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FORMAL OPINION	)	No. 12-04
OF	)	AG Alpha No. HE CO AGBDU
JOHN W. SUTHERS Attorney General	)	June 19, 2012

This opinion, requested by the Colorado Community College System, addresses the authority of state institutions of higher education in Colorado to provide discounted tuition to students who cannot prove they are lawfully present within the United States.

QUESTION PRESENTED AND ANSWER

Question: Without statutory authorization, do Colorado's state-supported institutions of higher education have the authority to grant discounted tuition rates to students who cannot prove they are lawfully present in the United States?

Answer: No. Discounted tuition is a "public benefit," which under current state law may only be provided to individuals who prove their lawful presence in the United States.

BACKGROUND

Colorado's state-supported institutions of higher education generally charge students one of two rates of tuition: a lower rate for "students with in-state classification" and a higher rate for students statutorily classified as "nonresident students."[1] To qualify for the in-state tuition classification, and thus for the lower rate, students must meet a

[1] *See* § 23-5-130.5(1), C.R.S. (2011) (providing authority, within certain limitations, for "each governing board" to "annually set the amount of tuition to be paid by students with *in-state classification* and by *nonresident students*" (emphasis added)). Other statutes explicitly authorize certain additional tuition categories for students who meet specific criteria. *See* §§ 23-7-103, 23-7-105 through 111 C.R.S. (2011).

number of requirements, including that they prove they are lawfully present in the United States.[2]

Six times in the past decade, the General Assembly has considered, and rejected, legislation that would have changed this tuition structure by creating an additional student classification and authorizing higher-education institutions to charge students who cannot prove their lawful presence a tuition rate lower than the typical rate for nonresident students.[3] The most recent effort was Senate Bill 12-015, known as the "ASSET" bill, which was supported by the governing boards of a number of state institutions of higher education, including the Community College System, Metropolitan State College of Denver ("Metro State"), the University of Colorado, and others, including the Lieutenant Governor.[4] Despite this support, the General Assembly declined yet again to alter the basic in-state/nonresident tuition structure.

Nevertheless, on June 7, Metro State created a new tuition classification similar, but not identical to, that contemplated by the bill.[5] Metro State's new tuition classification charges a so-called "unsubsidized" tuition rate to nonresident students who have graduated from and attended a Colorado high school for three years—including students who cannot prove their lawful presence in the United States.[6] Metro State calculated the rate for this new classification by adding to the in-state rate of $6,164.40 (which includes the per-student amount from the state College Opportunity Fund ("COF") given to in-state students) a fee-for-service charge and a charge designed to cover a share of the institution's capital construction costs. The total to be charged for full-time students in this new tuition classification rate is $7,157.00 per school year at 15 credit hours per semester. This is a significant discount—nearly $9,000—from the tuition classification rate which such students (and other nonresidents) would otherwise be required to pay: $15,985.20.[7]

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[2] *See* § 24-76.5-103, C.R.S. (2011); *see also* §§ 23-7-101 *et seq.*, C.R.S. (2011); Colo. Dep't of Higher Educ., Policies, Section VI, Part B (Sept. 6, 2007).

[3] *See* Todd Engdahl, *Literacy Advances; ASSET Doesn't*, Education News Colorado, April 25, 2012, *available at* http://www.ednewscolorado.org/2012/04/25/37393-literacy-advances-asset-doesnt#asset.

[4] Sponsors of the ASSET bill represented that virtually every institution of higher education in Colorado supported the bill. *See, e.g.*, Testimony of Rep. Crisanta Duran during the Colorado House Finance Committee Hearing of April 25, 2012.

[5] Metro implemented this policy without consulting this office.

[6] *See* Agenda for the Metropolitan State College of Denver Board of Trustees Meeting of Thursday, June 7, 2012 ("Agenda"), at 2–4.

[7] It is also significantly lower than the rate charged to residents of 14 states under a program authorized by an inter-state compact and statute known as the Western Undergraduate Exchange (WICHE–WUE): $9,246.60. *Id.* at 5.

The debate over the ASSET bill was intense because it had generally been considered a necessary step to creating a new, discounted tuition classification rate for undocumented students. In light of this general understanding, certain state-supported institutions of higher education, elected officials, and members of the public have asked this office to give its opinion as to whether the current statutory regime prohibits state institutions of higher education from unilaterally creating a discounted tuition classification rate for undocumented students, or whether those institutions have had the discretion all along to do what the ASSET bill was designed to do.

