President Machen supports helping undocumented students who came to the U.S. as children and graduated from Florida high schools to pursue a college education. The federal and state law governing this issue is complex, and the University sought advice from the Miami office of a respected law firm that is expert in immigration law, Foley & Lardner LLP. Attached is Foley & Lardner’s legal opinion—that UF is prohibited by federal law to provide out-of-state tuition waivers or instate tuition to these undocumented students (called “DACA” or Deferred Action Childhood Arrivals).*

The full paragraph on page 2 of the opinion provides a summary of Foley & Lardner’s analysis: (1) federal law prohibits state entities to provide any benefits (including a waiver of out-of-state tuition) to these undocumented students, and (2) no exception applies in Florida because the Florida legislature hasn’t enacted a statute that affirmatively provides for benefits to undocumented aliens. Also, on page 11, the opinion makes clear that the Board of Governors’ regulations require non-US citizens to fall under one of the listed categories of aliens—as well as satisfying all other requirements applicable to everyone—in order to qualify for in-state tuition; and these undocumented students are not in one of the listed categories so cannot qualify for in-state tuition. (A state law or Congress’ enactment of the DREAM Act would be required for instate tuition or waiver of out-of-state tuition.)

The opinion is long because the law is complex. For the bottom line on each part of Foley & Lardner’s analysis, see:

(1) the top of page 8 (even with the Obama Administration’s deferred action policy, no branch of federal government has deemed DACA aliens eligible for federal or state benefits and the executive branch has expressly denied such benefits to DACA aliens due to the Congressional statutory prohibition),
(2) all of page 11 (DACA students are not a class of aliens qualified for instate tuition benefits by Board Of Governors’ regulations),
(3) all of page 13 (the Florida legislature has not enacted a law that affirmatively provides for benefits to undocumented aliens so the federal prohibition against providing benefits to DACA students applies in Florida), and
(4) the bottom of page 15 and the top of page 16 (“current federal law continues to prohibit the University of Florida from granting instate tuition or out of state tuition waivers to DACA students”).

(*Through a limited waiver of privilege/attorney work product, UF agreed to provide a copy of the Foley & Lardner LLP opinion with this highlights page to those who have asked for it. With the exception of providing this document, the University of Florida retains all privileges and attorney work product on this subject.)
November 6, 2013

The attached opinion is privileged and Attorney Work Product and the University is not required to produce it pursuant to Section 119.071(1)(d)1., Florida Statutes, but is doing so as a limited waiver on this single occasion, while not waiving and expressly retaining all applicable privileges including work product.
November 4, 2013

University of Florida
Office of the Vice President and General Counsel
123 Tigert Hall
P.O. Box 113125
Gainesville, Florida 32611-3125

RE: Legality Under Federal & State Law of Providing Instate Tuition Benefits or Out of State Tuition Waivers to Students Registered Under the Deferred Action for Childhood Arrivals Program

Ladies and Gentlemen:

You have requested the legal opinion ("Opinion") of Foley & Lardner LLP concerning whether providing instate tuition or a waiver of the out-of-state portion of tuition to University of Florida students registered under the Deferred Action for Childhood Arrival ("DACA") program is lawful under existing federal and/or state law.

This Opinion is based on our interpretation, post-review, of relevant provisions of the United States ("U.S.") Immigration and Nationality Act ("INA"), Title 8 of the U.S. Code; Title IV of The Personal Responsibility and Work Opportunities Reconciliation Act of 1996 ("PRWORA"), as incorporated into the INA; the Illegal Immigration Reform and Immigrant Responsibility Act of 1996; the June 15, 2012 Memorandum from Janet Napolitano, Secretary of the Department of Homeland Security ("DHS"), to David Aguilar, Acting Commissioner, U.S.
Customs and Border Protection ("CBP"), Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services ("USCIS"), and John Morton, Director, U.S. Immigration and Customs Enforcement ("ICE"), Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012)\(^1\) (the "DACA Memo"); Florida statutes and regulations relevant to instate tuition; and federal case law interpreting the aforementioned laws and the DACA Memo.

