

How Undocumented Immigrants Became Physicians: History and Future Prospects

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We review key legislative developments, case law, and institutional policy from the Elementary and Secondary Education Act of 1965 to the Deferred Action for Childhood Arrivals (DACA) program that was created in 2012 to show their contribution to enabling the development of undocumented physicians. Undocumented immigrants in the United States, by virtue of a range of laws at the local, state, and federal level, generally lack the documentation that enables U.S. citizens to obtain various kinds of education and to be lawfully employed. Despite these disadvantages, there are now undocumented individuals in the medical profession in the U.S. Undocumented immigrants are in all stages of training, from medical school to residency, and some are already licensed and employed as physicians. “Undocumented physicians” are a paradox, a result of the interaction of policies enacted from 1965 to the present. There has been no comprehensive federal immigration reform legislation since 1986, but policies at various levels of government and medical organizations have created the conditions that enabled some undocumented individuals to become physicians. We recommend that some additional educational structures be created to address similar situations that arise in the future.

INTRODUCTION	52
I. K–12 EDUCATION FOR ALL: <i>PLYLER V. DOE</i>	53
II. ENROLLING IN AND PAYING FOR COLLEGE	55

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III. EFFORTS TO ADJUST THE STATUS OF UNDOCUMENTED STUDENTS ...	57
IV. MEDICAL SCHOOL POLICIES.....	62
V. MEDICAL RESIDENCY AND LICENSING POLICIES.....	64
VI. CURRENT POLICY OUTLOOK	66
VII. PATHS FORWARD	68
CONCLUSION.....	70
APPENDIX	71
<i>Table 1. Timeline of Major Governmental Events for Undocumented Students.....</i>	71
<i>Table 2. Types of Policy That Allowed Undocumented People to Become Physicians.....</i>	73
<i>Table 3. Comparing the DREAM Act and DACA</i>	74
<i>Table 4. Policies That Would Aid Undocumented Medical Trainees & Professionals.....</i>	74

INTRODUCTION

Undocumented immigrants¹ are foreign nationals in the United States who lack current immigration authorization.² They are limited in regard to key activities such as working lawfully, attending some higher education institutions, and obtaining a driver’s license. Most people have assumed that earning a medical degree was an impossible feat for undocumented individuals because of the documentation required for the completion of medical school, residency, and licensing.³ Moreover, there are challenges that an undocumented person must surmount before even enrolling in medical school. Nevertheless, undocumented individuals have openly become physicians.⁴

In 2016, it was estimated that there were sixty-five undocumented medical students in the nation and by 2018, at least five undocumented

1. The term “undocumented immigrant” is one without a formal definition under immigration law and is used to be as neutral as possible when describing the class of individuals in the United States lacking a lawful immigration status. For purposes of this paper, it includes the range of individuals lacking status, including those who overstayed their visas, entered without inspection, or fell out of lawful immigration status due to failure to comply with the terms of a visa, as well as individuals lacking a lawful immigration status but who are permitted to stay under various programs protecting them from removal (such as Temporary Protected Status or Deferred Action for Childhood Arrivals).

2. Mark G. Kuczewski & Linda Brubaker, *Medical Education for “Dreamers”*: Barriers and Opportunities for Undocumented Immigrants, 89 ACAD. MED. 1593, 1593 (2014) (defining undocumented immigrants).

3. See *id.* at 1595 (“[A]ccess to residency programs and licensure presented insurmountable obstacles for Dreamers who wished to practice medicine.”).

4. See *infra* Table 1 (illustrating the timeline of major governmental events affecting undocumented students).

individuals had received a medical degree.⁵ The policies that allowed undocumented individuals to become physicians were enacted at multiple levels: federal government, state government, medical organizations, and individual medical programs.⁶ We will describe how the obstacles in the path of undocumented physicians, from K–12 to medical licensing, were addressed by the creation and interpretation of policy. In addition, we will consider the barriers that continue to make this possibility tenuous.

I. K–12 EDUCATION FOR ALL: *PLYLER V. DOE*

The Elementary and Secondary Education Act of 1965 set forth the definitions of immigrant youth as it pertained to K–12 education.⁷ Schools are required to report students that fall under this definition, and districts can apply for grants to support immigrant children (e.g., using funds to help develop the students’ English proficiency).⁸ In 1975, the State of Texas revised its education laws to withhold funds for educating undocumented children and gave schools the authority to deny enrollment of undocumented students.⁹ In addition, municipal districts

5. See Sunny Nakae et al., *Considerations for Residency Programs Regarding Accepting Undocumented Students Who Are DACA Recipients*, 92 ACAD. MED. 1549, 1550 (2017) (summarizing current policies and providing data on DACA recipients in medical school); Michael J. Dill, *The State of the Physician Workforce* 47, ASS’N AM. MED. COLLS. (Nov. 4, 2017), <https://www.aamc.org/download/484890/data/2017annualaddressofthephysicianworkforce.pdf> [<https://perma.cc/9MDX-R4KV>] (providing projections for the future physician workforce); see generally *Medical School Policies on Deferred Action for Childhood Arrivals (DACA)*, ASS’N AM. MED. COLLS. (2018), https://aamc-orange.global.ssl.fastly.net/production/media/filer_public/34/d9/34d992b9-50c0-4d20-958b-8b8bcc761830/daca_policies_march_2018-.pdf [<https://perma.cc/TE3Z-4Z69>] (accessed Jan. 7, 2019) (providing a partial list of medical schools that have reported willingness to consider applicants with DACA); see generally *Deferred Action for Childhood Arrivals (DACA)*, ICAHN SCH. MED., <http://icahn.mssm.edu/education/financial-aid/application/daca> [<https://perma.cc/3EPY-LXHR>] (last visited Feb. 8, 2021) (confirming the school’s support for protecting the rights of people who are undocumented or have DACA status to access the best medical care, education, and other opportunities); *DACA Recipients Welcome*, STRITCH SCH. MED., <https://ssom.luc.edu/daca/> [<https://perma.cc/C4RR-TEHX>] (last visited Feb. 8, 2021) (inviting applications from qualified students who have DACA status or are DACA-eligible); Erinn Connor, *We Made It This Far. We Will Be Doctors.*, LOY. UNIV. CHI.: STRITCH SCH. MED., <https://www.luc.edu/stritchdaca/> [<https://perma.cc/289C-PZY5>] (last visited Jan. 21, 2021) (describing the experience of the first undocumented students to openly attend medical school).

6. See *infra* Table 2 (outlining the various policies, from 1982 to 2018, that gave undocumented students access to becoming physicians).

7. Elementary and Secondary Education Act of 1965 § 3201, 20 U.S.C. § 7011 (defining immigrant children and youth as individuals aged three through twenty-one, not born in any state, and have not been attending school in any state for more than three full academic years).

8. See generally *Resources*, OFF. ELEMENTARY & SECONDARY EDUC., <https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/english-language-acquisition-state-grants/resources/> [<https://perma.cc/T8XR-JNWP>] (Jan. 19, 2021) (providing resources to assist English learners).

9. *Plyler v. Doe*, 457 U.S. 202, 205 (1982) (“The 1975 revision also authorized local school

attempted to charge an annual \$1,000 tuition for each undocumented child, which would be beyond the means of many undocumented families.¹⁰ This state statute was struck down in 1982 by the Supreme Court of the United States ruling in *Plyler v. Doe*.¹¹ In *Plyler*, the U.S. Supreme Court ruled that undocumented children have the same rights as U.S. citizens and permanent residents and can be protected from discrimination unless there is a substantial benefit to the state.¹²

The Supreme Court reasoned that children had little control over their immigration status and that denial of K–12 education would result in “the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”¹³ Furthermore, the Supreme Court set precedent in that the Fourteenth Amendment’s Equal Protection Clause applies to people who are “within the jurisdiction of a state” regardless of immigration status.¹⁴ The ruling was limited to K–12 education and did not pertain to college education.¹⁵ Four years after the *Plyler* decision, President Ronald Reagan alleviated this limitation on access to higher education with his amnesty through the Immigration Reform and Control

districts to deny enrollment in their public schools to children not ‘legally admitted’ to the country.”); *see also* TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981). This law was later repealed, as discussed *supra*.

