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August 23, 2006

TO: Cheryl Fong,
Coordinator, CARE and PUENTE Project

FROM: Steven Bruckman,
Executive Vice Chancellor and General Counsel

SUBJECT: Residency Determination for Incarcerated Students
Legal Opinion O 06-07

ISSUE:

You have asked whether a student incarcerated in a state prison qualifies as a California resident for purposes of nonresident tuition. You have also asked whether it is appropriate to inquire about the student's residency prior to incarceration.

CONCLUSION:

A student is not precluded from establishing residency simply by virtue of his or her status as a prison inmate. For purposes of determining residency, the same standards and procedures for all students should be applied to prison inmates.

ANALYSIS:

Under California Code of Regulations, title 5, section 54020, in order to establish legal residency, there must be a "union of act and intent." That is, a person must be physically present in the State of California for at least one year AND have the intent (determined through objective evidence) to make California his or her permanent home. Objective evidence of intent can be demonstrated through any of the factors listed in section 54024(e) as well as through other factors not listed that tend to show the student's intent to make California his or her home for other than a temporary purpose.

Section 54026 makes it clear that the burden of proof for establishing residency lies with the student. Incarcerated students may not be able to meet this burden of demonstrating intent as easily as other students since they may not be able to produce many of the forms of documentation listed in subdivision (e) of section 54024. However, incarceration, by itself, does not deprive a person of the ability to form the requisite intent.¹

¹ Although it will not be an issue in most cases, it is important to remember that a student must have sufficient mental capacity in order to be able to form the requisite intent.

Holding incarcerated students to the same requirement for demonstrating intent may mean that districts will receive documents from inmates which differ from those routinely submitted by other students to establish their intent to make California their home. It may also mean that some inmates will be unable to establish the requisite intent because they cannot produce sufficient relevant documentation. However, neither of these considerations warrant or permit applying different standards or procedures to residency determination for inmates.

As with any other student, the residency determination date for an incarcerated student, as defined in section 54002, is the day immediately preceding the opening day of instruction. The same residence classification procedures (Cal. Code Regs., tit. 5, § 54010) apply equally to incarcerated students, and the residence questionnaire required by section 54012 should be applied uniformly to all students, whether or not they are incarcerated. Under section 54012, every student should be asked where he or she has maintained a home for the last two years, and whether he or she has engaged in any of the activities listed in section 54024(f).

In all cases, the appropriate district official must determine if, given the totality of the circumstances, the student has carried the burden of proving residency. A student determined to be a California resident under title 5 must not be required to pay nonresident tuition. A student determined to be a nonresident must be charged the nonresident tuition fee unless some statutory exception applies.

cc: Linda Michalowski, Vice Chancellor, Student Services
Aiden Ely, Administrator, Student Access & Retention