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

From: Jonathan Lee
Staff Counsel

Subject: Nonresidents and Capital Outlay Fees
Legal Opinion 09-05

QUESTION

Are students who are exempted from the nonresident tuition fee pursuant to Education Code section 68130.5 (AB 540) automatically exempted from the capital outlay fee in section 76141 (without demonstrating economic hardship or persecution/discrimination), to the extent a district wishes to implement the fee for all nonresidents?

CONCLUSIONS

Students who are exempted from the nonresident tuition fee pursuant to Education Code section 68130.5 are exempted from the capital outlay fee in section 76141.

BACKGROUND

AB 947 amends Education Code section 76141 to enable community college districts to charge all nonresidents a capital outlay fee. The previous version of section 76141 only allowed districts to charge a capital outlay fee to nonresidents who were both citizens and residents of a foreign country and did not demonstrate some form of economic hardship, persecution, or discrimination in their home countries. Our office later determined in legal opinion O 04-15 that a college district may not charge the capital outlay fee authorized by section 76141 to a student who is eligible for the exemption from the nonresident tuition provided by section 68130.5.

ANALYSIS

In legal opinion O 04-15, our office examined the interaction between Education Code sections 76141 and 68130.5. As the plain language of the two codes did not provide any insight how the statutes affected each other, our office delved into their respective legislative history to shed some light on the issue.

The legislative history of section 76141 indicated that this statute was intended to apply to wealthy foreign students who came here for college and later would return to their countries of origin. As a result, those students do not pay taxes which would help support the capital outlay projects at the colleges they attended.

By contrast, the legislative history behind section 68130.5 was intended to benefit those who would be “long-term California residents.” Section 68130.5 was patterned after a similar legislation enacted in Texas which allowed long-term immigrants to pay in-state tuition. These students (AB 540 students) do pay taxes and invest in the system, and therefore would already be contributing to capital outlay projects at the colleges. This idea is further supported by the language which requires “high school attendance for three or more years” in California.

Based on these findings, our office determined that section 76141 did not apply to AB 540 students, since this would constitute an additional capital outlay fee to such students. As a result, those who qualify for the exemption through section 68130.5 would not be responsible for fees under section 76141.

AB 947 amends section 76141 to allow community college districts to charge all nonresident students a capital outlay fee. Again, the plain language of the statute does not clearly indicate how this would apply to AB 540 students. As a result, our office will turn to the legislative history behind AB 947 for insight.

The Assembly Committee Analysis of AB 947 dated April 21, 2009 makes a direct reference to AB 540 students in the “Comments” section. In that section, it states that, “Resident students, including those who pay resident fees under AB 540 (Firebaugh)...are not charged capital outlay fees because they are assumed to have contributed through their payment of state and local taxes.”

According to the Assembly Committee Analysis, the purpose of the bill is to “address an inequity in the law” that requires resident students to pay capital outlay fees while nonresidents who are not U.S. citizens do not pay capital outlay fees, “even though they use the facilities in the same way as resident and foreign students.” Thus, AB 540 students, who already do contribute to capital outlay fees, do not fall within the “inequity” contemplated by the authors of the legislation. AB 540 students therefore are exempt from fees described in the amended version of Education Code section 76141.

CONCLUSION

AB 947 amended section 76141 to enable community college districts to charge all nonresident students a capital outlay fee. The reasoning behind this change was to require all students who use college facilities to pay their fair share of the costs to maintain and use those facilities. AB 540 students already contribute to capital outlay costs through their payment of state and local taxes and are not affected by the AB 947 amendment. AB 540 students are therefore exempt from the capital outlay fees allowed by section 76141.