STATE OF CALIFORNIA

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September 17, 2007

Dr. Martha J. Kanter, Chancellor
Foothill-De Anza Community College District
12345 El Monte Road
Los Altos Hills, CA 94022

Re: The "District's Actual Cost" Requirement of
California Code of Regulations Title 5, Section 59402(c)
With Respect to Required Instructional Materials
Legal Opinion L 07-09

Dear Chancellor Kanter:

We are writing in response to your letter of May 25, 2007, in which you requested our opinion on several related issues regarding the "district's actual cost" requirement of California Code of Regulations, title 5, section 59402(c) with respect to required instructional materials.

Specifically, you asked:

1. May "the district's actual cost" passed on to students for required, faculty-published instructional materials available only through the District Bookstore include an amount that the faculty member claims is to compensate the faculty member for his/her time, labor and/or creativity in preparing the instructional materials?

2. May "the district's actual cost" passed on to students include compensation to the faculty member for "out-of-pocket expenses" such as royalties paid by the faculty member to other copyright holders for use of their copyrighted material?

3. May "the district's actual cost" passed on to students include a royalty charged by the faculty member to the District?

4. When a faculty member self-publishes and sells self-published instructional materials by any other means in addition to through the District's Bookstore, does title 5 regulate the price at which the instructional material may be sold by either the Bookstore or the faculty member?

CONCLUSIONS

For the reasons discussed below, we conclude that:

1. The "district's actual cost" passed on to students cannot include compensation for a faculty member's time, labor and/or creativity in preparing instructional materials.

2. The "district's actual cost" passed on to students may include costs the district incurs for reimbursing faculty for out-of-pocket expenses. This may include paying royalties to third parties for use of copyrighted material incorporated into instructor-prepared required instructional materials.

3. The "district's actual cost" passed on to a student may not include a faculty royalty charged to the District.

4. When a faculty member sells self-published required materials through means in addition to the District Bookstore, title 5 does not regulate the price the district may charge for the materials.

ANALYSIS

Before turning to an analysis of your specific questions, we need to provide some background information on the instructional materials regulations adopted by the Board of Governors and address some ancillary issues raised by your legal counsel, Carmen Plaza de Jennings.

In a letter dated June 14, 2007, Ms. Plaza de Jennings provided her analysis of the issues identified above and also described the position of the Foothill-DeAnza CCD Faculty Association on these matters. In particular, she indicated that the Faculty Association has taken the position that the legal opinions of this office are not entitled to weight under controlling legal precedent and that neither the Board of Governors nor any college district can legally "fix" the instructor's price for materials without violating state and federal antitrust laws.

Since these arguments raise fundamental issues concerning our ability to enforce the Board's instructional materials regulations, we will address them first and then turn to a consideration of the specific questions you asked us to answer.

I. The Legal Opinions of the Chancellor's Office Regarding Required Instructional Materials Solely and Exclusively Available Through The District Would Be Accorded Weight by the Courts and, Most Likely, Upheld.

As we understand it, the Faculty Association's belief that the opinions of this office would be disregarded by a court is based on its reading of the California Supreme Court decision in *Yamaha Corp. of America v. State Bd. of Education* (1998) 19 Cal.4th 1, which addressed the weight the courts should accord an agency's interpretation of a statute. (*Yamaha, supra,* 19 Cal.4th at p. 8.) Perhaps the Association took this position without having reviewed the decision

of the First District Court of Appeal in *Diablo Valley College Faculty Senate v. Contra Costa Community College District* (2007) 148 Cal.App.4th 1023, for which review was denied by the Supreme Court of California on June 27, 2007. *Diablo Valley* directly addresses the weight to be accorded the legal opinions of the Chancellor's Office when we interpret regulations adopted by the Board of Governors.