As explained below, prohibitions found in PRWORA do not allow federal, state, or local governments to provide any postsecondary education benefit to aliens,\(^2\) except for certain aliens specifically exempted from the prohibition. Aliens exempted from PRWORA's provisions consist of a limited subset of foreign nationals and do not include registrants under the DACA program. In unison with PRWORA, post-DACA pronouncements by the Obama Administration have expressly categorized DACA registrants as ineligible for multiple forms of federal public assistance benefits. Since the DACA program's inception, no branch of the federal government, whether the executive, legislative or judicial, has deemed DACA registrants eligible for any federal, state or local public assistance program. In the absence of federal or state legislation or judicial invalidation of PRWORA's mandates, the University of Florida would be in violation of well-established federal law barring DACA registrants from postsecondary education benefits in the form of instate tuition benefits or waiver of out-of-state tuition requisites if the university were to grant such benefits. The Florida legislature has not enacted a statute affirmatively providing for benefits to undocumented students and consequentially, the federal law's prohibitions apply in Florida without exemption.

\(^1\) Otherwise known as the Deferred Action for Childhood Arrivals ("DACA") program.

\(^2\) The terms "aliens" and "foreign nationals" are used interchangeably thought this Opinion.
I. Summary of Current Federal Limitations on Alien Eligibility for Federal, State and Local Public Benefits

PRWORA, passed by the 104th Congress and signed into law by President Clinton on August 22, 1996, bars the grant of multiple forms of federal, state and local public benefits, including any postsecondary education benefit, to aliens not expressly categorized as eligible for such benefits.³ See 8 U.S.C. §§ 1621, 1623.⁴ Congress stressed that its goals were to promote self-sufficiency, an enduring principle of U.S. immigration law, and to discourage aliens from immigrating illegally to the U.S. in an effort to secure welfare or other public assistance. See 8 U.S.C. § 1601[1]-[2]. Congress further stated that meeting these goals was a "compelling government interest." See 8 U.S.C. § 1601[5]-[6]. By enacting PRWORA, Congress restricted alien eligibility for multiple forms of federal, state and locally funded public assistance benefits. By way of example, PRWORA’s prohibitions govern eligibility for federal and state retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance and unemployment benefits, among others. See 8 U.S.C. §§ 1611(c),1621(c). For purposes of this legal opinion, however, we solely address PRWORA’s effect on prospective University of Florida postsecondary education benefits, including instate tuition or waiver of out-of-state portions of university tuition for students that registered under the DACA program. Since both of these types of tuition-related benefits for DACA registrants are subsidized by funds controlled by the University of Florida, such benefits are public benefits within the meaning of PRWORA.

³ Three broad alien classifications are expressly categorized by PRWORA as eligible for federal, state and local benefits as provided by 8 U.S.C. §§ 1621, 1641. These eligible aliens include non-immigrants holding valid visa status, parolees [foreign nationals physically admitted into the U.S. by USCIS] and “qualified aliens” defined by 8 U.S.C. § 1641 to include asylees, lawful permanent residents, refugees, aliens having their deportation withheld, aliens granted conditional entry, Cuban and Haitian entrants, or victims of battering or extreme cruelty by a spouse or other family member. DACA Registrants are not within PRWORA’s exempted alien classifications.

II. DACA Registrants Are Not Within PRWORA’s Exempted Alien Classifications

The DACA program, was implemented by a June 15, 2012\(^5\) interoffice policy memorandum from DHS Secretary Janet Napolitano to the head of removal/deportation-related federal agencies. The policy memorandum advises immigration-related law enforcement agencies that, for reasons of prosecutorial economy, a delineated class of aliens that were brought to the U.S. prior to the age of sixteen, will be provided a voluntary opportunity to register with DHS to receive “deferred action” on their removability.

The eligibility criteria for the DACA program require the alien to demonstrate that:

- the alien came to the U.S. prior to obtaining the age of sixteen;
- the alien has continuously resided in the U.S. for at least five years prior to June 12, 2012;
- the alien is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the U.S.;
- the alien has not been convicted of a felony, a significant misdemeanor offense, or multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of 31 on June 15, 2012.\(^6\)

Deferred [postponed] action on the basis of childhood arrival [before 16 years of age] is granted for a two year period and may be renewed indefinitely or terminated by DHS at any time at DHS’ discretion.\(^7\) Deferred action, while not defined by statute or regulation, is a discretionary determination “to defer removal action of an individual as an act of prosecutorial discretion” that has long been exercised by the Executive Branch, through DHS.\(^8\) An alien that has received deferred action is considered to be “lawfully present” in the U.S. during the two

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\(^6\) DACA Memo, supra.

