IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA ex rel. Attorney General Thomas C. Horne,

Plaintiff,

vs.

MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT BOARD,

Defendant.

No. CV2013-009093

JOINT SCHEDULING MEMORANDUM

(Assigned to the Hon. Arthur Anderson)
Plaintiff State of Arizona ex rel. Thomas C. Horne (“Arizona”) and Defendant Maricopa County Community College District Board (“MCCCD”) submit this Joint Scheduling Memorandum for the pretrial conference set for November 13, 2013 at 9:00 a.m.

1. **Nature of the Case, the Issues, and Parties’ Positions.**

   In June 2012, the Secretary of the United States Department of Homeland Security announced the Deferred Action for Childhood Arrivals (“DACA”) program. Under DACA, the Secretary has determined to exercise her prosecutorial discretion to allow certain young people who were brought to this country as children to remain in the United States for two years and obtain employment authorization documents. This dispute between the State and MCCCD concerns whether DACA participants may present employment authorization documents as evidence of eligibility for in-state tuition at MCCCD.

   After the Secretary announced the DACA program, the Governor issued an Executive Order stating that the employment authorization documents issued to aliens eligible for DACA do not confer lawful status upon them or make them eligible for any additional public benefit. She also directed agencies to ensure that state agencies take the steps necessary to ensure that they comply with Arizona voters’ intent to restrict access to state and local public benefits.

   MCCCD believes that work authorizations issued to DACA participants are evidence that the student is qualified to be considered for in-state tuition rates. Arizona disagrees and has filed suit against MCCCD, seeking a judicial declaration that A.R.S. §§ 15-1803(B) and -1825(A) prohibit MCCCD from granting DACA participants in-state tuition rates.

   **A. Arizona’s Statement.**

   Federal law limits a state’s ability to grant access to “state or local public
benefits” to most aliens. 8 U.S.C. § 1621. Postsecondary education benefits, such as in-state tuition, are a state or local public benefit. 8 U.S.C. § 1621(c)(1)(B). A state may only provide access to such benefits if it enacts a law that “affirmatively provides for such eligibility” after August 22, 1996. 8 U.S.C. § 1621(d). Arizona has not enacted any such law. Instead, in 2006, the legislature referred Proposition 300 to the voters. The voters passed the referendum and enacted A.R.S. §§ 15-1803(B) and -1825 into law. One provision of Proposition 300 provides that persons “without lawful status” are not entitled to in-state tuition at Arizona community colleges and university. A.R.S. § 15-1803(B) Another provision of Proposition 300 provides that persons who are “without lawful immigration status” and who are enrolled in community college are not entitled to “tuition waivers, fee waivers, grants, scholarship assistance, financial aid, tuition assistance or any other type of financial assistance that is subsidized or paid in whole or in part with state monies.” A.R.S. § 15-1825.

Aliens eligible for DACA are without lawful immigration status, and consequently ineligible for in-state tuition at Arizona’s community colleges. Eligibility for DACA does not change a person’s immigration status, a fact the DACA Proclamation itself recognizes when it states, “This memorandum confers no right, immigration status, or pathway to citizenship.” The DACA Proclamation is merely an exercise of prosecutorial discretion, that is, it sets out a process by which the Department of Homeland Security will elect not to prosecute certain young people who meet specified qualifications. The grant of an employment authorization document to DACA participants likewise does not change the recipient’s status.

A.R.S. § 1-502 mandates that state agencies and political subdivisions that administer any state or local benefit require applicants to submit at least one of the specifically enumerated documents; included on that list is an employment authorization document. More specifically, section 1-502 provides:

3
Notwithstanding any other state law and to the extent permitted by federal law, any agency of this state or a political subdivision of this state that administers any state or local public benefit shall require each natural person who applies for the state or local benefit to submit at least one of the following documents to the entity that administers the state or local public benefit demonstrating lawful presence in the United States: . . . (7) A United States citizenship and immigration service’s Employment Authorization Document.

