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March 27, 2006

TO: Robert Turnage
Vice Chancellor for Fiscal Policy

FROM: Steven Bruckman
Executive Vice Chancellor and General Counsel

SUBJECT: Conditions for Amending an Application for Exemption from the Fifty
Percent Law
Legal Opinion O 06-03

ISSUES:

You have asked the following questions regarding the procedures which apply to a community college district's amendment of its application for an exemption from the requirements of Education Code section 84362:

1. May a community college district amend its application for exemption if errors are discovered which significantly increase the district's deficiency and the amount of the exemption request must be adjusted accordingly?
2. If such an amendment is permitted, may it be submitted after December 15th of the fiscal year following the year of deficiency?
3. If such an amendment is permitted, can the district also modify the grounds on which the exemption was requested?
4. If such an amendment is permitted, is the district governing board required to hold a hearing and accept public testimony before approving the amended application?

CONCLUSION:

A community college district may amend its application for an exemption from the requirements of section 84362 where an arithmetical error or miscategorization of expenses has significantly changed the amount of the district's deficiency and its exemption request must be adjusted accordingly. Such an amendment may be filed after December 15th of the fiscal year following the year of deficiency. If the amendment is filed after December 15th, the district governing board may revise its findings to change the justification for its exemption application. If the district does wish to revise the justification for its exemption application, its governing board must hold a public hearing and afford employee organizations the opportunity to comment or object, but if the district does not wish to revise its findings, a hearing is not required although it would still be advisable.

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ANALYSIS:

Education code section 84362 (the Fifty Percent Law) requires that each community college district expend at least 50% of its current expense of education on the salaries of classroom instructors. The Board of governors has adopted regulations commencing with California Code of Regulations, title 5, section 59204, to implement this requirement.

Education Code section 84362 and the related regulations permit a district which has not expended 50% of the current expense of education on the salaries of classroom instructors to request an exemption from the requirements of the law. Such an exemption may be based on the grounds that compliance with the law would have imposed serious hardship on the district or that it would have required the district to pay salaries of classroom instructors in excess of those paid by comparable districts. (Cal. Code Regs., tit. 5, § 59206.) The application for exemption must be considered by the district governing board at a public hearing and, if approved, must be submitted to the Chancellor's Office no later than December 15th of the fiscal year following the year of deficiency. (Cal. Code Regs., tit. 5, § 59208.)

Title 5, section 59212 permits amendment of the application for exemption under certain circumstances. It provides:

"§ 59212. Amendments to District Applications.

(a) The Chancellor may accept amendments to the district's application for exemption if the Chancellor determines that the proposed amendments are nonsubstantive rather than substantive. Nonsubstantive amendments are only those which result from arithmetical errors and miscategorization of expenses. Such amendments must also be certified by the district's independent auditor.

(b) A district filing an amendment to its application for exemption under this section is not required to follow the procedures of section 59206. However, the district shall furnish a copy of the amendment to the certificated faculty organization required to be notified pursuant to section 59207 at the same time the amendment is filed with the Chancellor. Where a hearing of the Chancellor has been requested pursuant to section 59210, such amendment must be submitted 20 working days prior to the date of the hearing."

Your first question is whether a district may amend its exemption application to increase the amount of the requested exemption where it has been discovered that the district's deficiency amount is significantly higher than originally thought. It has been suggested that such an amendment is not allowed because section 59212 could be construed to refer only to errors in the exemption application itself, rather than errors in the calculation of the deficiency. However, we must reject this narrow reading of the regulation since section 59212 refers to errors involving "miscategorization of expenses." Requesting an exemption of a certain amount does not, in of itself, involve categorizing expenses. Rather, this is clearly intended to refer to errors in the categorization of expenses which

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might occur in the process of calculating the district's deficiency. Thus, we think section 59212 does permit an amendment of the exemption application to adjust the amount of the exemption request as a result of errors in calculating the district's deficiency amount.

Your second question is whether such an amendment may be filed after December 15th. Section 59212 is silent on this point, but some confusion arises from the fact that the regulation states that, "A district filing an amendment to its application for exemption under this section is not required to follow the procedures of section 59206." Section 59206 requires that an application for exemption be filed by September 15th. While it is clear that this deadline does not apply to amendments, the fact that section 59212 does not provide a similar exemption from the requirements of section 59208 could be construed to suggest that the December 15th deadline set forth in that section does bar amendment after that date.