In *Diablo Valley*, at issue was whether the community college district's decision to change from department chairs selected with involvement by faculty to full-time professional division administrators required the community college district to engage in collegial consultation with the college's academic senate before effecting such an administrative reorganization. In particular, the court addressed the issue of how much weight, if any, to accord the legal opinions of the Chancellor's Office on this issue. The court distinguished the *Yamaha* decision, stating that, "Here, we are considering the Chancellor's interpretation of a regulation, as opposed to his quasi-legislative act in drafting the regulation itself." (*Diablo Valley, supra,* 148 Cal.App. 4th at p. 1035.) Citing *Yamaha*, the court stated that the Supreme Court had proffered "two broad categories of factors relevant to a court's assessment of the weight due an agency's interpretation: Those 'indicating that the agency has a comparative interpretive advantage over the courts,' and those 'indicating that the interpretation in question is probably correct.'" (*Diablo Valley, supra,* 148 Cal.App. 4th at p. 1035 [internal citations omitted].) In *Diablo Valley*, the court found that both those factors weighed in favor of according the Chancellor's interpretation some deference.

The court stated that "an agency has a potential interpretive advantage over the courts if it has developed specialized expertise, 'especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.'" (*Diablo Valley, supra,* 148 Cal.App. 4th at 1035, [internal citations omitted.].) The court went on to state that "a court would be 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." (*Ibid.* [internal citations omitted].) Since, as the court noted, the Chancellor routinely issued opinions advising colleges and academic senates about whether collegial consultation is required for specific changes in policy or procedure, the Chancellor was considered to be "immersed in administering" the collegial consultation regulations and could be expected to have an intimate knowledge of the problems dealt with in the regulations and the various administrative consequences arising from particular interpretations, while a generalist court that infrequently visits a particular regulatory statute would lack the advantage arising out of specialization. (*Id.* at p. 1035-1036.)

Courts would find that the Chancellor's Office has an interpretive advantage on the issues we consider in this opinion dealing with interpretation of the regulations on instructional materials adopted by the Board of Governors. Staff in this office drafted the instructional materials regulations (Cal Code Regs. tit. 5, §§ 59400-59408) and we have issued a number of legal opinions interpreting those regulations.[1]

[1] These opinions include, but are not limited to:

1. Legal Opinion M 06-11 Appendix A, pages 40-41

Second, with respect to whether an agency's decision is "probably correct," factors suggesting such correctness include: (1) indications that the interpretation was carefully considered by senior agency officials; and (2) evidence that the agency has consistently maintained its interpretation, especially over a long period of time. (*Diablo Valley*, *supra,* 148 Cal.App. 4th at p. 1036, *citing Yamaha*, *supra,* 19 Cal.4th at pp. 12-13.) In determining whether the Chancellor's interpretation at issue in *Diablo Valley* had been carefully considered by senior agency officials, the *Diablo Valley* court noted that the Chancellor's Office had issued four legal opinions addressing the issues in that case. Similarly, we have issued several opinions which have emphasized the consistent principle that "neither a district nor its employees ought to be making a profit on materials which the district solely or exclusively provides." (Legal Opinion M 06-11 at p. 40.) Three of these opinions specifically address the issue of faculty royalties for faculty created or faculty published instructional materials (see Legal Opinions M 06-11, L 04-11, and L 02-29). In Legal Opinion L 04-11 we noted that if students were required to purchase faculty-produced lecture notes through the college, the price could not include a faculty royalty. (Legal Opinion 04-11 at p. 3.) In Legal Opinion L 02-29 we stated,

> "Students may not be required to purchase mandatory instructional materials that are exclusively available from the district unless those materials are provided at the District's cost. [citation omitted] Therefore, inclusion of a markup on instructional materials for royalties to the faculty/author or District from materials solely and exclusively available from the District is a prohibited practice." (*Id.* at p. 5.)

In particular, since we issued Legal Opinion L 02-29, our opinions have consistently prohibited inclusion of faculty royalties in the cost of required instructional materials purchased from a district.

Thus, a consideration of the indicia of "correctness" identified in *Diablo Valley* – whether the interpretation was carefully considered by senior agency officials and evidence that the agency has consistently maintained its interpretation, especially over a long period of time – strongly suggest that courts would indeed give weight to the opinions of the Chancellor's Office on this issue.

II. The Regulations of the Board of Governors Do Not Fix the Amount a District Can Pay for Instructor Prepared Materials.