The statute requires that a person applying for public benefits submit one of the listed documents that “demonstrate[es] lawful presence;” in other words, the applicant must demonstrate “lawful presence” using one of the listed documents. A 2010 Attorney General Opinion notes that reference to federal law is required when determining a person’s eligibility for state and local public benefits. Op. Ariz. Atty Gen. 110-008.

Following this reasoning, it is clear that an employment authorization document issued to a DACA participant (which bears the category “(c)(33)” on the face) does not establish that person’s eligibility for any state and local benefit, including in-state tuition.

**B. MCCCD’s Statement.**

An interpretation of A.R.S. §§15-1803(B) and -1825(A) necessarily requires an analysis of the relevant statutes, both federal and state, and the relevant legislative history, all of which support the conclusion that a DACA participant’s lawful presence in this country is enough to qualify for in-state tuition, as long as the person satisfies all other requirements for in-state tuition.

Section 15-1803(B), which was amended in 2006 as part of Proposition 300, establishes “[i]n accordance with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996” a person must have “lawful immigration status” to qualify for resident tuition. The federal law referenced in Section 15-1803(B) prohibits only those students not “lawfully present” in the United States from receiving resident tuition.
tuition. 8 U.S.C. § 1623. When these statutes are reviewed together, along with the legislative history related to Proposition 300, it is clear that state law used the terms “lawfully present” and “lawful status” interchangeably and without any meaningful difference.

Indeed, Section 15-1825 provides in subsection (A) that a person without “lawful immigration status” is not entitled to certain financial assistance and tuition waivers, and in subsection (B) that the community college must provide a bi-annual report to the legislature with the total number of students not entitled to such assistance because the student was not “lawfully present” in the United States. Even the Opinion issued by Attorney General Horne construing the statute and its requirements fails to distinguish between “lawful presence” and “lawful status,” instead using the term “lawful presence” throughout the Opinion to articulate the statutory requirement for in-state tuition. See Ariz. Att’y Gen. Op. I11-007 (entitled “Community Colleges: Student Not Lawfully Present in the U.S.”).

State law provides a list of documents that applicants for state or local public benefits may provide to establish that they are lawfully present in this country. A.R.S. § 1-502; cf. A.R.S. § 41-1080(A)(8) (providing a list of documents that applicants for a license may provide to establish citizenship or “alien status”). There is no such statutory guidance regarding documents that could be used to establish “lawful immigration status,” whatever that term may mean. If Section 1-502 does not apply to in-state tuition decisions, MCCCD would have no state guidance regarding the meaning of “lawful immigration status” or the documentation that could be used to demonstrate such status.

Since the enactment of A.R.S. § 1-502, MCCCD has relied on the documents listed in that statute to demonstrate lawful presence in the United States. Employment authorization documents issued by the USCIS are among the documents listed.
Although work authorizations are issued for a variety of reasons, the statute provides no basis on which to distinguish between and among holders of a work authorization on the basis of the underlying reason that it was granted. Therefore, DACA participants are eligible for in-state tuition if they present their work authorization documents.

2. Case Deadlines.

This case is still in its beginning stages. The parties have not yet exchanged initial Rule 26.1 disclosures, nor have they taken any discovery.

The deadlines proposed below reflect the parties’ views that the discovery in this case, both fact and expert discovery, will likely be limited. The parties are thus unable to reach an agreement about case deadlines. Each party has set forth its proposed deadlines below.

A. MCCCD’s Proposed Schedule:

- Initial Rule 26.1 disclosures due: December 13, 2013
- Final non-expert witness disclosures due: January 10, 2014
- Close of fact discovery: March 14, 2014
- Plaintiff’s expert report due: April 18, 2014
- Defendant’s expert report due: May 16, 2014
- Both parties’ rebuttal expert reports due: June 13, 2014
- Close of expert discovery: August 29, 2014
- Dispositive/partially-dispositive motions due: October 31, 2014

MCCCD believes that this schedule represents a realistic, yet accelerated, schedule for this case. Arizona’s proposed schedule would unrealistically shorten the schedule by eliminating fact discovery and decreasing the time for other matters necessary for MCCCD to properly defend its position. Without even having exchanged disclosure statements, MCCCD is unwilling to waive its right to such discovery, particularly in light of the likely need for third-party discovery related to
immigration policies and legislative history, among other things.