\(^7\) Id.

year registration period and any renewal period thereafter. DACA registrants are also eligible, under limited circumstances, for both employment authorization and advance parole [USCIS-authorized ability to engage in foreign travel and return to the U.S.]. DHS has expressly maintained that once registered, a DACA alien is “lawfully present” in the U.S., but such registration does not absolve the DACA registrant of continual removal/deportation prospects for all previous periods of unlawful presence. Additionally, DHS has also expressly provided that DACA registration does not confer any immigration status upon the registrant. That is to say, by registering, a DACA alien does not acquire any immigration status provided for in the INA, but is instead, “lawfully present,” in a state of limbo, or abeyance, awaiting an uncertain future resolution of his or her immigration status.

As noted earlier, a limited subset of aliens are exempted from the public assistance prohibitions found in 8 U.S.C. § 1621. Those aliens, broadly classified in three groups: (i)

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9 Employment authorization requires a showing the DACA registrant is in need of securing employment for economic necessity. Advance parole requires a showing by the DACA registrant that foreign travel is necessary to attend to a health-related event, an educational or employment objective or a humanitarian need such as visitation with an ill relative or attendance at a family funeral. See id.

10 DHS, Deferred Action for Childhood Arrivals, Frequently Asked Questions, supra.

New - Q1: What is deferred action?
A1: Deferred action is a discretionary determination to defer 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 authorized by the Department of Homeland Security (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...” (last accessed November 1, 2013).

Additionally, the DHS Secretary is the only executive authority responsible for categorizing an alien’s immigration status. See 8 U.S.C § 1103(a)(1); The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers; provided, however, that determination and ruling by the Attorney General with respect to all questions of law shall be controlling. Unlawful presence is an immigration concept defined in the INA [8 U.S.C. § 1182(a)(9)(B)(i)(I)]. Pursuant to 8 U.S.C. § 1103(a)(1), the Secretary of DHS is the authority charged with administering and enforcing that definition.

11 Id.
“qualified aliens;” (ii) nonimmigrants under the INA; and (iii) aliens paroled into the U.S. for less than one year, are the only classes of aliens that are eligible for State or local benefits. See 8 U.S.C. 1621(a).

The deferred action benefit provided by DACA registration does not fall into one of the enumerated alien classifications that would exempt a DACA registrant from PRWORA’s federal, state and local public assistance prohibitions. A DACA registrant is the beneficiary of temporary forbearance of removal/deportation as determined by the controlling policy of the federal government’s executive branch. As the DACA Memo itself notes, “[t]his memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.” Further recognition of the limited scope of the DACA Memo’s discretionary authority is enunciated by USCIS on its website in its Internet-published answers to “Frequently Asked Questions.” More than once, USCIS, specifies verbatim in its current Internet-published responses that:

This [deferred action] policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.

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12 Qualified aliens include aliens who are: lawfully admitted for permanent residence (i.e. “green card” holders), granted asylum, designated refugees, paroled into the U.S. for at least one year, having their deportation withheld, granted conditional entry, Cuban and Haitian entrants, or victims of battering or extreme cruelty by a spouse or other family member. See 8 U.S.C. § 1641(b)-(c).

13 PRWORA further defines a State or local public benefit as:

any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government (emphasis added). See 8 U.S.C. § 1621(c)(1)(A)-(B).

