

April 17, 2017

CONFIDENTIAL AND ATTORNEY-CLIENT PRIVILEGED

VIA EMAIL & U.S. MAIL

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**Re: *Legal Opinion re Claiming Apportionment for Undocumented Noncredit
Students***
Client-Matter: SA510/001

Dear Dr. Gribbons:

You requested an opinion as to whether the Santa Clarita Community College District ("District") can claim apportionment for undocumented students enrolled in its noncredit programs. Our analysis follows.

I. QUESTIONS PRESENTED AND SHORT ANSWERS

(1) Can the District claim apportionment for students who are undocumented and enrolled in non-credit courses, but do not qualify for exemptions to residence determinations?

No. The District cannot claim apportionment for students enrolled in non-credit courses who are undocumented and do not qualify for exemptions under Education Code sections 68130 et seq. ("A.B. 540"). California Code of Regulation, title 5, section 58003.3 only permits a district to claim apportionment for students who have been lawfully admitted to the United States under federal law.

(2) Which administrator at each community college or district should be designated as responsible for recommending and approving Full Time Equivalent Student (“FTES”) measurements for apportionment?

We are not aware of any authority under the Education Code or title 5 that specifies who at each community college or district should be responsible for recommending and approving FTES measurements for apportionment. However, the responsible administrator is legally required to submit data reported and compiled in accordance with the Education Code and title 5.

II. FACTUAL BACKGROUND

The Santa Clarita Community College District (“District”) claims apportionment¹ for non-credit courses only for students who are U.S. citizens, permanent residents, have a visa, or are otherwise lawfully admitted (or granted deferred prosecutorial action through the Deferred Action for Childhood Arrivals² policy) into the United States. Non-credit courses include English-Spanish Language (“ESL”) classes. The District believes it can also claim apportionment for students who qualify for a waiver of nonresident tuition under Assembly Bill

¹ Briefly, California Community colleges receive funds from the state through apportionments, which is measured by a variety of factors, largely driven by measuring the Full-time Equivalent Student (“FTES”) workload. The FTES measure does not necessarily represent a headcount of students. An FTES can be generated by one student or multiple part-time students. Essentially, one FTES is equivalent to 525 hours of student instruction. (See generally Ed. Code §§ 70901; Cal. Code Regs. tit. 5 §§ 58003.1, 58050, 58051.)

² The Department of Homeland Security (DHS) exercises its prosecutorial discretion to forego immigration enforcement (deportation) against specific qualifying undocumented individuals via the Deferred Action for Childhood Arrivals (DACA) program. DACA does not confer lawful immigration status upon the recipients, nor does it provide a pathway to citizenship. DACA was first announced through a memorandum disseminated to federal agencies and the public by then Secretary of Homeland Security, Janet Napolitano. In the memorandum, Secretary Napolitano instructed the directors of three agencies within the Department of Homeland Security to grant deferred action on current removal proceedings (and as a way to preemptively defer potential proceedings in the future) to undocumented immigrant youth who meet specific criteria. The current guidelines for consideration under DACA include requirements that the applicant must have:

- 1) Been under the age of 31 as of June 15, 2012;
- 2) Came to the United States before reaching his/her 16th birthday;
- 3) Continuously resided in the United States since June 15, 2007, up to the present time;
- 4) Been physically present in the United States on June 15, 2012, and at the time of making his/her request for consideration of deferred action with USCIS;
- 5) Had no lawful status on June 15, 2012;
- 6) Currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or was an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- 7) Not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety.

Undocumented students who qualify for DACA receive a two-year grant of deferred action against immigration enforcement.

(“A.B.”) 540³, although as a practical matter few, if any, students enrolling in noncredit courses satisfy the criteria under A.B. 540. The District does not claim apportionment for students in non-credit classes who are not United States citizens, legally admitted into the United States, or not eligible for a waiver of nonresident tuition.

The District’s online and paper applications request citizenship, permanent residence, and visa information. The District does not maintain any residency or immigration information about undocumented students other than what is necessary to make a residency determination.

III. ANALYSIS

A. TITLE 5 OF THE CALIFORNIA CODE OF REGULATIONS DOES NOT ALLOW COMMUNITY COLLEGE DISTRICTS TO CLAIM APPORTIONMENT FOR STUDENTS WHO ARE UNDOCUMENTED AND ENROLLED IN NONCREDIT COURSES UNLESS THEY QUALIFY FOR NONRESIDENT TUITION WAIVER.

Title 5 regulations implement the Education Code mandates. The Board of Governors of the California Community Colleges adopts regulations that determine the operations of the colleges. (Ed. Code §§ 66700, 70901 subd. (c).) The District’s Board of Trustees governs the District pursuant to the authority granted and duties defined in Education Code Section 70902 so long as its activities are not inconsistent with any law or regulation.

