

**CALIFORNIA COMMUNITY COLLEGES  
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February 23, 2007

TO: Fred Harris  
Assistant Vice Chancellor for College Finance

FROM: Steven Bruckman  
Executive Vice Chancellor and General Counsel

SUBJECT: Options for Setting Nonresident Tuition  
**Legal Opinion O 07-01**

**ISSUE**

You have asked whether Education Code section 76140 permits a community college district to set its nonresident tuition at a level below its own expense of education or the statewide average expense of education.

**CONCLUSION**

A community college district may not set its nonresident tuition at a level lower than either its own per unit expense of education, adjusted for inflation, or the statewide average per unit expense of education, adjusted for inflation, whichever is less.

**ANALYSIS**

Education Code section 76140 provides that each community college district "may admit and shall charge a tuition fee to nonresident students." Subdivision (e) of that section then goes on to prescribe the options available to a district for setting the level of the nonresident tuition. It provides, in pertinent part:

"(e) The fee established by the governing board pursuant to subdivision (d) shall represent for nonresident students enrolled in 30 semester units or 45 quarter units of credit per fiscal year (1) the amount that was expended by the district for the expense of education as defined by the California Community College Budget and Accounting Manual in the preceding fiscal year increased by the projected percent increase in the United States Consumer Price Index as determined by the Department of Finance for the current fiscal year and succeeding fiscal year and divided by the FTES (including nonresident students) attending in the district in the preceding fiscal year, (2) the expense of education in the preceding fiscal year of all districts increased by the projected percent increase in the United States

Consumer Price Index as determined by the Department of Finance for the fiscal year and succeeding fiscal year and divided by the FTES (including nonresident students) attending all districts during the preceding fiscal year, (3) an amount not to exceed the fee established by the governing board of any contiguous district, or (4) an amount not to exceed the amount that was expended by the district for the expense of education, but in no case less than the statewide average as set forth in paragraph (2)."

Since the nuances of calculation are not relevant to our analysis, we can simplify and describe these options in shorthand form as:

1. the district's actual expense of education;
2. the statewide average expense of education;
3. an amount not to exceed the level set by a contiguous district; or
4. an amount not to exceed the district's expense of education but not less than the statewide average expense of education.

We understand that some districts have asserted the view that option 3 effectively allows a district to set its nonresident tuition at any level less than or equal to the nonresident tuition rate established by any contiguous district. This interpretation is based on the fact that option 3 simply says that the nonresident tuition may be set at a level "not to exceed the fee established by the governing board of any contiguous district." According to this theory, this language only sets an upper limit on the tuition level and therefore suggests that a district could set its tuition at ANY level below that of neighboring districts--even a level below its own costs or the statewide average.

However, a review of the structure and legislative history of section 76140 convinces us that this notion is inconsistent with the basic purpose of the section and the intent of the Legislature in defining the options listed in subdivision (e).

Initially, we observe that under the theory described above, a community college district could conceivably set its nonresident tuition at 0 because this amount would be less than that charged by any contiguous district. Clearly this would be an absurd result and would be inconsistent with the very first sentence of the statute which says that districts "shall charge" nonresident tuition. Thus, there must be some lower bound to the level at which a district may set its nonresident tuition, but if we were to assume that a district can select any level lower than that of a contiguous district, the language of the statute leaves us with no rational basis for determining what that lower limit might be.

When the language of a statute is ambiguous, we look to the legislative history of the provision for guidance. As we shall see, the legislative history of section 76140 demonstrates that the Legislature did not intend option 3 to permit a district to reduce its nonresident tuition below the district's actual cost or the statewide average cost.