14 See DACA Memo, supra.

15 DHS, Deferred Action for Childhood Arrivals, Frequently Asked Questions, supra.
In keeping with the singular, immigration-related purpose of the deferred action benefit enunciated in the DACA Memo, the Obama Administration has uniformly denied federal public assistance benefits, including participation in Medicaid, the Children’s Health Insurance Program (“CHIP”), the Patient Protection and Affordable Care Act (otherwise known as “ObamaCare”), Federal Housing Assistance, and even postsecondary education benefits in the form of Federal Student Loans, to DACA registrants. These uniform public assistance prohibitions have followed issuance of the DACA Memo and are in keeping with PRWORA’s prohibitions of federal public assistance for ineligible aliens. PRWORA’s statutory language concerning prohibitions related to federal benefits, found in 8 U.S.C. § 1611, mirror verbatim PRWORA’s statutory language concerning prohibitions related to state and local benefits, found in 8 U.S.C. §

16 Student loan eligibility is codified at 20 U.S.C. § 1091; 20 U.S.C. § 1091(a)(5) provides student loan eligibility requires the applicant to “be a citizen or national of the United States, a permanent resident of the United States, or able to provide evidence from the Immigration and Naturalization Service that he or she is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident.” The federal student aid website (http://studentaid.ed.gov/eligibility/non-us-citizens) includes the following guidance for noncitizen applicants: “I am a non-U.S. citizen. Can I get federal student aid? If you fall in one of the categories below, you are considered an “eligible noncitizen.”

1. You are a:
   - U.S. national (includes natives of American Samoa or Swains Island) or
   - U.S. permanent resident with a Form I-551, I-151, or I-551C (Permanent Resident Card, Resident Alien Card, or Alien Registration Receipt Card), also known as a green card.

2. You have an Arrival-Departure Record (I-94) from U.S. Citizen and Immigration Services (USCIS) showing
   - “Refugee,”
   - “Asylum Granted,”
   - “Cuban-Haitian Entrant (Status Pending),”
   - “Conditional Entrant” (valid only if issued before April 1, 1980), or
   - “Parolee” (you must be paroled for at least one year, and you must be able to provide evidence from the USCIS that you are not in the U.S. for a temporary purpose and that you intend to become a U.S. citizen or permanent resident).

3. You hold a T-visa (for victims of human trafficking) or your parent holds a T-1 visa. Your college or career school’s financial aid office will ask to see your visa and/or certification letter from the U.S. Department of Health and Human Services.

4. You are a “battered immigrant-qualified alien” who is a victim of abuse by your citizen or permanent resident spouse, or you are the child of a person designated as such under the Violence Against Women Act.

5. You are a citizen of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau. If this is the case, you are eligible only for Federal Pell Grants, Federal Supplemental Educational Opportunity Grants, or Federal Work-Study. (Last accessed November 4, 2013)
1621. Even in the advent of the DACA program, it is evident that the federal government itself, has continued to adhere to PRWORA's public assistance prohibitions for those aliens, including DACA registrants that are not expressly exempted. Since the DACA program's inception, no branch of the federal government, whether it be the executive, legislative or judicial, has deemed DACA registrants eligible for any federal, state or local public assistance program. Indeed to the contrary, the federal executive branch has expressly denied federal public assistance benefits to DACA registrants.

A. Foreign Nationals that Engage in Foreign Travel and Return to the U.S. Pursuant to a USCIS Grant of Advance Parole are Parolees, as Defined by §1621 of PRWORA, and Are Not Barred From Receiving State or Local Benefits

PRWORA exempts aliens who secure advance parole and are thereafter re-admitted to the U.S. as parolees, from its prohibitions concerning federal, state and local public assistance if: (i) an alien applies before USCIS for advance parole; (ii) fulfills the specified qualifying criteria for USCIS grant of such advance parole [see footnote 9]; (iii) receives a USCIS-authorized

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17 Compare:
8 U.S.C. § 1611
(c) "Federal public benefit" defined

(1) Except as provided in paragraph (2), for purposes of this chapter the term "Federal public benefit" means—
(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and
(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

8 U.S.C. § 1621
(c) "State or local public benefit" defined

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term State or local public benefit means

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and
(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.
advance parole document; (iv) departs the U.S.; (v) returns to the U.S. within the period authorized by the advance parole; and (vi) is inspected by and physically admitted into the U.S. as a parolee by agents of CBP. If such an alien fulfills each step of the advance parole process, such a parolee is eligible to receive state and local benefits, including postsecondary education benefits in the form of instate tuition or waiver of out-of-state tuition made available by the University of Florida. Under PRWORA, DACA registrants and parolees are different categories of aliens. A DACA registrant who is not a dependent and successfully applies for, secures, and adheres to the requirements to receive and maintain parolee status may, as a parolee, qualify for postsecondary education benefits.

