Proposed Evaluation and Tenure Review Regulatory Action – Chancellor's Office Responses to Public Comments

The responses below are prepared by the Chancellor's Office in response to public comments received during the 45-day and the 15-day public notice periods for the proposed Evaluation and Tenure Review regulatory action. Official notice of the proposed regulatory action was published on March 11, 2022, and the 45-day comment period ended on April 25, 2022. Revisions made as a result of comments received during the 45-day comment period were renoticed on May 5, 2022 for a 15-day public comment period ending on May 20, 2022. Pursuant to Section 206, subdivision (c)(6) of the Procedures and Standing Orders of the Board of Governors, only comments received during the 15-day comment period that relate to the changes made to the text of the regulation following the 45-day comment period will be addressed. The Chancellor's Office thanks all the commenters for their submissions.

Responses to 45-Day Comments:

1. ERIC KALJUMAGI, PRESIDENT OF THE COMMUNITY COLLEGE ASSOCIATION (CCA) OF THE CALIFORNIA TEACHERS ASSOCIATION (CTA); JIM MAHLER, PRESIDENT OF THE COMMUNITY COLLEGE COUNCIL (CCC) OF THE CALIFORNIA FEDERATION OF TEACHERS (CFT); AND JEFFREY MICHELS, PRESIDENT OF THE CALIFORNIA COMMUNITY COLLEGE INDEPENDENTS (CCCI)

Messrs. Kaljumagi, Mahler, and Michels submitted a joint letter dated March 16, 2022, which provided, in relevant part, the following comments:

- "We are writing to express serious concerns over proposed regulatory action amending Title 5 of the California Code of Regulations related to the evaluation and tenure review of community college district employees and request immediate changes in the proposal. Most significantly, as written, the proposal would inappropriately and illegally interfere with local collective bargaining rights by imposing new evaluation criteria 'identified by the Chancellor.'"
    - **Chancellor's Office Response:** The Chancellor's Office respectfully disagrees with this comment. The Chancellor's Office is acting well within its "full authority to adopt rules and regulations necessary and proper to execute the functions specified in this section as well as other functions that the board of governors is expressly authorized by statute to regulate. (Ed. Code, sec. 70901, subd. (c).) These functions include, in relevant part:

> Establishing minimum standards for employment of college district employees;

(Ed. Code, sec. 70901, subd. (b)(1)(B).). Further specific authority for the contemplated action is provided by Education Code section 87626, which provides:

> Rules and regulations adopted in relation to the evaluation process shall assure that the standards and procedures of the evaluation process in each district will be fair and in accordance with the intent of this act and that the evaluation processes of all of the districts are basically similar in substance and intent. These regulations shall permit and encourage a district governing board to establish evaluation procedures and standards which meet the particular needs of that district. (emphasis added)

As the above-quoted language makes clear, the Board of Governors is required to ensure that evaluation processes across the system are "basically similar in substance and intent." Finally, as the language also makes clear, local governing boards may "establish evaluation procedures and standards which meet the particular needs of that district." Nothing in the proposed regulations infringes on a local districts' prerogative to establish such procedures through the collective bargaining process with their labor partners. With respect to the specific claim that the regulations would interfere with collective bargaining rights, we respectfully disagree with that premise. Given that the regulatory language instructs districts to adopt local policies upon adoption by the Board of Governors, and given that evaluation procedures are a negotiable subject, it follows that this language contemplates that local districts would begin the bargaining process upon adoption of these regulations. Moreover, there is generally a lag time of at least a few months between Board approval of a regulation, and its effective date, owing to Department of Finance review and the filing requirement with the Secretary of State. In addition, section 52010, of title 5, provides a 180-day implementation period for local policies following the effective date of a newly adopted regulations. This anticipated delay would give local districts time to begin the bargaining process with their labor partners upon adoption by the Board.

- "The proposed additions to subchapter 5 of Chapter 4 of Division 6 of Title 5 of the California Code of Regulations are inconsistent with EERA and Ed. Code. They include: a) The Chancellor shall adopt a publish a guidance describing DEIA competencies and criteria in collaboration with system stakeholder groups, and b) The DEIA competencies and criteria identified by the Chancellor shall be utilized in

community college district performance evaluations of employees and faculty tenure reviews as specified in this subchapter. But the procedures for faculty evaluations (including the identification and enumeration of evaluation criteria) are specifically enumerated as a subject for mandatory bargaining (Gov. Code 3543.2). Ed. Code 87619.1 and 87663 confirm the EERA's requirement that evaluation procedures are negotiable."

    - **Chancellor's Office Response**: It is unclear why the commenters believe that the proposed regulations are inconsistent with EERA. The Chancellor's Office agrees that any changes to the procedures for performing employee evaluations and tenure reviews necessitated by these regulations will be subject to negotiations at the local level. The Board of Governors is not a public school employer subject to the duty to bargain under EERA, so it is free to enact regulations that will implicate the duty to bargain at the local level without itself having to bargain over its actions. This regulatory action is designed to allow for local implementation through the adoption of policies by local governing boards, in keeping with the community colleges local governance model. The proposed regulatory action expressly contemplates local policy adoption which would undoubtedly include collective bargaining at the local level. Nothing in the proposed regulations precludes local bargaining.

- "The proposed regulatory action makes no mention of collective bargaining rights at all. Nor does the collaboration with 'system stakeholder groups' described as part of the process for developing evaluation criteria appear to include union representation." Further, the letter characterizes this process as "an inappropriate usurpation of collective bargaining rights...."

