IN-STATE TUITION AND SCHOLARSHIPS FOR UNDOCUMENTED STUDENTS: WHAT INSTITUTIONS SHOULD KNOW[1]

September 3, 2025

Since coming into office, the Trump administration has increasingly targeted undocumented students and the colleges and universities seeking to enroll and support them. This includes efforts to roll back in-state tuition access and scholarships for undocumented students, including filing lawsuits against states with such laws, restricting eligibility to adult education and career and technical education (CTE) classes, and opening federal civil rights investigations into institutions that offer scholarships to DACA recipients and undocumented students. In response to these developments, this issue brief explains the legal and policy foundations that allow states to offer in-state tuition rates to undocumented students and certain scholarship opportunities.[2]

Overview

This brief covers the relevant federal statutory framework, the constitutional principles of federal preemption, and the longstanding role of states in governing education. The brief also outlines the federal civil rights laws that relate to scholarships for undocumented students, explaining what Title VI and Section 1981 cover, how these laws define and treat race, national origin, and citizenship, and why those distinctions are important when setting scholarship eligibility. Before delving into the specifics, we outline the federal laws discussed in this issue brief along with the key takeaways for institutions.

[1] This resource was developed by the Presidents' Alliance in collaboration with Madeleine Rodriguez and Kristyn Defilipp of **Foley Hoag LLP.** It is intended for informational and policy planning purposes only and does not constitute specific legal advice. Institutions or organizations should consult legal counsel to address their unique legal issues. For further questions, please contact the Presidents' Alliance at **info@presidentsalliance.org.**

[2] The U.S. Department of Education **notice** restricting access to federal benefits for adult education and career and technical education is not covered in this memo. That notice specifically relates to the interpretation of "federal public benefit" under a separate section of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). To learn more about that notice and its implications, see NILC's ***Overview of Immigrant Eligibility for Federal Programs*** and the Presidents' Alliance **statement** in response to the notice.

Relevant Federal Laws Discussed in This Issue Brief

Law/Provision	Citation	Core Rule
IIRAIRA (Illegal Immigration Reform and Immigrant Responsibility Act	8 U.S.C. § 1623 (1996)	Prohibits states from granting postsecondary education benefits "on the basis of residence" to undocumented immigrants unless the same benefit is also available to all U.S. citizens, regardless of residency.
PRWORA (Personal Responsibility and Work Opportunity Reconciliation Act)	8 U.S.C. § 1621(d) (1996)	Allows states, through affirmative post-1996 legislation, to provide certain public benefits (in-state tuition) to undocumented immigrants.
Title VI of the Civil Rights Act	Civil Rights Act of 1964, 42 U.S.C. § 2000d	Prohibits discrimination based on race, color, or national origin in programs receiving federal funds.
Section 1981 of the Civil Rights Act	Civil Rights Act of 1866, 42 U.S.C. § 1981	Prohibits discrimination in making and enforcing contracts on the basis of race, color, or ethnicity.

Key Takeaways

In-State Tuition Laws

- Federal law sets boundaries, not a complete ban. While 8 U.S.C. § 1623 restricts residency-based eligibility, Section 1621(d) explicitly allows states to extend in-state tuition to undocumented students through affirmative legislation.
- The federal government has taken the position that certain in-state tuition laws are preempted by federal law, specifically the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 8 U.S.C. s. 1623. This position was first expressed in the context of an April 28 Executive Order issued by President Trump. But the April 28 Executive Order, standing alone, does not and cannot invalidate state laws.
- The question of preemption is complex and specific to the law and facts of a particular case. Even if one federal court decides that one particular state's law is invalid, a different federal court examining a different state law may reasonably come to a different conclusion.
- Laws remain valid until overturned. Therefore, until and unless an in-state tuition law is invalidated by a court (or repealed and/or superseded by the state legislature and/or relevant administrative body), it is in effect and operative.

Scholarships

- Scholarships based on immigration status are permissible. Title VI and Section 1981 do not prohibit eligibility criteria solely tied to immigration or citizenship status, provided they do not explicitly or implicitly discriminate on the basis of race, ethnicity, national origin, or shared ancestry.
- National origin and citizenship are distinct. National origin refers to a person's place of birth or ancestry, while citizenship describes legal status. Federal civil rights laws address national origin but do not include citizenship or immigration status.