III. Florida Statutes Interplay with Federal Law

The Board of Governors of the State University System of Florida ("BOG") are responsible for adopting regulations to determine the residency status of university students for tuition purposes. Fla. Stat. § 1009.21(13). The Chancellor of the State University System is appointed by the BOG and is tasked with aiding the BOG in implementing its responsibilities. Fla. Stat. § 20.155(3). The Florida BOG oversees twelve public universities in the State of Florida and is responsible for operating, regulating and controlling the management of the State University System. Fla. Stat. § 20.155(4).

Under Florida law, students are classified as either residents or non-residents in order to determine tuition rates for public colleges and universities. Fla. Stat. § 1009.21. The Florida statutes further define a "legal resident" or "resident" as "a person who has maintained his or her residence in this state for the proceedings years, has purchased a home which is occupied by him
or her as his or her residence, or has established domicile in this state.” Fla. Stat. § 1009.21(1)(d).

Florida Stat. §1009.21(d) further distinguishes between individuals who are independent and those that are dependent in establishing in-state residency. A "dependent" is "any person, whether or not living with his or her parent, who is eligible to be claimed by his or her parent as a dependent under the federal income tax code." To establish residency for tuition purposes, "[a] person or, if that person is a dependent child, his or her parent or parents must have established legal residence in this state and must have maintained legal residence in this state for at least 12 consecutive months immediately prior to his or her initial enrollment in an institution of higher education." 18

Pursuant to Fla. Stat. § 1009.21, the BOG are authorized to adopt additional rules in order to implement the statute. The BOG has adopted additional criteria in determining residency for tuition and other purposes. See Fla. Admin. Code R. 72-1.001. The rules provide additional criteria in determining residency when an individual or the parents of a dependent are not citizens of the U.S.

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Although the definition of "legal resident" is facially neutral regarding immigration status, the additional criteria contained in the rules adopted by the BOG prohibit both dependent and independent DACA students from receiving instate tuition rates.

The BOG rule, 72-1.001(5) provides that a non-U.S. citizen may be eligible to establish residency for tuition purposes if evidence is presented verifying that he or she is legally present in the U.S., has met the residency requirements of Fla. Stat. § 1009.21 and the person is one of the following:

(a) A foreign national in a nonimmigrant visa classification that grants the person the legal ability to establish and maintain a bona fide domicile in the United States according to the United States Citizenship and Immigration Services (USCIS).
   1. The following visa categories grant the person the legal ability to establish and maintain a bona fide domicile in the United States according to USCIS: A, E, G, H-1B, H-1C (classification expires 12-2011), I, K, L, N, NATO 1-7, O-1, R, S, T, U, and V.
   2. The following visa categories do not grant the person the legal ability to establish and maintain a bona fide domicile in the United States according to USCIS: B, C, D, F, M, P, Q, and TN. J visa holders are not eligible to establish residency for tuition purposes except as provided in Section 1009.21(10), F.S.
   3. The student, and parent if the student is a dependent, must present evidence of legal presence in the United States.

(b) A permanent resident alien, parolee, asylee, Cuban-Haitian entrant, or other legal alien granted an indefinite stay in the United States. The student, and parent if the student is a dependent, must present evidence of legal presence in the United States.

The BOG rule, enacted prior to the DACA Memo, contemplates a variety of immigration statuses, closely mirroring those statuses eligible to receive federal benefits pursuant to 8 U.S.C § 1621 as discussed earlier. Pursuant to the regulations issued by the BOG, DACA students are not a class of aliens that qualifies for instate tuition benefits under Fla. Stat. § 1009.21.

An exemption to the general prohibition of providing state or local benefits to nonqualified aliens is codified at 8 U.S.C § 1621(d). The provision authorizes States to provide state or local benefits to aliens that are not lawfully present by enacting a new law (after August 22, 1996) “which affirmatively provides for such eligibility.” In that respect, states have been endowed with the authority to provide state or local public benefits to aliens not lawfully present and with no legal status.

