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MEMORANDUM

DATE: November 17, 2015

TO: Rachelle Sharpe, Washington Student Achievement Council

FROM: Justin Kjolseth, Assistant Attorney General

SUBJECT: **Residency for Purposes of Tuition and State Financial Aid**

INTRODUCTION

On July 31, 2015, we provided the Washington Student Achievement Council (WSAC) with a memorandum discussing the eligibility of students with Deferred Action-Childhood Arrival (DACA) status for the College Bound Scholarship Program (CBS).[1] The memorandum concluded that DACA students are potentially eligible for the CBS because they are not excluded from meeting the requirements of RCW 28B.15.012(a)-(d). Our conclusion was reached after consideration of the legal authority discussed herein, in light of guidance handed down by the U.S. Citizenship and Immigration Service (USCIS) on June 15, 2015.[2]

This memorandum sets forth our analysis in greater detail. In pertinent part, the USCIS guidance is that "[i]ndividuals granted deferred action are not precluded by federal law from establishing domicile in the U.S." This new guidance clarified the USCIS position on the legal effect of deferred action, and raised questions about how deferred action impacts an individual's eligibility for state financial aid programs such as the CBS. These questions and short answers to them are set forth below and are discussed more fully in the following section of this memorandum.

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[1] *See* RCW 28B.118.005-.075.

[2] http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions

1. Which students are eligible to meet the residency requirements of the CBS under RCW 28B.118.010?

Under RCW 28B.118.010, students are "residents" for purposes of the CBS if they meet at least one definition of resident student found in RCW 28B.15.012(2)(a)-(d), which requires either the individual or one of their parents to be domiciled in the state of Washington for a period of at least one year.

2. Does immigration status impact an individual's capacity to establish domicile in Washington State?

Immigration status can impact the ability to establish domicile. An individual's legal capacity to establish domicile may be limited by a temporary visa status that requires the individual to maintain a domicile elsewhere (e.g., an F visa). Such a status prevents the individual from forming the intent to permanently remain in the United States. But, there is no legal authority that precludes an individual without such a visa status from establishing domicile in Washington State.

3. Are DACA students "nonresident students" under RCW 28B.150.012(3)(b), and thus ineligible for state financial aid programs?

Assuming the definition of "nonresident student" applies to establishing eligibility for state financial aid programs, DACA students are eligible to be considered residents because they have a representation from USCIS that indicates that the agency is aware of their presence and has no plans to deport them. Therefore, DACA students likely qualify under the "permanently residing under color of law" exception to the definition of nonresident student in RCW 28B.15.012(3)(b).

DISCUSSION

1. Student Residency Requirements and Eligibility for the College Bound Scholarship Under RCW 28B.118.010.

   A. Relevant Statutory Language

In order to assess who is eligible for the College Bound Scholarship, it is necessary to look at the implementing statute, chapter 28B.118 RCW. The legislature describes the purpose of the program as follows:

> The legislature intends to inspire and encourage all Washington students to dream big by creating a guaranteed four-year tuition scholarship program for students from low-income families. The legislature finds that, too often, financial barriers prevent many of the brightest students from considering college as a future possibility. Often the cost of tuition coupled with the complexity of finding and

> applying for financial aid is enough to prevent a student from even applying to college. Many students become disconnected from the education system early on and may give up or drop out before graduation. It is the intent of the legislature to alert students early in their educational career to the options and opportunities available beyond high school.

RCW 28B.118.005. RCW 28B.118.010 contains the program design and eligibility requirements that, in relevant part, are:

> To receive the Washington college bound scholarship, a student must graduate with at least a "C" average from a public high school or an approved private high school under chapter 28A.195 RCW in Washington or have received home-based instruction under chapter 28A.200 RCW, must have no felony convictions, and *must be a resident student as defined in RCW 28B.15.012(2) (a) through (d).*

RCW 28B.118.010(4)(b) (italics added). So, in order to qualify as a resident for purposes of the College Bound Scholarship, an individual must meet at least one of the definitions of "resident student" contained in RCW 28B.15.012(2)(a)-(d), which are:

> (2) The term "resident student" shall mean:
> (a) A financially independent student who has had a domicile in the state of Washington for the period of one year immediately prior to the time of commencement of the first day of the semester or quarter for which the student has registered at any institution and has in fact established a bona fide domicile in this state primarily for purposes other than educational;
> (b) A dependent student, if one or both of the student's parents or legal guardians have maintained a bona fide domicile in the state of Washington for at least one year immediately prior to commencement of the semester or quarter for which the student has registered at any institution;
> (c) A student classified as a resident based upon domicile by an institution on or before May 31, 1982, who was enrolled at a state institution during any term of the 1982-1983 academic year, so long as such student's enrollment (excepting summer sessions) at an institution in this state is continuous;
> (d) Any student who has spent at least seventy-five percent of both his or her junior and senior years in high schools in this state, whose parents or legal guardians have been domiciled in the state for a period of at least one year within the five-year period before the student graduates from high school, and who enrolls in a public institution of higher education within six months of leaving high school, for as long as the student remains continuously enrolled for three quarters or two semesters in any calendar year;

RCW 28B.15.012(2)(a)-(d).[3]

Under this subsection, two factors influence residency under "(a) through (d)": the financial dependence of the student, and based on that factor, the domicile of either the student or their parents. Because the College Bound Scholarship is only available to recent high school graduates, it is likely that many of these students are financially dependent, and would have to qualify through subsections (b) or (d). Regardless, to qualify as a resident under (a) through (d) either the student or at least one of their parents must be domiciled in the state of Washington, as discussed below.

Neither the CBS nor RCW 28B.15.012(2)(a)-(d) reference immigration status. Nevertheless, as discussed herein, one's immigration status can affect residency for purposes of (a) through (d).

2. Immigration Status and Capacity to Establish Domicile in Washington State

A. Immigration Status and Domicile for Purposes of In-state Tuition Under State and Federal Law

"The indispensable elements of domicile are residence in fact coupled with the intent to make a place of residence one's home." *In re Marriage of Strohmaier*, 34 Wn. App 14 (1983). A person has established domicile in Washington for purposes of in-state tuition "if such person is physically present in Washington primarily for purposes other than educational and can show satisfactory proof that such person is without a present intention to return to such other state or to acquire a domicile at some other place outside of Washington."[4] Generally, the determination of an individual's domicile is "purely one of state law."[5] Under certain circumstances however, federal immigration law creates obstacles to an individual's ability to establish domicile in the United States. Thus, it is first necessary to determine how federal law implicates the domicile of noncitizens, and then to determine whether classes of noncitizens can establish domicile in Washington consistent with federal law.

B. Temporary Immigration Statuses and Domicile

Although the determination of domicile within any state is an issue controlled by that state's laws, Congress has restricted the capacity of certain noncitizens to establish domicile within a state. In *Elkins v. Moreno,* the United States Supreme Court discussed this restriction as it relates to domicile for in-state tuition benefits:

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[3] It is very likely that no Washington students would meet the requirements of RCW 28B.15.012(2)(c). Therefore, this analysis will only focus on those who qualify as resident students under (a), (b), or (d).

[4] RCW 28B.15.013.

[5] *California v. Texas*, 437 U.S. 601, 607 (1978).

> Although nonimmigrant aliens can generally be viewed as temporary visitors to the United States, the nonimmigrant classification is by no means homogeneous with respect to the terms on which a nonimmigrant enters the United States. For example, Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States. Thus, the 1952 Act defines a visitor to the United States as "an alien . . . having a residence in a foreign country which he has no intention of abandoning" and who is coming to the United States for business or pleasure. § 101(a)(15)(B). Similarly, a nonimmigrant student is defined as "an alien having a residence in a foreign country which he has no intention of abandoning . . . and who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study . . . ." By including restrictions on intent in the definition of some nonimmigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States was to immigrate permanently . . . .
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> But Congress did *not* restrict every nonimmigrant class. In particular, no restrictions on a nonimmigrant's intent were placed on aliens admitted under § 101(a)(15)(G)(iv).[21] Since the 1952 Act was intended to be a comprehensive and complete code, the conclusion is therefore inescapable that, where as with the G–4 class Congress did not impose restrictions on intent, this was deliberate. Congress' silence is therefore pregnant, and we read it to mean that Congress, while anticipating that permanent immigration would normally occur through immigrant channels, was willing to allow nonrestricted nonimmigrant aliens to adopt the United States as their domicile.[6]

Based on the Supreme Court's analysis in *Elkins*, the Attorney General's Office position has been to interpret Washington's residency statute to mean that individuals with a temporary nonimmigrant status based on a representation that they have not abandoned their domicile abroad lack the capacity to establish domicile in Washington. Due to their inability to establish domicile in the U.S., they cannot be considered eligible for residency under RCW 28B.15.012(a)-(d). Conversely, individuals with nonimmigrant statuses that lack an express restriction on intent are not incapable of establishing domicile within Washington.[7]

USCIS has also made it clear that DACA individuals are not precluded from establishing domicile under federal law, stating that "although deferred action does not confer a lawful immigration status, your period of stay is authorized by the Department of Homeland Security while your deferred action is in effect and, for admissibility purposes, you are considered to be

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[6] *Elkins v. Moreno*, 435 U.S. 647, 665 (1978).

