

**CALIFORNIA COMMUNITY COLLEGES
SYSTEM OFFICE**

1102 Q STREET
SACRAMENTO, CA 95814-6511
(916) 445-8752
[HTTP://WWW.CCCCO.EDU](http://www.cccco.edu)



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To: Superintendents and Presidents
Chief Instructional Officers
Chief Student Services Officers
Chief Business Officers
Academic Senate Presidents
Admissions Officers and Registrars
Community College Attorneys

From: Steven Bruckman
Interim General Counsel

Subject: Requirements for Claiming Apportionment for Noncredit Courses
Legal Advisory 05-03

A recent report by the California State Controller has focused attention on apportionment for noncredit community college courses. The Controller found irregularities in the conduct of such courses and related apportionment claims at one of the colleges. These findings suggest the need for a review of the requirements for claiming apportionment for noncredit courses, including the requirement for state approval. The applicable statutes and regulations are discussed below and additional guidance is provided.

The Legislature has clearly recognized adult noncredit education as an "essential and important function of the community colleges." (Ed. Code, § 66010.4.) As such, it is appropriate that well-defined structures are in place for noncredit offerings. The process for claiming apportionment for noncredit courses has two steps. The first step is to ensure that each noncredit course meets the basic standards for noncredit offerings. The second step is to ensure that the additional standards for claiming apportionment are met. Where apportionment for tutoring is involved, additional rules apply.

I. Standards for noncredit courses. Courses can only be offered as noncredit courses if they meet the standards of California Code of Regulations, title 5, section 55002(c) and have been properly approved as follows:

A. The college and/or district curriculum committee must recommend the courses and the district governing board must approve them.

This requirement is quite straightforward. Every noncredit course that is offered should have background documentation that demonstrates that the curriculum committee recommended the course and the governing board approved it.

Governing boards may approve individual courses, approve courses by adopting a college catalog that describes the courses, or take some other action to ensure that the educational programs of a district have the consent of the board.

Course materials should be updated as appropriate. In recommending a course, the curriculum committee is required to assess the need for the course and prescribe its content. Both need and content can change over time. Accordingly, some means for ongoing review of courses is needed. One minimum condition on the receipt of state aid is that districts adopt policies for the establishment, modification, or discontinuance of courses or programs. (Cal. Code Regs., tit. 5, § 51022(a).) We interpret this provision to require districts to periodically undertake meaningful reviews of their course offerings.

In this regard, the State Controller questioned the legitimacy of a noncredit computer course that was established nearly 20 years ago and not updated.

B. The curriculum committee recommendation must address the subject matter to be taught, use of resource materials, teaching methods, and student attendance and achievement.

C. Each noncredit course must have a course outline of record that states the course scope, objectives, content, and instructional methodology for evaluating whether students have met the course objectives.

D. A qualified instructor must teach the course in accordance with the stated objectives and other specifications defined in the course outline of record.

E. The course must be approved by the State Chancellor's Office in addition to being approved by the curriculum committee and district board. (Cal. Code Regs., tit. 5, §§ 55002(c)(1), 55150, and 58050(a)(1).) Colleges can download the application form (Form CCC-456) from www.cccco.edu under the Academic Affairs and Educational Services Division, Noncredit (Adult Education) menu.

II. Standards for claiming apportionment in noncredit courses. If the above standards for offering a noncredit course are met, attendance in the course may be claimed for apportionment if all the following additional apportionment requirements are satisfied. (Cal. Code Regs., tit. 5, §§ 58050(a)(2), 58160.)

A. The content of the noncredit courses must be eligible for apportionment.

Student attendance in noncredit courses in dancing or recreational physical education is NOT eligible for apportionment. (Cal. Code Regs., tit. 5, § 58130.)¹

¹ The Chancellor's Office will approve noncredit courses for older adults or courses for persons with disabilities which incorporate dance or recreational activities as a component of the course. Dancing or recreational physical education activities may be taught in other types of noncredit courses, but student participation in such activities may not be claimed for apportionment.

Student attendance in noncredit courses in statutorily defined areas is eligible for apportionment. (Ed. Code, § 84757.) These allowable funding areas are:

Parenting, including parent cooperative preschools, classes in child growth and development and parent-child relationships.

Elementary and secondary basic skills and other courses and classes such as remedial academic courses or classes in reading, mathematics, and language arts.

English as a second language.

