



# Higher Ed Immigration Policy Guide

*Current and upcoming immigration policies impacting the higher ed community*

# DACA

## “Deferred Action for Childhood Arrivals” Executive Order (2012) DACA Court cases related to the September 5, 2017 rescission of DACA Dream Act legislation and other legislative proposals

### SUMMARY

On September 5, 2017, the Trump Administration terminated the DACA program, putting 800,000 hardworking young people at risk of losing their work authorization and being deported. Since then, DACA recipients have been living court case to court case, under constant threat of losing their protections. Only Congress can remedy this uncertainty by passing a permanent legislative solution.

For now, USCIS is accepting and processing applications for DACA renewals, including those for current DACA recipients whose protections expire in more than 150 days or applications from individuals who previously had DACA benefits. No new or initial applications are being accepted for individuals seeking to apply for DACA for the first time, including high school students who would now be aging into the program (see [eligibility criteria](#)).

**It's strongly suggested that eligible individuals apply to renew their DACA as soon as possible.**

### IMPACT ON HIGHER EDUCATION

DACA has allowed approximately 800,000 undocumented youth to access more affordable higher education, work opportunities, driver's licenses, bank accounts, professional and occupational licenses (in some states), and more. For students, alumni, staff, faculty, and their families and who rely on it, loss of DACA [would be devastating](#) for individuals as well as across campuses and across the entire country. Additionally, it would result in [significant losses to the economy](#).

An end to the DACA program would lock tens of thousands of students out of in-state tuition or the ability to access higher education at all. It would also strip individuals of their work authorization, raising the cost of higher education and causing some students to take longer to graduate, or forcing them to drop out entirely.

[Students' ability to pay in-state tuition will be impacted](#) in Massachusetts, Ohio, and Virginia. They may be barred from even accessing higher education in Alabama and South Carolina, as well as at certain universities in Georgia. In-state tuition could also be denied for previous DACA recipients in other states without tuition equity policies.

Recipients will also lose access to driver's licenses in a majority of states, impacting their ability to commute to school. Few states [make driver's licenses available to all undocumented residents](#) or have passed proactive legislation that will allow DACA recipients to retain their licenses even if the DACA program is ended.

# DACA (cont.)

## TIMELINE

### September 5, 2017

The Trump Administration repeals DACA, gives Congress 6 months to act.

### January - April 2018

Court-issued injunctions in California, New York, and DC compel the federal government to continue accepting DACA renewal applications. First-time applicants remain barred from submitting applications.

### February - June 2018

Multiple efforts in Congress to address legislative protections for Dreamers fail, including votes in the Senate and a Republican-led effort in the House of Representatives via a discharge petition.

### August 2018

Texas-based District Judge Andrew Hanen rules against Ken Paxton's Texas-led lawsuit; denies states' request to end DACA while suggesting that the DACA program could still be found unconstitutional. Plaintiffs in the DC lawsuit drop their request to re-open DACA to new applicants.

### October 2018 and Beyond

Multiple cases are still moving forward, including appeals, with potential to advance as high as the Supreme Court.

### November 2018 - Two significant developments:

First, the Department of Justice (DOJ) took an unusual step in petitioning for [certiorari](#) to the Supreme Court to bypass three Federal Courts of Appeals. This filing shows the Department of Justice is moving ahead to what they promised two months ago: to "take every lawful measure" to terminate the DACA program.

A few days later, the Ninth Circuit issued its ruling in the pending DACA appeal before it, upholding the lower court's decision finding the termination of DACA unlawful, and affirmed the lawfulness of the preliminary injunction.

The Supreme Court will announce their decision to accept or deny DOJ's cert petition in early 2019. If the Supreme Court accepts the petition, oral arguments will occur in April 2019, with a ruling on whether the Administration's termination of DACA was lawful or not expected in June 2019.

[Follow NILC for timely updates](#) on pending cases.

## RESOURCES

[Informed Immigrant](#)

[Go Fund Me](#) - Help DACA recipients renew their applications. If you are a DACA recipient, set up your own fundraiser.