10. *Doe v. Plyler*, 458 F. Supp. 569, 574 (E.D. Tex. 1978), *aff’d*, 628 F. 2d 448, 454–58 (5th Cir. 1980), *aff’d*, 457 U.S. 202, 219–20 (1982). Part of the school’s policy for immigrant children was to charge each one a tuition of \$1,000, which the school determined to be the cost of educating each child. *Named & Unnamed Children v. Texas*, 448 U.S. 1327, 1329 (1980) (“Although they could attend school upon payment of tuition, the court further found that such payment is beyond the means of their families.”). As of 2007, the median annual household income for undocumented immigrants was \$36,000, compared to \$50,000 for American-born households. Jeffrey S. Passel & D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISP. CTR. (Apr. 14, 2009), <https://www.pewresearch.org/wp-content/uploads/sites/5/reports/107.pdf> [<https://perma.cc/3CSE-VLE5>].

11. *Plyler*, 457 U.S. at 230 (noting that the state was not able to show that its denial furthered some substantial state interest).

12. *Id.* at 226 (“But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to ‘the purposes for which the state desires to use it.’” (citing *Oyama v. California*, 332 U.S. 633, 664–65 (1948))).

13. *Id.* at 230.

14. *Id.* at 210, 215 (“[T]he protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory.”); *see also* U.S. CONST. amend. XIV, § 1 (stating that no state can deny any person within its jurisdiction the equal protection of the laws).

15. *See* KATE M. MANUEL, CONG. RSCH. SERV., R43447, UNAUTHORIZED ALIENS, HIGHER EDUCATION, IN-STATE TUITION, AND FINANCIAL AID: LEGAL ANALYSIS 5 (2016) (analyzing the Supreme Court’s reasoning in *Plyler*, including its express references to the lack of culpability due to the young age of the children and the necessity of a basic education, to suggest that *Plyler* in fact only applies to primary education).

Act (IRCA) of 1986.¹⁶

IRCA primarily addressed the immigration status of working adults.¹⁷ Its goal was to regulate the employment of lawfully present immigrants and penalize the hiring of unauthorized immigrants.¹⁸ This legislation gave lawful status to undocumented immigrants that had entered the country prior to January 1, 1982.¹⁹ Interestingly, the Act itself did not address how undocumented children would adjust their status. In 1987, President Reagan signed an executive action that would enable the adjustment of the status of children whose parents had adjusted their status under the amnesty.²⁰ This alleviated the issues faced by undocumented immigrants present in the United States prior to 1982. Of course, the problem would recur for all undocumented immigrants who entered the United States thereafter.

II. ENROLLING IN AND PAYING FOR COLLEGE

President Bill Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) which made it much more difficult to gain lawful status.²¹ Undocumented immigrants that reside in the United States for more than 365 days and left the country had to stay outside of the United States for ten years unless granted a waiver.²² The IIRIRA also prevented undocumented students from

16. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 1011, 100 Stat. 3359, 3388–90 (codified as amended at 20 U.S.C. § 1091) (amending section 484 of the Higher Education Act of 1965).

17. See generally Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (“An Act to amend the Immigration and Nationality Act to revise and reform the immigration laws, and for other purposes.”); see also *National Origin Discrimination*, U.S. EEOC, <https://www.eeoc.gov/national-origin-discrimination> [https://perma.cc/R6D9-G2M5] (last visited Feb. 8, 2021) (describing IRCA’s protections against employment discrimination based on citizenship status).

18. See, e.g., Muzaffar Chishti et al., *At Its 25th Anniversary, IRCA’s Legacy Lives On*, MIGRATION POL’Y INST. (Nov. 16, 2011), <https://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives> [https://perma.cc/CE8N-YHE9] (providing background on the IRCA).

19. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 245A, 100 Stat. 3359, 3394–99 (codified as amended in scattered sections of 8 U.S.C.).

20. *Executive Grants of Temporary Immigration Relief, 1956-Present*, AM. IMMIGR. COUNCIL (Oct. 2014), <https://www.americanimmigrationcouncil.org/research/executive-grants-temporary-immigration-relief-1956-present> [https://perma.cc/GL3Q-X832] (listing the executive grants of temporary immigration relief).

21. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.); see also AM. IMMIGR. COUNCIL, *supra* note 20 (displaying a chart of President Clinton’s immigration reforms).

22. See *Illegal Immigration Reform and Immigration Responsibility Act*, LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act [https://perma.cc/2QEC-6D2Z] (last visited Jan. 20, 2021) (“The Act mandates that immigrants who are unlawfully present in the U.S. for 180 days but under 365 days must remain

receiving state residency-based education benefits, such as in-state tuition, if these were not available to out-of-state U.S. citizens and legal permanent residents.²³

IIRIRA arose in an era in which the United States was repudiating the federal benefits programs of the 1960s and the earlier New Deal programs. The legislative centerpiece of President Clinton's campaign to "end[] welfare as we know it" was the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).²⁴ Unfortunately, the PRWORA made it more difficult for undocumented students to pursue higher education. The PRWORA prohibited undocumented students from applying for federal financial aid.²⁵ The PRWORA also denied state and local benefits to undocumented individuals unless the state passed a law to "affirmatively provide" these benefits to the

outside the United States for three years unless pardoned. If they remain in the United States for 365 days or more, they must stay outside the United States for ten years unless they obtain a waiver. However, if they return to the U.S. without the pardon, they must wait 10 years until they may apply for a waiver."); Austin T Fragomen, Jr., *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: An Overview*, 31 INT'L MIGRATION REV. 438, 438-39 (1997) (detailing the IIRIRA).

23. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 505, 110 Stat. 3009, 3141 (limiting the eligibility for preferential treatment of aliens); see also Laura A. Hernandez, *Dreams Deferred - Why In-State College Tuition Rates Are Not a Benefit Under the IIRIRA and How This Interpretation Violates the Spirit of Plyler*, 21 CORNELL J. L. & PUB. POL'Y 525, 528-29 (2012) (explaining IIRIRA's prohibition of conferring residency-based benefits on undocumented immigrants when the same benefit is not available to nonresident citizens).

24. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; see also Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC (Mar. 1997), <https://www.theatlantic.com/magazine/archive/1997/03/the-worst-thing-bill-clinton-has-done/376797/> [<https://perma.cc/HG76-NZV5>] (explaining why the welfare law is so bad and suggesting how its worst effects could be mitigated).

25. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401(a), 110 Stat. 2105 (discussing alien's eligibility for federal benefits); see generally Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159, 162 (1998) ("[T]he 'welfare reform' bill . . . was as much or more about immigrant policy reform and budget savings as it was about improving the welfare system."); see also Michael Fix & Jeffrey Passel, *The Scope and Impact of Welfare Reform's Immigrant Provisions*, URBAN INST. 6 (Jan. 2002), http://webarchive.urban.org/Uploadedpdf/410412_discussion02-03.pdf [<https://perma.cc/L5KC-MQC4>] ("PRWORA's comprehensive redefinition of immigrant eligibility for benefits involved the creation of three separate 'bright lines.' One divides 'qualified' and 'unqualified' immigrants. The class of unqualified aliens is composed mostly, but not exclusively, of undocumented immigrants who are eligible only for a small, enumerated set of federal and state benefits. Qualified immigrants, by contrast, are eligible for a wide range of 'federal public benefits' with restricted eligibility, including Social Security, Pell Grants for higher education, and the Earned Income Tax Credit."); MANUEL, *supra* note 15, at 13 ("Neither courts nor commentators appear to have raised any significant questions about the permissibility of state measures denying state financial aid (i.e., financial aid provided using only state funds) to unauthorized aliens post-PRWORA, perhaps because financial aid has been widely recognized as a public benefit for purposes of PRWORA and IIRIRA.").

undocumented.²⁶ States could then use the PRWORA as a basis to deny financial aid by citing that no statute had been passed to provide eligibility.²⁷

At present, there is a great variation across the United States at the state level in terms of the ability for undocumented students to pursue higher education. As of 2017, there were sixteen states that offer in-state tuition and financial aid to undocumented immigrants under specific eligibility requirements.²⁸

III. EFFORTS TO ADJUST THE STATUS OF UNDOCUMENTED STUDENTS

For nearly two decades there have been efforts by Congress to pass federal legislation that would enable young undocumented immigrants to gain a permanent “lawful” status, e.g., a pathway to citizenship. The most notable proposed legislation is the Development, Relief, and Education for Alien Minors Act (DREAM Act).²⁹ The DREAM Act has been introduced in the Senate multiple times since 2001.³⁰ As a result, various iterations may differ slightly. Generally, to be eligible to adjust their status under the DREAM Act, the undocumented person has to have entered the United States prior to being eighteen years old, resided in the United States for at least four to five years after arrival, have graduated from an American high school (or equivalent) or be in an institution of

26. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 411(a)–(d), 110 Stat. 2105, 2268–69 (describing the eligibility for state and local public benefits programs); *see also* MANUEL, *supra* note 15, at 14 (“Because access to public institutions of higher education has not been viewed as a public benefit for purposes of PRWORA, states may generally provide for unauthorized aliens’ access without enacting legislation to this effect. In-state tuition and financial aid, in contrast, have generally been viewed as public benefits. This means that states must enact legislation that affirmatively provides for unauthorized aliens’ eligibility for such benefits.”).

27. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 411, 110 Stat. 2105, 2269 (“A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law after the date of the enactment of this Act which affirmatively provides for such eligibility.”); *see also* Julie Mianeki, *States Make Their Own Tuition Rules for Undocumented Students*, L.A. TIMES (May 15, 2011), <https://www.latimes.com/world/la-xpm-2011-may-15-la-na-immigration-tuition-20110516-story.html> [<https://perma.cc/J9FA-A4D4>] (arguing that a lack of a comprehensive federal immigration plan has given states free rein to impose their own rules).

28. Gilberto Soria Mendoza & Noor Shakiah, *Tuition Benefits for Immigrants*, NAT’L CONF. STATE LEGIS. (Mar. 1, 2021), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx> [<https://perma.cc/M8CZ-FK8P>] (providing comprehensive data on the tuition benefits for immigrants).

29. DREAM Act of 2002, S.1291, 107th Cong. (2002).

30. The original version of the DREAM Act was introduced by Representative Luis Gutiérrez in April of 2001. Immigrant Children’s Educational Advancement and Dropout Prevention Act of 2001, H.R. 1582, 107th Cong. (2001). The bill was first introduced under the name DREAM Act later that year by Senators Orrin Hatch and Dick Durbin, S.1291, 107th Cong. (2001), and has been championed by Senator Durbin for two decades.

higher education, and be of good moral character as evidenced by the lack of a significant criminal record.³¹ There is always an age restriction, usually limiting eligibility to individuals between ages of twelve and thirty or thirty-five.³² The DREAM Act would consist of multiple stages of adjustment, ultimately resulting in citizenship for its recipients.³³

The DREAM Act has been introduced to Congress in multiple forms but failed to pass despite serious attempts in 2001, 2007, 2009, 2010, 2011, and 2017.³⁴ Efforts have also been made to pass the text of the DREAM Act as part of other legislation such as the Comprehensive Immigration Reform Act of 2006, the Comprehensive Immigration Reform Act of 2007, and the 2008 Department of Defense Authorization Bill.³⁵ In 2010, the DREAM Act passed in the House of Representatives but was stalled by a filibuster in the Senate; the motion to end the filibuster was four votes short.³⁶ The DREAM Act was incorporated into the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, a comprehensive immigration reform bill that passed in the Senate but was never brought up for a vote in the House of Representatives.³⁷ In 2018, the DREAM Act was one of multiple

31. See THE DREAM ACT, DACA, & OTHER POLICIES DESIGNED TO PROTECT DREAMERS, AM. IMMIGR. COUNCIL 3 (Aug. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_daca_and_other_policies_designed_to_protect_dreamers.pdf [<https://perma.cc/LZ5W-SUXZ>] (outlining the requirements for young undocumented individuals to obtain conditional permanent resident status, including work authorization).

32. See, e.g., DREAM Act of 2011, S. 952, 112th Cong. § 3(b)(1)(F) (2011) (setting the age limit at thirty-five); DREAM Act of 2007, S. 2205, 110th Cong. § 3(a)(1)(F) (2007) (setting the age limit at thirty); DREAM Act, S. 1291, 107th Cong. § 39(a)(1)(A) (2001) (setting the age minimum at twelve).

33. See *infra* Table 1 (explaining the purpose behind and process of citizenship employed by the DREAM Act).

34. See generally Immigrant Children's Educational Advancement and Dropout Prevention Act of 2001, H.R. 1582, 107th Cong. (2001); Blunt Reservoir and Pierre Canal Land Conveyance Act of 2006, S. 2205, 109th Cong. (2006); DREAM Act of 2009, S. 729, 111th Cong. (2009); DREAM Act of 2010, S. 3827, 111th Cong. (2010); DREAM Act of 2011, S. 952, 112th Cong. (2011); Dream Act of 2017, S. 1615, 115th Cong. (2017).

35. See generally Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007); National Defense Authorization Act for Fiscal Year 2008, H.R. 4986, 110th Cong. (2008).

36. Ted Barret & Dana Bash, *Senate Halts 'Don't Ask, Don't Tell' Repeal*, CNN (Sept. 22, 2010, 8:23 AM) <http://www.cnn.com/2010/POLITICS/09/21/senate.defense.bill/index.html?hpt=TI> [<https://perma.cc/UK2E-Q9RW>] ("In a graphic example of election-year politics at work, a defense bill that would repeal the military's 'don't ask, don't tell' policy got blocked Tuesday in the U.S. Senate by a Republican led filibuster. The bill stalled on a 56-43 vote, four short of the 60 votes needed to overcome the Republican opposition.")

37. *A Guide to S.744: Understanding the 2013 Senate Immigration Bill*, AM. IMMIGR. COUNCIL (July 10, 2013), <https://www.americanimmigrationcouncil.org/research/guide-s744-understanding-2013-senate-immigration-bill> [<https://perma.cc/8GGH-JL3E>] (explaining where the DREAM Act is located in S. 744 and how it functions); see generally Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

proposals in the U.S. Senate made to address the rescinding of DACA, but it failed to receive the necessary votes to be considered by the Senate.³⁸ Because of this long and familiar history, the undocumented youth described in the DREAM Act are sometimes called “Dreamers.”

In 2012, President Barack Obama created DACA by means of a presidential directive.³⁹ The aim of DACA was to defer deportation at renewable, two-year intervals for young undocumented immigrants⁴⁰—the population that would have been covered by the DREAM Act. DACA was conceived as a bridge to assist these young people until a means to permanently adjust their status was passed by Congress.⁴¹ DACA also provided recipients with a Social Security number⁴² and an Employment Authorization Document, i.e., a work permit.⁴³ DACA recipients have the opportunity to work lawfully and access some correlative opportunities previously unavailable (e.g., a driver’s license).⁴⁴ However,

38. Dream Act of 2017, S.1615, 115th Cong. (2017). The bill was proposed by Sen. Lindsay Graham to address DACA’s rescission. It was read twice and referred to the Committee on the Judiciary; however, it went no further and essentially failed.

39. See *infra* Table 3 (explaining DACA became law as an executive action by President Obama); Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’n, U.S. Customs & Border Patrol et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/CDL7-GZNC>] [hereinafter Homeland Sec. Memo] (detailing the administrative procedure that created DACA); see generally *Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/deferred-action-childhood-arrivals-daca> [<https://perma.cc/MN4K-NTQJ>] (Feb. 1, 2021) (providing more information on the presidential directive); Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), <https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html> [<https://perma.cc/6KWV-MSD4>] (“Under the change, the Department of Homeland Security will no longer initiate the deportation of illegal immigrants who came to the United States before age 16, have lived here for at least five years, and are in school, are high school graduates or are military veterans in good standing.”).

40. Homeland Sec. Memo, *supra* note 39 (“ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.”).

41. Remarks by the President on Immigration Reform and an Exchange with Reporters, 2012 DAILY COMP. PRES. DOC. 00483 (June 15, 2012) (“This is not amnesty; this is not immunity. This is not a path to citizenship. It’s not a permanent fix. This is a temporary stopgap measure that lets us focus our resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people.”).

42. See 8 C.F.R. § 1.3(a)(4)(vi) (2021) (providing young people with a method of obtaining a Social Security number if DACA applied to them).