Classes for immigrants eligible for educational services in citizenship, English as a second language, and work force preparation classes in the basic skills of speaking, listening, reading, writing, mathematics, decisionmaking and problem solving skills, and other classes required for preparation to participate in job-specific technical training.

Educational programs for persons with substantial disabilities.

Short-term vocational programs with high employment potential.

Education programs for older adults.

Education programs for home economics.

Health and safety education.

B. The course must meet the standards for noncredit courses discussed above and be approved by the State Chancellor's Office. (Cal. Code Regs., tit. 5, §§ 55002(c), 55150, and 58050(a)(1) and (2).)

C. The course must be open to all admitted students. Education Code section 78401(c) provides that, "Classes for adults shall be open for the admission of adults and of any minors who, in the judgment of the governing board, may be qualified for admission thereto."

D. A clear description of the course must be published in the general catalog and/or addenda to the catalog AND in the college's schedule of classes. (Cal. Code Regs., tit. 5, §§ 58102, 58104.)

If a course was established too late to be included in the general catalog, it should be included in any addenda to the catalog and added to the next general catalog. Suitable course descriptions must be included in these public documents as a means of ensuring that courses are open. If the existence of a course is not advertised broadly, it is only available to those students who happen to find out about it and may not be considered an open course.

Districts may not limit their course advertising to "specialized clientele" or give advance notice to individuals or groups so that they receive an advantage over the general public in enrolling. (Cal. Code Regs., tit. 5, §58104.)

A catalog or class schedule entry about a course or program that merely refers students to department representatives is not sufficient to meet the requirements of these sections. Students should not be required to meet individually with district representatives in order to obtain basic course information.

E. Attendance may only be counted for students who are engaged in educational activities required by the course. (Cal. Code Regs., tit. 5, § 58050(a)(6).)

Apportionment is not available where, for the most part, students are just using district equipment or facilities; actual instruction must occur.

With respect to the requirement for actual instruction, there is no authority to offer noncredit courses as independent study except via distance education. (Cal. Code Regs., tit. 5, § 55316.5.) Nor may a district claim apportionment for work experience education in the noncredit mode. (Cal. Code Regs., tit. 5, 58009.5).

The State Controller stressed the need for mechanisms to monitor or track students' computer usage time to ensure that student hours that were reported for apportionment reflected approved course work and not personal activities. The Controller criticized apportionment claims for periods where computers were left on and unattended after actual student use had ended as well as time when students were pursuing personal activities on computers.

Where students need to use district computers or other equipment for their course work, districts should develop ways to ensure that hours reported for apportionment are limited to approved course work.

This requirement also means that students must knowingly register for a class. If a student does not know he/she is enrolled in a class, the instructional activities are called into question. In the matter reviewed by the State Controller, student hours were automatically recorded when students logged on to computers, regardless of whether students had knowingly enrolled in the noncredit course.

Districts must be prepared to provide documents that reflect each student's intent to enroll in the noncredit course, such as a registration form.

F. Actual student contact hours must be recorded. (Cal. Code Regs., tit. 5, §§ 58003.1(e), 58007.)

For each class session, the actual attendance of each student whose attendance will be reported must be determined. It is not sufficient for instructors to estimate numbers of hours of student attendance. Thus, if a course is scheduled to meet for

four hours and several students leave after two hours, the student attendance reports should reflect that those students did not attend the full number of hours. If a class session is cancelled (and not made up), no student attendance may be reported for that session. The need for a determination of hours of attendance also pertains to noncredit courses offered through distance education such that "hours of instruction or programming received shall be independently verified by the instructor" within a formula for establishing FTES. (Cal. Code Regs., tit. 5, § 58003.1(f)(2).)

Although there is no nonresident tuition for noncredit courses, districts should make residency determinations for all students, even if they attend only noncredit courses. Nonresident students attending noncredit courses may be claimed for apportionment purposes only if "they are living in California during the period of attendance and are otherwise eligible for such purposes as provided in this chapter." (Cal. Code Regs., tit. 5, § 58007.)

Backup documents verifying student attendance are disposable records "basic to an audit." As such they must be retained at least until three years after the July 1 that follows their creation. (Cal. Code Regs., tit. 5 §§ 59025, 59026.)

Questions may arise if the only attendance record available is a roster of student names along with the total number of hours that would constitute full attendance; it is unusual for every student to attend every hour of every class. If district records reflect a pattern of such "summary" information suggesting perfect attendance by all students at all times without any backup documentation, attendance accounting practices should be reviewed.

