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TO: Chief Executive Officers  
Chief Instructional Officers  
Chief Student Services Officers

FROM: Steven Bruckman  
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SUBJECT: Distance Education and Open Course Requirements  
**Legal Advisory 05-04**

In recent years this office has received a number of inquiries regarding how to interpret the open course requirements established by regulations of the Board of Governors for courses offered through distance education.<sup>1</sup>

Our past advice has drawn a distinction between distance education courses that are made available through broadcast technology or over the Internet, and those courses that involve two-way synchronous communication between two or more fixed locations. In the latter case we have previously required that all locations where the course is offered must be open to all students who meet any established prerequisites.

This analysis is consistent with the actual language of the open course regulations. However, these regulations were written many years ago before technology permitted the widespread use of distance education. As a result, it is difficult to apply them to distance education in a literal way and reach a conclusion that makes sense from a policy standpoint.

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<sup>1</sup>The requirement that all courses be open to all students who have been admitted to the college and meet applicable prerequisites is embodied in several provisions of title 5 of the California Code of Regulations including sections 51006, 58050, 58051.5, and 58106. Of particular note is the language of section 51006, which provides in pertinent part, that "unless specifically exempted by statute or regulation, every course, course section, or class, reported for state aid, wherever offered and maintained by the district, shall be fully open to enrollment and participation by any person who has been admitted to the college(s) and who meets such prerequisites as may be established pursuant to regulations contained in Article 2.5 (commencing with Section 55200) of Subchapter 1 of Chapter 6 of Division 6 of Title 5 of the California Code of Regulations." Section 58051.5 also states that a district may not claim courses for apportionment purposes "if such classes are not located in facilities clearly identified in such a manner, and established by appropriate procedures, to ensure that attendance in such classes is open to the general public, except that students may be required to meet prerequisites which have been established pursuant to Sections 55002, 55201 and 55202."

Now that distance education has been made a permanent part of the community college curriculum, we believe it is appropriate to reconsider this issue. The purpose of this advisory is to inform districts that the System Office will henceforth accept two-way synchronous distance education courses conducted between fixed locations as being "open" (and eligible for apportionment) if at least half of the sites are open to all students. The title 5 regulations do not address where the facilities that are open to all students must be located within a district, but districts are strongly encouraged to ensure that those locations, which are open to all students, are conveniently located so that students in major population centers can participate in these courses.

One consequence of this approach is to somewhat expand the circumstances under which colleges may offer instruction to inmates of state correctional facilities.

Education Code section 84810.5 provides an exception to the open course requirements for courses for inmates conducted at local or federal correctional facilities. At present section 84810.5 does not provide this same exception for courses conducted at state correctional facilities,<sup>2</sup> so such courses or course sections may only be claimed for apportionment if they are open to enrollment by all students who have met applicable prerequisites. However, it is usually impossible to satisfy this requirement for courses taught in person in a classroom setting because of restrictions on access to correctional facilities.

We have previously approved the use of instruction provided to inmates at state correctional facilities via distance education where all students participate individually in the course<sup>3</sup> (e.g., through correspondence, broadcast technology, or the Internet) and there is no instruction of groups of students in a physical facility. Now, under the approach discussed above, distance education courses offered to inmates in a classroom at a state correctional facility can satisfy the open course requirements, provided that the course is simultaneously delivered to other fixed locations using two-way synchronous communication and at least half of the locations at which the course is offered are open.

However, there remain a number of legal requirements districts must satisfy before expanding their use of distance education in the manner discussed above.

First, the restrictions on offering courses outside of district boundaries contained in title 5, section 55231 are applicable to situations where a group of students gather together in a facility and participate in a course through two-way synchronous communication. (See Legal Opinion E 01-33.) Thus, if a district wishes to provide a course via this form of distance education to a facility outside its boundaries, title 5, section 55231 will require the district to obtain the permission of the district where the facility is located and annually report to the System Office on the conduct of these courses.