Ms. Plaza de Jennings stated in her letter that the Faculty Association contends that neither the Board of Governors nor any college district can legally "fix" an instructor's price for instructor-created/published required materials without violating state and federal antitrust laws. This

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2. Legal Opinion L 04-11
3. Legal Opinion L 02-29
4. Legal Opinion M 01-40 (Update on Student Fees), Section II F, pages 5-6.
5. Legal Opinion M 99-27 (Update on Student Fees), Section II F, pages 3-4.
6. Legal Opinion M 98-25 (Community College Student Fees), Section II F, page 4.
7. Legal Opinion M 97-27 (Community College Student Fees), Section II F, page 5.
8. Legal Opinion M 84-03.5 (Student Fees: General Impact of AB 1XX)

contention reflects a fundamental misunderstanding of the applicable statute and regulations and we must reject it for several reasons.

First, neither Education Code section 76365 nor title 5, section 59402(c) "fix" the price an instructor can charge for instructor-created/published materials or the amount a district can pay an instructor for such materials. Instead, section 59402(c) focuses on the transaction between the district and the student by regulating the price districts **may charge students** for required instructional materials which are solely and exclusively available from the district. As we explained in Legal Opinion L 02-29, "[T]he intent of the Board of Governors was to promulgate instructional materials regulations that prohibited the practice of charging students a price for mandatory materials that included a profit for the district or faculty author that amounted to an unauthorized student fee." (Legal Opinion L 02-29 at p. 6.)

A district could, if it wished, pay an instructor any amount the instructor requests, including a royalty, for materials the instructor creates, provided the district is prepared to absorb the cost of the royalty or other costs in excess of those which it can pass on to students pursuant to section 59402(c).

Second, a district is always free to list instructional materials as "optional" and, in that case, it may charge students any amount it deems appropriate even if those materials are exclusively available from the district.

Finally, a faculty author or publisher can arrange to market the materials he or she has produced through other channels so that the materials are not solely or exclusively available through the district. (See Legal Opinion L 02-29 at pp. 4-5.) This can be done through a traditional publisher, by self-publishing, or through services like Amazon.com. This will allow competitive market forces to determine what students pay for required materials. As a result, the regulations do not control what a district charges students in this situation.

III. The Actions of the Board of Governors and the College Districts in Determining the Conditions Under Which Course Materials May Be Required Are Not Subject to Federal or State Antitrust Laws.

For purposes of this analysis, we assume that, in making its allegations of anticompetitive behavior by the Board of Governors, the Faculty Association is referring to the Sherman Antitrust Act[2], and the Clayton Act,[3] as well as the state Cartwright Act[4], all of which address restraint of trade.

As we have demonstrated above, the regulations adopted by the Board of Governors do not "fix" the price faculty members charge for their self-created/published required materials. However, for the sake of argument, we now consider the probable outcome of a challenge on this ground.

[2] 15 U.S.C. § 1 et seq.
[3] 15 U.S.C. § 14 et seq.
[4] Bus. & Prof. Code, § 16700 et seq.

Although we are not experts in the field of antitrust law, our brief review of the subject suggests that neither federal nor state antitrust laws prohibit the Board of Governors from discharging its duty under Education Code section 76365. That section states:

> "The board of governors *shall* adopt regulations regarding the authority of community college districts to require students to provide various types of instructional materials . . . . These regulations *shall* specify the conditions under which districts may require students to provide those materials that are of a continuing value to the student outside the classroom setting, including, but not limited to, textbooks . . . ." ((Ed. Code, § 76365 (emphasis added).)

Federal antitrust laws are not applicable to state action or official action directed by a state. (*City of Columbia v. Omni Outdoor Advertising, Inc.* (1991) 499 U.S. 365, 379 ("We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is '*ipso facto*' . . . exempt from the operation of the antitrust laws.); *Parker v. Brown* (1943) 317 U.S. 341, 351 ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by the state); *Lancaster Community Hospital v. Antelope Valley Hospital District* (9th Cir. 1991) 940 F.2d 397, 400, cert. den., (1992) 502 U.S. 1094 ("It is clear that a state itself, whether acting through its legislative, judicial, or executive departments, is not subject to the antitrust laws."); *Lebbos v. State Bar of California* (1991) 53 Cal.3d 37, 47) .) Similarly, the state's Cartwright Act, Business and Professions Code section 16700 et seq., does not apply to the actions of political subdivisions of the state. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 323.)