The course outline should indicate the number of class hours normally required for a student to complete the course. Apportionment claims that exceed this number of hours are not appropriate. For open entry/open exit noncredit courses, apportionment may not be claimed for more than two times the number of hours that are specified for normal completion of the course. (Cal. Code Regs., tit. 5, § 58164(c).)

The State Controller found that hours were reported in one computer course that far exceeded the limitations described in the course outline (e.g., the course outline described 36 hours and 180 hours were reported for some students). As noted above, the number of allowable hours may increase for open entry/open exit courses, but still cannot exceed two times the amount described in the outline.

Districts should have adequate controls in place to be sure that they are reporting actual attendance, that they are not allowing students to exceed the number of hours called for by the course, and to be certain that they do not claim excess hours for apportionment.

Class roll call records or sign-in sheets for each class period are considered appropriate means of verifying student attendance.

G. "All sections of the course are to be taught by a qualified instructor in accordance with the set of objectives and other specifications defined in the course outline of record." (Cal. Code Regs., tit. 5, § 55002(c)(3), and see §§ 58051(a)(1), 58056(a), 58058, and 58060.)

The minimum qualifications for teaching noncredit courses are generally the same as for credit instruction, although some differences may apply. (Cal. Code Regs., tit. 5, § 53412.)²

The State Controller criticized the conduct of a noncredit course in computer technology in part because student hours of computer use were reported for apportionment when no person provided instruction or evaluated the students. Additionally, the person who was named as the instructor of the course was not qualified to teach in that area.

H. The instructor must be able to demonstrate that he/she adhered to the requirements of the course outline of record. For example, an instructor must be prepared to demonstrate that students were evaluated as required by the course outline, even though noncredit courses are not graded courses.

I. The instructor must be able, in terms of physical proximity and range of communication, to provide immediate supervision and control.

The purpose of the immediate supervision and control requirement is two-fold: (1) to ensure that students are achieving the student-learning outcomes identified in the course outline and (2) to ensure the health and safety of students. (Cal. Code Regs., tit. 5, §§ 58052, 58056(a)(1) and (2).)

The term "immediate supervision" has been specifically defined for health sciences education programs and for educational programs sponsored by the California Firefighter Joint Apprenticeship Program. (Cal. Code Regs., tit. 5, § 58055(b).)

Board of Governors' regulations recognize that the parameters of "immediate supervision" may vary depending on the course and instructional methods used. (Cal. Code Regs., tit. 5, § 58056(a)(3).) In assessing whether a qualified instructor has exercised immediate supervision and control, districts should ensure that both the above-stated purposes of the requirement are met.

J. The instructor cannot have any other assigned duty during the instructional activity. (Cal. Code Regs., tit. 5, § 58056(a)(3).)

² If a district has established additional qualifications for service that go beyond the state-required minimum qualifications, it should also ensure that all instructors meet those qualifications.

This requirement complements the requirement that the instructor provide immediate supervision and control. The instructor would presumably be unable to maintain supervision and control if he/she has other assignments that conflict with the instructional requirements of the course.

K. If a noncredit course is offered through an Instructional Service Agreement (ISA), additional requirements apply if student attendance is reported for apportionment.

If an employee of the entity with whom a district contracts is the instructor of a district course, apportionment eligibility requires districts to have contracts both with the contracting entity and with the contractor's employee who is providing the instruction. Both contracts are required as a condition to claiming apportionment, and specific provisions must be included in the contracts.

In addition, a district may not claim apportionment for a noncredit course offered pursuant to an ISA if the other entity with which the district is contracting has received full compensation for the direct education costs of the course. This is true whether or not the district receives any funding from the other entity under the ISA. Therefore, if a course is offered pursuant to an ISA and apportionment is to be claimed, the district must require the entity with which it has contracted to provide a certification that it did not receive full compensation for the costs of the course. (Cal. Code Regs., tit. 5, §§ 58051.5(a)(2) and 58051.5(b).)

Please see Legal Advisory 04-01.5 (available at <http://www.cccco.edu/divisions/legal/notices/notices.htm>) for an analysis of instructional service agreements and related contract provisions.

L. Districts may claim apportionment for instruction that occurs using the services of instructional assistants or aides if applicable requirements are met.

The main thing to keep in mind is that instructional aides are employed to assist classroom instructors and other academic employees; instructional aides cannot be hired in lieu of academic employees. Thus, instructional aides cannot be assigned a class and cannot be considered academic employees for apportionment purposes. Rather, if certain requirements are met, the attendance of students working under instructional aides can be claimed for apportionment.