Presidents' Alliance [FAQs](#) for campuses

[ACE Protect Dreamers Higher Ed Coalition](#)

[HACU](#) DACA resources

[NILC](#) Educational resources

[Niskanen Center](#) FAQs on Immigration

[My Undocumented Life](#) information for undocumented students

[United We Dream](#) resources

[ULead Network Map](#): State Policies

[Immigrants Rising](#)

[TheDream.US](#) resources

Migration Policy Institute (MPI) analyzed how the [Spring 2018 Senate and June 2018 House](#) legislative proposals related to DACA and the Dream Act would impact undocumented young people.

# PUBLIC CHARGE

## “Inadmissibility on Public Charge Grounds” proposed regulations

### SUMMARY

The proposed rule would expand the definition of “public charge” to immigrants or nonimmigrants who receive one or more public benefits (in contrast to the current definition which refers to a person who is considered likely to become **primarily dependent** on the government for assistance). The new definition significantly expands it to include not only cash assistance for basic income assistance, but also Non-Emergency Medicaid, SNAP/Supplemental Nutrition Assistance Program (formerly food stamps), Medicare Part D Low Income Subsidy, and Housing Assistance (public housing or Section 8 housing vouchers and rental assistance).

The public charge test will consider the “totality of circumstances” to determine if someone is or is likely to become a public charge, and will make it more difficult for immigrants earning incomes below 125% of the federal poverty level (FPL) to avoid scrutiny. To avoid scrutiny under the new test, a family of 4 would need to earn nearly \$63,000 annually.

For immigrants, USCIS or Dept. of State would apply the public charge test at the time of green card determination or when seeking to enter the U.S.; for nonimmigrants, including F-1 students, J-1 visitors, H-1B workers or their dependents, the public charge test would be applied when they seek to adjust, extend, or change their status (for example, an international student with F-1 status applying for an employment status).

The public charge test is not a consideration when legal permanent residents (green card holders) apply for U.S. citizenship. It does not apply for refugees, asylees, and survivors of domestic violence.

The new public charge rule will not be retroactive--it will only impact those seeking to enter the country or adjust their status after the final rule is published.

*Note: Receipt of public benefits by U.S. citizen children will not directly be a factor in a parents' public charge determination test.*

### TIMELINE

The official notice of proposed rulemaking (NPRM) was published in the [Federal Register](#) on **October 10, 2018**.

A 60 day public comment period is currently open, with the deadline of **December 10, 2018**.

DHS is required to read and consider all comment letters. Comments can be submitted at [regulations.gov](#)

### RESOURCES

[Protecting Immigrant Families](#) (PIF) campaign.

Consider submitting an institutional “Comment Letter” regarding the proposed regulations. The Presidents' Alliance, Community College Consortium for Immigrant Education, and CLASP, with input from the National Skills Coalition have collaborated to create a higher education-focused template for individual institutions to submit their own specific comment letters.

Download the [template](#).

# **PUBLIC CHARGE** *(cont.)*

## **IMPACT ON HIGHER EDUCATION**

More than a quarter of undergraduate students are immigrants or children of immigrants. Although a [majority](#) of immigrants are legal permanent residents or naturalized citizens (who would not be subject to the public charge test), the proposed rules would still affect many students and families.

Researchers estimate that the proposed changes will create significant and lasting harm to the health and well-being of immigrant students, children, parents, and families, as legally present immigrants decide to forego enrollment for themselves and/or their families out of fear of harming their future eligibility to stay in U.S.

While Pell Grants and other non-cash benefits that provide education, child development, employment, and job training are not included in the specified public benefits, the proposed regulations will diminish prospects for immigrant students' success; and deter enrollment and retention in post-secondary programs, including English Language Learners (ELL), job-training, and certification programs.

## **OTHER CONCERNS FOR HIGHER EDUCATION**

Research shows that postsecondary education boosts economic mobility, improves lives, and helps the economy, yet the proposed rule would deter immigrant youth from enrolling in higher education.

The proposed rule would apply to international students, visitors, and workers seeking to extend or adjust their status.

The proposed rule could affect changes in the U.S. talent pipeline that would ultimately undermine our nation's global competitiveness.