Accordingly, it is our view that community college districts acting in accordance with the regulations of the Board of Governors and the Chancellor's opinions are not subject to federal antitrust laws or the Cartwright Act. Although the actions of a community college district would not be subject to blanket *Parker* immunity (see *Community Communications Co. v. City of Boulder* (1982) 455 U.S. 40, 52 (noting that the City of Boulder's ordinance in question could not exempt the city from antitrust scrutiny unless it constituted action of the State of Colorado in its sovereign capacity or municipal action in furtherance or implementation of a clearly articulated and affirmatively expressed state policy), the U.S. Supreme Court's decision in *Town of Hallie v. City of Eau Claire* (1985) 471 U.S. 34, provides the analysis to determine when a political subdivision of the state is immune from federal antitrust laws. Under *Town of Hallie*, a municipality is considered to be immune from federal antitrust laws if it acted pursuant to a clearly articulated statutory provision intended to replace competition with regulation. (*Town of Hallie, supra*, 471 U.S. at pp. 41-42.) A statute was considered clearly articulated if the legislature contemplated the kind of action complained of is a foreseeable and logical result from the authority to regulate. (*Town of Hallie*, *supra*, 471 U.S. at pp. 41-42.) *Town of Hallie* has been applied to political subdivisions other than municipalities. (See, e.g., *Lancaster Community Hospital v. Antelope Valley Hospital District* (9th Cir. 1991) 940 F.2d 397 (hospital district); *Grason Electric Company v. Sacramento Municipal Utility District* (9th Cir. 1985) 770 F.2d 833 (municipal utility district).)

The U.S. Court of Appeals for the Ninth Circuit has further refined the test in *Town of Hallie*, holding that first it must determined that the legislature authorized the challenged action, and

then it must be determined whether the legislature intended to displace competition with regulation. (See, e.g., *Boone v. Redevelopment Agency of the City of San Jose* (9th Cir. 1988) 841 F.2d 776, 890.) Additionally, the Local Government Antitrust Act of 1984[5] protects municipalities against antitrust damage claims under the Clayton Act.

In this case, the action challenged – regulating the conditions under which students may be required to provide instructional materials – is clearly and affirmatively expressed as a policy of the legislature in Education Code section 76365. As discussed above, we reject the notion that this involves any effort to restrict competition, but if a court were to find that section 59402(c) does displace competition with regulation, it is clear that, in granting the Board of Governors the authority to determine the conditions under which districts can require students to provide instructional materials, the Legislature must have foreseen that consequence.

Thus, we conclude that the antitrust protections that the Faculty Association invokes are completely inapplicable to the Board of Governors and the community college districts acting pursuant to Education Code 76365.

IV. The History Of The Instructional Materials Regulations Indicates That Provisions Permitting A District To Require Students To Purchase Materials Which Are Solely And Exclusively Available From The District Should be Narrowly Construed.

As noted above, in Legal Opinion L 02-29 we concluded that the definition of the term "district's actual cost" does not include faculty royalties. This conclusion is supported by a review of the history of the relevant statute and regulations.

The current instructional materials regulations were adopted in more or less their current form in 1985. The Final Statement of Reasons, which was prepared as part of the rulemaking file when the regulations were adopted, provides a comprehensive discussion of the law and practices regarding instructional and other materials prior to the adoption of the regulations. We summarize that discussion below.

