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16
17 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
18 IN AND FOR THE COUNTY OF MARICOPA

19 STATE OF ARIZONA ex rel. Attorney)
General Thomas C. Horne,) No. CV2013-009093
20)
Plaintiff,) **JOINT SCHEDULING**
21) **MEMORANDUM**
vs.)
) (Assigned to the Hon. Arthur
22 MARICOPA COUNTY COMMUNITY)
COLLEGE DISTRICT BOARD,)
23)
Defendant.)
24)
25)

1 Plaintiff State of Arizona ex rel. Thomas C. Horne (“Arizona”) and Defendant
2 Maricopa County Community College District Board (“MCCCD”) submit this Joint
3 Scheduling Memorandum for the pretrial conference set for November 13, 2013 at
4 9:00 a.m.

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

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

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

20 MCCCD believes that work authorizations issued to DACA participants are
21 evidence that the student is qualified to be considered for in-state tuition rates. Arizona
22 disagrees and has filed suit against MCCCD, seeking a judicial declaration that A.R.S.
23 §§ 15-1803(B) and -1825(A) prohibit MCCCD from granting DACA participants in-
24 state tuition rates.

25 **A. Arizona’s Statement.**

26 Federal law limits a state’s ability to grant access to “state or local public

1 benefits” to most aliens. 8 U.S.C. § 1621. Postsecondary education benefits, such as
2 in-state tuition, are a state or local public benefit. 8 U.S.C. § 1621(c)(1)(B). A state
3 may only provide access to such benefits if it enacts a law that “affirmatively provides
4 for such eligibility” after August 22, 1996. 8 U.S.C. § 1621(d). Arizona has not
5 enacted any such law. Instead, in 2006, the legislature referred Proposition 300 to the
6 voters. The voters passed the referendum and enacted A.R.S. §§ 15-1803(B) and -
7 1825 into law. One provision of Proposition 300 provides that persons “without lawful
8 status” are not entitled to in-state tuition at Arizona community colleges and university.
9 A.R.S. § 15-1803(B) Another provision of Proposition 300 provides that persons who
10 are “without lawful immigration status” and who are enrolled in community college are
11 not entitled to “tuition waivers, fee waivers, grants, scholarship assistance, financial
12 aid, tuition assistance or any other type of financial assistance that is subsidized or paid
13 in whole or in part with state monies.” A.R.S. § 15-1825.

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

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

1
2 Notwithstanding any other state law and to the extent permitted by federal law,
3 any agency of this state or a political subdivision of this state that administers
4 any state or local public benefit shall require each natural person who applies for
5 the state or local benefit to submit at least one of the following documents to the
6 entity that administers the state or local public benefit demonstrating lawful
7 presence in the United States: . . . (7) A United States citizenship and
8 immigration service’s Employment Authorization Document.

9 The statute requires that a person applying for public benefits submit one of the listed
10 documents that “demonstrate[es] lawful presence;” in other words, the applicant must
11 demonstrate “lawful presence” using one of the listed documents. A 2010 Attorney
12 General Opinion notes that reference to federal law is required when determining a
13 person’s eligibility for state and local public benefits. Op. Ariz. Atty Gen. I10-008.
14 Following this reasoning, it is clear that an employment authorization document issued
15 to a DACA participant (which bears the category “(c)(33)” on the face) does not
16 establish that person’s eligibility for any state and local benefit, including in-state
17 tuition.

18
19 **B. MCCCCD’s Statement.**

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

25 Section 15-1803(B), which was amended in 2006 as part of Proposition 300,
26 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

1 tuition. 8 U.S.C. § 1623. When these statutes are reviewed together, along with the
2 legislative history related to Proposition 300, it is clear that state law used the terms
3 “lawfully present” and “lawful status” interchangeably and without any meaningful
4 difference.

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

15 State law provides a list of documents that applicants for state or local public
16 benefits may provide to establish that they are lawfully present in this country. A.R.S. §
17 1-502; *cf.* A.R.S. § 41-1080(A)(8) (providing a list of documents that applicants for a
18 license may provide to establish citizenship or “alien status”). There is no such
19 statutory guidance regarding documents that could be used to establish “lawful
20 immigration status,” whatever that term may mean. If Section 1-502 does not apply to
21 in-state tuition decisions, MCCCCD would have no state guidance regarding the meaning
22 of “lawful immigration status” or the documentation that could be used to demonstrate
23 such status.

24 Since the enactment of A.R.S. § 1-502, MCCCCD has relied on the documents
25 listed in that statute to demonstrate lawful presence in the United States. Employment
26 authorization documents issued by the USCIS are among the documents listed.

1 Although work authorizations are issued for a variety of reasons, the statute provides no
2 basis on which to distinguish between and among holders of a work authorization on the
3 basis of the underlying reason that it was granted. Therefore, DACA participants are
4 eligible for in-state tuition if they present their work authorization documents.

5 **2. Case Deadlines.**

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

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

12 **A. MCCCCD's Proposed Schedule:**

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

21 MCCCCD believes that this schedule represents a realistic, yet accelerated,
22 schedule for this case. Arizona's proposed schedule would unrealistically shorten the
23 schedule by eliminating fact discovery and decreasing the time for other matters
24 necessary for MCCCCD to properly defend its position. Without even having
25 exchanged disclosure statements, MCCCCD is unwilling to waive its right to such
26 discovery, particularly in light of the likely need for third-party discovery related to

1 immigration policies and legislative history, among other things.

2 **B. Arizona's Proposed Schedule:**

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

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

11 **3. Expert Witnesses.**

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

15 **4. Unresolved Discovery or Rule 26.1 Disputes.**

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

18 **5. Whether Any Claims or Defenses May be Eliminated.**

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

24 **6. Amendment of Pleadings.**

25 Because the addition of a defendant or defendants in this case would likely alter
26 its defense of this matter and require revisions to the case deadlines set forth herein, it

1 is MCCCCD's position that the Attorney General should be required to amend the
2 Complaint or otherwise take action with regard to any similarly-situated community
3 college districts by December 2, 2013.

4 **7. Stipulations as to Evidence.**

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

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

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

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

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

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

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

18 Neither party seeks a modification of the discovery rules.

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

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

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

23 As set forth above, both parties believe that this matter will be resolved on
24 dispositive motions. MCCCCD believes that a trial date in early 2015 is appropriate and
25 will allow for the resolution of dispositive motions prior to trial preparation activities.
26 In the unlikely event that trial is necessary, Arizona believes that a trial date in mid

1 2014 is appropriate. Arizona and MCCCCD anticipate that trial should take two days.

2 **13. Rule 38.1 Waiver.**

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

5 DATED this 7th day of November, 2013.

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

29 /s/ Melissa De Marie