    - **Chancellor's Office Response**: While it is true that the proposed regulations do not explicitly mention collective bargaining, such mention is not necessary to trigger the public school employers' duty to bargain. As the letter points out, the duty to bargain arises from the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. It requires a public school employers, which includes community college districts, to negotiate with an exclusive representative over hours, wages, and other terms and conditions of employment. Whether the duty to bargain is implicated does not depend on whether the Board of Governors or the Chancellor's Office says it does. In fact, this is within the Public Employment Relations Board's exclusive jurisdiction to determine rights under EERA. (See Govt. Code § 3541.3, subd. (b); *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 894.)

Contrary to the assertion alleging that these regulations constitute a "usurpation of collective bargaining rights," these regulations in fact leave much of the implementation of its prescriptions to the local process, including collective bargaining where appropriate.

- The commenters further state that they "strongly believe that the proposed regulatory changes should be amended to clarify that the criteria identified by the chancellor should be provided to local districts to help guide and inform local bargaining units and that local units shall have the responsibility and authority to determine the best way to incorporate an increased focus on DEIA and anti-racist principles into evaluation and tenure-review procedures.
    - **Chancellor's Office Response**: The Chancellor's Office agrees with this suggestion and has incorporated it into the revised proposed regulatory text currently before the Board of Governors. It is reflected in section 53601, subdivision (b), which has been revised to read: "The DEIA competencies and criteria identified by the Chancellor shall be used as a reference for locally-developed minimum standards in community college district performance evaluations of employees and faculty tenure reviews."
- Finally, the commenters list a number of specific changes they recommend be made to particular sections of the regulations. These will be listed below with responses:
- "Section 52510 (h) defines "cultural competency" by referring to "specific bodies of cultural knowledge," but fails to specify what those bodies of cultural knowledge are or include. Again, a reference to discussions in local faculty senates and in collective bargaining would seem useful here."
    - **Chancellor's Office Response:** The Chancellor's Office agrees that reference to "specific bodies of cultural knowledge" should be changed to "developing cultural knowledge" to emphasize that cultural knowledge is difficult to specify and relevant cultural knowledge may differ based on the composition of the student body. With respect to referencing discussion in local senates and collective bargaining, we do not believe that reference would be appropriate in a definition and will decline to incorporate it.
- Section 53400 proposes to cut language that is helpful for readers of Title 5 regulations that are not trained in law and regulations; we recommend that this language be kept."
    - **Chancellor's Office Response**: We do not believe this is necessary because the text is duplicative of the authority cited below the regulation, and for

this reason, and for the sake of clarity, declines to incorporate the suggested change.

- "Section 53401 seems to suggest that all non-credit community service courses are taught by contractors, which is not true. Sometimes these courses are taught by district employees, and these employees should not be excluded from compliance with these regulations."
    - **Chancellor's Office Response**: We appreciate the commenters input and suggestion in this regard. We have revised the language in section 53401 to further clarify that instructors of the covered classes, while exempt from other minimum qualifications requirements of the chapter, are not exempt from the DEIA requirements to be adopted in this regulatory action.
- "Section 53403 seems to inappropriately narrow the guarantee that the original language provided by limiting the protection to faculty qualifications "in their current position" rather than the original protection, which stipulated that faculty would continue to meet minimum qualifications for any area where they met minimum qualifications at the time they were hired (even if qualifications change at a later date). Since this has nothing to do with DEIA and has not been discussed as an intended consequence of the proposed changes, we suggest keeping the original language and not making any changes here."
    - **Chancellor's Office Response:** The Chancellor's Office has amended the proposed regulatory action to remove these clarifying amendments and intends to revisit this in the future.
- "Sections 53601 (b) and 53602 (a) should, again, make reference to the role of local collective bargaining."
    - **Chancellor's Office Response**: As previously explained above, because the duty to bargain is an independent obligation arising from EERA, we do not believe it is necessary to include reference to it in these regulations.
- "Section 53602 (c) should include language referring to the importance of training and professional development, including training for evaluators."
    - **Chancellor's Office Response**: We appreciate the commenters input in this regard. Although we decline to add the requested language here, it may be an appropriate topic for regulatory amendments relating to the flex calendar.
- "Section 53605 (a) should not reference "curriculum" since calling for anti-racist curriculum in some areas (welding, for example) may seem confusing and vague."

- **Chancellor's Office Response**: We appreciate the input received from the commenters regarding this section and have made revisions in response. Subdivision (a) was amended to reference professional practices and omit "curriculum" to broaden this subdivision's applicability to non-instructional staff such as counselors and librarians who could have been excluded from coverage under the previous version of the language.

