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September 6, 2011

Jacob S. Elkes, Esq., Chairman  
Board of Trustees  
Brookdale Community College  
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### Re: Regulation 2.002R

Dear Mr. Elkes:

You have asked us to advise as to whether Brookdale Regulation 2.002R, "Establishment of Board Policies and College Regulations," requires submission of all proposed Board policies to the Governance Steering Committee or other internal College body before they can be adopted. For the reasons that follow, please be advised that no such regulation can be read so as to restrict the Board's exercise of its statutory authority.

Regulation 2.002R (the Regulation) at Section A (1) defines a "Board policy" as "binding on the part of the Administration and...preceded by the word, 'shall.'" Under this definition, a Board policy is a rule or regulation for the administration and operation of the College.

At Section A(2) the Regulation states that "any member of the student body, faculty, staff, or administration may initiate a policy recommendation at any time by submitting it in writing to the Governance Steering Committee. Section A(2) does not include the Board or individual Trustees among the persons who can initiate policy recommendations.

At Section A(3) the Regulation states that "Policy recommendations made through the Governance procedure will be reviewed by the President, who may choose to forward the proposed policy to the Board."

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Section A (4) states that "Approval of a proposed Board Policy for submission to the Board will be by the President."

At Section A(5) the Regulation refers to the "lodging" of the recommended policy "after a proposed policy has been approved by the President." The purpose of "lodging" the policy is not clear. Section 6 provides for distribution of the policy after it has been "adopted by" the Board of Trustees. At Section 7 (b) (V), the Regulation states that "The President is responsible for implementing Board policies."

The Regulation thus sets up multiple "gatekeepers" whose approval must be obtained before the Board may consider a policy that is initiated under the Regulation. First, someone other than the Board or individual Trustees must submit the policy to the Governance Steering Committee. The Governance Steering Committee must then approve it in order for it to be sent to the President, and the President "may choose to forward the proposed policy to the Board" and must "approve" it, but is not required to do so. Since the Regulation does not confer any power on the Board to override the disapprovals of either the Governance Steering Committee or the President or to initiate policies on its own, it confers absolute discretion on both the Governance Steering Committee and President to disapprove policies before they ever reach the Board. The statement in Section 7 (b) that the President is responsible for implementing policies, could be read to prevent the Board from designating another College official (for example, an internal auditor) to implement a particular policy.

Section B of the Regulation sets up a similar process for the adoption of College regulations. As in Section A(2), Section B(2) limits the persons who can propose a regulation to "student body, faculty, staff or administration" and provides for their referral to the Governance Steering Committee. Under Section B(3), upon creation or revision of the regulation through "the Governance procedure" the regulation is then "reviewed by an appropriate officer of the College." Under Section B (4), "approval of a College Regulation will be by the President following review and recommendation by the process indicated in Section 3, above."

Regulation 2.003R also states at Section IV (10) that "proposed Board Policies and College Regulations" "require final approval by the President," and at the end of Section IV states that "In no event will implementation of a project as regards to any of the foregoing be undertaken prior to official action of the President." There is no provision for the Board to initiate, review, approve, or disapprove any regulation. Instead, this function is delegated entirely to the President.

As the Regulations currently stand, all of the foregoing is of concern because N.J.S.A. 18A: 64A-11 states in relevant part that "The board of trustees...shall be responsible for the management and control of [the county] college." N.J.S.A. 18A: 64A-12 states in relevant part as follows:

...the board of trustees of a county college in addition to such other powers expressly granted to it by law, is hereby granted the following powers:

\* \* \*

o. To make and promulgate such rules and regulations, not inconsistent with this chapter . . . that are necessary and proper for the administration and operation of a county college and to implement the provisions of this chapter. .."(emphasis added).

The above is also mirrored in N.J.S.A. 18A: 3B-6, which confers powers in addition to those set forth in N.J.S.A. 18A: 64A-1 et seq, and states in relevant part that the "governing board of each public institution of higher education shall have the following powers and duties...(b) to have authority over all matters concerning the supervision and operation of the institution ...".

Thus, to the extent that Regulations 2.002R and 2.003R or any other College bylaw or regulation allows anyone but the Board itself to control the exercise of powers granted to the Board by relevant statutes, the regulation or bylaw is inconsistent with N.J.S.A. 18A: 3B-6 (b), N.J.S.A. 64A-11 and N.J.S.A. 64A-12 (o).

Any delegation of the Board's statutory authority cannot be so extensive as to deprive the Board of the ability to exercise its own powers. The New Jersey Supreme Court in *Jansco v. Waldron*, 70 N.J. 320, 328 (1976) considered the extent to which a municipality could delegate rule-making functions to a chief of police, holding that this was permissible as to administrative functions but making clear that "In a situation where the governing body has subdelegated the rule-making power, it necessarily would retain its primary authority to modify or change such rules and regulations as may be promulgated." While it is therefore permissible for the Board to delegate executive functions to the President, who serves as the College's chief executive officer under N.J.S.A. 18A: 64A-12 (e), no such delegation may act as a check on the Board's exercise of its own "primary authority."

For the foregoing reasons, Regulations 2.0002R and 2.003R in their present form constitute impermissible interferences with the Board's authority under N.J.S.A. 18A: 3B-6 (b), N.J.S.A. 18A: 64A-11 and -12 (o) to the extent that they can be construed as limitations on the Board's statutory powers. Thus, in order to be consistent with the Board's statutory authority the Regulation must be read not to apply to policy recommendations of individual Trustees, Trustee committees, or the Board itself.

For purposes of clarity, we suggest that the Board either rescind these Regulations or amend these and any similar Regulations so as to avoid any doubt as to the Board's primary rulemaking authority. If the Board chooses to amend the Regulations, the amendment should make it clear that while the processes contained in the Regulations may apply to policies that originate with the "student body, faculty, staff or administration," they do not restrict or limit the Trustees' power to initiate, approve, disapprove, rescind, or modify any policy at any time. The Trustees' action in this regard may be initiated by motion at any regular Board meeting, is not required to be referred to any other College process, and may be adopted, at that meeting, by majority vote.

It should also be noted that the distinction between "policies" and "regulations" in the College's governance documents appears to be intended to accommodate the aforementioned delegation to the President of the power to approve "regulations" while "policies" are approved by the Board. While nothing in the statute forbids the Board from referring particular rules or regulations to an internal College governance process for comments and recommendations, or delegating some level of administrative authority, the ultimate authority "to make and promulgate such rules and regulations, not inconsistent with this chapter . . . that are necessary and proper for the administration and operation of a county college" rests with the Board at all times. Therefore, any such reference or delegation of authority needs to recognize that only the Board has "primary authority" to adopt, modify or change any rules or regulations, *Jansco, supra*,

The above underscores the need for the College to review all of its "policies" and "regulations" for internal consistency and for conformance to State law, particularly in the area of delegation of statutory powers to the President and others. As part of that review we suggest that the Board consider elimination of the present distinction between "policies" and "regulations" as unnecessary, in favor of a single comprehensive set of regulations that both include and implement Board policy. Any such rulemaking process may of course include provisions for input from various stakeholders as and to the extent the Board may consider appropriate.

Very truly yours,

WILENTZ, GOLDMAN & SPITZER, P.A.