In-State Tuition for Undocumented Students

Federal Efforts to Restrict Access to In-state Tuition Rates

On April 28, 2025, President Trump issued an executive order: "Protecting American Communities from Criminal Aliens" (the "EO"). Section 5 of the EO, entitled "Equal Treatment of Americans," directs the Attorney General to identify and take action to stop the enforcement of state laws "favoring aliens over any groups of American citizens," and specifically invokes 8 U.S.C. § 1623 to target state laws that provide in-state tuition eligibility to resident undocumented students but not to non-resident citizen students.

Sec. 5. Equal Treatment of Americans

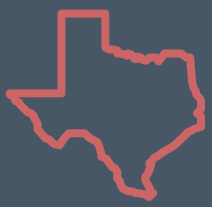
The Attorney General, in consultation with the Secretary of Homeland Security and appropriate agency heads, shall identify and take appropriate action to stop the enforcement of State and local laws, regulations, policies, and practices favoring aliens over any groups of American citizens that are unlawful, preempted by Federal law, or otherwise unenforceable, including State laws that provide in-State higher education tuition to aliens but not to out-of-State American citizens that may violate 8 U.S.C. § 1623 or that favor aliens in criminal charges or sentencing.

8 U.S.C. § 1623

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

DOJ Challenges

Following the release of the EO, the Department of Justice filed lawsuits against five states offering access to in-state tuition rates to eligible undocumented students: Texas, Minnesota, Kentucky, Oklahoma and Illinois (as of September 3rd, 2025).

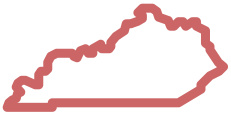


Texas

The Texas legislative session ended on June 2, with efforts to repeal the Texas Dream Act ultimately failing. Two days later, on June 4, the DOJ filed a **lawsuit**, joined by the state in a motion to permanently block the law. Within hours, a district judge issued an **order** halting the 24-year-old policy, which had granted eligible undocumented students access to in-state tuition rates and state financial aid.

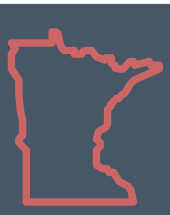
On June 11, the Mexican American Legal Defense and Educational Fund (MALDEF) filed a motion to intervene on behalf of impacted students. A second motion to intervene was also filed on June 24 by Lynn Pynker Hurst & Schwegman, Texas Civil Rights Project, the National Immigration Law Center (NILC), ACLU TX and Democracy Forward on behalf of the Austin Community College District, La Union Del Pueblo Entero, and Oscar Silva.

On August 15, the district court judge denied both motions to intervene. Both parties filed notices of appeal with the Fifth Circuit Court of Appeals.



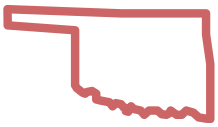
Kentucky

On June 17, the DOJ filed a **lawsuit** challenging the Kentucky Council on Postsecondary Education's policy that provides access to in-state tuition rates to eligible undocumented students. On August 22, 2025, the Kentucky Council on Postsecondary Education and the DOJ filed a **joint motion for a consent judgment** agreeing to end in-state tuition access for undocumented students. MALDEF filed a **motion to intervene** the same day **on behalf of a student association.** Litigation is ongoing.



Minnesota

On June 25, the DOJ filed a **lawsuit** challenging the state's policy that provides access to in-state tuition rates for eligible undocumented students and the North Star Promise Scholarship program. The state of Minnesota is defending its law and litigation is ongoing.



Oklahoma

On August 5, 2025, the DOJ filed a **lawsuit** challenging Oklahoma's state law that provides access to in-state tuition rates to eligible undocumented students. Within hours, Oklahoma's Attorney General supported the legal challenge and joined a motion to end the policy. On August 7, the magistrate judge recommended granting the joint motion and entering an order to strike down the law, allowing three days for any objections to be filed. The **order** eliminating access to in-state tuition was issued by the court on August 29, 2025.