Until 1976, when the Education Code was reorganized, most Education Code provisions on instructional materials for community college districts were interspersed with provisions related to K-12 education. Then-section 9320 of the Education Code provided that no provision of that division of the code was to be construed as requiring community college districts to provide instructional materials free of charge, nor was any provision of that division of the code to be construed as applicable to instructional materials required or authorized to be used by students in any community college. (Final Statement of Reasons, Rulemaking File, § 59402 (1985) at p.3.) However, section 9320, which became section 78930 under the reorganized Education Code, was unclear as to whether it conferred a positive grant of authority to levy a mandatory fee or whether it simply said that community colleges didn't need to furnish instructional materials. An Attorney General's opinion of February 28, 1979 (61 Ops.Cal.Atty.Gen. 75) opined that community college districts could only impose such fees, mandatory or otherwise, as were

[5] 15 U.S.C. § 35.

specifically authorized by the Legislature. In December of 1978, the Chancellor's Office responded with an interpretation stating that section 78930 conferred a positive grant of authority to levy a mandatory fee for the "reasonable cost of materials actually provided the student." (Final Statement of Reasons, *supra*, at p. 2.)

Fiscal pressures in the aftermath of Proposition 13 resulted in more districts charging for instructional materials in ways that were not uniform, with some districts charging an across-the-board instructional materials fee on a per-class basis. Chancellor's Office staff believed this practice was beyond the intent of the law because the cost borne by a student was not directly related to the materials he or she received and that the student was, in effect, being asked to support the cost of instruction generally, i.e., being required to pay tuition.

In 1981, Education Code section 78930 was repealed and newly enacted as follows:

> "78930. Fees. (a) The governing board of a community college district may charge a reasonable fee for instructional materials provided to any student enrolled in its college or colleges. Fees for instructional materials shall be established so as not to exceed the actual cost to the district in providing such materials, and the materials themselves shall be tangible personal property which is owned or controlled by the student."

However, this authorization for an instructional materials fee was repealed in 1984 by AB 1XX (Stats. 1984, 2d Ex. Sess., ch. 1), which, like the predecessor version of section 78930, left unanswered the question whether districts had to furnish instructional materials. The Legislature subsequently enacted AB 2808 (Stats. 1984, ch. 1282), which contained a statement of legislative intent that the repeal of the instructional materials fee didn't mean that districts had to provide "all materials, textbooks, equipment, and clothing necessary for each course and program." The legislative intent statement in AB 2808 went on to request the Board of Governors to adopt regulations to:

> "specify the conditions under which districts may require students to provide those materials which are of continuing value to the students outside of the classroom setting, including, but not limited to, textbooks, tools, equipment, clothing, and those materials which are necessary for the student's vocational training and employment." (Final Statement of Reasons, *supra*, at p. 6.)

Based on the legislative history discussed above, Chancellor's Office staff established several principles to govern the development of the instructional materials regulations. One of these principles was:

> "With respect to any given material, the critical distinction between payment of a mandatory fee for the material and a requirement for the student to procure the material is that in the latter instance the student isn't required to purchase or procure the material from the district. Applying this distinction, it would generally be improper for a district to require a certain material and further require that the student buy it from the district. It would also be improper, following this logic, for a district to require a certain material that only it (the district) could supply. For purposes of Board regulations, it appears

> important that any required materials not be solely or exclusively available from the district." (*Ibid*.)

When the instructional materials regulations were circulated for public comment, subdivision (c) of section 59402 reflected the above general principle and simply stated that:

> "(c) 'Solely or exclusively available from the district' means that the material is not available except through the district, or that the district requires that the material be purchased or procured from it." (Rulemaking File, § 59402 (1985), Appendix C at C-1.)

However, numerous comments were received regarding the hardship the initially-proposed regulation would have created with respect to instructor-produced materials which usually are only available from districts. Comments were also received stating that health and safety reasons might dictate that a district be the sole provider of materials. As a result, section 59402(c) was modified to allow districts to be the sole provider of required materials *so long as* the district provided the material at its actual cost, in keeping with the spirit of the repealed section 78930 and so long as a health and safety reason was involved, or the material provided by the district was in lieu of other generally available but more expensive material. (Final Statement of Reasons, *supra*, at p. 8.) The revised section 59402(c) read as follows:

> "(c) 'Solely or exclusively available from the district' means that the material is not available except through the district, or that the district requires that the material be purchased or procured from it. A material shall not be considered to be solely or exclusively available from the district if it is provided to the student at the district's actual cost; and:
>
> (1) The material is otherwise generally available, but is provided solely or exclusively by the district for health and safety reasons; or
> (2) The material is provided in lieu of other generally available but more expensive material which would otherwise be required." (*Id*. at p. 10.)