43. See 8 C.F.R. § 274a.12(a)(11) (2021) (allowing young people covered by DACA to obtain legal employment).

44. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/TGS4-K2T9>] (Feb. 4, 2021) (explaining the process and requirements to

DACA does not provide recipients with a permanent solution—it does not offer any pathway to permanent status or citizenship.⁴⁵ While extremely helpful, it nevertheless relegates young immigrants to a kind of limbo in which they cannot access many of the conditions for success, such as federal student loans.

On September 5, 2017, President Donald Trump announced he was rescinding DACA.⁴⁶ DACA recipients were informed that their work permits would no longer be renewed and that they would lose the protections of DACA on their individual expiration date. The termination of DACA was challenged in court by three cases—*Regents of the University of California v. Dept. of Homeland Security*,⁴⁷ *Batalla Vidal v. Nielsen*,⁴⁸ and *NAACP v. Trump*.⁴⁹ The appellate courts that heard the cases directed the United States Citizenship and Immigration Services (USCIS) to continue processing DACA renewals, but USCIS did not

apply for DACA); *Access to Driver's Licenses for Immigrant Youth Granted DACA*, NAT'L IMMIGR. L. CTR., <https://www.nilc.org/issues/drivers-licenses/daca-and-drivers-licenses/> [https://perma.cc/QVK5-PKS5] (July 22, 2020).

45. See, e.g., AM. IMMIGR. COUNCIL, *supra* note 31 at 1, 3–4 (noting that DACA does not provide permanent legal status which thereby impedes any pathway to citizenship).

46. Memorandum on Rescission of Deferred Action for Childhood Arrivals from Elaine C. Duke, Acting Sec'y, Homeland Sec. for James W. McCament, Acting Dir. U.S. Citizenship & Immigr. Servs. et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [https://perma.cc/S24H-XX9Z] [hereinafter Memorandum on Rescission of DACA] (detailing the Department of Homeland Security's deescalating of DACA at President Trump's direction); *Deferred Action for Childhood Arrivals 2017 Announcement*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/deferred-action-for-childhood-arrivals-2017-announcement> [https://perma.cc/66NB-W54P] (Feb. 14, 2018) ("On Sept. 5, 2017, the Department of Homeland Security (DHS) initiated the orderly phase out of the program known as Deferred Action for Children Arrivals (DACA)."); see also Presidential Statement on the Deferred Action for Childhood Arrivals Policy, 2017 DAILY COMP. PRES. DOC. 201700 (Sept. 5, 2017) ("Therefore, in the best interests of our country, and in keeping with the obligations of my office, the Department of Homeland Security will begin an orderly transition and winddown of DACA, one that provides minimum disruption."); Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> [https://perma.cc/SCX4-SSVC].

47. 279 F. Supp. 3d 1011, 1027–28 (N.D. Cal. 2018) (challenging that the rescission of DACA violated the Administrative Procedure Act), *rev'd in part and vacated in part*, 140 S. Ct. 1891 (2020).

48. 291 F. Supp. 3d 260, 268 (E.D. N.Y. 2018) (challenging that the decision to end DACA violated the Equal Protection Clause of the Fourteenth Amendment because it was primarily motivated by racial animus against Latinos), *rev'd in part sub nom.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

49. 298 F. Supp. 3d 209, 215 (D.D.C. 2018) (challenging that the rescission of DACA violated both the Constitution and the Administrative Procedure Act), *aff'd and remanded sub nom.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1892 (2020); see BEN HARRINGTON, CONG. RSCH. SERV., LSB10136, *DACA RESCISSION: LEGAL ISSUES AND LITIGATION STATUS 2* (May 23, 2018), <https://crsreports.congress.gov/product/details?prodcode=LSB10136> [https://perma.cc/Y5ZS-QUBP] (detailing litigation challenging President Trump's efforts to scale back DACA protections).

accept new applications for more than two years as the cases made their way to the Supreme Court of the United States.⁵⁰ This left unprotected a segment of the undocumented population which was coming of age and otherwise met the requirements.⁵¹ Despite the uncertainty that shrouded DACA during the legal challenges to the rescission, DACA recipients in medical school continued to successfully match with residency programs in the 2018–2019 and 2019–2020 cycles.⁵²

On June 18, 2020, the Supreme Court of the United States vacated the rescission on procedural grounds related to the Administrative Procedures Act in *Department of Homeland Security v. Regents of the University of California*.⁵³ As a result, DACA recipients are currently able to renew their work permits. However, the Acting Secretary of the U.S. Department of Homeland Security (DHS) has instructed USCIS to only renew work permits for a period of one year and to return applications from individuals who have never received deferred action.⁵⁴

The ruling of the U.S. Supreme Court enables medical students, residents, and physicians who have DACA to continue forward in their careers. However, the shortening of the deferrals to one year and the intent of the Acting Secretary of DHS to pursue rescission anew increases the uncertainty in training and hiring a physician with DACA. Further, the continued closure of conferral of DACA to new applicants slowly chokes off the pipeline of such potential future physicians.

50. See *Regents of the Univ. of Cal.*, 140 S. Ct. at 1903–04 (explaining the process by which the Supreme Court granted certiorari to address the decision to end DACA).

51. HARRINGTON, *supra* note 49 (discussing injunctions granted to would-be DACA enrollees during the rescission); see generally *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> [<https://perma.cc/2Z74-E2ZA>] (Aug. 24, 2020) (explaining who is not eligible to apply for DACA benefits).

52. Mark Kuczewski et al., *When DACA Recipients Seek to Match: Some Tips from the Trenches*, AM ROUNDS (Apr. 2, 2019), <http://academicmedicineblog.org/when-daca-recipients-seek-to-match-some-tips-from-the-trenches/> [<https://perma.cc/C8Z9-4MZH>] (discussing Loyola University Chicago Stritch School of Medicine’s trailblazing role in accepting and matriculating would-be DACA enrollees to their residency program).

53. See *Regents of the Univ. of Cal.*, 140 S. Ct. at 1901 (“For the reasons that follow, we conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated.”).

54. Memorandum from Chad F. Wolf, Acting Sec’y Dep’t of Homeland Sec., to Mark Morgan, Senior Official, U.S. Customs and Border Protection et al. (July 28, 2020), https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf [<https://perma.cc/G4RB-GJLU>] (“Shortening renewal periods granted during this reconsideration period will have the potential benefit of significantly lessening the lasting effects of the DACA policy if I ultimately decide to rescind it.”).

IV. MEDICAL SCHOOL POLICIES

The two main barriers for undocumented students attending medical school are admission and funding. To be considered for medical school, students must sit for the Medical College Admission Test (MCAT).⁵⁵ While students can request a temporary identification number to take the MCAT in place of a Social Security number, they are still required to present a current photo ID on exam day.⁵⁶ This ID must be issued by a government agency, thus creating a barrier for undocumented individuals living in certain states, such as those that do not issue drivers licenses to undocumented immigrants.⁵⁷ Medical school applicants must also apply through the American Medical College Application Service (AMCAS). The AMCAS application requires applicants to specify their citizenship status (U.S. citizen, J1 visitor/student, etc.) and only recently added an option for undocumented students.⁵⁸ These barriers were somewhat alleviated by the introduction of DACA in 2012, which enabled recipients to get Social Security numbers and employment authorization and thereby apply for government-issued photo IDs.⁵⁹ In addition, DACA

55. See *About the MCAT® Exam*, ASS'N AM. MED. COLLS., <https://students-residents.aamc.org/applying-medical-school/taking-mcat-exam/about-mcat-exam/> [<https://perma.cc/K5EQ-EWFJ>] (last visited Jan. 21, 2021) (“Almost all U.S. medical schools and many Canadian schools require you to submit MCAT exam scores as part of your admission application.”).

56. *Valid Identification for MCAT Examinees*, ASS'N AM. MED. COLLS., <https://students-residents.aamc.org/applying-medical-school/article/valid-identification-mcat-examinees/> [<https://perma.cc/W7PL-FTFK>] (last visited Jan. 21, 2021) (explaining the requirements for students intending to take the MCAT).

57. *Valid Identification for MCAT Examinees*, *supra* note 56 (listing the requirements for an acceptable ID, including that it was issued by a government agency). Currently only sixteen states—California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Utah, Vermont, Virginia, and Washington—and the District of Columbia permit undocumented immigrants to obtain driver’s licenses. *States Offering Driver’s Licenses to Immigrants*, NAT’L CONF. ST. LEGIS., <https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx> [<https://perma.cc/ZC2V-DKCY>] (Feb. 8, 2021).