[7] Currently, the B, C, D, F, J, and M visa classifications restrict an individual's capacity to establish domicile in the United States.

lawfully present in the United States during that time. Individuals granted deferred action are not precluded by federal law from establishing domicile in the U.S."[8]

C. Capacity of Other Nonimmigrants to Establish Domicile

Although Supreme Court jurisprudence is clear with respect to the above-discussed nonimmigrant statuses, there is no such clarity for individuals who neither hold a visa subject to a statutory restriction on intent to reside in the United States, nor hold any valid immigration status. This inquiry is important because many children who qualify for DACA may be financially dependent upon undocumented parents.[9] Generally, there is no federal statute or traditional legal principle that would inhibit the capacity of a non-citizen to establish domicile in a state, regardless of whether they are lawfully present. The Supreme Court addressed this issue indirectly in its holding in *Plyler v. Doe*, stating that "illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State."[10] Not surprisingly then, several states have determined that undocumented persons in fact can establish domicile within their borders.[11] A review of applicable authorities suggests that, like the students in *Elkins v. Moreno*, the determination as to whether undocumented persons have the capacity to establish domicile for purposes of postsecondary education benefits in Washington is "purely a matter of state law."[12]

There is no prior long-standing interpretation of the residency statute that addresses the capacity of undocumented persons to establish domicile in Washington under state or federal law. Washington case law has rarely discussed immigration status with respect to domicile. In one of the few cases to directly address the issue, *Gunderson v. Gunderson*, Division I of the Court of Appeals held that:

> [A]fter examining cases from other states, we have concluded that Lorraine's immigration status is not dispositive of her domiciliary intent. 'It is not necessary for the courts of this state to carry out immigration policy by denying nonimmigrant aliens a judicial forum when they otherwise meet domiciliary

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[8] http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

[9] RCW 28B.15.012(2)(b) and (d) both require consideration of parental domicile.

[10] *Plyler v. Doe*, 457 U.S. 202, 227n22 (1982).

[11] *See, e.g.*, *Matter of Marriage of Pirouzkar*, 626 P.2d 380, 383-84 (Ore. 1981); *Bustamante v. Bustamante*, 645 P.2d 40, 42 (Utah 1982); *St. Joseph's Hosp. & Med. Ctr. v. Maricopa Cnty.*, 688 P.2d 986, 991-93 (Ariz. 1984); *Intermountain Health Care, Inc. v. Bd. of Comm'rs of Blaine Cnty.*, 707 P.2d 1051, 1054-55 (Idaho 1985); *Garcia v. Angulo*, 644 A.2d 498, 504 (Md. 1994); *Matter of Guardianship of Lafontant*, 617 N.Y.S.2d 292, 292-93 (N.Y. 1994); *Caballero v. Martinez*, 897 A.2d 1026, 1033 (N.J. 2006); *Cervantes v. Farm Bureau General Ins. Co. of Michigan*, 272 Mich.App. 410, 726 N.W.2d 73 (Mich.App. 2006); *Padron v. Padron*, 641 S.E.2d 542, 543 (Ga. 2007); *Munoz-Hoyos v. de Cortez*, 207 P.3d 951, 953 (Colo. App. 2009); Tenn. Op. Atty. Gen. No. 14-84 (Sept. 16, 2014).

[12] *Elkins*, 435 U.S. at 668.

> requirements and when they are subject to the courts of this state for other purposes.' . . . 'A visa is a document of entry required of aliens by the United States Government and is a matter under the control of the Government. It has little relevance to the question of domicile.' We find these cases persuasive and hold that domicile for purposes of dissolution does not depend on federal immigration laws.[13]

Although *Gunderson* is an unpublished case, it reflects how a court would likely approach the application of immigration law to domicile determinations for undocumented persons. Applying these principles to DACA students and their parents, such individuals are likely not precluded from establishing domicile in Washington.