However, we reach a contrary conclusion for several reasons.

First, a careful reading of Education Code section 84362 and the relevant regulations makes clear that the December 15th deadline set forth in title 5, section 59208 does not relate to the submission of the application for exemption. Subdivision (e) of Education Code section 84362 provides that:

"In the event it appears to the governing board of a community college district that the application of the preceding subdivisions during a fiscal year results in serious hardship to the district, or in the payment of salaries of classroom instructors in excess of the salaries of classroom instructors paid by other districts of comparable type and functioning under comparable conditions, the governing board may apply to the board of governors, in writing, not later than September 15th of the immediately succeeding fiscal year for exemption from the requirements of this section."

This statutory requirement is implemented by title 5, section 59206. By contrast, the December 15th deadline set forth in section 59208 does not relate to the submission of the "application for exemption" but to the date by which the district must "transmit the findings of the governing board to the Chancellor in a form and manner to be determined by the Chancellor."

Second, the regulations indicate that both the application for exemption described in section 59206 and the findings of the governing board described in section 59208 are to be submitted in a form and manner to be determined by the Chancellor. We have a long-standing practice of allowing districts to make adjustments in the details of their exemption request between the submission of the exemption application in September and submission of the findings of the governing board by December 15th. It would, therefore, have been pointless for the Board of Governors to have adopted section 59212 if it only permitted amendments up until December 15th.

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Finally, section 59212 states that, "Where a hearing of the Chancellor has been requested pursuant to section 59210, such amendment must be submitted 20 working days prior to the date of the hearing." Section 59209 provides that if the exclusive representative of the academic employees wishes to request a hearing before the Chancellor, it must do so "Within two weeks of the public hearing or by the date the district is required to transmit its findings to the Chancellor, whichever is later." Since the deadline for submission of findings is December 15th, unless the district holds its local hearing by December 1st, the deadline for the exclusive representative to request a hearing by the Chancellor will not even occur until after December 15th. Yet, section 59212 refers to the hearing by the Chancellor having already been requested, so it clearly contemplates the possibility that an amendment might be filed after December 15th.

Your third question is whether a district which amends its exemption application after December 15th may also modify the grounds on which it requested an exemption.¹ We conclude that it may.

Section 59206 does not require that a district specify in its application for exemption the grounds on which the exemption will be based. That information is contained in the findings of the governing board which, as noted above, are to be transmitted to the Chancellor's Office by December 15th pursuant to section 59208. Since section 59212 deals with amendments to the district's application for exemption, it is unremarkable that it does not discuss whether, or under what circumstances, a district might change the basis on which it justifies its exemption request.

Since the regulations are silent on the question of whether a district may modify the grounds on which it requests an exemption after the December 15th deadline, we must look to the intent underlying section 59212. As we have demonstrated above, section 59212 does permit a district to amend its application for exemption in the event that it discovers arithmetical errors or errors resulting from miscategorization of expenses which occurred in calculating the percentage of current expense of education it devoted to salaries of classroom instructors. In many instances a change in the amount of the district's deficiency will not impact on the justification for requesting the exemption. If a district justified its original application for exemption on the grounds that spending the amount of the deficiency on salaries of classroom instructors would have required it to pay salaries in excess of those paid by comparable districts, an amendment reflecting an

¹ Of course, if the district amends its application for exemption early on in the process, it will not need to be concerned with modifying the basis for justifying the request because it will be working with the revised deficiency amount at the time the governing board holds its public hearing pursuant to section 59208.

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increase in the district's deficiency will only strengthen this argument. However, there may be circumstances where the amendment of the exemption application will suggest the need for a revision in the district's justification and the findings made by its governing board. Some examples might help to illustrate how this could occur:

First, suppose district X has a deficiency of \$300,000 and submits its application for exemption in a timely manner. On December 15th the district submits the findings of its governing board indicating that the district had unanticipated and unbudgeted expenses in the year of deficiency of \$400,000² and that spending an additional \$300,000 on salaries of classroom instructors that year would have resulted in serious hardship for the district. In February the district discovers an arithmetical error which increases the amount of its deficiency to \$500,000. It now seeks to amend its application for exemption to reflect this increased deficiency but the justification it had originally provided is obviously inadequate to support a request for an exemption in the amount of \$500,000.

