January 16, 2009

MEMORANDUM

TO: Institutional Residency Officers, Admissions Directors
FROM: Karen Woodfaulk, Director of Student Services Division
SUBJECT: Issuance of transcripts to non-verified students

Background

On June 17, 2008, the SC General Assembly passed Act 280, the SC Illegal Immigration Reform Act. Following the passage of the legislation, CHE worked collaboratively with our state’s colleges and universities by convening meetings and working through the details of the legislation with college representatives and others to ensure statewide best practices are followed in implementing the higher education provisions of Act 280. We know that each of you have been working diligently to implement the new legislation.

While the Act addressed several areas of state government, its specific charge to the higher education institutions in this state was to require them to develop a process that ensures that no student who is unlawfully present in the United States be allowed to attend a public higher education institution in South Carolina. The Act also requires both public and independent institutions to ensure that no student who is unlawfully present receives a higher education public benefit including, but not limited to, scholarships, grants, financial aid or resident tuition. Since the passing of the Act, some institutions and students have contacted the Commission to determine if the issuance of transcripts is considered a public benefit.

Research

Recently, several constituencies have contacted the South Carolina Commission on Higher Education to determine if the issuance of transcripts is considered a higher education public benefit. Section 17 of the South Carolina Illegal Immigration Reform Act, found in 59-101-430 of the South Carolina Code of Laws, determines that higher education institutions in South Carolina shall verify an alien’s immigration status with the federal government pursuant to 8 USC Section 1373 (c). Section 5 of the South Carolina Immigration Reform Act amends Section 8-29-10 of the South Carolina Code of...
Laws, to allow for the Federal definition of a public benefit to be the prevailing definition, as determined by the United States Department of Education, as stated in the passage from the 8-29-10(C)(7) of the South Carolina Code of Laws below:

“(C) Verification of lawful presence pursuant to the provisions of this article is not required for…(7) postsecondary education, whereby the Department of Education shall set forth, or cause to be set forth, policies regarding postsecondary benefits that comply with all federal law including but not limited to, public benefits as described in 8 USC Sections 1611, 1621, or 1623;”. 

The South Carolina Illegal Immigration Reform Act defers to the federal definition of a public benefit, which can be found in Sections 8 USC, 1611, 1621, and 1623.

Sections 1611 and 1621 both define what public benefits undocumented immigrants are ineligible for from both the federal government and state governments respectively. Both sections indicate that public benefits are “payments or assistance” from government agencies. From these sections, we can derive that a postsecondary benefit is monetary in nature, whereby the student is receiving a payment or assistance of some kind. Section 1623 further states that “an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States. Because a college transcript is not a monetary benefit, it would not be included in this definition of a public benefit. In addition, out-of-state residents and foreign nationals who attend South Carolina institutions are also able to obtain college transcripts from their respective universities as long as they remain in good standing. This would suggest that a transcript is not a higher education benefit, and is not reserved solely for South Carolina residents.

Further support for this position can be found in the case of Equal Access Education v Merten, 305 F. Supp. 2d 585 (E.D. Va 2004). In this case, the Supreme Court of Virginia upheld the state’s policy of denying undocumented students admission to state funded colleges. The Court rationalized that 8 USC 1611, 1621 and 1623 define post-secondary education benefits as only monetary assistance paid to students or their households.

In addition, through discussions with legislative staff from the South Carolina Senate, it was revealed that the issuance of transcripts was not included in the discussion of what defines a public benefit when the legislation was created and passed into law. To make a determination that the issuance of transcripts would be included in the definition of public benefit could misrepresent the original intent of the legislation.

**Conclusion**

Though Act 280 prohibits undocumented students from receiving a public benefit, it does not list the issuance of transcripts in its definition of a public benefit. Unless the state’s law is changed to include the issuance of transcripts as a public higher education benefit, South Carolina institutions of higher education cannot lawfully deny a transcript request from a student whose lawful presence has not been verified.