58. Nakae et al., *supra* note 5, at 1550 (detailing changes to the AMCAS application); see also 2020 AMCAS APPLICANT GUIDE, AM. MED. COLL. APPLICATION SERV. 21 (2020), https://aamc-orange.global.ssl.fastly.net/production/media/filer_public/b2/23/b223c482-8ba3-44dd-bb1c-8835ac84f3e6/2020amcasapplicantguide-060419.pdf [<https://perma.cc/7VNL-3AWL>] (“If you [applicant] do not currently hold a visa or have Permanent Resident status, select None from the drop-down list.”).

59. See *supra* notes 42–44 and accompanying text (discussing additional protections afforded to DACA enrollees); see also Zenen Jaimes Pérez, *How DACA Has Improved the Lives of Undocumented Young People*, CTR. FOR AM. PROGRESS (Nov. 19, 2014, 5:03 PM), <https://www.americanprogress.org/issues/immigration/reports/2014/11/19/101868/how-daca-has-improved-the-lives-of-undocumented-young-people/> [<https://perma.cc/26M9-L49E>] (reporting on a survey that showed DACA enabled 57% of undocumented young people to get driver’s licenses); REAL ID Act of 2005, § 202(c)(2)(B)(viii), 49 U.S.C. § 30301 (permitting individuals with deferred status to obtain government IDs satisfying the REAL ID standards).

enabled applicants to safely travel to MCAT test sites and medical school interviews.⁶⁰

Securing funding is a major hurdle faced by DACA recipients. Most medical students borrow significant amounts of money from the federal direct student loan program. Graduating medical students averaged more than \$201,000 in loan debt in 2019.⁶¹ As per the PRWORA, undocumented immigrants, including those with DACA, cannot apply for federal “benefits” such as federal student loans.⁶² Unless a medical school assists in providing a funding pathway, a DACA applicant would seldom enable access to medical education.

In the wake of the creation of DACA, the Loyola University Chicago Stritch School of Medicine became the first medical school to publicly announce the eligibility for consideration of undocumented immigrants and a commitment to help fund their education.⁶³ The school worked with various partners including the Illinois Finance Authority (IFA), Trinity Health, and the Resurrection Project to create loan programs available to DACA medical students.⁶⁴ The largest of the loan programs is done in partnership with the state’s infrastructure bank, IFA, and is modeled after Public Health Service loan programs.⁶⁵

60. To fly on an airplane in the United States, the Transportation Security Administration requires government-issued identification. Beginning in October 2021, all travelers will need REAL ID-compliant identification. See *REAL ID*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/real-id> [<https://perma.cc/CA85-FFWP>] (last visited Jan. 21, 2021). The REAL ID Act permits individuals with deferred status to obtain REAL ID-compliant identification. See § 202(c)(2)(B)(viii). Thus, because of DACA’s grant of deferred status, medical school applicants can travel via plane to get to testing sites and interviews across the country.

61. *Medical Student Education: Debt, Costs, and Loan Repayment Fact Card*, ASS’N AM. MED. COLLS., https://store.aamc.org/downloadable/download/sample/sample_id/296/ [<https://perma.cc/A6H2-JFQH>] (last visited Feb. 19, 2021) (outlining the educational debt of medical students).

62. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105, 2261 (“Aliens who are not qualified aliens ineligible for Federal public benefits.”); Kuczewski & Brubaker, *supra* note 2, at 1596 (explaining how DACA medical school applicants are ineligible for federal student loans); Danish Zaidi & Mark Kuczewski, *Ending DACA Has Pragmatic and Ethical Implications for U.S. Health Care*, 47 HASTINGS CTR. REP. 14, 14–15 (2017) (explaining the effects rescission of DACA will have on medical students and in turn U.S. health care).

63. See *DACA Recipients Welcome*, STRITCH SCH. MED., <https://ssom.luc.edu/daca/> [<https://perma.cc/R22U-T6VS>] (last visited Jan. 21, 2021) (explaining Loyola’s plan to help DACA recipients in their medical school).

64. *Id.*; see also Connor, *supra* note 5 (crediting the various people and institutions that have made the Stritch DACA program feasible).

65. See, e.g., Kuczewski & Brubaker, *supra* note 2, at 1596 (explaining how public health agencies help with financial aid); Connor, *supra* note 5 (“Under Gov. Pat Quinn, the IFA agreed to provide loan packages for the initial DACA students in 2014 in exchange for four years of work in an underserved community in Illinois upon completion of their residencies. The IFA funded 12 student loan packages in the Classes of 2018 and 2019. Gov. Bruce Rauner has also been supportive of the IFA’s loan program and Stritch’s DACA program.”).

Even though it is a rare occurrence, it is possible for undocumented students to be admitted to and complete medical school without DACA.⁶⁶ A program could admit an undocumented person and provide funding via a scholarship or the student could self-fund, but the main deterrent would be the inability for the student to continue his or her training after medical school. A work permit is required to be admitted to residency and to be employed as a physician,⁶⁷ limiting undocumented individuals' ability to practice medicine.

V. MEDICAL RESIDENCY AND LICENSING POLICIES

Medical residency policy is primarily decided by employment guidelines and the decisions of the individual residency program.⁶⁸ The Social Security number and Employment Authorization Document provided by DACA facilitate the legal employment and licensing of undocumented physicians.⁶⁹ Consideration of DACA applicants is still heavily dependent on programs being informed of what DACA is and being willing to extend an opportunity to physicians who must renew their deportation deferral every two years. From the standpoint of a residency program considering "matching" with an applicant,⁷⁰ DACA can be perceived as a liability, especially after the attempts to rescind DACA by the Trump administration in 2017.⁷¹ Residency program

66. See Nakae et al., *supra* note 5, at 1550 (explaining that undocumented students who were admitted to medical school programs without DACA were subsequently unable to complete their medical education through residency programs).

67. See Kuczewski & Brubaker, *supra* note 2, at 1596 (noting that a work permit can provide barriers to medical education).

68. See Nakae et al., *supra* note 5, at 1551 (outlining the complex decision process for medical residency programs).

69. See Kuczewski & Brubaker, *supra* note 2, at 1596 (illustrating that EAD and SSN programs allowed DACA recipients to become licensed physicians); see also Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization & Prosecutorial Discretion in Immigrant Cases*, 6 COLUM. J. RACE & L. 1, 3 (noting that DACA provides a route to work authorization that the "vast majority" of its recipients would otherwise lack). Federal law prohibits anyone from hiring or from continuing to employ any person who is not authorized by the federal government to work. See 8 U.S.C. §§ 1324a(a)(1)–(2), (h)(3) (outlining federal law regarding undocumented immigrants).

70. Matching is a complex process that takes place only once a year, and residency slots are filled through both residency programs and graduating medical students rank-listing their respective choices. See, e.g., *The Match: Getting into a Residency Program*, AM. ACAD. FAM. PHYSICIANS, https://www.aafp.org/students-residents/medical-students/become-a-resident/match.html?cmpid=_van_710 [<https://perma.cc/4TXG-64MW>] (last visited Jan. 21, 2021) ("The Match process is a uniform system by which residency candidates and residency programs simultaneously 'match' to fill first-year and second-year post-graduate training positions accredited by the Accreditation Council for Graduate Medical Education (ACGME)."); see also *Understanding the Basics About Medical Residencies*, GLOB. PRE-MEDS (Oct. 27, 2014), <https://www.glob-alpremeds.com/blog/2014/10/27/understanding-the-basics-about-medical-residencies/> [<https://perma.cc/569R-2TBZ>].