2. MATTHEW GARRETT, PROFESSOR OF HISTORY AND ETHNIC STUDIES, BAKERSFIELD COLLEGE

On March 18, 2022, Mr. Garrett, in his personal capacity, submitted comments via email. Mr. Garrett's comments, in relevant part, are summarized below:

- Mr. Garrett comments indicated that he believes the adoption of these Evaluation and Tenure Review regulations will increase the legal liability of the California Community Colleges. He further asserts that "the state simply cannot compel faculty to echo (and certainly not 'promote') socio-political postures" and that the adoption of these regulations would invite a "deluge of First Amendment lawsuits that will… erode educational resources for students" and infringe on "California citizens' freedom of conscience to resist a socio-political posture that Californians widely rejected in the most recent election (Proposition 16)." Mr. Garrett further contends that "[i]t is undeniable that racial equity is widely contested, and yet this proposal would obligate faculty to affirm one side of that socio-political value." Mr. Garrett then provides what appears to be a legal analysis of court decisions on compelled speech and closes by asserting that these regulations would be struck down by the courts and requesting that the Board of Governors not adopt the regulations.
    - **Chancellor's Office Response**. The Chancellor's Office thanks Mr. Garrett for his comments but respectfully disagrees with his comments and analysis. The proposed regulations would not amount to "compelled speech" by employees. These revisions would simply enshrine DEIA values in the evaluation and tenure review processes. We disagree with Mr. Garrett's analysis of First Amendment case law, finding it inapposite as the cases cited do not involve issues of academic freedom and free speech in the context of institutions of higher education prescribing curriculum. In that sphere, courts have held that a university can "make content-based decisions when shaping its curriculum." (Edwards v. California University of Pennsylvania (3rd Cir. 1998) 156 F.3d 488, 492.) Indeed, the Edwards court stated that "case law from the Supreme Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards

[instructor] does not have a constitutional right to choose curriculum materials in contravention of the University's dictates." (Id.) At least one California federal court has cited Edwards approvingly, stating that "[t]eachers and professors do not have a First Amendment right to choose their own curriculum materials, if it goes against a university's requirements. (California Teachers Ass'n v. Davis (C.D. Cal. 1999) 64 F.Supp.2d 945, 953.)

- Mr. Garrett closes with the following appeal: "Please do not deny faculty our First Amendment rights. Please do not rob our students of educational resources. Please do not mandate a campus culture that is hostile to intellectual diversity. Please do not reassign valuable class time to socio-political causes. Please do not adopt the proposed changes to Title V."
    - **Chancellor's Office Response**. The Chancellor's Office respectfully disagrees with Mr. Garrett's implication that the proposed regulations would do any of the things he lists.

3. DR. AMANUEL GEBRU, PRESIDENT, AFRICAN AMERICAN MALE EDUCATION NETWORK AND DEVELOPMENT (A2MEND) ORGANIZATION

Dr. Gebru submitted the following comment to the Board of Governors for their meeting on March 21, 2022:

- "On Behalf of the A2MEND Organization, I would like to express my support in favor of local and state level system changes that will advance the outcomes of our marginalized populations of students, specifically in favor of increasing success for our African American male students. It is necessary that our system continually commit to serving our students better on our campuses and in our communities, but most importantly inside of the classroom where they feel connected to their educational journey and personal success. It is necessary to include DEIA Competencies into professional development opportunities on each campus and to be used as baseline criteria in which we evaluate the performance and advancement of our faculty around these competencies. As an organization, we also stand in favor of the approved set of regulatory changes to the EEO template and requirements focused on the recruitment, hiring, and promotion process that was passed last summer. We will continue to advocate for these radical changes in our system in order to make a large-scale impact and improve the successes of our students.

  Thank you for your efforts around the changes in DEIA competencies and criteria. We stand in solidarity."

4. CHANCELLOR'S OFFICE RESPONSE: THE CHANCELLOR'S OFFICE THANKS DR. GEBRU FOR THIS COMMENT.

Dr. Barnes submitted comments to the Board of Governors for their meeting on March 21, 2022, including the following:

- "Well, I fear that some of our colleges will not be able to effectively engage or carryout the faculty evaluation changes around DEIA as meaningfully intended by the Board's currently written and proposed Title 5 changes. Additionally, it is worth reiterating, that the Board--before moving any proposed changes forward--clearly understand and honor the current and differing contexts in which colleges are functioning currently around RSJ and DEIA issues. The best intentions can create at best, unintended consequences, and at worst, detrimental or exact opposite effects of our intentions. CFT would like to see the Board's efforts succeed on this very important issue, not just for our colleges, but also to our students, our communities, and society at large. I respectfully request that you give serious consideration the concerns outlined in the written letter offered collectively by the three union Presidents and the verbal comments of my union siblings. As Senior VP of CFT, I offer our efforts, and we stand ready, to assist in creating effective and meaningful changes for faculty evaluation through the proper channels around DEIA."
    - **Chancellor's Office Response:** The Chancellor's Office thanks Dr. Barnes for these comments.

5. WENYUAN WU, EXECUTIVE DIRECTOR, CALIFORNIANS FOR EQUAL RIGHTS FOUNDATION

On March 21, 2022, Wenyuan Wu submitted a letter on behalf of the Californians for Equal Rights Foundation. The comments are summarized below:

- Ms. Wu asserts that the proposed regulatory action "pushes California Community Colleges, the nation's largest system of higher education, further toward ideological indoctrination and thought conformity."
    - **Chancellor's Office Response**: The Chancellor's Office respectfully disagrees with this statement. The purpose of the proposed regulations is to support student success and retention by creating inclusive, anti-racist institutions, pedagogy, and curriculum that are reflective of the system's diverse student body.
- Ms. Wu further asserts that the "CCC Governing Board and the Chancellor's Office have narrow, politicized conceptions of diversity, inclusion and equity. By marrying DEIA with anti-racism, CCC has fully subscribed to all major tenets of

critical race theory (CRT), including 'intersectionality of social identities,' 'multiple axes of oppression,' 'minoritize(d) subordination,' and 'equitable student outcomes.' Anti-racism aggressively advocates for discrimination in the name of equity and race-based nonsolutions that assault our founding principle of equality and our long-standing value of meritocracy. The proposed changes are illiberal and toxic, serving only to further inflame racial divisions and cover up real problems in our education system."