The Florida Statutes provide for a broad, discretionary waiver of the out-of-state fees for nonresident students. Specifically, Fla. Stat. § 1009.26(9) provides:

> Each university board of trustees is authorized to waive tuition and out-of-state fees for purposes that support and enhance the mission of the university. All fees waived must be based on policies that are adopted by university boards of trustees pursuant to regulations adopted by the Board of Governors. Each university shall report the purpose, number, and value of all fee waivers granted annually in a format prescribed by the Board of Governors.

In unison with this Florida statute, the BOG has adopted regulations allowing for waivers. The waiver’s enabling regulation is 7.008(1) entitled *Waiver of Tuition and Fees*, and provides as follows:

> Each university board of trustees is authorized to waive tuition, non-resident tuition and associated fees for purposes that support and enhance the mission of the university. All tuition, non-resident tuition and associated fees waived must be based on regulations that are adopted by the university board of trustees and where applicable, consistent with regulations adopted by the Board of Governors.

Florida universities, including the University of Florida, have adopted regulations under BOG Reg. 7.008(1) and broadly used this waiver authorization for various purposes that support and enhance the mission of their respective university.
Although the waiver provision of Fla. Stat. § 1009.26(9) was enacted post-August 22, 1996, it does not comply with case law interpreting 8 U.S.C § 1621(d)’s provision of a new law affirmatively providing for such public assistance eligibility. In *Martinez v. Regents of University of California*, the California Supreme Court set forth guidance on interpreting the phrase “which affirmatively provides for such eligibility” contained in 8 U.S.C § 1621(d). See *Martinez v. Regents of University of California*, 241 P.3d 855 (Cal 2010). In *Martinez*, the California Supreme Court held that although the state statute does not necessarily need to cite 8 U.S.C § 1621, the enacted state statute “must expressly state that it applies to undocumented aliens, rather than conferring a benefit generally without specifying that its beneficiaries may include undocumented aliens.” *Id.* Since Fla. Stat. § 1009.26(9) makes no express reference to undocumented aliens but instead merely provides Florida universities with authorization to create discretionary waivers for any purpose supporting and enhancing a university’s mission, Fla. Stat. § 1009.26(9) does not comport with the requirements set forth in 8 U.S.C. 1621(d)’s opt-out clause. Consequently, Fla. Stat. § 1009.26(9) does not give the University of Florida the authorization provided for in PRWORA to provide in-state tuition benefits or a waiver of the out-of-state portion of tuition to DACA students.

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19 Title XVI.III of the Florida Statutes, K-20 Education Code, was codified in 2002 and the fee waiver provision of Fla. Stat. § 1009.26(9) was adopted during the 2007 legislative session (originally appearing as Fla. Stat. § 1009.26(10)).

20 The California Court rejected the argument that the language in the Congressional Record, specifically H.R. Rep. No. 104-725, 2d Sess., p. 383 (1996) stating “[o]nly the affirmative enactment of a law by a State legislature and signed by the Governor after the date of after the date of this Act, that references this provision” will meet the requirements of 8 U.S.C. § 1621. The Court found that an unpersuasive committee report cannot change the plain statutory language citing *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. at p. 568, 125 S. Ct. 2611).

21 If the State of Florida were to enact a state law providing for the waiver of out-of-state portion of tuition fees or afford in-state tuition to DACA registrants on the basis of a DACA student’s deemed residence in the State, 8 U.S.C § 1623 would govern the State’s actions. 8 U.S.C § 1623 provides:

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 (emphasis added).
IV. DACA Eligibility in Other States