The complex regulations under the proposed rule would create significant administrative burdens on institutions and college advisors, as well as increased uncertainty about use of braided funding for education and career pathway programs.

# UNLAWFUL PRESENCE FOR F, J, AND M NONIMMIGRANTS

## SUMMARY

USCIS has implemented revised guidance for how “unlawful presence” (ULP) will be counted for F and M foreign students and J exchange visitors.

As of **August 9, 2018**, USCIS began counting unlawful presence for F and M students and J exchange visitors at the moment they violate or fall out of status (rather than at the point USCIS denies a benefits application on the basis of a status violation or an immigration judge determines a status violation). Even if the violation is discovered years down the line, unlawful presence will be calculated retroactively, meaning students and exchange visitors (and any of their dependants) could unknowingly accrue unlawful presence, and be subject to 3- or 10-year bars for reentry into the United States.

## IMPACT ON HIGHER EDUCATION

This policy will have a substantial impact on those in F, J, and M status; it could impose 3- and 10-year reentry bars on thousands of international students, researchers, medical residents, and others who inadvertently fall out-of-status. The policy is expressly and purposefully targeting higher education and research institutions for this enhanced immigration enforcement, even though F, M, and J categories are already highly tracked in SEVIS. It impacts not only members of campus communities, but also imposes new, unpredictable liability on higher education institutions.

## TIMELINE

### In effect (as of August 9)

#### October 2018

Four colleges [filed a federal suit](#) against U.S. Citizenship and Immigration Services in the U.S. District Court for the Middle District of North Carolina to challenge the unlawful presence policy.

## RESOURCES

NAFSA has provided a series of [resources](#) for campuses regarding ULP and other recent guidance

NAFSA/Connecting our World provides a range of [Advocacy resources](#) to support international students

Higher education, business, immigration [August letter](#) to the Senate Judiciary Committee regarding unlawful presence and other sub-regulatory policy changes

# NOTICE TO APPEAR (NTA) *released on July 5* REQUESTS FOR EVIDENCE (RFE) & NOTICE OF INTENT TO DENY (NOID) *released on July 13*

Policy guidance memos (sub-regulatory)  
Policy memo (sub-regulatory)

## SUMMARY

A Notice to Appear (NTA) is the first step in the deportation process. New policy guidance announced this past July requires USCIS to issue NTAs with unprecedented frequency, undermining its focus on helping immigrants with benefits adjudication. The NTA guidance could lead significant numbers of immigrants who are denied a benefit to end up in immigration court in deportation proceedings. This will put individuals' lives on hold, and may subject them to being barred from the U.S. for 3 or 10 years as a result of court backlogs.

Experts estimate that, if fully implemented, the new policy could result in as many as 260,00 NTAs issued annually, nearly tripling current figures.

Additionally, in July, USCIS released new guidance on Requests for Evidence (RFE) and Notices of Intent to Deny (NOID), which establishes that USCIS has the authority to deny applications and petitions without first issuing a RFE or NOID.

Prior to the change in the RFE policy, those requesting immigration benefits and those filing for them were able to provide additional or clarifying information in support of benefits requests. The new RFE guidance magnifies USCIS's authority to deny applications and petitions without RFEs. This could lead to an increase of denials without giving the petitioner or applicant an opportunity to provide clarifying information even when the evidence initially submitted fails to establish eligibility for the benefit requested.

Denial without a NOID forecloses the option for the applicant to seek other legal immigration status that may be available to avoid falling out of status and potentially accruing unlawful presence.

## IMPACT ON HIGHER EDUCATION

The new NTA guidance, especially when compounded with the unlawful presence policy (detailed above), will have significant impacts on nonimmigrant students seeking to change their status or apply for a new visa.

As H-1B denials remain on the rise, more students are likely to be issued NTAs after being rejected from the H-1B lottery. In addition, the number of NTAs issued to international students is expected to increase due to the new unlawful presence policy. This is because those in F, J, and M status will be counted as accruing unlawful presence as soon as a status violation occurs, even if it is inadvertent. If it comes to light that an individual is deemed to be unlawfully present when seeking a new status, they almost certainly will be denied and served an NTA for failing to maintain their status.