  - **Chancellor's Office Response:** Again, the Chancellor's Office respectfully disagrees with these statements. As stated above, the purpose of the proposed regulations is to support student success and retention by creating inclusive, anti-racist institutions, pedagogy, and curriculum that are reflective of the system's diverse student body. The Board of Governors and the Chancellor's Office expect that these regulations will be implemented in conformity with applicable law, including but not limited to, state and federal anti-discrimination laws and regulations.

- Ms. Wu further asserts that the proposed regulations "would gravely jeopardize academic freedom for CCC's over 57,000 academic staff and chill free speech on CCC campuses." She further contends that "[i]n addition to mandating DEIA as a minimum standard for employee performance review, the plan would also empower education bureaucrats to thought-police college professors through ensuring 'a uniform understanding of how to evaluate' and developing a comprehensive process for all local boards."

  - **Chancellor's Office Response**: Again, the Chancellor's Office disagrees with these assertions. Nothing in the proposed regulations will impact academic freedom. Indeed, the Academic Senate for California Community Colleges has been an important partner in the development of these regulations. Finally, as to the creation of a uniform understanding of how to evaluate and develop a comprehensive process for all local boards, as we have explained before, the Board of Governors would simply be following the strictures of the Legislature, who in enacting Education Code section 87626, provided that evaluation processes throughout the system should be "basically similar in substance and intent." However, also consistent with section 87626, these regulations leave many of the specific aspects of local implementation to the local consultation and/or bargaining processes, which the Chancellor's Office expects will be consistent with the needs of the local community.

6. NILI KIRSCHNER, PROFESSOR OF SOCIOLOGY, CURRICULUM CO-CHAIR, WOODLAND COMMUNITY COLLEGE

Nili Kirschner submitted the following comment on April 8, 2022:

- "I am writing to share my strong support for the proposed changes regarding evaluation and tenure review regulations. As a tenured faculty member, I have often lamented the shallowness of our current evaluation process for tenured and tenure-track faculty. The proposed emphasis on Diversity, Equity, Inclusion, and Accessibility (DEIA) is essential to close our system's achievement gaps and follow our Vision for Success and Call to Action for antiracism. For too long faculty have relied on the concept of academic freedom to avoid making changes. We must not conflate academic freedom and discipline expertise with holding ourselves and our system to the highest standards. Recently, COVID forced many faculty to teach online, pushing some out of their comfort zone - and yet, we still hold faculty to high standards for Distance Education. Being out of one's comfort zone is no excuse not to do the work to serve students. The same should be true for the vital work in DEIA. We cannot let some people's discomfort with change or with the unfamiliar be an excuse to maintain a status quo that is unquestionably inequitable in its outcomes for our students. The California Community College must primarily orient itself to meeting students' needs, not faculty comfort. Saying that faculty must consider DEIA in developing and presenting curriculum does not take away academic freedom, it simply reminds us that we cannot remain complacent in the face of grave inequities."
    - **Chancellor's Office Response**: The Chancellor's Office thanks Ms. Kirschner for this comment.

7. BETSY ALLEN, INSTRUCTIONAL DESIGN RESOURCE FACULTY, WOODLAND COMMUNITY COLLEGE

Ms. Allen submitted the following comment to the Chancellor's Office on April 11, 2022:

- "I write in support of the proposed changes to Title 5, that would amend the California Code of Regulations to include diversity, equity, inclusion, and accessibility as criteria for evaluating employee performance and in tenure review. As the California Community College system takes action in addressing systemic racism in its institutions, ensuring that both staff and faculty are accountable for continually learning and implementing equitable practices in their teaching and work is a critical step toward real and sustainable change. These proposed changes to Title 5 tie student outcomes to faculty and staff practice, at the levels of policy and funding, teaching and learning, and enrollment and support. Anchoring

this cultural shift in the DEIA competencies framework (§ 53601.) will provide research-based guidance in how to implement equitable practice into all aspects of CCC institutions, allowing us to measure our progress as districts, colleges, and individuals. I am especially pleased with the proposed status of districts in ensuring institutional commitment to DEIA (§ 53602.), including the offering of professional development opportunities in DEIA and requiring "self-reflection and a comprehensive evaluation from appropriate evaluators […] to demonstrate their understanding of DEIA and anti-racist principles" ((c) (6))."

- **Chancellor's Office Response**: The Chancellor's Office thanks Ms. Allen for this comment.

8. A CALIFORNIA CITIZEN WITH STRONG INTEREST IN THE CALIFORNIA COMMUNITY COLLEGES

An anonymous commenter submitted comments to the Chancellor's Office on April 21, 2022, which are summarized as follows:

- "I have some serious concerns about statewide control and regulation that could be too strict regarding DEIA, harming students and faculty instead of helping DEIA efforts. In general, the proposed changes to Title 5 regarding diversity, equity, and inclusion could be interpreted as the imposition of a specific viewpoint of these topics by the state in conflict with academic freedom of community college faculty seeking truth in teaching and learning. For example, there are very specific definitions of vocabulary terms proposed for subchapter 1 of chapter 4 of division 6, 52510 definitions, and these definitions might still be reasonably debated by faculty, administrators, and students in good faith. In other words, there is still not necessarily consensus among all California residents, or even a majority viewpoint, on the definitions of these vocabulary terms."
    - **Chancellor's Office Response**: Because this comment does not reference any specific text, or provision of the proposed regulations that the commenter claims would impose a specific viewpoint, the Chancellor's Office cannot provide a meaningful specific response to the concerns expressed in this comment. However, in general, academic freedom is not curtailed when the Board of Governors exercises its lawful authority to establish "minimum standards for the employment of academic and administrative staff in community colleges." (Ed. Code, sec. 70901, subd. (b)(1)(B).).
- "Developing a set of statewide DEIA competencies and criteria by the state chancellor's office, as proposed for subchapter 5 and 7 of chapter 4 of division 6, 53601 (a), may in fact decrease pedagogical diversity by imposing a single

perspective and a single approach for diversity, equity, and inclusion in the classroom. The recommendation to include representative stakeholders in the process of developing the statewide DEIA competencies, while appearing to be fair on the surface, might end up excluding the conservative, centrist, and moderate political viewpoints of stakeholders who fear the very real and severe social consequences (including demotion, job loss, and public ridicule on social media) of speaking up and sharing their views. I am not including my name or city on this letter for this very reason."

    - **Chancellor's Office Response**: This comment is speculative and not grounded in specific facts or observations. As such, the Chancellor's Office cannot provide a meaningful specific response to the concerns expressed in this comment.

- "Requiring all districts to conform to the state chancellor's DEIA competencies instead of locally developed DEIA competencies, as proposed for subchapter 5 and 7 of chapter 4 of division 6, 53602, could potentially and paradoxically decrease teaching effectiveness in classrooms with diverse groups of students because the statewide competencies might be too strict and inflexible to meet the needs of the students in a specific district, college, or classroom." The commenter further states, ". Imposing statewide DEIA competencies could reduce the ability of faculty to respond compassionately, creatively, and quickly to changing circumstances in the classroom. Faculty could feel pressured to conform to the statewide competencies over responding to actual student needs if there was conflict between the two priorities."

    - **Chancellor's Office Response**: As with the previous comment, this comment is speculative and not grounded in specific facts or observations. As such, the Chancellor's Office cannot provide a meaningful specific response to the concerns expressed in this comment.

- The commenter concludes her comments by stating, "In conclusion, please allow much more time to get more input, especially anonymous input, from all faculty around the state. So much work is already being done to foster appreciation of diversity, lift up students who have experienced disadvantages, and prioritize a welcoming campus climate at CA colleges, especially with the strong support of the CA Academic Senate. Local control (at the district and college levels) is preferable to state control of these DEIA activities due to the flexibility and diversity of pedagogical approach that can be achieved."

    - **Chancellor's Office Response**: The Chancellor's Office thanks the commenter for their comment; however, the consensus view of the various stakeholders in the California Community Colleges was that there is no time

to lose in engaging in this work. To the extent that the commenter believes that local control will be lost in this area, we respectfully disagree because local districts will still be able to establish evaluation and tenure review policies in consultation with their local stakeholder groups.

9. JOE COHN, LEGISLATIVE AND POLICY DIRECTOR, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE)

Mr. Cohn submitted a letter to the Chancellor's Office on April 22, 2022, containing a number of comments, which are summarized as follows:

- Mr. Cohn's primary assertion is that "[t]he proposed revisions to regulations governing faculty evaluation and tenure review would violate the First Amendment rights of California Community Colleges (CCC) faculty by compelling them to endorse specific views related to diversity, equity, inclusion, and accessibility (DEIA). The Board of Governors cannot require colleges in the CCC system to penalize faculty members based on their refusal to endorse particular ideological views or to incorporate those views into their academic work." Mr. Cohn's letter provides his analysis of First Amendment law and academic freedom in the context of higher education and concludes that "the proposed regulations would transgress these constitutional principles by requiring faculty members to affirm certain perspectives on disputed political and ideological issues and to embed those perspectives in their academic activities. This violates faculty members' freedom to dissent from the prevailing consensus on issues of public or academic concern without suffering diminishing career prospects."
    - **Chancellor's Office Response**: The Chancellor's Office appreciates Mr. Cohn's submission, but respectfully disagrees with Mr. Cohn's characterization of the regulations and his analysis of their constitutionality. It appears that Mr. Cohn's analysis, while grounded in some First Amendment cases involving higher education, does not include cases that deal with the specific subject of speech in the instructional setting.

      Academic freedom is a concept that protects faculty members from reprisal by their community college district employer, to the extent the employer has a policy or collective bargaining agreement codifying those protections. Neither the Board of Governors nor the Chancellor's Office stands in an employment relationship with faculty (unlike UC and CSU), accordingly the concept of academic freedom is not applicable to the regulations of the Board of Governors that are adopted in furtherance of its mandate of

"[e]stablishing minimum standards for employment of college district employees." (Ed. Code, sec. 70901, subd. (b)(1).).

Moreover, academic freedom is not absolute. Courts have held that a university can "make content-based decisions when shaping its curriculum" (Edwards v. California University of Pennsylvania (3rd Cir. 1998) 156 F.3d 488, 492 [upholding public university decision to prohibit use of "doctrinaire religious materials"].) Indeed, the Edwards court stated that "case law from the Supreme Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards [instructor] does not have a constitutional right to choose curriculum materials in contravention of the University's dictates." (Id.) At least one California federal court has cited Edwards approvingly, stating that "[t]eachers and professors do not have a First Amendment right to choose their own curriculum materials, if it goes against a university's requirements. (California Teachers Ass'n v. Davis (C.D. Cal. 1999) 64 F.Supp.2d 945, 953.)

