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**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:** Ralph Black  
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**Subject:** Fifteenth Advisory on Proposition 209 and  
Update on *Connerly v. State Personnel Board*

**Questions and Answers Regarding Proposed Regulations on  
Equal Opportunity and Diversity in Employment**

Introduction: On September 4, 2001, the Third District Court of Appeal struck down the statutes concerning affirmative action employment in community colleges. (*Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16.) The Court found that the statutes violate equal protection guarantees and Proposition 209. The invalidation of the statutes and the decision itself required an immediate review of Board of Governors' regulations that also address affirmative action employment.

The statutes that were found to be unconstitutional are cited as authority in the Board's regulations that address community college hiring processes. The ability to cite to these statutes as authority was effectively removed by the Court of Appeal. Although the Board has broad regulatory authority, the designation of other clear bases for Board regulations in employment

and nondiscrimination strengthen the regulations. Alternate statutory authority exists to justify, and even require, regulatory action to ensure nondiscrimination and diversity in employment practices.

The decision also challenged certain specific portions of the Board's existing regulations, asserting that they also suffer from constitutional deficiencies. The focus of the criticism was on the setting of goals and timetables for women and minorities, and on any aspect of the regulations that required different treatment for women and minorities or the consideration of race or gender in decision-making. The specific criticism of the regulations also triggered the need to immediately address problems identified by the Court.

As part of the response to the *Connerly* decision, the Chancellor's Office issued its Fourteenth Advisory on Proposition 209. That Advisory notified the system that a technical workgroup would be convened to review the affected regulations and to recommend changes to conform the regulations to the requirements of the *Connerly* decision.

Proposed regulatory changes have been developed and were forwarded to the Board of Governors at its January, 2002 meeting as an information item. Questions about the proposed regulations and about aspects of acceptable district employment practices have been presented to the Chancellor's Office. This advisory answers questions about the proposed regulation changes and other employment practices so that districts will have guidance in how to proceed even before the regulations become final.

- 1. Question: At the close of a district's recruitment efforts, human resources (HR) totals the statistics of applicants to review how close the pool came to the availability statistics, and uses this information (in addition to the size of the applicant pool) to determine whether or not recruitment should be extended. May districts still use the availability statistics in this way? Would the absence of applicants from one or more of the underrepresented groups now be considered to create an adverse impact and provide a justification for extending the district's recruitment efforts?**

*Answer:* At the close of a district's recruitment efforts, and prior to considering the comparative qualifications of the applicants, the composition of the applicant pool must still be analyzed. The analysis is a means of determining whether the recruitment efforts have resulted in a pool of applicants that suggests that there has been no discrimination against or preference for any group. If a district generally knows the availability of persons who are qualified to perform the job in terms of ethnic group identification, gender, and disability, but it attracts members from only one ethnic group, for example, this fact suggests that the recruitment efforts may have disadvantaged other groups. The proposed regulations continue to provide for extension of the application deadline and additional recruitment efforts.

The proposed change is in the scope of expected representation in the applicant pool. Current regulations describe the assessment of the initial applicant pool only in terms of minority, women, or disability status. The proposed regulations call for an analysis by ethnic group identification, gender, and disability. In concrete terms, if an initial applicant pool includes no male applicants, even though data indicate a high availability of qualified males, districts should be concerned that their recruitment efforts may be deficient. This situation remains a justification for extending a district's recruitment efforts. However, it's important to note that, at this stage of the process, before applications have been screened to determine who meets minimum qualifications, the proposed regulations provide that any additional recruitment must be general in nature and not targeted to any particular group. This is true even though analysis of the initial applicant pool only revealed underrepresentation for a particular group.

**2. Question: What types of reporting will we now do to the State Chancellor's Office (if any) on applicant and/or employee demographics?**

*Answer:* The *Connerly* decision specifically noted that collecting data concerning the participation of women and minorities in government programs, which would include district hiring processes, does not violate equal protection, and that so long as such data collection does not discriminate or grant a preference to an individual or a group, Proposition 209 is not offended. Our regulations have always required the collection of data by ethnic group identification and by gender. This requirement will continue.