ANALYSIS

The thicket of law and regulation surrounding the issue of higher education and tuition rates for undocumented students is dense. The precise question here, however, arises from a fairly narrow disagreement. Supporters of Metro State's approach do not dispute that a subsidized tuition rate is a "public benefit"—indeed, Metro State has taken pains to set the new special tuition rate at a level it argues would precisely match the cost to the state of providing an education.[8] In doing so, Metro State argues that it has eliminated any state benefit. The contrary argument is that providing a discount of nearly $9,000 per year compared to the rate these students would otherwise pay is a "public benefit," even if the state's costs are covered. I am persuaded that the latter view is correct.

State law requires that "each agency or political subdivision of the state shall verify the lawful presence in the United States of each natural person eighteen years of age or older who applies for state or local public benefits."[9] It is "unlawful for an agency or a political subdivision of the state to provide a federal public benefit or a state or local public benefit in violation of this section."[10] Under this law, every year "each state agency or department that administers a program that provides state or local public benefits shall provide a report with respect to its compliance . . . to the state, veterans, and military affairs committees of the senate and house."[11]

Federal law likewise declares that anyone not legally in the country "is not eligible for any State or local public benefit."[12] If a state wishes to offer "public benefits" to those

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[8] Agenda, at 2–4.

[9] § 24-76.5-103(1), C.R.S. (2011).

[10] § 24-76.5-103(9), C.R.S. (2011).

[11] *Id.*

[12] 8 U.S.C. § 1621(a). Because the receipt of federal funds is generally premised on compliance with state and federal law, it is possible that providing a "public benefit" in violation of this federal statute could jeopardize any federal funding a state agency receives. *See, e.g.*, Tex. Attorney Gen. Op. JC-0394, 2001

who cannot establish lawful presence in the United States, it may do so only if it "enact[s] . . . a State law after August 22, 1996, which affirmatively provides for such eligibility."[13]

State and federal law define "public benefit" identically, covering "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government."[14] By their plain terms, these provisions undisputedly apply to any "postsecondary education ... benefit" Metro State or any other state institution of higher education might provide. Thus, the question is whether nearly $9,000 in discounted tuition is a "benefit" for purposes of these laws.

There is little case law on this question to guide us. There have been a number of lawsuits over state programs similar to what would have been authorized by the ASSET bill. But none of them addresses whether a state-supported educational institution may, without legislative approval, create a lower rate of tuition for unlawful residents than that which would otherwise apply. Moreover, the case law does not involve disputes about whether there is any "benefit" in these situations; the disputes center instead on whether the provision of these benefits violates the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), a federal law providing that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a state ... for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit without regard to whether the citizen or national is such a resident."[15] Metro State's proposal, like the ASSET bill, seeks to avoid IIRIRA's specific prohibition by administering the tuition discount not on the basis of residence in Colorado, but instead upon three years' attendance and graduation from high school here.[16] This approach was upheld in California,[17] and it is not necessary to question it in this Opinion.[18]

WL 786684, at *5 (July 10, 2001) (noting that a hospital system's failure to comply with 8 U.S.C. § 1621 "could jeopardize the receipt of state or federal funding").

[13] 8 U.S.C. § 1621(d).

[14] § 24-76.5-102(3), C.R.S., *citing* 8 U.S.C. § 1621.

[15] 8 U.S.C. § 1623.

[16] *See* SB 12-015.

[17] *See Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 861–64 (Cal. 2010). Other cases challenging similar programs on similar grounds have typically been dismissed for lack of standing. *See, e.g., Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007).

[18] This Opinion should not be read to address the legality of the ASSET bill. Like Metro State's new tuition policy, that bill would have created a new statutory tuition classification rate based on high

I am guided by three considerations, however, that all support the conclusion that discounted tuition is a "public benefit," and, without specific statutory authorization, may only be given to those who can verify their lawful presence in Colorado.

First, the language of the statutes defining "public benefit" is broad and clear. It applies to a wide range of possible forms of government benefits or aid, including any postsecondary education benefit "for which payments or assistance are provided."[19] Metro State's new tuition rate does not involve a direct "payment," so the question becomes whether the $8,828.20 per-year discount is a form of "assistance." There can be little doubt it is.