RFEs are now common practice.

With the implementation of the new guidance, campuses will likely be negatively impacted as faculty and other personnel are denied benefits that would otherwise be granted if additional information was provided.

## TIMELINE

### In effect.

The USCIS RFE and NOID guidance went into effect on **September 11**, while the NTA guidance went into effect on **October 1**.

## RESOURCES

NAFSA has provided [resources](#) on understanding and responding to recent USCIS guidance on unlawful presence, NTAs, RFEs, and NOIDs.

[Compete America coalition letter](#) to Director Francis Cissna regarding sub-regulatory changes

# ACTIONS TO CONSIDER

## *Actions to consider to support the immigration-related needs for students, faculty, and staff in your campus community*

**Prioritize support for undocumented/Dreamer students on campus**, including providing support for undocumented student services, access to legal and financial support for DACA renewals, counseling support, and information about post-graduate opportunities. DACA recipients on campus should be informed of the critical importance of renewing their DACA as soon as possible if they have not yet done so. Consider joining an amicus brief supporting DACA, and look for national Higher Education Call-In Days to support DACA and Dreamer-related federal legislation.

**Engage at the state level** to support [policies that are beneficial to DACA recipients and undocumented students](#), including extending access to in-state tuition, financial aid, driver licenses, and professional licensure to undocumented residents, which can help undocumented students access and succeed in post-secondary education.

**Evaluate and prioritize support services** for international students on campuses, which may require more resources, a review of policy training for faculty and staff on how best to support students and respond to changing policies. Engage your international offices for faculty, staff, researchers, and students to understand the magnitude of filings with USCIS submitted by campus officials or outside counsel.

**Create a cross-campus immigration task force** (encompassing undocumented and international students (including those tracked in SEVIS and those who are not, such as H-4 students), TPS recipients, refugees, and other immigrant populations), which brings together administrators/staff, faculty, and students to share information and resources on campus, and identify emergent campus and student needs. A very useful set of policy recommendations for federal, state, and local policymakers, as well as for educational institutions, on what is needed to support undocumented/DACA students can be found in the October 2018 [TheDream.US report and survey](#).

**Collect campus-specific data and stories** about immigrant and international students, staff, faculty, and leadership as a key part of gaining a better understanding of how immigration policy impacts your institution. This also can be helpful as you engage in advocacy or draft opinion pieces or public statements. Writing opinion pieces or otherwise sharing the stories of the countless contributions that immigrant and international students, faculty, and staff make to your institution and broader campus community both highlights the promise and power of higher education and the importance of immigrant and international students to your education mission and success.

**Submit institutionally-specific comment letters** as the opportunity arises. Right now public commenting is open on the proposed “public charge” rule. The Presidents’ Alliance, the Community College Consortium for Immigrant Education, and the Center for Law and Social Policy have collaborated to create a higher education-focused template for individual institutions to submit their own specific comment letters. You can [access that template here](#) and read about why the proposed rule matters to the higher education community [here](#). Individuals can also visit [www.OurAmericanStory.us](http://www.OurAmericanStory.us) to submit a formal public comment on the proposed changes. Comments close on **December 10, 2018**.

# ANNOUNCED INTENDED CHANGES

## OPTIONAL PRACTICAL TRAINING (OPT)

Although not yet issued, the Administration has continued to signal that it will issue regulatory changes to the OPT program, which could result in the [reduced](#) availability of OPT and/or STEM OPT for international students. OPT already has faced challenges. Last spring, USCIS posted changes on their website that reduced eligible STEM OPT sites, leading to a lawsuit filed in July; in August, USCIS reversed course and updated their website to provide new [clarifications](#) regarding the OPT extension. There is also an ongoing court case brought by the “Washington Alliance of Technology Workers” (Washtech), represented by an anti-immigration group, Immigration Reform Law Institute, that is challenging OPT which is proceeding in Federal Court. If the lawsuit by Washtech succeeds, that could end all OPT, including STEM OPT. On October 18, the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Information Technology Industry Council (ITIC) [filed a motion](#) to intervene in the Washtech case, citing the importance of the OPT program as a “crucial bridge” between the student visa status and employment and longer term immigration status, and that their interests were not “adequately represented” by the government, which has already taken steps to reconsider a revision of the program.