One consistent theme was recurrent throughout the comments addressing the "solely and exclusively available" provision of the regulations: That section 59402 contemplated that the required instructional materials at issue were produced by instructors and subsequently reproduced by the district. In the Summary of Comments Received, it was noted that

> "[s]everal commenters objected to the requirement that the materials not be solely or exclusively available from the district. They noted that community college instructors have developed their own materials which are uniquely suited to the needs of their students and courses. This requirement was included to distinguish requiring a student to obtain instructional material from a practice which is tantamount to requiring a student to pay a fee. The requirement is modified in Section 59402(c) below to allow the specific practice of concern to these commenters." (*Id*. at p. 13.)

In particular, commenters suggested that subdivisions (c)(1) and (c)(2) be eliminated, and one commenter in particular, the Los Angeles Community College District, suggested they be

eliminated because the actual reproduction costs of instructor-produced materials might be more expensive than other generally available but inferior texts. In the Summary of Comments Received, the agency responded:

> "This was found to be highly unlikely, and these comments were rejected. If a district requires a student to purchase a required material from it, this is tantamount to a mandatory fee and should be generally prohibited. If there is no other source for securing the required material, the requirement is tantamount to a mandatory fee and should also be generally prohibited. Exceptions to the general prohibition address those needs that have been brought to our attention." (*Id*. at p. 13.)

Additionally, Frederick P. Trapp, Dean of Academic Services for the Long Beach Community College District, noted in his comment proposing elimination of subdivisions (c)(1) and (c)(2):

> "In many courses, the student is required to purchase a syllabus or manual authored by the instructor or the department. The material is specific for this course, and, therefore, cannot be published nationally by a major publishing house, but the material is too extensive for the college to give free to the student. Since it contains text materials, it is also of continuing value to the student so it meets that part of the regulation. In addition, it would increase costs to the student if the student were required to purchase this at a local copying service just to meet the letter of the regulations. (These copying services might not be available in smaller towns.)" (*Id*., Summary of Comments Received, at p. 14.)

Thus, it is clear that, throughout the rulemaking process, the phrase "district's actual cost" was understood by both commenters and the Chancellor's Office to mean the cost of reproducing instructor-produced materials.

With this background in mind, we now proceed to address your specific questions.

V. May "the district's actual cost" passed on to students for required, faculty-published instructional materials available only through the District bookstore include an amount that the faculty member claims is to compensate the faculty member for his/her time, labor and/or creativity in preparing the instructional material?

No. For several reasons, we conclude that this is not permissible.

First, it is our view that "the amount intended to compensate a faculty member for his or her time, labor, and /or creativity in preparing instructional material" is essentially a royalty payment, and we have been consistent in our opinions that the district's actual cost may not include royalty payments. "[I]nclusion of a markup on instructional materials for royalties to the faculty/author or District from materials solely and exclusively available from the District is a prohibited practice." (Legal Opinion L 02-29 at p. 4.)

Second, inherent in the activity of writing a book is the risk that an author may not be paid for his or her time, labor, and/or creativity, i.e., the book may never sell. In the publishing industry, an author would not receive compensation for time, labor, and/or creativity except through a publisher's advance or royalty payments for books sold.[6] Requiring that a student obtain materials prepared by the instructor of a course the student is taking, especially when those materials are only available or must be purchased from the college bookstore, locks in sales for the faculty author, regardless of the true marketability of the materials, and imposes what amounts to a mandatory fee on the student.