Education Code section 76380(b) allows community college districts to compute, for purposes of claiming apportionment, the FTES of adults enrolled in specified noncredit courses, including classes in “English and citizenship for foreigners.” California Code of Regulations, title 5, section 58007, in turn, provides in pertinent part:

[FTES] in noncredit courses shall be computed by dividing the sum of contact hours of enrollment by 525 ...Nonresidents may be claimed for purposes of calculating full-time equivalent student only if they are living in California during the period of attendance and are otherwise eligible for such purposes as provided in this chapter.

In claiming apportionment for students in noncredit courses, the District must comply with the language above stating that students must be “otherwise eligible for such purposes as provided in this chapter.” California Code of Regulations, title 5, section 58003.3 clarifies the meaning of this phrase as follows:

[F]or the purposes of crediting community college attendance for apportionments from the State School Fund, a community college district may claim the attendance of students living in California

³ A.B. 540 allows undocumented students who meet certain requirements to pay in-state tuition instead of out-of-state tuition in California’s post-secondary educational institutions, such as the University of California, California State Universities and California Community Colleges. It is codified at Education Code §§ 68130 et seq.

who have been lawfully admitted to the United States in accordance with all applicable laws of the United States and enrolled in noncredit courses. (Emphasis added.)

This language prevents the District from claiming undocumented students for apportionment purposes because those individuals cannot establish their lawful admission to the United States.

We turn to the Immigration and Nationality Act (INA), codified in Title 8 of the United States Code, to understand how individuals can establish their lawful admission into the United States. Title 8 of the United States Code section 1101(a)(13)(A), defines the terms “admission” and “admitted” with respect to a person as follows, “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” A person present in the United States “without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”⁴ Immigrants are required at the time of application for admission into the United States to be in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality; failure to provide documentation will deem the individual inadmissible.⁵

While an argument could be made that because neither title 5 nor the Education Code require community college districts to verify a student’s lawful presence in the United States, a district could claim apportionment for undocumented students by relying on a lack of knowledge of the students’ undocumented status. We advise against this approach.

The District must certify the accuracy of information it submits via the CCFS-320 reporting system (Apportionment Attendance Report). In submitting the report, the District is required to certify that the report is true and correct, and that the data is reported and compiled in accordance with the Education Code, title 5, and the instructions on the form. As noted above, the District can only claim apportionment for students “lawfully admitted to the United States in accordance with all [federal] laws.”⁶ The District’s application requests student information about citizenship, permanent residence and visas. While the District does not maintain residency or immigration information about undocumented students, by seeking information that might or does reveal the immigration status of students applying for enrollment, the District becomes aware of which students are likely undocumented or otherwise not able to establish that they are “lawfully admitted to the United States.” The District cannot ignore this information in submitting the CCFS-320 report; its representations must be accurate and true, and in compliance with the instructions furnished by the California Community College Chancellor.⁷

⁴ (8 U.S.C. § 1182(a)(6)(A)(i).)

⁵ (8 U.S.C. § 1182(a)(7)(A)(i).)

⁶ (Cal. Code Regs. tit. 5 § 58003.3.)

⁷ (Cal. Code Regs. tit. 5 § 58003.4(d).)

B. UNDER AB 540 CALIFORNIA OFFERED UNDOCUMENTED STUDENTS EXEMPTION FROM OUT-OF-STATE TUITION.

On October 12, 2001, Governor Gray Davis signed into law Assembly Bill (“A.B.”) 540 (Stats. 2001, ch. 814) adding section 68130.5 to the California Education Code which exempts certain non-resident students from having to pay non-resident tuition. In summary, to qualify for the exemption under A.B. 540, a student has to have attended a California high school for at least three years and graduated from a California high school. (Ed. Code § 68130.5.) Non-immigrant students are not eligible for the exemption.

Under Education Code section 68130.5(b), community college districts can report a student meeting the above requirements as a “full-time equivalent student for apportionment purposes.” California Code of Regulations, title 5, section 58003.6 states, “students who are exempt from nonresident tuition ... may be included in calculating credit full-time equivalent student (FTES) for apportionment purposes.” Under A.B. 540, the California legislature allows apportionment for students in the process of legalizing their immigration status.

While Education Code section 68130.5 and California Code of Regulations, title 5, section 58003.6 allow the District to calculate for apportionment purposes students who are exempt from non-resident tuition, the California Community Colleges Board of Governors has not changed title 5, section 58003.3. In other words, title 5 only allows community colleges to seek appointment for noncredit courses to the extent the students enrolled are “lawfully admitted to the United States in accordance with all [federal] laws.” Until there is a change in the regulations, community college districts have a legal duty to process and certify the apportionment attendance reports in a manner that is consistent with the applicable regulations.