Consider another scenario. On September 1st district Y submits an application requesting an exemption in the amount of \$500,000. On December 1st the district transmits the findings of its governing board indicating that if it had devoted that \$500,000 to salaries of classroom instructors it would have paid salaries to its faculty in excess of those paid by comparable districts. On January 15th the district discovers that its deficiency is actually only \$200,000 instead of \$500,000. It might turn out that the district could have paid an additional \$200,000 in salaries of classroom instructors without paying salaries in excess of those paid by comparable districts.

We do not think that, under such circumstances, a district should be precluded from offering alternative grounds to justify its amended application for exemption. Perhaps a prudent district would assert all possible grounds for claiming an exemption in case a subsequent amendment rendered one insufficient. Nevertheless, a district which does not adopt this "belt and suspenders" strategy should not be punished by being precluded from later asserting a different justification for its exemption if the one it chose is rendered inadequate by a subsequent amendment. To do so would only serve to encourage districts to refrain from disclosing such errors and would, thereby, frustrate the purposes of the amendment process.

² This is only one of the circumstances which can support a finding of serious hardship. Title 5, section 59204(c) lists all of those situations. It provides:

"(c) 'Serious hardship' shall mean conditions under which:

- (1) conformance with the 50% requirement during the year of deficiency would have resulted in the district's inability to discharge financial liabilities;
- (2) the first year of infusion of new moneys resulted in the district's inability to comply with the requirements of Education Code Section 84362;
- (3) unanticipated, unbudgeted, and necessary expenditures resulted in the district's inability to comply with the requirements of Education Code Section 84362; or
- (4) the district has expended funds pursuant to Section 59213(f)."

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Before leaving this topic, we must point out that the above analysis should not be misconstrued to allow a district to revise the findings of its governing board after their submission pursuant to section 59208 in the absence of an amendment resulting from an error in calculating the amount of the deficiency. Section 59208 is quite emphatic that failure of a governing board to submit its findings by December 15th will void the district's application for exemption. For the reasons discussed above, we conclude that the amendment of the district's application for exemption pursuant to section 59212 creates an exception to this rule and permits the district to also revise the justification for its exemption request if the original justification is no longer sufficient.³ However, in the absence of an amendment revising the amount of the deficiency there is no basis for overriding the deadline established by section 59208.

Finally, you have asked whether the district is required to hold another public hearing if it wishes to amend its application for exemption. As discussed above, the reason for holding a public hearing is for the governing board to determine whether an exemption is justified and, if so, on what grounds. Thus, there is no need for a second hearing unless the governing board wishes to also revise its findings and change the basis on which it justifies its exemption request.

Section 59212 says nothing about the governing board needing to hold another hearing. Indeed, it seems to suggest that this is not necessary since it provides that the exclusive representative of the academic employees and the academic senate must be sent a copy of the amended application for exemption and then goes on to discuss the hearing to be held by the Chancellor where one has been requested. Presumably the employee groups would have their opportunity to challenge the propriety of the amendment at the hearing to be held by the Chancellor if they have objections.

Nevertheless, we think there may be sound reasons for strongly encouraging a district which amends its exemption application to hold another public hearing if the amendment occurs subsequent to the hearing required pursuant to section 59208. The employee organizations may, for example, dispute that the amendment is the result of arithmetic errors or miscategorization of expenses. It would be desirable to have such objections fully aired and hopefully resolved at the local level so that a hearing by the Chancellor would be unnecessary.

We must, however, emphasize that this is not a hearing required by the regulations and a district could decline to offer employees this forum for contesting the amendment. Of course, if the change in the amount of the deficiency does affect the grounds on which the

³ One of the fundamental principles of statutory construction is that a specific provision will take precedence over a more general one. To the extent that our interpretation of section 59212 might be seen as conflicting with the deadline established by section 59208, we hold that section 59212 would control because it deals with the more specific situation of an amendment not addressed in the more general language of section 59208 dealing with the hearing by the district governing board.

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district based its original request and the district wishes to alter the findings made by its governing board as discussed above, it would be required to hold a second hearing and would be obliged to permit employee organizations to object to the change in the basis of the exemption request.

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