Additionally, if the district were to agree during the collective bargaining process to pay royalties for instructor prepared materials as a part of the faculty compensation package, passing such costs on to students as part of the cost for purchasing the required instructional materials would effectively force students to contribute to paying for the personnel costs of providing instruction. California residents are not required to pay such costs because they are exempt from paying tuition and nonresidents have already paid their share of the cost of education by paying the per unit nonresident tuition for the course.[7]

Finally, the above review of the rulemaking file clearly demonstrates that the Board of Governors intended to create only very narrow exceptions to the prohibition against charging students for required instructional materials which are exclusively available from the district.

The exceptions to this prohibition, which are contained in subdivisions (1) and (2) of section 59402(c), were added only after many districts expressed opposition to the original proposal. Moreover, some commenters suggested that the narrow exceptions which were added would not give districts the flexibility they needed to charge students for the cost of providing instructor-prepared instructional materials. Yet, those comments never so much as mentioned the notion of paying royalties to faculty – they merely advocated that districts should be able to recover the full cost of reproducing instructional materials even if that made the instructor-prepared materials more expensive than generally available materials which would otherwise have been required. The Board rejected this argument and retained the requirement that the district's actual cost could not exceed the cost of equivalent generally available materials which would otherwise be required. Thus, the Board was not prepared to give districts unconditional authority to pass on the full cost of reproducing instructor-prepared materials, let alone paying royalties which would undoubtedly further increase costs.

6 Even in the publishing industry, publishers hold back a percentage of royalties to compensate for books returned by retailers, as royalties paid for unsold books would be unearned.

7 Of course, a district is free to negotiate such an arrangement. Section 59402(c) simply restricts the district's ability to pass royalty costs on to the students where the materials are required and are solely or exclusively available from the district.

VI. May "the district's actual cost" passed on to students for required materials available solely and exclusively through the district include compensation to the faculty member for "out-of-pocket expenses" such as royalties paid by the faculty member to other copyright holders for use of their copyrighted material?

As we have explained, when the regulations were originally adopted the discussion of instructor-prepared materials was focused on the cost of reproducing those materials. However, we believe it would be consistent with the narrow scope of the exceptions in subdivision (c) of section 59402 for a district to pass on to students costs it incurs for reimbursing faculty for out-of-pocket expenses involved in producing required instructional materials. Out-of-pocket expenses (i.e. payments to third parties) do not represent a profit for either the district or its faculty, nor do they constitute part of the compensation faculty receive for teaching a course. In this sense, the cost of royalty payments to other copyright holders for materials included in the instructor-prepared materials are no different than any other hard costs of production such as the cost of reproducing the finished product.

This view is also consistent with our prior interpretations of section 59402. (See, e.g., Legal Opinion L 04-11 at p. 3 ("[A] fee [for required materials available solely and exclusively through the district] in the form of the bookstore purchase price may be appropriate, but the fee may not exceed the cost of production plus a reasonable markup by the bookstore.").)

However, we must hasten to reiterate that even though out-of-pocket expenses reimbursed to a faculty member can be included in the cost passed on to students, the requirements of either subdivision (c)(1) or (c)(2) must still be satisfied. Thus, unless there is a health and safety justification for requiring students to purchase the material from the district under subdivision (c)(1), subdivision (c)(2) caps the cost which can be passed on to students by saying, in essence, that it may not exceed the cost for equivalent generally available materials which would otherwise be required.

VII. May "the district's actual cost" passed on to the students include a royalty charged by the faculty member to the District?

No. This has been clearly addressed above and in Legal Opinion L 02-29 at page 4.

VIII. When a faculty member self-publishes and sells self-published instructional materials by any other means in addition to through the District's bookstore, does Title 5 regulate the price at which the instructional material may be sold by either the Bookstore or the faculty member?

No. Required materials sold in this manner would not be considered "solely and exclusively available" from the district and would not be subject to the strictures of section 59400 et seq.

If you have any additional questions, you may contact Staff Counsel Terrie L. Robinson at (916) 445-1605 or via e-mail at trobinson@cccco.edu.

Sincerely,

Steven Bruckman
Executive Vice Chancellor and General Counsel

Terrie Robinson
Staff Counsel

cc: Carmen Plaza de Jennings, District Legal Counsel
Linda Michalowski, Vice Chancellor for Student Services

TR/RB/rs/fr

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