Mr. Cohn's analysis overlooks the fact that while the proposed regulations provide a framework for what local districts should consider when enacting evaluation and tenure review policies and procedures, what those policies and procedures ultimately require will involve local districts and their employees. Any issues involving First Amendment rights or academic freedom should be viewed through that lens and analyzed under the Connick v. Myers framework.

- Mr. Cohn's letter continues to attempt to make the case that "the First Amendment and principles of academic freedom protect faculty members' right to discuss these ideas and to take any position on them. CCC may not grant itself the authority to declare this debate settled, leaving its faculty no choice but to affirm one narrow perspective." Mr. Cohn further posits that the proposed regulations equate to the California Community Colleges "demanding rigid ideological conformity on issues of public and academic debate" which would "shrink the universe of ideas that can be studied or expressed on its campuses…."

  Mr. Cohn concludes by stating, "FIRE recognizes that CCC may shape and express its own values as an institution, including promoting DEIA and the diversification of its faculty and student body, and act on those values within the bounds of the law. CCC must also, of course, ensure its educational environment is free from unlawful discriminatory conduct. What CCC may not do, however, is prescribe an orthodox political or ideological position that restricts faculty members' opportunities for advancement—including the awarding of tenure—or prevents the hiring of those who hold dissenting views."

- **Chancellor's Office Response**: The Chancellor's Office respectfully disagrees with Mr. Cohn's characterization of what the proposed regulations would require of faculty. Rather than prescribe a specific and rigid ideology that must be imparted on students. The proposed regulations simply provide an overall framework on just one aspect related to DEIA that should be part of local districts' evaluation and tenure review processes, which as mentioned above, will ultimately be negotiated at the local district level and will likely look different at each of the system's 73 community college districts.

  Indeed, in the words of Mr. Cohn himself, through this regulatory action, the Board of Governors, on behalf of the California Community College system, would be "shap[ing] its own values as an institution, including promoting DEIA and the diversification of its faculty and student body, and [will] act on those values within the bounds of the law." This regulatory action is not, and will not "prescribe an orthodox political or ideological position that restricts faculty members' opportunities for advancement…."

10. ETHAN BLEVINS, ATTORNEY, PACIFIC LEGAL FOUNDATION (PLF)

Mr. Blevins submitted a letter to the Chancellor's Office on April 22, 2022, containing a number of comments in general opposition to the proposed regulations. The relevant comments are summarized as follows:

- Mr. Blevins indicates in his letter that the PLF "opposes the growing trend among universities and colleges to require adherence to ideological tenets such as anti-racism as a condition in the hiring, retention, and promotion of faculty. Such demands share an unsettling resemblance to the unconstitutional loyalty oaths required by California universities in the 1950s. The proposed regulation will entrench a political orthodoxy, reduce intellectual diversity on college campuses, threaten First Amendment freedoms, and impair the education of students who deserve exposure to a rich and robust range of viewpoints on the critical issues facing our country. In the words of the Supreme Court in striking down a law compelling a classroom flag salute: 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.' (footnote omitted) The proposed regulation would prescribe just such an orthodoxy."
  - **Chancellor's Office Response:** The Chancellor's Office thanks Mr. Blevins for sharing the PLF's concerns with respect to this regulatory action, but respectfully disagrees with the characterization of this work.

- The remainder of Mr. Blevins's letter is a treatise on why PLF opposes the regulatory action. Among other things, he asserts that it will "result in greater political and ideological uniformity among community college employees" and that it is "not neutral with respect to viewpoint—it will give strong preference to faculty who agree with and actively promote a specific political and philosophical vision regarding some of the most controversial topics of our day. Mr. Blevins adds that "[t]he regulation will likewise disfavor those employees and job applicants with an alternative viewpoint."
    - **Chancellor's Office Response:** The Chancellor's Office respectfully disagrees with these characterizations. These assertions are highly speculative and point to no evidence that the parade of horribles it lists is likely to occur. Nothing in the regulatory language indicates that "strong preference" will be given to "faculty who agree with and actively promote a specific political and philosophical vision…" Finally, Mr. Blevins asserts that the regulation will disfavor job applicants with an "alternative view point." It is unclear what this "alternative viewpoint" would be, but perhaps more importantly, the proposed regulations relate to the evaluations and tenure reviews of existing employees; accordingly, the relevance of the regulations to job applicants is also unclear.
- Mr. Blevins's letter describes what is included in the proposed regulations, but veers into speculative territory again when, in attempting to describe the concepts of anti-racism and DEIA, he posits that "a core notion behind anti-racist thought is that '[t]he only remedy to past discrimination is present discrimination.' (footnote omitted)" Mr. Blevins asserts that "requiring staff to conform to such views [anti-racism] as a condition of employment 'amounts to an ideological litmus test.' (footnote omitted)" The remainder of the first part of Mr. Blevins' letter continues along the same vein, alternately denouncing some aspect of DEIA and anti-racism and then immediately speculating as to how the California Community Colleges may operationalize the concept to the maximum detriment of "staff holding alternative viewpoints on a variety of important issues." Again, Mr. Blevins' narrative posits that a commitment to anti-racism will disfavor the hiring of any number of individuals with disfavored views, such as those criticizing the 1619 project for example.
    - **Chancellor's Office Response**: The Chancellor's Office again respectfully disagrees with these characterizations. Again, the regulations at issue relate to the evaluation and tenure reviews of existing employees, so the speculation as to how they might be used to disfavor job applicants is inapposite.