Assistance is defined as "aid" or "help."[20] It is quite clear that Metro State's new discounted tuition would be a significant aid or help to students who qualify. After all, the very purpose of Metro State's plan—and indeed the ASSET bill—is to make attending college easier for certain students (that is, to "help" them attend college) by discounting currently applicable tuition rates. Metro State estimated that its plan would result in the enrollment of 300 new students, who otherwise would not enroll at the University.[21] Discounted tuition to a state-supported university therefore falls within the plain meaning of the term "public benefit."

As explained above, federal law permits states to offer benefits to individuals who cannot prove their lawful presence, but a state can do so only by "enact[ing] . . . a *State law* after August 22, 1996, which *affirmatively provides* for such eligibility."[22] Federal law therefore requires an affirmative choice by the state legislature to provide benefits to

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school attendance and graduation, rather than on residency, so as to avoid a conflict with IIRIRA. And, as noted above, had it passed, the ASSET bill would have been a new state law intended to satisfy the exception in 8 U.S.C. § 1261 to the general prohibition against giving "benefits" to unlawful residents. Moreover, aside from its intended compliance with federal law, the ASSET bill's specific provisions appeared to be designed to prevail over contrary language in other state law, including § 24-76.5-103, C.R.S. (2011). *See, e.g., Martin v. People*, 27 P.3d 846, 852 (Colo. 2001) ("If statutes conflict irreconcilably, then the General Assembly has directed us to apply special rules of construction to determine which statute will prevail. The legislative direction most relevant to the matter before us states that if a general provision conflicts with a specific provision, then 'the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.'" (citations omitted)).

[19] § 24-76.5-102(3), C.R.S. (2011), *citing* 8 U.S.C. § 1621 and adopting the meaning of "public benefit" therein.

[20] *American Heritage Dictionary*, 2d ed. at 135. One example of "assistance" provided by the dictionary—relevant here—is "financial assistance." *Id.*

[21] *See* Agenda, at 5.

[22] 8 U.S.C. § 1621(d) (emphasis added).

individuals who cannot prove their lawful presence in the United States. The ASSET bill was one of many efforts by the Colorado legislature to satisfy this federal mandate. But the General Assembly has consistently refused to make the affirmative choice required by federal law to grant discounted tuition to undocumented students.[23]

Second, as a matter of logic, discounting tuition in this way is identical to providing a cash payment or scholarship, either of which would constitute a public benefit. Metro State could have achieved the same result by leaving the tuition rate as it is, but offering a scholarship of $8,828.20 per year to students meeting the same criteria as those in the new program. No one could reasonably argue that this "payment" would not qualify as a public benefit, and the statutes bring within them multiple forms of "assistance" that would have the same effect. So, from the perspective of both the institution and the prospective student, the effect of this assistance is the same, whatever form it takes—as a result of Metro State's new policy, attending college costs far less for a certain class of students than it otherwise would. Metro State, for example, suggests that approximately 120 students currently attending the University will be eligible for the discounted tuition rate.[24] For these 120 students, the program is identical to a scholarship of $8,828.20. And the benefit to these students alone translates to a total of over $1 million the students would otherwise have been required to pay.

Third, Metro State's proposed analytical framework—that "assistance" or "benefits" exist only when the tuition rate falls below the total cost to the state—is unworkable and cannot have been what the state and federal legislatures intended when enacting provisions prohibiting "public benefits" to those who are unable to verify their lawful presence. Calculating the actual subsidy provided to students attending state institutions of higher education is difficult, if not impossible. Metro State's proposal takes the in-state tuition rate (including the COF stipend) and adds to it an estimate of a fee-for-service per full-time employee and an estimate of the student's annual share of the state's capital contributions to Metro State.[25] This, it says, creates an "unsubsidized"

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[23] No state law in Colorado "affirmatively provides" for tuition benefits to students who are unable to establish their lawful presence in the United States. *Compare Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 866–67 (Cal. 2010) (analyzing California law that, like the failed ASSET bill, "affirmatively provided that qualifying unlawful aliens are eligible for the nonresident tuition exemption") *with* § 23-5-130.5, C.R.S. (2011) (providing to the governing boards of Colorado's state-supported institutions of higher education the authority to set tuition rates within existing tuition categories, without affirmatively providing the authority to set lower rates for undocumented students) *and* § 23-54-102.5(1), C.R.S. (2011) (providing the board of trustees of Metro State the authority to set tuition within existing tuition categories, without affirmatively providing the authority to set lower rates for undocumented students).