## H-4 VISA WORK AUTHORIZATION

The Administration has indicated it still plans to rescind the ability of spouses of H-1B visa holders to apply for work authorization, including those on our campuses (see this American Immigration Council [fact sheet](#) on H-4 Visas). Advocates do not expect to see this regulatory change introduced until early 2019.

## H-1B VISA RESTRICTIONS

The Department of Homeland Security (DHS) has signaled its intention to enact a new rule (regulatory change) that would limit who would qualify for an H-1B visa, and restrict which companies would be eligible to hire H-1B workers. This is expected to disproportionately impact employers and entry-level foreign national workers, including international students, as the H-1B is one of the only accessible avenues for international students and highly-skilled foreign nationals to work long-term in the U.S. Advocates do not expect that to see this regulatory change introduced until early 2019.

# OTHER CHANGES IMPACTING HIGHER ED

## SEVP FEE INCREASES

SEVP (Student and Exchange Visitor Program) [posted a notice in the summer of 2018](#) of increased fees for international students and visitors (F, M, J visas) as well as for institutional certifications. This regulatory change includes an increase from \$200 to \$350 for F and M visas, an increase in the initial school certification fee that SEVP charges new F and M schools, and adds a new \$1,250 fee for F and M school recertification.

## VISA RESTRICTIONS FOR CHINESE STUDENTS

Starting in June 2018, the State Department has been [restricting visas for Chinese graduate students](#) studying in sensitive research fields to one year, while offering them the chance to reapply every year. Chinese nationals were previously able to apply for five-year visas. This is a sub-regulatory change.

## SUSPENSION OF PREMIUM PROCESSING

On August 28, 2018, USCIS announced the extension of the April 2, 2018 suspension of premium processing for H-1B cap-subject petitions until at least February 19, 2019. The suspension of premium processing and backlog in administrative processing has meant that some students in OPT have faced the possibility of their work authorization ending before their H-1B authorization begins.

## TEMPORARY PROTECTED STATUS (TPS)

TPS, a form of humanitarian protection provided to individuals who cannot return to their home countries due to violent conflict or natural disaster, provides recipients temporary refuge in the U.S., along with work authorization. The U.S. currently provides TPS for over [300,000 foreign nationals](#). The Administration is declining to renew TPS protections for many countries as the programs [near their expiration dates](#). On October 3, 2018, a federal district judge in San Francisco [issued](#) a preliminary injunction temporarily halting the Administration's termination of the program. The government appealed the ruling, but meanwhile is complying with the injunction, and TPS holders will retain their status while the preliminary injunction is in place (See the Catholic Legal Immigration Network's [summary](#) of the new DHS orders). Many TPS recipients have been in the country for a decade or more. They are a crucial part of the workforce, including at many colleges and universities and have U.S. citizen children in our higher education system.

## REFUGEE ADMISSION

In September, the Administration announced that the new FY2019 refugee ceiling will be set at 30,000. This is the lowest proposed cap since the creation of the U.S. Refugee Admissions Program in 1980. Refugee students and scholars historically have greatly enriched higher education in the United States, and colleges and universities historically have been integral environments for welcoming, educating, and integrating refugees.

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*The non-partisan Presidents' Alliance on Higher Education and Immigration brings together college and university leaders dedicated to increasing public understanding of how immigration policies and practices impact our students, campuses and communities, and supporting policies that create a welcoming environment for undocumented, immigrant, and international students. The Alliance is comprised of over 420 presidents and chancellors of public and private colleges and universities, serving over four million students in 41 states, D.C. and Puerto Rico.*

*FWD.us is a bipartisan political organization that believes America's families, communities, and economy thrive when more individuals are able to achieve their full potential. For too long, our broken immigration and criminal justice systems have locked too many people out of the American dream. Founded by leaders in the technology and business communities, we seek to grow and galvanize political support to break through partisan gridlock and achieve meaningful reforms. Together, we can move America forward.*