Although the *Connerly* decision affected a significant statutory structure (Ed. Code, §§ 87100 - 87107), those statutes are not the only statutes that obligate the Board of Governors to regulate in the area of discrimination. Both specific and general regulatory authority remains. Districts will still be required to report the results of their annual surveys of employees to the Chancellor.

**3. Question: For those districts that have "voting" and "non-voting" affirmative action representatives on hiring committees, could these simply be re-titled "hiring compliance representatives" if the role of such representatives does not include any affirmative action duties?**

*Answer:* The term "affirmative action" is not an "illegal" term. The problem with continued use of the term is that it is misunderstood by many, its parameters remain unclear in terms of Proposition 209, and its use may invite challenges. The presence of a person who is available to monitor for potential discrimination is appropriate. As to voting, we assume the voting is based on job qualifications without regard to an applicant's status in terms of ethnic group identification, gender, disability, religion, age, sexual orientation, political affiliation, or any similar applicant characteristic that would generally have no bearing on the job. Provided care is taken to avoid voting or making decisions which are influenced

by such factors, the compliance or EEO officer may continue to vote if so authorized by district policy.

4. **Question: To what extent can we continue targeted recruitment, such as in publications, which are historically read by historically underrepresented groups?**

*Answer:* The goal is equality of treatment and of opportunity. Put another way, districts should generally pursue a course of neutrality in terms of characteristics of ethnic group identification, gender, and disability, in all their activities, including recruitment efforts. Recruitment efforts, like other hiring activities, may not discriminate against protected groups or grant a preference on the basis of race or gender. The current regulations call for broad outreach, but also require focused recruitment for ethnic minorities, women and persons with disabilities. The proposed regulations eliminate this focused outreach in favor of outreach to all underrepresented groups.

As to the specific question of advertising in publications that are designed to reach a certain limited population, the extent that such recruitment is permitted is not altogether clear. The *Connerly* decision provided broad guidance, but it is not always clear how general guidance should translate into actual practice. The *Connerly* Court noted that “outreach or recruitment efforts which are designed to broaden the pool of potential applicants without reliance on an impermissible race or gender classification are not constitutionally forbidden.”

An overall outreach effort that does not make any differentiation on any impermissible basis is appropriate. Special efforts where no underrepresentation exists would undoubtedly be subject to challenge because the inference is that there is no basis for focusing on a particular group and that such focus represents a preference. We believe that some percentage of recruitment efforts that are focused on underrepresented groups may be defensible, but the district should be prepared to show that all who are interested have a full and fair opportunity to learn about job openings. We hasten to add that any specialized outreach efforts should be used only for groups that are actually underrepresented (in terms of ethnic group identification, gender, and disability) and to underscore that judicial guidance on the issue is, at this point, very thin.

The proposed regulations include a provision indicating that, once applications for a job have been screened to determine who meets minimum qualifications, an adverse impact analysis must be conducted. If that analysis indicates that there is adverse impact on any group, the district must take effective steps to address that problem which may include engaging in additional recruitment aimed at the group which was found to be underrepresented.

5. **Question: If immediately challenged by the community or other interested parties, should currently adopted district affirmative action plans, hiring policies, or discrimination complaint procedures that reflect the subject Title 5 sections be suspended?**

*Answer:* Any plans or portions of plans, policies, or procedures that contain elements of discrimination on an impermissible basis or that grant a preference on any basis covered by Proposition 209 should be suspended, regardless of whether a district receives a challenge. District discrimination complaint procedures are based on a different set of statutes than was struck down in the *Connerly* decision. Nondiscrimination in district programs and activities, including district employment programs and activities, remains a requirement, and the complaint procedures should not be affected.

6. **Question: Many current hiring processes have incorporated the provisions of these Title 5 sections. Should the processes which have begun continue to follow those provisions, for example, review for compliance with the adopted affirmative action plan?**

*Answer:* We recognize that processes may have started prior to the guidance that was provided by the recent *Connerly* decision, and, of course, prior to the appellate decision a trial court had upheld our regulations under both equal protection standards and under Proposition 209. However, in our Fourteenth Advisory to the system, we advised districts to eliminate any recruitment or hiring procedures that treated persons differently based on race or gender. This is true even if the regulations have not yet been amended.