Illinois

On September 2, 2025 the DOJ **filed** a lawsuit challenging Illinois's state law that provides access to in- state tuition rates and state financial aid to eligible undocumented students. The state is expected to defend its policy

Federal Statutory Framework

States have historically held broad authority over education policy, including the power to set tuition classifications for their public colleges and universities. While federal immigration law imposes some restrictions on public benefits for undocumented immigrants, it does not eliminate state discretion in this area.[3] Understanding why states can lawfully enact in-state tuition laws requires a look at the interplay between federal statutes, constitutional principles, and the longstanding role of states in higher education governance.

Two provisions of federal law are central to understand how states can structure in-state tuition policies for undocumented students. Together, they define both the limitations and the opportunities available to states.

8 U.S.C. § 1623

This section, enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), places limits on state authority to offer certain postsecondary education benefits to undocumented immigrants. It states that an undocumented individual cannot be eligible for a postsecondary education benefit "on the basis of residence within a State" unless the same benefit is available to all U.S. citizens, regardless of where they reside. In practice, this means that if a state bases in-state tuition eligibility solely on residency, it risks having that law preempted under federal law. Section 1623 functions as an express preemption clause because it contains clear language restricting certain state policies.

8 U.S.C. § 1621(d)

Also enacted in 1996 as part of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), this provision creates an explicit pathway for states to extend certain public benefits to undocumented immigrants, including in-state tuition. Under § 1621(d), a state may provide such benefits if it adopts a law after August 22, 1996, that "affirmatively provides" for undocumented immigrants' eligibility.

[3] As noted above, this brief does not cover the Department of Education notice restricting access to federal benefits for adult education and career and technical education. As of the writing of this brief, that notice, along with others issued regarding federal public benefits, is currently in litigation. The government has agreed to stay, or pause, any enforcement or application of the challenged notices in plaintiff states through September 3, 2025 (State of New York, et al., v. USDOJ, et al., 25-cv-00345 (D.R.I.)). In addition, the government has stipulated that, regardless of the outcome of the pending litigation, including any appeal, it will never enforce or apply the PRWORA notices with respect to conduct, funds expended, or any other actions taken in reliance of the stipulation prior to September 4, 2025.

Preemption Principles and State Authority

Under the Supremacy Clause of the U.S. Constitution, Congress can expressly preempt state law by including clear statutory language that overrides state authority.

Section 1623 explicitly prohibits offering postsecondary education benefits to undocumented students "on the basis of residence" unless the same benefit is also available to "a citizen or national of the United States" regardless of in-state residence. As a result, state laws that base eligibility solely on residency (i.e., where a person resides) may fall within the scope of this prohibition, while laws that rely on other criteria (such as high school graduation or attendance) may be evaluated differently.

8 U.S.C. 1621(d) and the Preemption Framework

In addition to the preemption considerations discussed above, it is important to examine how 8 U.S.C. § 1621(d) interacts with state in-state tuition laws. Alongside PRWORA's general restrictions on undocumented immigrant access to certain public benefits, § 1621(d) provides that a state "may" make undocumented immigrants eligible for specific state or local public benefits if the eligibility is established "through the enactment of a State law after [August 22, 1996] which affirmatively provides for such eligibility." [4]

Some states point to § 1621(d) as a basis to defend their in-state tuition laws, particularly where they contend that their statutes do not fall within § 1623's prohibition on benefits "on the basis of residence." In cases considering the applicability of § 1621(d) , courts have examined what it means for a state law to "affirmatively provide" eligibility under § 1621(d). Courts have interpreted this to mean that the state law does not need to create a new benefit or to explicitly reference the federal statute in order to meet the "affirmatively provides" standard, but the law must go beyond silence or incidental inclusion to expressly identify eligibility.[5]

Practical and Legal Realities[6]

A state's in-state tuition law remains valid and enforceable unless and until it is repealed, superseded by new legislation, or struck down by a court with appropriate jurisdiction. Executive orders or litigation threats from the federal government do not, by themselves, invalidate these state laws. Court outcomes in this area have been mixed, reflecting the fact-specific nature of preemption analysis and the variety of approaches states take in crafting eligibility criteria.

[4] *Kaider v. Hamos*, 2012 IL App (1st) 111109, P14.