71. See Nakae et al., *supra* note 5, at 1549 (discussing the "enormous" obstacles that DACA

directors can fear unexpectedly losing a resident who is a DACA recipient thereby leaving a hole in their resident workforce. While medical schools and their DACA recipients have developed strategies to minimize such concerns,⁷² they cannot be completely eliminated. But as long as DACA remains in place, DACA physicians have no national training, licensing, or employment restrictions.⁷³

Most residency positions in the United States are funded by the Center for Medicare and Medicaid Services (CMS),⁷⁴ and this funding source does not preclude DACA recipients from holding the positions. DACA recipients can also have their research funded by federal institutes and agencies during residency.⁷⁵ In 2016, the United States Department of Veterans Affairs (VA) announced that, under Title 38, DACA physicians can work and rotate in VA facilities.⁷⁶ Furthermore, DACA physicians are protected against discrimination based on their status under the Civil Rights Act and the Immigration and Nationality Act.⁷⁷ In addition, the immigration status of a medical professional is not relevant to their ability to complete the National Board of Medical Examiners (NBME), the United States Medical Licensing Examinations (USMLE), or any other medical licensing requirement.⁷⁸ Medical licensing policies are devised

recipients face); Connor, *supra* note 5 (explaining that DACA was eventually successfully rescinded by the Trump administration); *see also* Memorandum on Rescission of DACA, *supra* note 46 (elaborating on a multitude of attempts by the Trump administration to rescind DACA).

72. Kuczewski et al., *supra* note 52 (explaining the numerous ways in which residency matching programs work to minimize concerns).

73. *See* Nakae et al., *supra* note 5, at 1551–52 (noting how DACA prevents restrictions that may otherwise be applied to DACA physicians).

74. *See, e.g.,* Darryl S. Weiman, *Who Pays for Resident Salaries?*, HUFFPOST, https://www.huffpost.com/entry/who-pays-for-resident-sal_b_12967008 [<https://perma.cc/PV4W-ZYRU>] (Nov. 15, 2017) (describing that President Lyndon B. Johnson created Medicare—the program which pays residents’ salaries); COMM. ON THE GOVERNANCE & FIN. OF GRADUATE MED. EDUC. ET AL., INST. OF MED. OF THE NAT’L ACAD., GRADUATE MEDICAL EDUCATION THAT MEETS THE NATION’S HEALTH NEEDS 61–80 (2014).

75. *See* Nakae et al., *supra* note 5, at 1551 (pointing out that DACA recipients have opportunities for medical research funding).

76. *Id.* (showing the policy change that allowed DACA recipients to work in VA medical facilities).

77. *See* 8 U.S.C. § 1324(b) (prohibiting unfair immigration-related employment practices); *see also* Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq. (prohibiting discrimination based on race, color, religion, sex, or national origin); Immigration and Nationality Act of 1952, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.); Nakae et al., *supra* note 5, at 1551 (explaining the prohibitions on discrimination based on immigration status).

78. *See* Nakae et al., *supra* note 5, at 1552 (explaining that immigration status does not prevent someone from becoming licensed to practice medicine); *Eligibility for the USMLE Steps*, U.S. MED. LICENSING EXAMINATION, <https://www.usmle.org/bulletin/eligibility/> [<https://perma.cc/3HGN-GTYQ>] (last visited Jan. 21, 2021) (noting that there is no question or requirement regarding immigration status).

at a state level, which many may or may not request information regarding citizenship status.⁷⁹

VI. CURRENT POLICY OUTLOOK

On his inauguration day, President Biden signed an executive memorandum instructing the Attorney General and the Secretary of Homeland Security to “take all actions he deems appropriate, consistent with applicable law, to preserve and fortify DACA.”⁸⁰ But if DACA remains in its original form, the policy will still be vulnerable. Given its nature as an executive action, DACA is in a particularly precarious position—it was placed in jeopardy by a single signature in 2017.⁸¹

DACA’s status is not solid. While the Trump administration’s attempts to rescind DACA were struck down by the Supreme Court for procedural defects, the Court left open the possibility for future rescission that does comply with the Administrative Procedure Act.⁸² Furthermore, several states’ attorneys general continue to challenge the authority of the president to use prosecutorial discretion in this manner.⁸³ At some future date, should the courts conclude that the President of the United States does not have the blanket authority to defer action on the immigration status and issue work permits for a class of individuals, or should a future presidential administration successfully rescind DACA, these physicians will lose their Employment Authorization Document. Residents would not be able to remain in residency and licensed physicians would not be

79. Kuczewski & Brubaker, *supra* note 2, at 1596 (explaining that Dreamers face barriers at the state-level); Chad R. Doobay, *Clearing the Way for Medical Students with DACA*, NAT’L IMMIGRANT JUST. CTR. (May 19, 2014), <https://immigrantjustice.org/staff/blog/clearing-way-medical-students-daca> [<https://perma.cc/7ZBT-SWSP>] (noting that each state varies in its questions on immigration status).

80. Memorandum from President Joseph R. Biden, Jr. for the Att’y Gen. & the Sec’y of Homeland Sec. on Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA) 2021 DAILY COMP. PRES. DOC. 64 (Jan. 20, 2021) [hereinafter President Biden DACA Memorandum].

81. See Memorandum on Rescission of DACA, *supra* note 46 (explaining the Trump administration’s plan to get rid of DACA).

82. See Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (“We do not decide whether DACA or its rescission are sound policies. . . . We address only whether the agency complied with the procedural requirement The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.”); see also Adam Liptak & Michael D. Shear, *Trump Can’t Immediately End DACA, Supreme Court Rules*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/us/trump-daca-supreme-court.html> [<https://perma.cc/2KCN-2AU2>] (“The court’s decision was provisional, and it did not remove the uncertainty that young immigrants have lived with—including the possibility of being forcibly returned to countries many of them cannot even remember—since they arrived in the United States as children.”).

83. Juan A. Lozano, *No Immediate Ruling After Hearing on Fate of DACA Program*, AP NEWS (Dec. 22, 2020), <https://apnews.com/article/donald-trump-houston-deferred-action-for-childhood-arrivals-program-immigration-us-supreme-court-bc19608c6aa54623902c44ded180d005> [perma.cc/FT88-6CWP].

able to practice.⁸⁴ Given the accompanying poor outlook for being able to go on to residency and practice medicine, medical students would likely be unable to secure funding to attend medical school.

There have been arguments to codify DACA,⁸⁵ but this is problematic. DACA creates a second-class status in the community by not allowing the recipient to benefit from any of the federal systems to which he or she contributes, such as Medicaid, federal student loans, and other benefits.⁸⁶ The ideal legislative solution would provide a lawful status such as Legal Permanent Resident (LPR), and a pathway to U.S. citizenship rather than maintaining the program unchanged.⁸⁷

However, it is important to recognize that even a major piece of immigration reform legislation such as the DREAM Act will not completely end the problem. If a version of the DREAM Act is passed that covers all who are currently included under the DACA eligibility criteria, it will provide a path to citizenship for approximately 1.8 million

84. See 8 U.S.C. § 1324a (noting that it is illegal to employ someone who is not authorized by the federal government to work in the United States).

85. See, e.g., Ike Brannon, *Codifying DACA Would Be a Revenue Windfall for the U.S.*, FORBES (Sept. 4, 2019, 9:00 AM), <https://www.forbes.com/sites/ikebrannon/2019/09/04/codifying-daca-would-be-a-revenue-windfall-for-the-u-s/?sh=134ebb07524b> [<https://perma.cc/5X5M-XNCS>] (explaining the importance behind codifying the DACA program, stating it would actually help the federal deficit, rather than cause harm).

86. See *supra* notes 39–45 and accompanying text (explaining the restrictions on persons with DACA immigration status and how the restrictions affect individuals with DACA immigration status in different fields).

87. See e.g., THE DREAM ACT, DACA, AND OTHER POLICIES DESIGNED TO PROTECT DREAMERS, *supra* note 31. Such a legislative action may be closer than expected; President Biden's inauguration day activities included a legislative proposal for an immigration act that would include an eight-year pathway to citizenship for undocumented immigrants (with a five-year pathway to a green card, pending a successful background check and verification of payment of taxes). See Seung Min Kim, *Biden to Propose Overhaul of Immigration Laws on First Day in Office*, WASH. POST (Jan. 18, 2021, 5:52 PM), https://www.washingtonpost.com/politics/biden-immigration-plan/2021/01/18/f0526824-59a8-11eb-a976-bad6431e03e2_story.html [<https://perma.cc/6REV-2HPB>] (“President-elect Joe Biden will roll out a sweeping overhaul of the nation’s immigration laws the day he is inaugurated, including an eight-year path to citizenship for immigrants without legal status . . .”); Laura Foote Reiff, *New Biden Immigration Bill Announced on Day One of Administration*, NAT’L L. REV. (Feb. 7, 2021), <https://www.natlawreview.com/article/new-biden-immigration-bill-announced-day-one-administration> [<https://perma.cc/TFB8-DVY9>] (explaining that the U.S. Citizenship Act will provide a legal pathway to citizenship for those with destabilized status in the United States). *But see* Michael Macagnone, *Biden’s Immigration Bill Faces Difficult Path in Senate*, ROLL CALL (Jan. 19, 2021, 4:52 PM), <https://www.rollcall.com/2021/01/19/bidens-immigration-bill-faces-difficult-path-in-senate/> [<https://perma.cc/KQ6T-554D>] (noting that Biden’s plan is far from guaranteed passage given the need for bipartisan support and significant opposition); Laura Litvan, *Biden’s Immigration Plan May Hit Delays Amid GOP Opposition*, BLOOMBERG (Jan. 21, 2021, 4:49 PM), <https://www.bloomberg.com/news/articles/2021-01-21/biden-s-immigration-plan-may-hit-delays-amid-gop-opposition> [<https://perma.cc/3T32-CKT6>] (explaining that Biden’s immigration plan will face harsh pushback in Congress).

youths.⁸⁸ Nevertheless, it will still omit significant numbers of young people, such as those outside the age limits as well as future arrivals.