- The second part of Mr. Blevins' letter asserts that the "proposed regulation endangers academic freedom and free speech." As before, the entirety of Mr. Blevins arguments are based on speculation that the "proposed regulation will constrict teachers' rights to express themselves freely in the classroom." As a result, Mr. Blevins speculates that the "regulation therefore likely violates the First Amendment's guarantees of academic freedom and freedom of speech." Again, as throughout his letter, Mr. Blevins speculates as to the effect of the regulations, positing that simply because teachers may have to incorporate DEIA principles into their teaching, it would impermissibly chill the speech of any number of different types of instructors. Mr. Blevins also asserts that the terms "DEIA and anti-racist principles" are vague and lack coherent meaning and assails a number of the other definitions in section 52510 as unclear. However, rather than provide alternatives for the Chancellor's Office to consider, Mr. Blevins simply asserts that the lack of clarity will lead to yet more fear, self-censoring, and distrust.
    - **Chancellor's Office Response**: The Chancellor's Office again respectfully disagrees with these characterizations. Once the regulations are implemented and operationalized at the local level, we do not believe the parade of horribles Mr. Blevins conjures will materialize. Furthermore, we dispute Mr. Blevins's analysis of the First Amendment and academic freedom concerns. Finally, we do not believe the applicable terms are unclear, but in any event, Mr. Blevins provides no alternatives for us to consider.
- The final section of Mr. Blevins' letter asserts that the proposed regulations will impair students' education because they will serve to reduce viewpoint diversity rather than promote it. Mr. Blevins makes these assertions without providing any scholarly research in support. Rather, those assertions are based on statements made by an Ivy League President and a political celebrity. In conclusion, Mr. Blevins summarizes his arguments and urges the Board of Governors to reject the proposed regulation.
    - **Chancellor's Office Response:** The Chancellor's Office again respectfully disagrees with Mr. Blevins's characterizations. In sum, Mr. Blevins's objections to the proposed regulations appear based on hostility to DEIA principles and speculation about what they might bring. We recommend that the Board reject Mr. Blevin's request and approve the proposed regulations.

11. SHAARON VOGEL, PRESIDENT, BUTTE COLLEGE EDUCATORS ASSOCIATION (BCEA)

Shaaron Vogel submitted a letter on April 22, 2022 containing a number of comments regarding specific amendments to different sections of the proposed regulations. Each comment is summarized with responses below:

In general, Ms. Vogel and the BCEA oppose the proposed regulatory changes. While the letter asserts that they "are NOT in opposition to Diversity, Equity, Inclusion and Accessibility but rather to the intrusion into Academic Senate 10 plus 1 and labor role." Ms. Vogel repeated that they "do not oppose the movement toward teaching under DEIA principles, as they are what is best for our students and society." She further indicated that "Local Districts should maintain the authority to approach this change in the way that works best for them." BCEA's specific concerns were the following:

- **Section 53403**: Ms. Vogel suggested the Chancellor's Office "[a]dd the phrase 'or discipline' to the end of the revised sentence, to protect faculty's existing approval in different faculty service areas."
    - **Chancellor's Office Response**: The Chancellor's Office thanks Ms. Vogel and BCEA for their recommendation, but declines to submit it to the Board of Governors for consideration. After further consultation with stakeholder groups, we are withdrawing the proposed amended language presented at First Reading at the Board's March meeting. This will have the effect of leaving the language of section 53403 unaltered from its current form.
- **Section 53601(c)**: With respect to section 53601, Ms. Vogel states, "We have grave concerns about an evolving set of competencies/criteria that are not part of our contract and that are frequently changed. A primary principle of performance evaluations is that employees must have notice of the items that will be assessed. If this set of competencies/criteria is constantly under construction, it could create a "gotcha" moment where the employee is negatively evaluated for something they did not know they were supposed to be doing. This will lead to unnecessary grievances and will cost both Districts and labor unions time and money. Also, our contracts govern evaluations, and they are locally negotiated for each District. Standardizing evaluation competencies/criteria removes those parties from their role in determining the terms of local contractual arrangements, and we strongly believe that this constitutes improper interference into the bargaining process. Though subsection (a) refers to the competencies/criteria as a "guidance", which suggests authority still resides at the local level, subsection (b) states that they "shall" be utilized, which suggests standardization across the CCC system, violating local control.."

- **Chancellor's Office Response**: The Chancellor's Office appreciates BCEA's perspective on this issue. With respect to the purported "interference into the bargaining process" and "violating local control," we respectfully disagree with those views. To begin, as we have specified in response to prior comments, the Chancellor's Office is well within its authority to regulate in the area of "[e]stablishing minimum standards for employment of college district employees." (Ed. Code, sec. 70901, subd. (b)(1).) To the extent these regulations will trigger the duty to bargain, such an obligation rests with the local community college districts to negotiate with their labor partners. Neither the Board of Governors nor the Chancellor's Office is a "public school employer" as defined by EERA, and as such, cannot be seen to "interfere" with the bargaining process simply by enacting regulations the Board is empowered by the Legislature to enact. Moreover, BCEA's concern that the Board of Governors' regulations may violate local control is likely mooted by revisions to the text of section 53601 considered at First Reading that we are now proposing for Second Reading. As a result of further consultation with system stakeholders, the Chancellor's Office recommends revising the language in subdivision (b) of section 53601 from "utilized" to "used as a reference for locally developed minimum standards." The effect of this change is to clarify that the guidance published by the Chancellor's Office pursuant to subdivision (a) is to be just that, guidance used by local districts as a reference in developing their local policies and procedures.