Instructional aides may exercise immediate supervision and control over students only if they are under the "exclusive direction" of the instructor who is assigned to the educational activity. The instructional aide cannot function independently of the authorized academic employee. (Cal. Code Regs., tit. 5, § 58056(c)(1).)

If a course would normally be limited in enrollment to a specific number of students, instructional aides cannot be used to increase that number. (Cal. Code Regs., tit. 5, § 58056(c).) The instructional aides must be hired by the governing

board as such. (Ed. Code, § 88242.) "Informal" assignments of classified staff as instructional aides do not satisfy the apportionment requirements. Regrouping of students under instructional aides cannot be considered a class for apportionment purposes. To the extent that districts count the services of instructional assistants or aides in claiming apportionment, the assistants or aides should not have other assigned duties during the instructional activity.

M. Districts may not claim apportionment for noncredit courses if they receive full compensation for direct education costs from another source. (Cal. Code Regs., tit. 5, §§ 58050(a)(4), 58051.5(a)(1).)

N. Students may only be charged such fees as are expressly authorized by law. (Cal. Code Regs., tit. 5, § 51012.) Education Code section 76380 generally prohibits mandatory fees for enrollment in noncredit courses. Of course, the standard per unit enrollment fee for credit courses does not apply to noncredit courses. (Ed. Code, § 76300(e)(1).) If properly established, instructional materials fees may be charged. (Cal. Code Regs., tit. 5, § 59400(a).) For a fuller review of the scope of allowable student fees, please consult the Student Fee Handbook, available at:

http://www.cccco.edu/divisions/legal/studentfeehandbook_files/studentfeehandbook.htm or
http://www.cccco.edu/divisions/legal/studentfeehandbook_files/StudentFeeHandbook.pdf

III. Tutorial and Learning Assistance Activities. In addition to the nine categories described in II.A. above, colleges may claim apportionment for supervised tutoring and for learning assistance under noncredit. Tutoring activities in noncredit courses are eligible for apportionment ONLY if they meet specific standards in addition to those described in Section II.

A. With respect to course content, students must be enrolled in a noncredit course that is approved by the State Chancellor's Office and properly designated "supervised tutoring." (Cal. Code Regs., tit. 5, §§ 58168, 58170(d).)

B. Students must be assigned to the tutoring course by a counselor or instructor based on an identified learning need. (Cal. Code Regs., tit. 5, § 58170(e).)

This means that students cannot voluntarily enroll in tutoring. While title 5 does not specify how students are to be "assigned," districts should document how the student was referred, why, and by whom. This process should ensure that the student knowingly registers in the class.

1. The tutoring must be conducted in a designated learning center. (Cal. Code Regs., tit. 5, § 58170(a).)

2. The designated learning center must be supervised by a person meeting minimum qualifications prescribed in title 5, section 53415. (Cal. Code Regs., tit. 5, 58170(b).)

3. Tutoring is provided by a student tutor who has been successful in a particular subject or discipline, or who has demonstrated a particular skill, AND who has successfully completed a course in tutoring practices and methods, including the use of appropriate written and mediated instructional materials, AND who has been approved by a faculty member from the discipline in which tutoring will be provided. (Cal. Code Regs., tit. 5, §§ 58168, 58170(c).) Waivers of the training in tutoring methods may be granted by the chief instructional or student services officer based on advanced degrees or equivalent training. (Cal. Code Regs., tit. 5, §58170(c).) Faculty approval cannot be waived.

C. Tutors must be actively involved in the tutoring process. Even though students may be using computer-aided instruction, there must be some level of instructor or student tutor intervention by an individual qualified under the provisions of title 5.

D. Apportionment cannot be claimed for tutoring services for which state categorical funds are being paid. (Cal. Code Regs., tit. 5, § 58170(h).)

E. The Chancellor's Office has concluded that apportionment is not available for individual tutoring conducted at a distance. (Legal Opinion E 01-36.) Section 58170 of title 5 specifically requires that individual tutoring be conducted "in a designated learning center." We do not think that requirement can be met through Internet options, and the distance education regulations do not presently authorize this option.

F. Supplemental learning assistance may also be provided in a noncredit course. (Cal. Code Regs., tit. 5, § 58172.) However, this must not be confused with individual student tutoring. Only student attendance in scheduled and supervised instructional activities that are required of all students who are enrolled in a class may be claimed for apportionment under the learning assistance provision.

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