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To: Fred Harris
Assistant Vice Chancellor, College Finance & Facilities Planning

From: Steve Bruckman
Executive Vice Chancellor of Operations and General Counsel

Subject: Full time Faculty Obligation
Legal Opinion O 09-01

The percentage of instruction offered by full-time faculty, a perennial issue for our colleges, is governed by Education Code section 87482.5 et seq. Section 87482.7 directs the Chancellor to adopt regulations that establish minimum standards regarding the percentage of hours of credit instruction that shall be taught by full-time instructors. (Note: for purposes of compliance determination, current regulations consider full-time equivalent faculty or FTEF percentage attributable to instructional and noninstructional full-time faculty and is no longer based on the percentage of hours of credit instruction.) These regulations are contained in title 5, section 51025.

Colleges are increasingly having difficulty meeting their obligations for full-time faculty (FTF), and we have been asked to provide guidance on the appropriate implementation of reductions in funding as provided in title 5. California Code of Regulations, title 5, section 51025, subsection (c) provides a formula for adjusting the full-time faculty obligation number (FON) for districts that have FTF below 75%. Subsection (e) provides the enforcement mechanism (sometimes called a reduction and sometimes called a payment), a deferral process and a 3 year installment plan. The language contained in the regulation is in bold followed by an explanation of its meaning and application.

(e) On or before January 31 of each year, the Chancellor shall determine, based on information submitted by districts, the extent to which each district, by the fall term of that fiscal year, has maintained or hired the number of full-time faculty, or maintained the full-time faculty percentage if applicable, determined pursuant to subsection (c) for the prior fiscal year.

This section requires the Chancellor to determine, for each district, if it maintained its FON. The FON is established in the prior fiscal year as provided in (c). The District FTF number for purpose of compliance is based on the number of FTF in the current year. So if District A has a

FON of 100 for the 2007-08 fiscal year and the calculation calls for an increase of 5 FTF, the district must maintain 105 FTF for the 2008-09 fiscal year. Thus, based on the information submitted, we must determine prior to January 31, 2009, whether District A is employing 105 FTF.

To the extent that the number of full-time faculty or percentage of full-time faculty has not been maintained or additional full-time faculty have not been retained, the Chancellor shall reduce the district's revenue for the current fiscal year by an amount equal to the average replacement cost for the prior fiscal year times the deficiency in the number or percentage equivalent of full-time faculty.

If we determine that District A does not have 105 FTF, then its revenue is reduced by the formula described above.

If the Board has determined, pursuant to subsection (a), that there are not adequate funds in the current fiscal year to allow full implementation of paragraph (1) of subsection (c), then the Chancellor may defer this reduction of revenue until the subsequent fiscal year in which the Board determines that adequate funds have been provided to allow full implementation of that paragraph.

Each year, prior to November 20, the BOG assesses whether the current year budget will support increases in the FON for the subsequent fiscal year. If there are insufficient funds, districts are not required to increase their FON for the subsequent fiscal year. So to continue the example, District A has a FON of 105 for 2008-09 and the formula contained in subsection (c) ordinarily provides for an increase in the FON to 110 for the 2009-10 fiscal year. However, if the BOG determines prior to November 20 that there are insufficient funds, then subsection (c)(7) comes into play and the FON doesn't increase for the next year.

Subsection (a) requires an evaluation of the current year budget to determine whether the FON will be increased for the next year. This sentence appears to say that if the determination is negative, then "this reduction" may be deferred by the Chancellor. "This reduction" must refer to the reduction referenced in the previous sentence. So, District A would not have to pay the reduction in 2008-09 because the Board determined funding is inadequate. The reduction is deferred at least for one year and the deferral would continue until the Board determines the fiscal conditions have improved.

To the extent a district hires the additional full-time faculty in subsequent fiscal years, the reductions will no longer be levied.

This sentence says that the reduction in funding that occurs if the FON is not met is not a permanent reduction. Once, the FON is reached, the reduction is eliminated for subsequent years. So if District A reaches 105 prior to January 1, 2010, an additional reduction will not be imposed.

Notwithstanding this provision, the Chancellor may not waive reductions that are deferred under the authority of this subsection.

This is a catch-all provision to emphasize that there can be no waivers of reductions, only deferrals as described above. This was a major bone of contention when the regulation was being adopted. CEO's argued intensely for waiver, but the Board did not agree.

The Chancellor may authorize a funding reduction that is deferred under the authority of this subsection to be made over a period not to exceed three fiscal years, provided that the district is meeting its full-time faculty obligation and it is the Chancellor's judgment that the district's financial integrity otherwise would be jeopardized.

This sentence is particularly difficult because it causes one to wonder why a funding reduction that is already deferred would be paid over 3 years. I have reviewed the entire file on this regulation and it was extremely controversial. It was discussed at multiple Board meetings and Consultation Council meetings and it appears that every time it was discussed language was changed. This final sentence was added at the very last meeting (probably in the heat of battle) so it likely did not receive the scrutiny that it should have.

The Final Statement of Reasons in the rulemaking file provides as follows: "The proposed regulations included a clarification that the Chancellor may, defer payments that districts owe as a result of falling short of full-time faculty obligation targets, but may not waive these payments. Another change allowed the Chancellor to authorize these payments to occur on an 'installment plan' not to exceed three fiscal years" provided criteria are met. This indicates that if and when payments are made by a district, the Chancellor has discretion to receive payment over no more than 3 years.

So, returning to our example, if District A has 103 FTF in the 2008-09 fiscal year, they are short 2 FTF positions and if each FTF hypothetically is valued at \$100,000, District A is obligated to pay a reduction of \$200,000. The question then is when does District A pay the \$200,000? Under normal circumstances, that payment is to be made immediately, in the fiscal year that the FON was not reached. However, as explained above, it can be deferred if the BOG makes the finding of insufficient funds prior to November 20. Having deferred the reduction, when fiscal conditions improve and the reduction comes due, the Chancellor has the additional discretion to spread payment over 3 years if and only if two strict criteria are met: 1) the FTF obligation is being met; and 2) financial integrity would otherwise be jeopardized. Criteria #1 must be read prospectively.

We already know District A didn't meet its FON for 2008-09 and we know the Board made the necessary finding in November 2008. To be eligible for the 3 year repayment plan, District A's FON will be evaluated when the Board determines that the budget supports adjustment to the FON. To continue the example, if the Board decides prior to November 20, 2009, that the budget situation has sufficiently improved, the Chancellor has authority to offer a 3 year repayment plan. To be eligible, Criteria # 1 will require District A to be meeting its FON for the 2009-10 fiscal year based on the information that must be submitted prior to January 31, 2010. Criteria #2 sets an extremely high standard because jeopardizing financial integrity is a higher standard than mere financial hardship. Using District A as an example, it's hard to imagine that a district with the resources to employ 100 FTF would have its financial integrity jeopardized by a one-time payment of \$200,000. However, this is speculative and the Chancellor will assess each case as necessary under the circumstances.

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