Up until 1983, section 76140 provided only the first two options for setting nonresident tuition. That is, a district could base its nonresident tuition on its actual expense of

education adjusted for inflation or could base it on the statewide average cost adjusted for inflation. In 1983, Senate Bill 646 (Stats. 1983, ch. 317) changed this by adding the language at issue here permitting a district to set its nonresident tuition at a level not to exceed that of any contiguous district. Although it is not reflected in the language added by SB 646, it is clear that the Legislature understood the bill to have the effect of allowing districts to increase their nonresident tuition above the levels authorized under either option 1 or option 2 listed above. The Enrolled Bill Report prepared by the Department of Finance on July 14, 1983, explained that:

"This bill would authorize each community college district to use a method other than those presently prescribed by law to compute the level of tuition it is required to charge to its nonresident students. This new method would authorize districts to increase nonresident tuition. . . .

. . . . Thus, a district which is a neighbor to another district with a higher CEE and resultantly higher nonresident tuition could increase its own nonresident tuition."

Nowhere in the record is there any indication whatsoever that the Legislature ever anticipated that the amendments made by SB 646 would have the effect of allowing districts to lower their nonresident tuition rate or even to discontinue charging nonresident tuition entirely.

In 1989, SB 716 (Stats. 1989, ch. 985) added the fourth option for determining the level of nonresident tuition. Although the meaning of option 4 is not in dispute, the legislative history of SB 716 is instructive.

It appears that SB 716 was intended to allow districts to have flexibility to establish nonresident tuition in a range between the specific amounts authorized under options 1 and 2. The analysis prepared for the hearing of the Assembly Subcommittee on Higher Education on July 11, 1989, explained that:

"This bill would establish a range between options 1 and 2 within which the community college district governing boards could select a tuition level. The Los Angeles Community College District in 1989-90, for example, can charge \$94 per semester unit for nonresident students (option 2), \$102 per unit (option 3), or \$120 per unit (option 1). To meet expenses and remain competitive, it wants to raise tuition from \$97 to \$107 per unit, but under current law it can only raise it from \$97 to either \$102 or \$120 per unit. This bill would allow LACCD to set tuition anywhere between \$94 and \$120 per unit."

*raise yr.*  
*raise yr.*

This analysis reflects the Legislature's understanding of the law as it existed in 1989. Specifically, it was understood that a district in the situation of LACCD could only raise its nonresident tuition to one of two discrete values and nothing in between. However, this would not have been true if the 1983 amendments to the statute already authorized districts to set their nonresident tuition at any level below that of a contiguous district.

Had that been the case, LACCD would have been able to set its nonresident tuition at any level below \$102 per unit.

The Higher Education Committee analysis also explained that SB 716 was being considered in the light of recommendations on nonresident tuition policy for the three segments of higher education which had recently been presented to the Legislature in a June 1989 report by the California Postsecondary Education Commission (CPEC). The analysis lists several of the recommendations from that report, including that, "In annually determining nonresident tuition, each segment should consider its average cost of instruction, in addition to nonresident fees of public institutions in other states. . . . A segment's level of nonresident tuition and fees should never be less than that segment's marginal cost of instruction." The analysis for the Ways and Means Committee hearing on August 23, 1989, added that the provisions of SB 716 were "consistent with the practices of four-year public segments, particularly the University of California, with respect to nonresident tuition. These requirements come from recommendations contained in a recent CPEC report on a long-term non-resident fee policy."

Consistent with the CPEC recommendation that nonresident tuition should never be set at a level below a segment's marginal cost, SB 716 authorized districts to set their nonresident tuition in a range carefully defined as "an amount not to exceed the amount that was expended by the district for the expense of education, but in no case less than the statewide average." It would have made little sense for the Legislature to insist that the nonresident tuition rate under the new option 4 could "in no case" be less than the statewide average if option 3, which had been incorporated into the statute in 1983, allowed a district to set its nonresident tuition below that level.

Thus, we conclude that the theory that option 3 allows a district to set its nonresident tuition at any level below that of a neighboring district is inconsistent with the language and legislative history of section 76140. Instead, it is our view that the statute must be read to impose an implicit limit on option 3 -- that a district may set its nonresident tuition at any level which does not exceed that of a contiguous district, but in no case less than the districts actual cost or the statewide average cost, whichever is less.

cc: Erik Skinner, Vice Chancellor, Fiscal Policy  
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SB/RB/fr/jg