VII. PATHS FORWARD

We counsel a two-fold pathway forward for undocumented immigrants in medicine. First, medicine and medical education must continue to advocate for a path to citizenship for those who are DACA recipients and others who present a similar profile. This kind of advocacy must continue until a pathway to citizenship is established. But, as we noted earlier, similar cases will arise almost immediately. That is, there will likely be people who will not gain eligibility even though they have similar claims. So, to prevent medicine and the country from continuing the cycle of adjusting the status of current undocumented youth, accumulating a new stock of addition undocumented youth, and fighting for years or decades to pass a new DREAM Act and repeating this process again and again, the legislature can create a new, ongoing category of individuals who may adjust after meeting the specified criteria regardless of arrival date. This kind of legislation would be a “perpetual DREAM Act” that keeps the pathway to citizenship open for undocumented youth who meet the criteria such as age of arrival and years in the United States. A perpetual DREAM Act would be a systemic solution to the structural injustice of cyclically marginalizing undocumented young people.⁸⁹ While the DREAM Act that creates a one-time adjustment for a particular group of undocumented youth may become law within the coming years, a perpetual DREAM Act that resolves the structural problem is unlikely to become law any time in the foreseeable future. As a result, we propose that the medical community continue to intentionally carve out opportunities for undocumented youth to become physicians.

For instance, more states could follow the examples of California⁹⁰ and Illinois⁹¹ in passing or amending professional licensing laws to decouple all professional licenses from immigration status.⁹² Individual medical

88. Tom Jawetz et al., *Dreams Deferred: A Look at DACA Renewals and Losses Post-March 5*, CTR. FOR AM. PROGRESS (Mar. 2, 2018, 9:01 AM), <https://www.americanprogress.org/issues/immigration/news/2018/03/02/447486/dreams-deferred-look-daca-renewals-losses-post-march-5/> [<https://perma.cc/K4HH-ZLEL>].

89. Mark G. Kuczewski, *Addressing Systemic Health Inequities Involving Undocumented Youth in the United States*, 23 AMA J. ETHICS 146, 151 (2021).

90. See CAL. BUS. & PROF. CODE § 135.5 (West 2021) (making it unlawful to deny licensure to an applicant based on citizenship or immigration status).

91. See 20 ILL. COMP. STAT. 2105/2105-15(f-5) (2020) (permitting applicants to use their ITIN number in place of a Social Security Number when applying for a license); 705 ILL. COMP. STAT. 205/2(a) (2020) (prohibiting denial of law licenses on the basis of noncitizenship).

92. See Nakae et al., *supra* note 5, at 1552 (noting that California has removed immigration status from the ability to become professionally licensed); *Professional and Occupational Licenses*

schools can make available scholarships open to undocumented applicants. In other words, while legislative action is greatly needed, we suggest that there also be a normalization of creating opportunity for undocumented youth.

Of course, in the absence of a work permit, undocumented students will not be able to obtain residency slots because residents must be able to draw a paycheck. It is unlikely that any scheme that tried to reclassify residents as trainees and deliver them a stipend will be effective if the doctors continue to do the “work” of residents such as seeing patients, creating treatment plans in the medical record, prescribing treatments, and performing procedures. Hospitals would be unlikely to embrace such a risky scheme since they could be subject to prosecution for intending to employ undocumented workers.⁹³ Similarly, efforts to remedy the situation by reclassifying them as doing an internship and not paying them would run into federal restrictions on unpaid internships as defined under the Fair Labor Standards Act of 1938.⁹⁴

What needs to be created is a genuine training program beyond medical school that is not simply a residency imitation. That is, the trainee should be learning and training and not doing the actual “work” of residency.⁹⁵ This can be tacked on as additional years of medical school or can be a hospital-based education program. Because it is a genuine training program, financial aid including living expenses can be provided. The main innovation required is that the medical specialty boards would have to develop criteria by which they recognize these training programs as enabling the trainee to be eligible for board certification just as are those completing traditional medical residencies. With the creation of

for *Immigrants*, NAT'L CONF. STATE LEGISLATURES (Jan. 17, 2017), <https://www.ncsl.org/research/immigration/professional-and-occupational-licenses-for-immigrants.aspx> [<https://perma.cc/WE6B-CJ5F>] (“[In California,] [a]ll individuals seeking a professional license can now provide either a federal Individual Taxpayer Identification Number (ITIN) or Social Security number (SSN). Any individual lawfully or unlawfully present in the U.S. can apply for and receive a professional license, provided he or she fulfills all other requirements.”).

93. See *supra* note 69 (explaining the importance of creating a path to license undocumented physicians to, in part, eliminate a hospital’s risk).

94. See 29 U.S.C. § 203 (outlining the legality of unpaid internships under federal law); see generally Kuczewski, *supra* note 2.

95. In such a program, the participants would learn all of the essentials of patient care including differential diagnosis, developing a treatment plan, and having their clinical skills assessed rigorously. But they would not write official “orders” for medications, etc., in the patient’s chart. While residents currently are not theoretically responsible for patient care, their work accomplishes the work of the facility as their notes only require a pro forma countersignature from an attending physician. Hence, they are considered employees in addition to being trainees. It is their employee status that creates the need for a work permit. See 29 U.S.C. § 203; see generally Kuczewski, *supra* note 2 (noting the challenges that DACA recipients face with attempting to participate in residency programs).

such programs, the path to becoming a board-certified physician would be available to future generations of undocumented doctors.

CONCLUSION

The path of undocumented physicians in the United States has not been a straightforward one, in part because it is a result of policy at multiple levels. Policies that have propelled undocumented physicians have been both deliberate and at times unintentional. The last three decades have seen monumental strides for undocumented individuals in terms of becoming embedded within higher education and the U.S. workforce, especially for those pursuing careers in health care. We believe that it is important for states and the health care sector to lay the groundwork for these paths to continue to develop to better serve future generations of undocumented physicians.

APPENDIX

Table 1. *Timeline of Major Governmental Events for Undocumented Students*

Year	Event
1965	Elementary and Secondary Education Act of 1965 begins federal funding of primary and secondary education, focusing on supporting schools with children from impoverished families. ⁹⁶
1975	Texas denies free K–12 education to undocumented children. ⁹⁷
1982	<i>Plyler v. Doe</i> rules that undocumented children cannot be denied K–12 education. ⁹⁸
1986	Immigration Reform and Control Act of 1986 legalizes undocumented immigrants that arrived prior to 1982. ⁹⁹
1996	Illegal Immigration Reform and Immigrant Responsibility Act of 1996 imposes restrictions on higher education for undocumented students. ¹⁰⁰
1996	Personal Responsibility and Work Opportunity Reconciliation Act of 1996 denies federal benefits to undocumented students but allows states to supersede with state laws. ¹⁰¹
2001	Texas is the first state to allow in-state tuition for undocumented students, with other states following suit. ¹⁰²
2001	DREAM Act proposed as a path to permanently adjust the status of young undocumented immigrants but fails to pass in Congress. ¹⁰³
2002	No Child Left Behind Act defines “immigrant children and youth.” ¹⁰⁴

96. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (showing an act in place to strengthen and improve educational quality and opportunities in the Nation’s elementary and secondary schools).

97. TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981). The 1975 revision of this act authorized school districts to deny enrollment to public school children not legally admitted to the country.

98. *Plyler v. Doe*, 457 U.S. 202, 203 (1982) (holding in Texas that states cannot constitutionally deny students a free public education due to their immigration status).

99. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394.

100. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 505, 110 Stat. 3009, 3672 (codified as amended in scattered sections of 8 U.S.C.).

101. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105, 2113, 2261–62 (defining Federal Public Benefit and explaining how states can offer assistance to needy families).

102. See Act of June 16, 2001, 2001 Tex. Gen. Laws ch. 1392, § 2 (amending TEX. EDUC. CODE ANN. § 54.052 (West 2019)).

103. See *supra* note 30 (providing more information on the Dream Act, DACA and other policies in place to protect dreamers); Immigrant Children’s Educational Advancement and Dropout Prevention Act of 2001, H.R. 1582, 107th Cong. (2001).

104. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 301, 115 Stat. 1425, 1730 (codified at 20 U.S.C. § 7011) (“The term ‘immigrant children and youth’ means individuals who—

2007	DREAM Act fails to pass in Congress. ¹⁰⁵
2009	DREAM Act fails to pass in Congress. ¹⁰⁶
2010	DREAM Act fails to pass in Congress. ¹⁰⁷
2011	DREAM Act fails to pass in Congress. ¹⁰⁸
2012	Deferred Action for Childhood Arrivals (DACA) defers deportation for young immigrants and provides a social security number and work permit. ¹⁰⁹
2017	Announcement of repeal of DACA. ¹¹⁰
2017	DREAM Act fails to pass in Congress. ¹¹¹
2017	DACA litigation begins. ¹¹²
2018	USCIS announces that DACA renewals are still allowed. ¹¹³
2020	Supreme Court rules in <i>Dept. of Homeland Security v. Regents of the University of California</i> that the Trump administration's DACA rescission violated the Administrative Procedure Act. ¹¹⁴
2021	Biden administration issues an executive memorandum to reinstate and reinforce DACA. ¹¹⁵

(A) are aged 3 through 21; (B) were not born in any State; and (C) have not been attending one or more schools in any one or more States for more than 3 full academic years.”).

105. See 153 CONG. REC. S13300, 13306 (daily ed. Oct. 24, 2007) (voting 52 yeas and 44 nays thus rejecting the motion to proceed for the DREAM Act).

106. See 155 CONG. REC. S8841, 8924, 8958 (daily ed. Mar. 26, 2009) (introducing S. 729—the last action taken on the bill).

107. See 156 CONG. REC. S16113, 16160 (daily ed. Sept. 22, 2010) (introducing S. 3827, an updated DREAM Act—the last legislative action for this bill).

108. See S. 952, 112th Cong. (2011).

109. See Homeland Sec. Memo, *supra* note 39 (explaining how the Department of Homeland Security should enforce the Nation's immigration laws against young immigrants).

110. Memorandum on Rescission of DACA, *supra* note 46.

111. See S. 1615, 115th Cong. (2017).

112. See, e.g., Complaint, NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018) (filed on Sept. 18, 2017). This is the first of several cases. See also *supra* note 47–49 and accompanying text.

113. See *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, *supra* note 51 (“USCIS would continue to accept requests from aliens who had been granted DACA in the past.”); see also Order Denying FRCP 12(b)(1) Dismissal and Granting Provisional Relief, *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, No. C. 17-05211 et al. (filed Jan. 9, 2018), https://www.uscis.gov/sites/default/files/document/injunctions/234_Order_Entering_Preliminary_Injunction.pdf [<https://perma.cc/DB3Z-GPMX>] (“[O]rdered . . . to maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017 . . .”); Amended Memorandum & Order & Preliminary Injunction, *Batalla Vidal v. Nielsen*, 16-CV-4576 (filed Feb. 13, 2018), https://www.uscis.gov/sites/default/files/document/injunctions/255_EDNY_AMENDED_Order_Entering_Preliminary_Injunction.pdf [<https://perma.cc/GF9Y-ASCP>] (granting the motion for a preliminary injunction).

114. See 140 S. Ct. 1891, 1901 (2020) (stating that the Acting Secretary had violated the APA by failing to adequately address important factors bearing on her decision).

115. See President Biden DACA Memorandum, *supra* note 80 (giving the Secretary of Homeland Security and Attorney General permission to take all action he deems appropriate to preserve and fortify DACA).

Table 2. *Types of Policy That Allowed Undocumented People to Become Physicians*

Date	Policy Change	Policy Type
1982	<i>Plyler v. Doe</i> rules that undocumented children cannot be denied K–12 education. ¹¹⁶	Supreme Court decision
2001	State laws passed that allow undocumented students to attend higher education (on-going). ¹¹⁷	State law
2012	DACA issued by President Barack Obama. ¹¹⁸	Executive branch memorandum
2014	Medical schools openly accept DACA applicants. ¹¹⁹	Medical program decision
2015	Association of American Medical Colleges amends the AMCAS and Electronic Residency Application Service applications to include DACA status. ¹²⁰	Medical-related organization decision
2018	Department of Homeland Security announces that DACA renewals will continue until further notice. ¹²¹	Court-issued injunction
2018	Medical residency programs openly accept DACA applicants. ¹²²	Medical program decision

116. 457 U.S. 202, 203 (1982) (holding that Texas may not deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States).

117. See, e.g., Act of June 16, 2001, 2001 Tex. Gen. Laws ch. 1392, § 2 (amending Tex. Educ. Code Ann. § 54.052 (West 2019)) (allowing in-state tuition for undocumented students).

118. See M Homeland Sec. Memo, *supra* note 39 (explaining how the Homeland Security Department should enforce the Nation’s immigration laws against certain individuals).

119. See, e.g., *DACA Recipients Welcome*, *supra* note 63 (allowing DACA students to apply to Loyola University Chicago Stritch School of Medicine).

120. See Nakae, *supra* note 5, at 1549 (“More than 50 medical schools now consider applicants who are DACA recipients, and medical school graduates with DACA are eligible to continue their training in graduate medical education.”).

121. See Press Release, Dep’t Homeland Sec., Acting Press Sec’y Tyler Q. Houlton Statement on Deferred Action for Childhood Arrivals (Mar. 7, 2018), <https://www.dhs.gov/news/2018/03/07/acting-press-secretary-tyler-q-houlton-statement-deferred-action-childhood-arrivals> [<https://perma.cc/M8J7-HMU2>] (“In compliance with court injunctions, USCIS is accepting and adjudicating DACA requests for renewals as they are submitted.”).

122. See, e.g., *DACA Recipients Welcome*, *supra* note 63 (showing that Loyola University Chicago Stritch School of Medicine began accepting DACA recipients).

Table 3. Comparing the DREAM Act and DACA

Trait	DREAM Act ¹²³	DACA ¹²⁴
Policy-type	Federal legislation by Congress	Executive action by U.S. President
Policy goal	Adjustment to permanent status	Deportation deferral
Immediate benefits	Lawful status	SSN and work permit
Cutoff age	35	31
Age of entry into U.S.	18 or younger	16 or younger
Good moral character	Yes, as defined by immigration law	Yes, as defined by immigration law
Path to citizenship	Yes	No
Phases	Conditional residency, then permanent residency, then citizenship	Renewal every 2 years

Table 4. Policies That Would Aid Undocumented Medical Trainees & Professionals

Recommended Policy Change	Who Could Enact This Policy
Ruling to protect DACA status after repeal attempt by the Trump administration	Federal court
Federal legislation to adjust recipient's status	U.S. Congress
Medical school funding options for undocumented students	Individual medical schools
Medical residency admission & support for undocumented physicians	Individual medical residency programs
Medical licensing of undocumented physicians	Individual states

123. DREAM Act, S. 3827, 111th Cong. (2010) (intending to amend the Illegal Immigration Reform and Immigrant Responsibility act of 1996).

124. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 44 (explaining the process and requirements to apply for DACA); Homeland Sec. Memo, *supra* note 39 (explaining how the Homeland Security Department should enforce the Nation's immigration laws against certain individuals); 8 C.F.R. § 1.3(a)(4)(vi) (2021) (permitting DACA individuals to receive Social Security benefits); 8 C.F.R. § 274a.12(a)(11) (2021) (allowed young people covered by DACA to obtain legal employment).