

January 18, 2018

MEMORANDUM

To: College Presidents
Chief Student Affairs Officers
Vice Presidents for Finance and Administration
Legal Affairs Designees

From: Loretta P. Martinez, Esq.
General Counsel & Vice Chancellor for Legal Affairs

Re: Scholarships and Other Payments from Private Funds to Students without
Lawful Status in the United States – Updated and Revised Guidance

Since the rescission of the Deferred Action for Childhood Arrivals (DACA) program on September 5, 2017, numerous questions have arisen about the ability of colleges and college foundations to accept and distribute scholarships and other financial assistance from private funders to undocumented students. We are fortunate at CUNY to be recognized as a national leader in advocating for these students, and both private foundations and scholarship providers are eager to begin or to continue assisting our students, thus increasing the urgency of clear guidelines on this subject.

The University has issued advisory memoranda in the past addressing funding questions related to undocumented students, but has not comprehensively reviewed the question of private funds either earmarked for or available to such students on the same basis as all students. Accordingly, my office has reviewed this specific matter and is providing this updated and revised guidance concluding that it is permissible for either foundation or college staff to assist in the administration of scholarships and other assistance to undocumented students that is funded by private sources. This guidance supersedes all prior University guidance on this issue, including the November 27, 2012 memorandum from former Vice Chancellor for Student Affairs Frank D. Sanchez.

Applicable Law

In 1996, the federal government passed the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”), 8 U.S.C. Section 1621, which prohibits states and localities from providing any “state or local public benefit” to unqualified aliens, including “postsecondary education benefits.” This prohibition applies to students who do not have lawful immigration status, including students whose deportation is being deferred under the DACA program.

There are no regulations under PRWORA, and we have found no case law that defines what constitutes a postsecondary education benefit under this law. However, based on the text of the law and the interpretations thereof in various states, we have concluded that it is concerned primarily with state and local governments providing financial benefits, i.e., “payments” or equivalent assistance in forms such as vouchers. It would not seem to include benefits that are part of the educational program, such as academic services to students.

While PRWORA provides that a State may counter its prohibition against providing financial benefits to unqualified aliens by affirmatively enacting state laws making those aliens eligible for such benefits, New York has not passed such a law. Given the law’s unequivocal statement that no postsecondary education benefit can be provided to undocumented students “by appropriated funds of a state or local government,” CUNY and its colleges cannot provide scholarships, stipends, emergency assistance or other direct financial benefits to undocumented students using tax-levy funds. In addition, it is our opinion that these benefits cannot be provided by any CUNY or college program where public and private funds are commingled.

Moreover, as the University previously determined, college association funds (student activity fees) cannot be used to provide scholarships, stipends or other direct financial benefits to undocumented students. In Matter of Smith v. City University of New York, 92 N.Y. 2d 707 (1999), the New York State Court of Appeals deemed college associations to be public bodies, and student activity fees to be public funds. Therefore, it has been our view that these funds are the equivalent of “appropriated funds of a State or local government” and cannot be disbursed directly to undocumented students.

College Foundations

College foundations are private tax exempt charitable organizations under Section 501(c)(3) of the Internal Revenue Code, which are created and operated to support the colleges. College foundations rely on private fundraising and such funds are not appropriated funds of a State or local government. In the 2012 Sanchez memorandum, the University took the position that a private foundation could provide benefits to undocumented students only if it were done independently of the student’s college. However, it is my opinion that this earlier guidance that college staff could not be involved in the administration of the foundation’s private funds was overly restrictive because such prohibition is not required by law. A similar conclusion was reached by my predecessor Frederick Schaffer in his September 9, 2014 memorandum regarding the Dream.US scholarship program.

As set forth above, federal immigration law does not regulate the provision of private funds by private donors to undocumented individuals, nor is there any pertinent case law indicating that incidental effort by state or local government employees to administer such private funds constitutes a public benefit in and of itself. In his 2014 Dream.US memorandum, Schaffer sanctioned numerous forms of effort by college staff to administer a privately-funded scholarship program, including recruitment of applicants, assistance to applicants seeking scholarships, provision of academic services and support to scholarship recipients and ongoing contact with the private funder to maintain the program and track scholarship recipient progress.

It is also my opinion that it is appropriate for college staff to devote some time and effort to assisting their college foundation with administering private funds given to the foundation for the benefit of the college's students. Without the assistance of college staff, access to college databases, and cooperation among the donor, foundation and the college, it would be difficult or impossible to fulfill the intent of donors to identify and grant funds to eligible and deserving students. Colleges and their foundations would be well advised to ensure that their donors' intent is clear in gift agreements. While it is preferable for donors to select their own recipients to most closely align recipients with intent and preserve staff time, if a donor chooses to leave the selection up to the college, this is acceptable so long as the donor provides clear criteria that would govern the award or disbursement of the private funds thereby lessening the discretion and time of staff to administer the funds.

Please feel free to contact my office if you have any questions or continuing concerns about this issue. Additionally, the OGC would be pleased to provide your or your campus counsel with input on donor agreements in this area to assist you in ensuring that the intent and criteria of the donor are clear and in alignment with our practices and capabilities.

cc: Chancellery
University Registrar Vivek Upadhyay
University Director of Admissions Clare Norton
Interim University Dean for Institutional Advancement Duffie Cohen
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