[5] De Vries v. Regents of Univ. of Cal., 6 Cal. App. 5th 574, 595 (2016) (citing Martinez v. Regents of Univ. of Cal., 50 Cal. 4th 1277, 1295 (2010); Kaider v. Hamos, 2012 IL App (1st) 111109, P14-15)); E.M. v. Neb. HHS, 306 Neb. 1, 14 (2020).

[6] In Arizona, the Attorney General issued a **formal opinion** confirming that Proposition 308, which grants in-state tuition to certain undocumented students, is consistent with federal law. In Colorado, state officials have also **stated** that they are committed to defending the state's in-state tuition law for undocumented students.

Scholarships for Dreamers[7]

Federal Investigations into Scholarships for Undocumented Students

On July 23, 2025, the Department of Education's Office for Civil Rights (OCR) issued a **press release** announcing that it had opened "national origin discrimination" investigations into five institutions.[8]

OCR's **press release** indicates the investigations "will determine whether these universities are granting scholarships only for Deferred Action for Childhood Arrivals (DACA) or 'undocumented' students, in violation of [Title VI's] prohibition against national origin discrimination."

The investigations were opened following complaints submitted by the Legal Insurrection Foundation's **Equal Protection Project**, an organization "devoted to the fair treatment of all persons without regard to race or ethnicity."

While these complaints remain confidential, OCR identifies two bases for investigation: (1) the Trump administration's "America first" policies; and (2) Title VI's prohibition on national origin discrimination does not "permit universities to deny [American] citizens the opportunity to compete for scholarships because they were born in the United States."

[7] This section outlines relevant federal civil rights laws. Institutions should confirm whether any applicable state or local laws limit the ability to preference or otherwise confer benefits based on alienage or immigration status. States like **California**, **New York**, and **Washington** explicitly prohibit discrimination based on citizenship or immigration status.

[8] University of Louisville's Sagar Patagundi Scholarship, University of Nebraska Omaha's Dreamer's Pathway Scholarship, University of Miami's U Dreamers Program, University of Michigan's Dreamer Scholarship, Western Michigan University's WMU Undocumented/DACA Scholarship.

Relevant Federal Civil Rights Framework

Institutions may provide scholarship programs for undocumented students, including those with DACA, if the programs are consistent with federal civil rights laws. Title VI of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866 do not prohibit eligibility criteria based on immigration and citizenship status.

Two federal civil rights laws are most relevant to the design of scholarships for undocumented students, including DACA recipients.

Title VI of the Civil Rights Act of 1964

Title VI prohibits discrimination based on race, color, or national origin in programs that receive federal funding. Courts have consistently held that citizenship or immigration status is distinct from national origin. National origin refers to the country where a person was born or where their ancestors came from, while citizenship is a legal status. For this reason, Title VI does not prohibit distinctions based solely on citizenship or immigration status.

While discrimination based on immigration status alone does not violate Title VI, organizations should be mindful of situations where discrimination on the basis of citizenship or immigration status"has the purpose or effect of discriminating on the basis of national origin."[9] In other words, as with other practices that typically fall outside the purview of Title VI, organizations should not use race-neutral criteria (like citizenship) as a proxy for race, ethnicity, or national origin.[10]

Section 1981 of the Civil Rights Act of 1866

Section 1981 prohibits discrimination in the making and enforcement of contracts on the basis of race, color, or ethnicity. As with Title VI, this law does not extend to immigration or citizenship status unless those criteria are being used to indirectly target individuals based on race, ethnicity, or national origin.

[9] *Chih-Kai Liao v. Univ. of Tex. at San Antonio*, 2024 U.S. Dist. LEXIS 193318, *11 (W.D. Texas 2024).
[10] For example, in a situation where a state singled out refugees of Syrian "citizenship" or those who "last resided in Syria" for exclusion, the court concluded the program could "fairly be described as a classification based on nationality." *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 734 (S.D. Ind. 2016).

Key Distinctions Between Citizenship and National Origin

While citizenship and national origin are sometimes confused in everyday language, they are distinct concepts under federal civil rights laws.