B. Arizona’s Proposed Schedule:

- Rule 26.1 Fact disclosures due November 27, 2013
- Expert reports due January 15, 2014
- Rebuttal expert reports due February 14, 2014
- Close of discovery March 28, 2014
- Dispositive motions due April 30, 2014.

Arizona’s proposed schedule reflects its belief that this matter involves a dispute regarding an interpretation of law. Arizona believes that this matter can be efficiently resolved on the basis of stipulated facts and motions for summary judgment.


Although a final decision will be made after disclosures and more discovery, MCCCD anticipates calling one expert at this time. Arizona does not anticipate calling any experts at this time, but reserves the right to call a rebuttal expert witness.

4. Unresolved Discovery or Rule 26.1 Disputes.

There are no current discovery or disclosure disputes because the parties have not yet exchanged initial disclosure statements or begun discovery in this matter.

5. Whether Any Claims or Defenses May be Eliminated.

Both Arizona and MCCCD anticipate filing a dispositive motion on one or more counts of the Complaint. Resolution of in whole or part of such motions should narrow the claims before the jury to only those in which a true material issue of fact remains. Arizona believes that it is likely that this matter can be resolved entirely by summary judgment.

6. Amendment of Pleadings.

Because the addition of a defendant or defendants in this case would likely alter its defense of this matter and require revisions to the case deadlines set forth herein, it
is MCCCD’s position that the Attorney General should be required to amend the Complaint or otherwise take action with regard to any similarly-situated community college districts by December 2, 2013.

7. **Stipulations as to Evidence.**

Arizona and MCCCD believe that they will be able to stipulate to certain historical facts in connection with their dispositive motions and for the Final Joint Pretrial Statement, if one is required.

Arizona and MCCCD believe that they will be able to stipulate to the authenticity of exhibits in connection with their dispositive motions and prior to trial.

8. **Any Special Procedures Required to Manage the Case.**

Neither party believes that special procedures are necessary in this case. However, MCCCD reserves the right to request special case management procedures if additional defendants are added to this matter.

9. **Mandatory Settlement Conference or Mediation.**

Given the issues in this matter, neither party believes that a settlement conference or mediation is appropriate.

10. **Modification of Any Time Limits or Procedures for Discovery.**

Neither party seeks a modification of the discovery rules.

11. **Date for Filing a Joint Pretrial Statement.**

The parties request the Joint Pretrial Statement be filed three weeks before the trial date.

12. **Proposed Trial Date and Length.**

As set forth above, both parties believe that this matter will be resolved on dispositive motions. MCCCD believes that a trial date in early 2015 is appropriate and will allow for the resolution of dispositive motions prior to trial preparation activities. In the unlikely event that trial is necessary, Arizona believes that a trial date in mid
2014 is appropriate. Arizona and MCCCD anticipate that trial should take two days.

13. Rule 38.1 Waiver.

The parties agree that all requirements of Arizona Rule of Civil Procedure 38.1 should be waived for this matter.

DATED this 7th day of November, 2013.

OSBORN MALEDON, P.A.

By /s/ Mary O’Grady

Mary O’Grady
Lynne Adams
Grace E. Rebling
2929 North Central Avenue
21st Floor
Phoenix, Arizona 85012-2793

Attorneys for Maricopa County Community College District

ARIZONA ATTORNEY GENERAL

By /s/ Leslie Kyman Cooper

Kevin D. Ray
Leslie Kyman Cooper
Jinju Park
Assistant Attorneys General
1275 W. Washington
Phoenix, Arizona 85007

Attorneys for the State of Arizona ex rel. Attorney General Thomas C. Horne

THE FOREGOING has been electronically filed this 7th day of November, 2013.

/s/ Melissa De Marie