If there is any reason to believe that a hiring process that has already started includes an element that discriminates against applicants on impermissible bases or grants a preference on an impermissible basis, that process should be assessed prior to continuing. Affirmative action plans vary widely from district to district, so we cannot make a blanket statement about adhering to an affirmative action plan. Adhering to a part of a plan that does not differentiate on an impermissible basis would not raise issues; adhering to a part of a plan that called for including the race or gender of an applicant in a hiring decision would clearly be problematic.

7. **Question: Under the provisions of AB 1725 faculty hiring policies have been jointly adopted between academic senate and local boards and contain provisions for affirmative action efforts. Frequently, this has required many months or years to accomplish. What recommendations do you make when the faculty may not wish to change provisions in the policy, which appear to be inconsistent with the law?**

*Answer:* Education Code section 87360 requires governing board and academic senate representatives to agree on hiring criteria, policies and procedures to be adopted by the board. Boards are also required to consult collegially with academic senates when adopting policies and procedures on academic and professional matters. Although the regulations related to academic and professional matters do not explicitly include faculty hiring, faculty hiring can certainly be included as an academic and professional area by mutual agreement. Collegial consultation must include procedures either that call for the board of trustees to rely on the advice of the academic senate or to reach mutual agreement with academic senates on areas of academic and professional matters.

In those districts where boards of trustees have elected to provide for mutual agreement, policies may not be changed without agreement unless continuing the policy exposes the district to legal liability or causes substantial fiscal hardship. Where a district's existing practices run afoul of current legal requirements, they need not achieve mutual agreement in order to change the practices because to continue would expose them to legal liability. Ultimately, boards may not justify noncompliance with the *Connerly* decision on the basis of a need to reach mutual agreement.

8. **Question: Certain districts have direct federal contracts in which they are required to file affirmative action plans and to achieve certain hiring goals. Can you clarify for us the criteria under which districts must prepare and implement such plans?**

*Answer:* The *Connerly* decision did not address federal program requirements. Additionally, Proposition 209 provides "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State." Districts should continue to comply with the requirements of their federal contracts.

9. **Question: Do the changes in the Title 5 sections have any impact upon the legal requirements to meet equal opportunity adverse impact requirements during the hiring process? If not, what advice can you give us concerning our obligations to meet these requirements?**

*Answer:* The proposed regulations continue to refer to the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection" which were established as guidance for monitoring for potential discriminatory hiring practices and which include the adverse impact concept. The proposed regulations still specifically require that all screening or selection techniques be monitored to ensure that they do not have an adverse impact on any group defined in terms of ethnic group identification, gender, or disability. This means that each point in a hiring process where the elimination of candidates occurs should be monitored for adverse impact. This does not mean that the existence of an adverse impact is proof that discrimination has occurred. It means that districts need to assess why certain groups were eliminated at a substantially higher rate than were other groups. If the higher rate of elimination was not based on job-related factors, the process may not continue until the problem is remedied. We recognize that at certain stages in the selection process, the numbers of applicants may become too small for a meaningful assessment of adverse impact, but even

at those stages, districts must be careful that all hiring considerations are job-related.

10. **Question: What new flexibilities do you feel exist with hiring committees, hiring managers or boards of trustees with the elimination of affirmative action requirements currently prescribed by Title 5? Is the requirement to have a diverse applicant pool still valid? There is concern about the Title 5 regulations that encourage going beyond minimum qualifications and then the requirements to remove those additional qualifications if the applicant pool is not diverse.**

*Answer:* The intent of the pending revisions to the Title 5 regulations that address district hiring is to bring the regulations into conformance with the requirements laid out in the *Connerly* decision. We fully expect that new options and flexibilities will be explored, but that activity will take some time and will require the expertise and creativity of a wide variety of system representatives. We did not feel we could wait for those efforts to be completed before making the more technical revisions to the regulations that can be immediately implemented. With respect to new options and flexibilities, the Chancellor has established the Task Force on New Approaches to Promoting Equity and Diversity. The purpose of that group is to explore innovative mechanisms for promoting diversity, including the consideration of improved outreach and selection procedures.