3. DACA Students and the Definition of Nonresident Student Under RCW 28B.150.012(3)(b)

It has been suggested that the CBS eligibility criteria should take into account the definition of "nonresident student" found in RCW 28B.15.012(3). The CBS statute expressly incorporates only a portion of the residency statute, RCW 28B.15.012(2)(a)-(d).[14] If a statute's meaning is plain on its face, then a court must give effect to that plain meaning as an expression of legislative intent.[15] Thus, on its face, one would argue that it is not necessary to read any further than RCW 28B.15.012(2)(a)-(d) to determine whether an individual meets the "resident student" criteria. Nonetheless, one could argue that the legislature's definition of nonresident student is necessary to give full context to an individual's eligibility for residency under (a)-(d). Under this interpretation a non-citizen student is eligible for residency only if they also meet an exception to the definition of nonresident student.

In this case, we need not definitively resolve whether the definition of "nonresident student" should be read into the CBS statute because the result is the same with respect to the eligibility of DACA students.

> The term "nonresident student" shall mean any student who does not qualify as a "resident student" under the provisions of this section and RCW 28B.15.013. Except for students qualifying under subsection (2)(e) or (m) of this section, a nonresident student shall include . . . (b) A person who is not a citizen of the United States of America who does not have permanent or temporary resident status or does not hold "Refugee-Parolee" or "Conditional Entrant" status with the United States citizenship immigration services *or is not otherwise permanently*

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[13] *Gunderson v. Gunderson*, 123 Wn. App. 1035 (unpublished) (discussing domicile in the context of a marital dissolution) (quoting *Dick v. Dick*, 15 Cal.App.4th 144, 18 Cal.Rptr.2d 743 (1993)).

[14] In a different financial aid statute, the legislature incorporated all of the residency statute, rather than a subset, demonstrating that it understands the distinction. See RCW 28B.710.010(8), "'Resident student' has the same meaning as provided in RCW 28B.15.012."

[15] *Dept' of Ecology v. Campbell & Gwinn, LLC.*, 146 Wn.2d 1 (2002).

> *residing in the United States under color of law* and who does not also meet and comply with all the applicable requirements in this section and RCW 28B.15.013.

RCW 28B.15.012(3)(b) (italics added).

Of particular interest in the listed exceptions is the italicized phrase "permanently residing in the United States under color of law," often referred by its acronym "PRUCOL", which was added to the residency statute in 1987.[16] Neither the legislature nor Washington courts have defined what this phrase means, though it has been defined in other federal and state jurisdictions. For example, a Social Security Administration (SSA) regulation states:

> (1) General. We will consider you to be permanently residing in the United States under color of law and you may be eligible for SSI benefits if you are an alien residing in the United States with the knowledge and permission of the Immigration and Naturalization Service and that agency does not contemplate enforcing your departure. The Immigration and Naturalization Service does not contemplate enforcing your departure if it is the policy or practice of that agency not to enforce the departure of aliens in the same category or if from all the facts and circumstances in your case it appears that the Immigration and Naturalization Service is otherwise permitting you to reside in the United States indefinitely. We make these decisions by verifying your status with the Immigration and Naturalization Service following the rules contained in paragraphs (b) through (e) of this section.[17]

The regulation further provides for seventeen categories of statuses which qualify as permanently residing in the United States under color of law for purposes of SSI benefits. See attachment for reference.

Federal courts outside of the Ninth Circuit have addressed the meaning of this phrase on several occasions. In *Holley v. Lavine*, the Second Circuit Court of Appeals addressed what constitutes "permanent" residence within the meaning of the phrase.[18] Citing to the definition of "permanent" found in the Immigration and Naturalization Act, the Court held that "[t]he term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law."[19] *In Berger v. Heckler*, the Second Circuit Court of appeals addressed the Secretary of

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[16] 1987 c 96 § 1.

[17] 20 C.F.R. § 416.1618(a). It should be noted that the name of the Immigration and Naturalization Service has changed to the United States Citizenship and Immigration Service.

[18] *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977).

[19] *Id.* at 850 (citing 8 U.S.C. § 1101(a)(31)).