Publications from the Chancellor’s Office, including the Student Attendance Accounting Manual, Chapter 2, further supports the finding that undocumented students cannot claim residency status. Therefore, the District should not claim these students for apportionment unless they qualify under AB 540.

C. THE CHANCELLOR’S OFFICE HAS OPINED THAT WHILE COMMUNITY COLLEGE DISTRICTS MAY ADMIT UNDOCUMENTED STUDENTS TO NONCREDIT COURSES THEY CANNOT CLAIM THEM FOR APPORTIONMENT PURPOSES.

While California courts have not addressed the issue of whether community college districts may seek apportionment for undocumented students enrolled in noncredit courses, on June 29, 2001, the Chancellor of the California Community Colleges (“the Chancellor’s Office”) issued Legal Opinion 01-20 which addressed this issue. The Chancellor’s Office concluded that while districts may admit undocumented students to their noncredit courses, districts must absorb the cost of serving those students and cannot claim them for apportionment purposes. The conclusions stated in Legal Opinion L 01-20, are consistent with the title 5 regulations discussed above.

Legal Opinion 01-20 constitutes a quasi-legislative administrative decision which likely will receive deference from court. (*Diablo Valley College Faculty Senate v. Contra Costa*

Community College Dist. (2007) 148 Cal.App.4th 1023, 1034 [“A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.”].) In the *Diablo Valley College Faculty Senate* the Court of Appeal agreed with the Chancellor’s Office legal opinions that title 5 regulations did not require a community college district to engage in collegial consultation with a college's academic senate before effecting an administrative reorganization. Similarly here, if challenged, a court is likely to defer to the Chancellor’s legal opinion and conclude that the regulation does not allow community college districts to seek reapportionment for undocumented students who attend noncredit courses.

D. THE DISTRICT MAY WISH TO CONSIDER ADVOCATING FOR CHANGES TO TITLE 5.

We have not found statutory authority, or published cases, that prohibit community college districts from claiming apportionment for undocumented students enrolled in noncredit courses. As discussed above the restriction comes from the regulations. The California Community College Board of Governors has the authority to establish regulations and methods for “determining and allocating the state general apportionment.”⁸ Therefore, if the District desires to advocate reform of the title 5 to allow apportionment for undocumented students enrolled in noncredit courses, it will need to work with the Chancellor’s Office and/or Board of Governors.

In seeking to change the regulations, the District may argue that title 5 severely limits community colleges districts from effectively educating undocumented students since districts are required to bear the costs in their entirety. Additionally, the title 5 regulations are inconsistent with current public policy in California, including laws such as A.B. 540, A.B. 131 (which allows qualified undocumented students to apply for Cal Grant awards and for grants and scholarships awarded by California public colleges and universities) and S.B. 1210 (which would enable qualified undocumented students to be eligible for student loan benefits). These laws reflect the state’s public policy of expanding educational opportunities for students regardless of their citizenship and immigration status. The title 5 regulations that prevent the District from seeking apportionment for undocumented students enrolled in noncredit courses are inconsistent with the state’s current efforts to provide educational opportunities to immigrants, regardless of legal status in the United States. We are available to assist the District in seeking changes to the regulations.

E. THE DISTRICT HAS DISCRETION TO DETERMINE WHICH EMPLOYEE IS RESPONSIBLE FOR IDENTIFYING FULL TIME EQUIVALENT STUDENT FOR APPORTIONMENT.

There is no specific authority identifying which employee at a community college or district is responsible for recommending and approving FTES to be included in reports to the

⁸ (Ed. Code § 70901(b)(5)(B).)

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Chancellor's Office for apportionment. The District has discretion to authorize an employee to certify complete and accurate information to the state Chancellor and Board of Governors. This is thus a policy decision to be determined by the District.

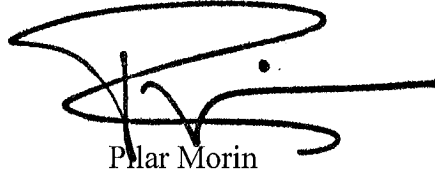
IV. CONCLUSION

Undocumented students enrolled in non-credit English as a second language and other noncredit courses should not be claimed for apportionment purposes. California Code of Regulations, title 5 prevents this practice.

Thank you for the opportunity to assist you on this matter. Please do not hesitate to contact me if you have any additional questions.

Very truly yours,

LIEBERT CASSIDY WHITMORE

A handwritten signature in black ink, appearing to read 'Pilar Morin', is written over the typed name. The signature is stylized with a large loop at the top and a horizontal line extending to the right.

Pilar Morin

PM:lt