[24] Audio recording of June 7, 2011 meeting of the Board of Trustees of Metro State, consideration of Agenda Item IV.C.1 (presented by Metro State University President Stephen M. Jordan), *available at* http://www.mscd.edu/trustees/boardmeetings/.

[25] Agenda, at 4.

rate. Yet the ASSET bill sought to do the same thing—create an "unsubsidized" tuition rate—but it arrived at a different number.[26] And both of these calculations are open to serious attack as underestimating the cost of the state's contributions to these institutions.[27]

The state subsidizes higher education institutions in ways that are effectively impossible to calculate. State institutions receive, for example, state and federal tax benefits, the ability to participate in state financial bonding, and other benefits that are not cost-neutral. Metro State itself is part of the Auraria Higher Education Center, which consumes state resources in the form of administration, maintenance, and other costs. Although an institution might attempt to account for these costs in its version of an "unsubsidized" tuition rate, there is no legal basis for the assertion that the statutory definition of a "benefit" depends on such differences in calculation.[28]

As a final matter, Metro State's proposal raises another issue: whether a state-supported higher-education institution can, without approval from the General Assembly, create an entirely new tuition classification applicable to Colorado students. As a general matter, the General Assembly creates the categories of tuition that may be charged to students of state-supported institutions. This includes in-state tuition, nonresident tuition, and a host of other special tuition categories, such as those for Canadian military personnel, certain Chinese and Russian students, and members of the Colorado National Guard.[29] By statute, the General Assembly has stated its intention that "the state institutions of higher education shall apply uniform rules, *as prescribed in this article and not otherwise*, in determining whether students are classified as in-state students or out-of-state students for tuition purposes."[30] Only under limited, statutorily recognized circumstances may a student qualify for a full or partial waiver of non-

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[26] *See* SB 12-015 (Stating that a student would pay "THE STUDENT'S SHARE OF IN-STATE TUITION, AS DEFINED IN SECTION 23-18-102, PLUS AN AMOUNT EQUAL TO THE COLLEGE OPPORTUNITY FUND STIPEND AWARDED TO IN-STATE STUDENTS." This excludes the fee-for-service per full-time employee and the estimate of the state's capital contributions that are included in Metro State's tuition rate).

[27] *See, e.g.*, Statements by Sen. Keith King at the Colorado Senate Committee on Education Hearing on Senate Bill 12-015 (Jan. 26, 2012).

[28] For example, if the state provides a group of individuals public housing and charges a rental rate that is 50% of the market rate, acknowledging that the state is giving those individuals a benefit (or "assistance") does not require calculating whether or not the charged rental rate covers all monthly maintenance, utility, depreciation, capital, management, program overhead, and other costs that the government might incur in owning and operating a housing facility.

[29] *See generally* §§ 23-7-101 through 111, C.R.S. (2011).

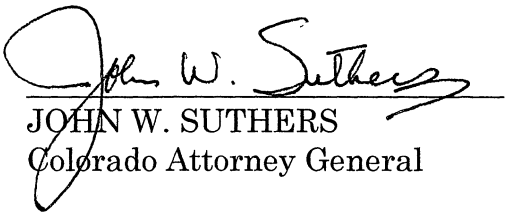
[30] § 23-7-101, C.R.S. (2011) (emphasis added).

resident tuition.[31] These provisions suggest that a single institution, such as Metro State, cannot unilaterally create a new tuition classification (as opposed to setting rates within an existing tuition classification) without legislative approval. Even so, we need not reach a conclusion on this additional requirement, because the question posed in this Opinion may be fully answered by the determination that a reduced tuition rate is a "public benefit" under federal and state law.

CONCLUSION

Reasonable people of good intentions and good faith can disagree about the wisdom of granting discounted tuition to undocumented students. But that decision is one that under existing law must be made by the legislature, not individual institutions of higher education.

Issued this 19th day of June, 2012.



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[31] *See, e.g.,* § 23-1-108(10), C.R.S. (2011) (The Colorado Commission on Higher Education ("CCHE") may enter into reciprocal agreements with another state or with the western interstate commission for full or partial waivers of nonresident tuition for postgraduate or professional students); § 23-1-112 (CCHE shall identify those circumstances where reciprocal agreements for waiving the nonresident differential in tuition rates with other states would enhance educational opportunities for Colorado residents and may negotiate agreements, direct state institutions of higher education to grant waivers, and establish regulations governing these waivers); § 23-3.3-601 (similar directive to CCHE to establish reciprocal agreements for waiving the non-resident tuition differential with other states and foreign countries).