National Origin vs Citizenship/Immigration Status

In explaining the distinction between national origin and citizenship for the purposes of the Civil Rights Act, a federal judge noted "[t]he term national origin on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."[11] Citizenship describes a person's legal status in relation to a country, such as being a U.S. citizen, a lawful permanent resident, or undocumented. Neither Title VI nor Section 1981 prohibits distinctions based solely on citizenship or immigration status.[12]

Recent Investigations and Implications

None of the five scholarships targeted by OCR's investigation violate Title VI or Section 1981. All five limit eligibility to DACA or undocumented students, without reference to race, ethnicity, or national origin.

OCR's argument that these scholarships discriminate against individuals "born in the United States" is false, as highlighted by Editorial Board opinions in both the **Wall Street Journal** and the **Washington Post**. These scholarships exclude United States citizens. U.S. citizenship is not defined by any race, ethnicity, or national origin.[13] U.S. citizens come from any racial background and an expansive number of ethnicities and national origins.

[11] *MacNamara v.Korean Air Lines*, 863 F.2d 1135, 1146–47 (3d Cir. 1988), applying *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973)

[12] Courts in a variety of jurisdictions have made this distinction clear; a person's national origin is not the same as their alienage or citizenship, and Title VI covers the former, not the latter. See *Pathria v. Univ. of Tex. Health Sci. Ctr. at San Antonio,* 531 Fed. Appx. 454, 456 (5th Cir. 2013) ("We have held that citizenship and national origin should not be conflated, and that citizenship is not a protected category under Title VI."); *Bibliotechnical Athenaeum v. Am. Univ. of Beirut,* 527 F. Supp. 3d 625, 634 (N.Y.S.D. 2021) ("[National origin] does not include citizenship or alienage . . . A federally-funded program thus can discriminate against an individual based on the country in which she chooses to live or establish citizenship."); *Warren v. United States Dep't of Educ.,* 2022 U.S. Dist. LEXIS 193536, *9 (D. Kan. 2022)
(holding that Plaintiff failed to allege facts supporting national origin discrimination beyond his U.S. citizenship because "Title VI does not list citizenship as a protected class" and "[n]ational origin discrimination, which is unlawful under Title VI, is not the same as discrimination on the basis of citizenship.")

[13] The Fourteenth Amendment of the U.S. Constitution makes this clear: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Best Practices for Structuring Scholarships for Undocumented Students

Institutions and organizations can extend eligibility for internally or externally-funded scholarships and programs using various criteria so they are inclusive of undocumented students. See the Presidents' Alliance resource, **Fellowships & Scholarships: Creating Inclusive Eligibility Requirements for Undocumented Students**. For example, TheDream.US, one of the nation's largest scholarship programs for undocumented students, opens its applications "to undocumented immigrant students with or without DACA or TPS who came to the U.S. before the age of 16 and before Nov. 1, 2019." This eligibility criteria, centered squarely on immigration status and without reference to any protected characteristics, is consistent with Title VI and Section 1981. Its criteria do not operate as a proxy for race, ethnicity, or national origin, but instead focus on ensuring access for students who are excluded from federal financial aid programs.

Conclusion

States and higher education institutions retain significant authority to design and maintain policies that expand access to higher education for undocumented students, including DACA recipients. Federal immigration law imposes certain limits, such as the residency-based restrictions in 8 U.S.C. § 1623, but it also provides a clear pathway in 8 U.S.C. § 1621(d) for extending in-state tuition through affirmative legislation.

Similarly, scholarships for undocumented students are consistent with federal civil rights laws when they are structured in line with Title VI and Section 1981. These laws prohibit discrimination based on race, color, and national origin, but they do not apply to citizenship or immigration status unless those criteria are used as a proxy for targeting a protected group.

Recent executive actions and federal investigations have increased attention on these issues, but they do not, on their own, change the law or automatically invalidate existing state statutes or institutional programs. In most cases, states and institutions are not required to make immediate changes in response to federal announcements or investigations. Instead, they can review the details of these developments, consider potential impacts, and determine whether any adjustments are necessary in light of their specific policies and circumstances.

Note: If Presidents' Alliance member institutions would like a more detailed analysis of these issues, please contact us at info@presidentsalliance.org for additional information and technical assistance.