

**CALIFORNIA COMMUNITY COLLEGES
CHANCELLOR'S OFFICE**

1102 Q STREET
SACRAMENTO, CA 95814-6511
(916) 445-8752
<http://www.cccco.edu>



October 19, 2001

To: Superintendents and Presidents
Presidents of Boards of Trustees
Consultation Council
Community College Attorneys
Faculty and Staff Diversity Directors/Affirmative Action Officers
Chief Instructional Officers
Chief Human Resources Officers
Academic Senate Presidents
Faculty and Staff Diversity Committee Chairs
Other Interested Parties

From: Thomas J. Nussbaum
Chancellor

Subject: Fourteenth Advisory on Proposition 209 and
Update on *Connerly v. State Personnel Board*

Synopsis: On September 12, 2001, we issued our thirteenth advisory on Proposition 209 which discussed the September 4, 2001, decision of the Third District Court of Appeal in *Connerly v. State Personnel Board* (2001) 92 Cal.App. 4th 16. In that decision, the Court struck down the community college statutes that address affirmative action employment, finding that the statutes violate equal protection guarantees and Proposition 209.

The Board of Governors directed my office to fully explore the options related to this decision, and it authorized a petition to the California Supreme Court to review the decision if a review would be in the best interests of the system. We considered our legal options and also consulted with the several civil rights groups who participated in the litigation as "real parties in interest." These groups strongly recommended against an appeal and urged us to instead focus on identifying new approaches to promoting diversity.

We have decided not to file a petition for review. The real parties in interest and other defendants in this action have also declined to seek review by the Supreme Court. Thus, the Court of Appeals decision is now final. The Court will remand the matter to the Superior Court for final disposition. However, even before the Superior Court issues a final order, we must recognize the practical effects of the decision as they pertain to district hiring practices.

Although the Court invalidated our particular statutory and regulatory system, it nevertheless agreed that many activities are appropriate to ensure equal employment opportunity. In commenting on state level employment, the Court found that actions "that provide for data

collection and reporting do not suffer a constitutional defect because a determination of the underutilization of minorities and women . . . can serve legitimate and important purposes. Such a determination may indicate the need for further inquiry to ascertain whether there has been specific, prior discrimination in hiring practices. It may indicate the need to evaluate applicable hiring criteria to ensure that they are reasonably job-related and do not arbitrarily exclude members of the underutilized group. And it may indicate the need for inclusive outreach efforts to ensure that members of the underutilized group have equal opportunity to seek employment with the affected department." (*Connerly v. SPB, supra*, 92 Cal.App.4th 16, 56.)

Based on the entirety of the decision, including the foregoing, we believe many permitted activities remain that are fully consistent with the decision and with promoting diversity. For example, in our view, districts should continue to collect voluntarily-submitted data from candidates regarding their gender and ethnicity. This information is kept separate from the hiring process, and its collection should not encourage a challenge. Districts should also continue to monitor their hiring for underutilization on the basis of race and gender.

Districts should engage in broad recruitment efforts and continue to use the Faculty and Staff Diversity Registry. The Registry is available to all persons without regard to race or gender, so it remains a valuable repository of information about individuals who are qualified for service in our system.

Districts should carefully consider their job qualifications, ensuring that all qualifications are job-related. Districts should also continue to monitor their hiring processes to ensure that the processes themselves do not create artificial barriers for applicants. Districts should continue assessments of adverse impact at every stage where candidates are eliminated from the selection process. If adverse impact exists, districts should not proceed until they have reviewed the process up to that point, and have determined that the adverse impact did not result from any element that discriminates against persons or grants a preference on the basis of race or gender.

Districts should proceed with setting of goals and timetables as specified in the Board's regulations for hiring of persons with disabilities and continue focused outreach efforts for that population. Proposition 209 does not restrict efforts to improve the representation of persons with disabilities in the workforce.

The Court also left open the possibility that federal statutory law or the U.S. Constitution might at certain times require race or gender-based preferences. Furthermore, the Court acknowledged that actions that are required to retain eligibility for federal funding are not affected by the decision.

Each district should review the status of its programs to determine whether it participates in a program where federal funding may be conditioned on actions that might otherwise be problematic under Proposition 209. For example, some districts may be federal contractors with special obligations related to those contracts. If so, the Court of Appeal verified that such programs are not affected.

Although the decision directly affects the statutes that require affirmative action hiring and related regulations, the Board of Governors is still responsible for general supervision of the California Community Colleges. It is also obligated to adopt regulations to carry out the State's commitment to equal employment opportunity. Over the upcoming weeks, we will be working carefully, but with all due speed, to put in place a full-scale system for dealing with the many issues that are presented by this decision. We have already taken the first step. Yesterday, we proposed to the system's Consultation group our initial strategy, and the group endorsed it in its entirety.

First, we will postpone the deadline for districts to adopt and submit their Faculty and Staff Diversity Plans to my office. The tentative revised date for submission will be November 19, 2002. Well in advance of that date, my office will issue a revised Model Faculty and Staff Diversity Plan. The components of the Model Plan will, of course, adhere to the guidance provided by the Court of Appeal.

Second, we will quickly convene a technical workgroup to review our regulations and to recommend changes necessary to conform their requirements with the Connerly decision.

Third, we will establish a policy task force to explore options for vigorously promoting diversity in our system that will not offend equal protection guarantees or Proposition 209. We will actively seek suggestions from the field as to ways to ensure inclusive hiring practices.

At each stage, we will keep the system fully informed of our progress.

While this effort is underway, we recommend that districts should immediately take the following steps:

1. Suspend district efforts to calculate new goals or timetables for hiring of women and ethnic minorities as specified in Board regulations.
2. Discontinue goals or timetables for hiring of women and minorities, if any have been established, for any purpose in district hiring processes.
3. Ensure that recruitment efforts are broadly inclusive and afford all groups equal opportunity to obtain information about district openings.
4. Do not consider the race, gender, or ethnicity of any candidate in any hiring process, or in any employment decision.
5. In-house or promotional only recruitment should be confined to those situations where the position is being filled on an interim basis.

We expect that districts may have questions that are not fully covered by this communication. We hope that our efforts in providing direction regarding the Faculty and Staff Diversity plans, reviewing the regulations, and convening the policy task force will answer those questions and provide on-going support for the system. We will issue additional advisories as our work progresses.

Action/Date Requested: Districts should immediately take the steps described in this advisory to eliminate any aspects of recruitment or hiring procedures which involve making decisions or treating any individual or group differently based on race or gender. In other respects, districts should continue to vigorously monitor for and promptly address any indications of intentional or unintentional bias or discrimination in employment practices.

We also urge districts to consult with their own legal counsel on any uncertainty regarding hiring issues that could be affected by the decision.

RB/fr/es

cc: Board of Governors
Cabinet
Management staff