Health and Human Service's duty to promulgate regulations giving effect to the phrase found in 42 U.S.C. §1382c(a)(1)(B).[20]

The secretary contended that only those with a specifically worded letter from immigration authorities could qualify as permanently residing in the United States under color of law.[21] Rejecting the secretary's argument, the court held that "the phrase, '[permanently residing] under color of law,' is designed to be an open vessel—to be given substance by experience. We agree with the District Court's conclusion that the 'color of law' provision is inherently elastic."[22] Ultimately, the court ordered the secretary to promulgate amendments to regulations, procedures, and guidelines to include an appropriately flexible definition of "permanently residing under color of law," but stopped short of implementing its own definition of the phrase.[23] However, in the later case of *Lewis v. Thompson*, the court recognized that the phrase "include[s] at least those aliens who are residing in the United States with the INS's knowledge and permission and whom the INS does not contemplate deporting."[24] Other state courts have similarly interpreted the phrase to include a variety of situations where an individual is in the country with the knowledge of federal immigration authorities who do not contemplate enforcing the individual's departure.[25]

Given the elastic, ever-changing nature of federal immigration law and the elastic nature of the phrase itself, it is likely that "permanently residing in the United States under color of law," which is one of several exceptions to the definition of nonresident that are found in RCW 28B.150.012(3)(b), would be interpreted by Washington courts in a way that is consistent with federal regulations and court opinions. Significantly, we are unable to find any evidence that the legislature had any alternative meaning for the phrase when adding it into the residency statute along with other references to federal immigration status. In short, it is very likely that DACA students meet the exception to the definition of nonresident student. USCIS defines "deferred action" within the DACA context as follows:

> Deferred action is a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion. For purposes of future inadmissibility based upon unlawful presence, an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect. An individual who has received deferred action is

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[20] *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985).

[21] *Id.* at 1575.

[22] *Id.* at 1574-75.

[23] *Id.* at 1580.

[24] *Lewis v. Thompson*, 252 F.3d 567, 571-72 (2d Cir. 2001). It should be noted that the name of the INS has since been changed to USCIS.

[25] *See, e.g.*, *Gillar v. Employment Div.*, 300 Or. 672, 717 P.2d 131 (Ore. 1986); *Lapre v. Dep't of Employment Sec.*, 513 A.2d 10, 12 (R.I. 1986); *Industrial Comm'n v. Arteaga*, 735 P.2d 473 (Colo. 1987); *Dep't of Health & Rehabilitative Servs. v. Solis*, 580 So. 2d 146 (Fla. 1991); *Castillo v. Jackson*, 594 N.E.2d (Ill. 1992); *Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085 (N.Y. 2001).

> authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer lawful status upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.[26]

DACA is only one form of deferred action. Individuals in DACA status receive a letter of decision from USCIS which indicates they have been granted deferred action, as well as a separate employment authorization document if applicable.[27] Thus, if an individual has DACA status, USCIS is aware that they are in the country, and is allowing them to remain, although it does not confer them lawful status. Furthermore, the fact that USCIS has indicated that individuals in DACA status are able to establish domicile within the United States, means that these individuals have the legal capacity to form the intent to permanently reside in the United States, and thus in Washington State.[28] This interpretation is also supported by the fact that the states of California and New York have determined that DACA students qualify as "PRUCOL" for purposes of state Medicaid statutes.[29] For those reasons, Washington courts would likely hold that DACA students are Washington residents for purposes of the CBS eligibility statute, because they qualify for the "permanently residing under color of law" exception to the definition of nonresident student in the Washington State residency statute.

CONCLUSION

Under either of the plausible interpretations of the College Bound Scholarship eligibility statute, DACA students are capable of meeting the residency portion of the CBS eligibility requirements, and should not be treated as ineligible for CBS solely because they hold DACA status.

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Attachment: 20 C.F.R § 416.1618

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[26] http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

[27] http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

[28] *See, e.g., Sasse v. Sasse*, 41 Wn.2d 363, 366, 249 P.2d 380 (domicile necessarily includes an intent to permanently remain).

[29] *See* GIS 13MA/011: Children's Health Insurance Program Reauthorization Act (CHIPRA) Expanded Coverage for Certain Qualified and PRUCOL Aliens, N.Y. Dep't of Health, *available at* http://www.health.ny.gov/health_care/medicaid/publications/gis/13ma011.htm; *See also* California Dep't of Health Care Services, Medi-Cal Eligibility Division Information Letter No. I 14-45, August 6, 2014, *available at* http://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/MEDIL2014/MEDILI14-45.pdf