The proposed regulations do not directly state that each hiring pool must be diverse. In fact, they concede that there is no universal or specific measure for determining when diversity has been achieved. However, the regulations require active recruitment from both inside and outside the district's workforce for new openings (unless limited exceptions apply) and they require an assessment of each initial applicant pool to guard against restrictions on equal opportunity to compete for job openings. We believe it follows that ensuring nondiscrimination will contribute to diversity in the workforce. We expect that the new Task Force will be exploring further means for addressing diversity. We should point out that the proposed regulations continue to echo the statutory requirement that faculty and administrative processes include a consideration of applicants' demonstration of a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students.

It is true that districts are encouraged to go beyond the state minimum standards in setting employment qualifications. However, this fact has never suggested that districts may use qualifications that are not job-related. If additional qualifications cannot be shown to predict the ability to perform important job requirements, the job-relatedness of those qualifications is certainly questionable.

- 11. Question: Would internal recruitment be legally defensible if it were done for all positions prior to external recruitment, making no distinction regarding areas that have or have not achieved adequate historically underrepresented group representation?**

*Answer:* Under the current regulations, in-house recruitment alone is allowable only under two limited circumstances: a position is filled on an interim basis, or a district's workforce has reached parity for women and minorities. The second circumstance was specifically criticized by the *Connerly* Court and it is eliminated under the proposed regulations. This means that in-house or "promotional only" hiring will only be permitted when a position is being filled on an interim basis. It is helpful to recall that limited recruitment efforts for open positions, such as "word-of-mouth" efforts, were identified early-on as a potential means of denying equal employment opportunity. The principle of broad recruitment has been a system goal to ensure both nondiscrimination and a broad pool of applicants.

- 12. Question: What are the specific criteria for determining adverse impact? As we monitor applicant pools we can't hold up processes due to lack of representation, but we can monitor for adverse impact. What is the definition of adverse impact?**

*Answer:* Adverse impact is generally measured under the "4/5" standard. This means that there is evidence of adverse impact if the selection rate for any group is less than 4/5 (or 80%) of the selection rate for the group with the highest rate. The proposed regulations still require an analysis of the applicant pool. However,

the focus only on minorities, women, or the disabled is removed in the proposed regulations. Instead, the initial pool is analyzed for all underrepresented groups, defined in terms of ethnic group identification, gender, and disability. Under the proposed regulations, a finding that any group is underrepresented requires that the application deadline be extended and additional recruitment conducted to ensure that recruitment efforts provide an opportunity for participation to a wide diversity of potential applicants.

Later on, once applications have been screened, the district should conduct an adverse impact analysis. A finding of adverse impact at that stage gives rise to an obligation to take effective steps to address the problem which may include further outreach targeted to the group specifically found to be underrepresented.

- 13. Question: Following the closing of a position, we calculate the percentage of minorities, women and persons with disabilities. Can this information in aggregate form (without identifying the individual candidates) be given to the EEO representative serving on the committee? At the beginning of the process, can the screening committees be given underrepresentation numbers for their department, i.e., Hispanic female?**

*Answer:* Recall that applicants are given the opportunity to voluntarily self-identify. Frequently, applicants do not provide any information regarding their ethnic group identification, gender, or disability. Additionally, the information is to be used only in research and monitoring for effectiveness in providing equal opportunity. The information does not bear on any candidate's qualifications or have relevance to job-related qualifications, so we see no basis for sharing it with the committee.

Where adverse impact has been found within the selection process, the proposed regulations still allow the equal opportunity officer or other process monitor to discuss the overall composition of the applicant pool and criteria or procedures that have caused an adverse impact, so long as confidential information about individuals is not disclosed. However, there is no authority for providing this information outside of this limited situation. The sharing of the information when an adverse impact is found has relevance regarding the presence of an adverse impact and how to remedy the situation within the process.

As to advising a screening committee of specific underrepresentation in the department, the purpose of that action is unclear. If such an action has the effect of conveying a message to a committee that it should give consideration to an impermissible factor in its decision, it should be avoided.

**14. Question: What is the status of faculty internship programs in light of the *Connerly* decision?**

*Answer:* There is no reason that faculty internship programs should be changed. There has never been authority to limit participation in such programs to any particular group, other than groups defined by educational qualifications.

**15. Question: Will the Chancellor's Office continue with technical assistance team visits?**

*Answer:* We have every intention of continuing such visits. Of course, the issues that the team raises on its visit will change, particularly after the new regulations have been adopted, but the *Connerly* decision did not in any way eliminate the need for technical assistance.