Because of PRWORA’s prohibitions concerning state and local public assistance, sixteen states have passed legislation expressly providing in-state tuition for unlawfully present aliens at state universities. These states include: California, Colorado, Connecticut, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Mexico, New York, Oklahoma, Oregon, Texas, Utah, and Washington. Of these states Colorado, Minnesota, and Oregon\(^ {22} \) have legislated since Secretary Napolitano released the DACA memo on June 15, 2012. In addition to state legislative actions, Board of Regents/Governors/Trustee decisions in Massachusetts, Rhode Island, Ohio, and several other states have authorized instate tuition at both the state and individual institution levels. These non-legislative actions have yet to be challenged judicially, but do not facially comport with PRWORA’s requisite mandating “enactment of a state law after August 22, 1996, which affirmatively provides for such [state or local public benefit] eligibility.” See 8 U.S.C. § 1621(d). Equally so, these non-legislative actions, expose each respective state to disparate treatment equal protection claims by DACA registrants in need of other forms of state public assistance that are readily denied, as DACA students enjoy postsecondary education benefits through Board of Regents/Governors/trustee decisions.

V. Conclusion

Ample guidance from all three branches of the federal government require the University of Florida to adhere to the postsecondary education benefits prohibitions found in 8 U.S.C. §1621. As a result, foreign nationals not specifically listed in the categories of aliens under 8

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Given that through the current date no such State law has been passed, 8 U.S.C § 1623 does not guide the University of Florida’s actions in the instant matter.

\(^{22}\) It appears that Oregon has specifically legislated mindful of DACA students. Oregon H.B. 2787 explicitly provides for evidence that the student registered for a federal deportation deferral program as evidence that the student intents to become a citizen or lawful permanent resident of the U.S. as part of their instate tuition guidelines.
U.S.C. 1621 cannot be lawfully awarded instate tuition or a waiver of the out-of-state portion of tuition by the University of Florida because the State of Florida does not have a statute enacted after August 22, 1996 that affirmatively provides eligibility for undocumented aliens. PRWORA was passed by the U.S. Congress, enacted by President Clinton and has been adhered to since 1996 by multiple states that have followed PRWORA’s well-established dictates concerning prohibitions and required exempting state legislation with affirmative coverage of undocumented aliens. The June 15, 2012 inception of the DACA program has engendered to-date, limited erosion in some states and before a limited number of Board of Regents/Governors/Trustee bodies of the previous universal adherence to PRWORA’s prohibitions. These deviations from prior adherence to PRWORA’s prohibitions are likely to be contended with by state and federal courts in the near term.

In the absence of new federal or state legislation, adherence by the University of Florida to clear statutory prohibitions and court precedents that enforce PRWORA’s postsecondary education benefit prohibitions is required as has been demonstrated by federal court decisions that have upheld PRWORA’s prohibitions and the Obama Administration’s adherence to PRWORA. In spite of its self-formulated deferred action policy with DACA registrants, the Obama Administration itself has tellingly excluded DACA-registrants from multiple forms of federal public assistance, most poignantly here, any benefit under the federal student loan program.
The deferral of removal/deportation afforded to DACA registrants has not provided such registrants with an immigration status exempted by the PRWORA statute and prohibitions, and through the current date, no Florida legislation has afforded postsecondary education benefits to DACA registrants. The dichotomy that exists between DACA students being lawfully present during their period of registration, but not classifiable with a particular immigration status that would exempt them under PRWORA, has understandably shrouded these students, and the viewing public, with great confusion and uncertainty. However, current federal law continues to prohibit the University of Florida from granting instate tuition or out of state tuition waivers to DACA students.

The legal opinions expressed herein are limited to the laws of the State of Florida and the Immigration and Nationality Act in effect on the date hereof as they presently apply, and we express no legal opinion herein as to the laws of any other jurisdiction. These legal opinions are given as of the date hereof, they are intended to apply only to those facts and circumstances that exist as of the date hereof, and we assume no obligation or responsibility to update or supplement these legal opinions to reflect any facts or circumstances that may hereafter come to our attention or any changes in laws that may hereafter occur, or to inform the addressees of any change in circumstances occurring after the date hereof that would alter the legal opinions rendered herein.
This legal opinion is limited to the matters set forth herein, and no legal or political opinion may be inferred or implied beyond the matters expressly contained herein. Except as expressly set forth herein, this legal opinion is being rendered solely for the benefit of the addressees heretof. This legal opinion may not be used or relied upon for any other purpose, relied upon by any other party.

Sincerely,

[Signature]
Foley & Lardner, LLP