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<sup>2</sup> Senate Bill 672 (Cox), which is currently pending in the California Legislature would amend section 84810.5 to include state correctional facilities within the scope of the exception to open course requirements provided by that section.

<sup>3</sup> See Legal Opinion O 03-17.

Second, districts should be cautious when considering offering courses via distance education in facilities where access is restricted based on race, gender, age, disability, etc. Consider, for example, a course offered via video-conference technology to two sites, one of which is restricted to persons of a particular race (e.g., a facility at a reservation which is closed to those who are not Native Americans). Such an arrangement could be viewed as according a preference based on race because Native Americans would have a choice of two locations at which to attend the course but other students can only participate at one location. This might well run afoul of Proposition 209 (Cal. Const., art. I, § 31) and other state and federal nondiscrimination laws.

Additional issues could arise under Title IX if a district offered a course via distance education to inmates at a correctional institution for men within its territory when the district territory also has a correctional institution for women. Title IX prohibits gender discrimination in education. There is some indication that equivalent programs must also be made available in women's prison facilities within the district's boundaries.<sup>4</sup>

Finally, it is important to understand that if distance education is conducted through an instructional services agreement (ISA), other conditions will apply before a course can be claimed for apportionment. In particular, title 5, section 58051.5 provides that a course offered through an ISA may be claimed for apportionment only if the district does not receive full compensation from the public or private agency with which it contracts. In the context of distance education, we interpret this requirement to mean that the district does not receive full compensation from the public or private agency for the pro-rata share of the costs of the course attributable to serving students at that agency's facility.

Moreover, the district will not be able to claim apportionment for a course held in conjunction with a public or private agency if that organization itself is fully funded to provide the course from other sources. (Ed. Code, § 84752.)<sup>5</sup> To ensure this, section 58051.5 requires a district to obtain certification from the public or private agency that it has not received full funding for the cost of the course. For a full discussion of requirements for claiming apportionment for instruction offered under an ISA, see Legal Advisory 04-01.5 available at [http://www.cccco.edu/divisions/legal/notices/attachments/Advisory\\_04-01.5.doc](http://www.cccco.edu/divisions/legal/notices/attachments/Advisory_04-01.5.doc).

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<sup>4</sup> In *Jeldness v. Pearce* (9th Cir. 1994) 30 F.3d 1220, the Ninth circuit held that Title IX does not require co-educational classes for inmates but does require that male and female inmates be provided with equal educational opportunities. *Jeldness* is not directly applicable here because it dealt with the obligation of state correctional officials to provide equal educational opportunities for inmates under Title IX. However, we believe *Jeldness* suggests that where a community college undertakes to offer education to inmates it must make this opportunity available on an equal basis. Thus, if a district contains correctional facilities for both men and women and the college refuses to offer the course at both facilities, this could constitute a violation of Title IX. A more difficult case might arise if the college offered to provide the course at both correctional facilities and the correctional authorities refused to allow this. We will not endeavor to address this circumstance because it is unlikely to arise given that the *Jeldness* decision would impose an independent obligation on correctional officials to avoid such discriminatory conduct.

<sup>5</sup> Section 84752 provides that "No community college district shall receive full-time equivalent student (FTES) funding for activities that are fully funded through another source." Thus, this restriction applies where a course is offered in cooperation with another public or private agency (e.g., a correctional facility), even where there is no contract.

Likewise, where courses are offered at a high school through distance education, the specific requirements related to offering instruction at a high school must be observed. Specifically, Education Code section 76002 provides that a course offered at a high school may not be claimed for apportionment if it is offered "during the time the campus is closed to the general public, as defined by the governing board of the school district during a regularly scheduled board meeting."

This rule continues to apply whether or not the course is offered via distance education. For a full explanation of requirements applicable to students who are concurrently enrolled in a K-12 school, see Legal Advisory 05-01 available at <http://www.cccco.edu/divisions/legal/notices/attachments/Advisory%2005-01.doc>.

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Advisory 05-04