California State Law, DACA Recipients and Other Applicants Are Eligible for Professional Licenses Regardless of Citizenship or Immigration Status.

LLU’s reasoning for its DACA policy reflects a lack of familiarity with California law. Contrary to LLU’s assertion, DACA recipients like Ms. Velasquez are eligible for professional licenses under California law. In 2014, California Business and Professions Code § 135.5 was amended to prohibit licensing bodies from denying licensure to an applicant based on his or her citizenship status or immigration status:

135.5. (a) The Legislature finds and declares that it is in the best interests of the State of California to provide persons who are not lawfully present in the United States with the state benefits provided by all licensing acts of entities within the department, and therefore enacts this section pursuant to subsection (d) of Section 1621 of Title 8 of the United States Code.

(b) Notwithstanding subdivision (a) of Section 30,⁴ and except as required by subdivision (e) of Section 7583.23,⁵ no entity within the department shall deny

California’s Unruh Civil Rights Act).

⁴ The law allows applicants for a professional license to provide an individual taxpayer identification number in lieu of a Social Security number. Cal. Bus. & Prof. Code § 30(a)(2).

⁵ Cal. Bus. & Prof. Code § 7583.23 provides as follows: “The bureau shall issue a firearms permit when all of the following conditions are satisfied: . . . (e) The applicant has produced evidence to the firearm training facility that he or she is a citizen of the United States or has permanent legal alien status in the United States. Evidence of citizenship or permanent legal alien status shall be that deemed sufficient by the bureau to ensure compliance with federal laws prohibiting possession of firearms by persons unlawfully in the United States and may include, but not be limited to, Department of Justice, Immigration and Naturalization Service Form I-151 or I-551,

licensure to an applicant based on his or her citizenship status or immigration status.

(c) Every board within the department shall implement all required regulatory or procedural changes necessary to implement this section no later than January 1, 2016. A board may implement the provisions of this section at any time prior to January 1, 2016.

The California legislature’s decision to make noncitizens eligible for professional licenses regardless of immigration status is fully consistent with federal law, which permits states to provide for such eligibility. *See In re Garcia*, 58 Cal. 4th 440, 457 (2014) (holding that federal law “grants a state the authority to make undocumented immigrants eligible” for professional licenses) (citing 8 U.S.C. § 1621(d)).

LLU’s assertion that DACA recipients will not be able obtain professional licenses is therefore unfounded. Regardless, students and their families should be able to determine for themselves whether pursuing a particular course of education is worthwhile, not LLU.

B. Grants of Deferred Action Under DACA Are Not Limited to 1 Year.

Likewise incorrect is LLU’s statement that grants of DACA are limited to one year. Rather, under the DACA program, deferred action is granted for renewable two-year periods. *See* USCIS, RENEW YOUR DACA, <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/renew-your-daca> (last visited June 2, 2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 901 (9th Cir. 2016) (“If granted deferred action under DACA, immigrants may remain in the United States for renewable two-year periods.”). For example, based on her DACA renewal, Ms. Velasquez has now held deferred action status for a total of three years—which is long enough to have completed LLU’s doctorate of physical therapy program during that time. *Cf., e.g., Matter of Pena-Diaz*, 20 I. & N. Dec. 841, 842, 846 (BIA 1994) (involving case of noncitizen granted deferred action for nearly a decade, explaining that the immigration agency had thereby “affirmatively permitted the alien to remain” for many years).

C. Deferred Action Constitutes Permission to Remain in the United States.

Although deferred action does not confer an affirmative immigration status, it does reflect that the government has affirmatively granted its recipient permission to remain in the United States. *See, e.g., Georgia Latino Alliance for Human Rights v. Governor of Georgia (“GLAHR”)*, 691 F.3d 1250, 1258-59 (11th Cir. 2012) (concluding that a noncitizen “currently classified under ‘deferred action’ status . . . remains permissibly in the United States” “[a]s a result of this

Alien Registration Receipt Card, naturalization documents, or birth certificates evidencing lawful residence or status in the United States.”



status”); *Matter of Quintero*, 18 I. & N. Dec. 348, 349 (BIA 1982) (explaining that “deferred action status is . . . permission to remain to remain in this country”); *see also Arizona Dream Act Coal. v. Brewer*, 818 F.3d 901 (9th Cir. 2016) (“[T]he federal government permits [DACA recipients] to live and work in the country for some period of time, provided they comply with certain conditions”).

D. DACA Recipients Have Passed Extensive Background Checks Conducted by the Federal Government.

LLU’s policy also expresses a generalized concern that DACA recipients would be unable to pass a background check. Yet, as noted above, Ms. Velasquez, like other DACA recipients, has already passed an extensive background check conducted by the Department of Homeland Security. *See Arizona Dream Act Coal.*, 818 F.3d at 906 (explaining that, to qualify for DACA, the noncitizen “must not pose a threat to public safety and must undergo extensive criminal background checks”).

Further, to the extent that LLU believes that presence in the United States without immigration status is a crime, such a belief would be erroneous. As the United States Supreme Court has explained, “it is not a crime for a removable alien to remain present in the United States.” *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012). *See also In re Garcia*, 58 Cal. 4th at 460 (explaining that “an undocumented immigrant’s unauthorized presence does not constitute a *criminal offense* under federal law and thus is not subject to criminal sanctions”).

Indeed, in the context of determining whether undocumented immigrants would have the requisite moral character and fitness to serve as lawyers in the state of California, the California Supreme Court has emphasized that “the fact that an undocumented immigrant is present in the United States without lawful authorization does not itself involve moral turpitude or demonstrate moral unfitness so as to justify exclusion from the State Bar, or prevent the individual from taking an oath promising faithfully to discharge the duty to support the Constitution and laws of the United States and California.” *In re Garcia*, 58 Cal. 4th at 460.

E. DACA Recipients Are Not Categorically Unable to Finance Their Education.

In addition, notwithstanding LLU’s concern that without certain forms of financial aid DACA recipients may not be able to afford to cost of attendance, Ms. Velasquez is able to finance her education at LLU and made clear on her LLU application that her family income did not meet the “criteria for economically disadvantaged”.

* * *

We urge LLU to reconsider its unlawful DACA policy immediately. LLU’s DACA policy violates 42 U.S.C. § 1981 and prevents eligible students from following their dreams. In addition, we ask that you reimburse Ms. Velasquez’s \$40 application fee, \$350 deposit to hold



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her spot in the class of 2016, and t\$42.95 fee she paid for a criminal background check, required for enrollment, without delay.

We look forward to your prompt attention to this matter and timely response. If you have any questions, please contact Katherine Traverso at 213-977-5234 or ktraverso@acluscocal.org.

Sincerely,



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