- **Section 53602(a) and (b):** With respect to this section of the proposed regulations, BCEA is concerned about purported vagueness the term "proficiency" found in subdivisions (b) and (c). They believe the term is undefined and these subdivisions do not specify how "proficiency" should be measured. BCEA asks, "What counts as 'proficient'? Two things that support DEIA? Three? Again, through the local labor negotiations process, each District and union representatives work these things out at the bargaining table when they develop their evaluation process and instrument. Imposing a system wide, undefined standard like 'proficiency' interferes with the ability of negotiation teams to define expectations for represented employees."

    - **Chancellor's Office Response**: The Chancellor's Office thanks BCEA for this comment, but respectfully disagrees that the term "proficiency" is too vague as used in section 53602 to be workable, as BCEA's comment implies. In our view, the language of subdivision (a) is clear in stating that "[d]istrict governing boards shall adopt policies for the evaluation of employee performance, including tenure reviews, that requires demonstrated, or

progress toward, proficiency in the DEIA competencies published by the Chancellor." This language assigns to local governing boards the obligation to adopt policies for evaluating employee performance and tenure reviews, which will include defining what "proficiency" in the DEIA competencies in that district. Contrary to BCEA's assertion, this regulation is not attempting to impose a system wide, undefined standard of "proficiency." Rather, the regulation leaves this determination to the local decision-making process for adopting such policies. To the extent that this decision-making process includes collective bargaining, the regulation would clearly not interfere with local negotiations, but rather encourage them. In general, where the regulations require community college districts to adopt or implement a policy, districts must go about that process in compliance with any independent statutory requirements, such as collective bargaining obligations. Our omission of any applicable statutory requirements districts must adhere to in the language of our regulations should not be construed as license to ignore those statutory requirements. Rather, it is generally because it is unnecessary to restate those requirements in each new regulation promulgated by the Board of Governors.

- **Section 53602(c):** With respect to subdivision (c) of Section 53602, BCEA's letter asserts that, "While this proposed revision seems to support local control in subsection (a) by not requiring any certain number of the DEIA competencies/criteria to be used in evaluations, it suffers from a similar vagueness problem in subsection (4) in the phrase "significant emphasis". This proposed language creates a guessing game of how much is enough. Given the variability of evaluation instruments across the CCC system, it should be left to local negotiations processes to determine how to incorporate DEIA competencies into their process." In addition, BCEA posits that "[a] top-down mandate of an undefined level – 'significant' that they must reach will be inoperable and may again lead to needless grievances."
    - **Chancellor's Office Response**. The Chancellor's Office thanks BCEA for its comment but respectfully disagrees that the phrase "significant emphasis" is too vague to be workable as implied. It appears that BCEA believes this purported vagueness will lead to "needless grievances." However, it is unclear how this could be the case as grievances are internal complaints brought by members of a bargaining unit when they allege the employer has violated a provision of a collective bargaining agreement. Here, subdivision (c) of section 53602 deals with requirements imposed on districts by the Board of Governors, so it is unlikely to be the basis of a local grievance. To the extent any ambiguity in the language becomes apparent

after enactment, the Chancellor's Office can provide clarification through guidance documents.

- **Section 53605(a)**. Finally, BCEA asserts that "this section unacceptably intrudes into the academic freedom of teaching faculty by requiring ("shall") faculty to use DEIA and anti-racist curricula. Faculty control the curriculum, based on their disciplinary expertise. They know best whether explicit curricula will work for their subject matter, or whether they can support/teach DEIA principles through particular instructional methods or strategies (such as critical thinking exercises applied to existing, non-DEIA curricula). Moreover, some subjects (e.g., in CTE) may not have that level of control over their curriculum, given existing certification requirements."
    - **Chancellor's Office Response**. Academic freedom is a concept that protects faculty members from reprisal by their community college district employer, to the extent the employer has a policy or collective bargaining agreement codifying those protections. Neither the Board of Governors nor the Chancellor's Office stands in an employment relationship with faculty (unlike UC and CSU), accordingly the concept of academic freedom is not applicable to the regulations of the Board of Governors that are adopted in furtherance of its mandate of "[e]stablishing minimum standards for employment of college district employees." (Ed. Code, sec. 70901, subd. (b)(1).)

      Moreover, academic freedom is not absolute. Courts have held that a university can "make content-based decisions when shaping its curriculum." (*Edwards v. California University of Pennsylvania* (3rd Cir. 1998) 156 F.3d 488, 492.) Indeed, the *Edwards* court stated that "case law from the Supreme Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards [instructor] does not have a constitutional right to choose curriculum materials in contravention of the University's dictates." (*Id*.) At least one California federal court has cited *Edwards* approvingly, stating that "[t]eachers and professors do not have a First Amendment right to choose their own curriculum materials, if it goes against a university's requirements. (*California Teachers Ass'n v. Davis* (C.D. Cal. 1999) 64 F.Supp.2d 945, 953.) Based on these concepts, the Chancellor's Office believes that the regulatory action is respectful of academic freedom as it is proposed. Accordingly, the Chancellor's Office respectfully declines to revise section 53605, subdivision (a) in response to this comment.

12. ERIC KALJUMAGI, PRESIDENT, CALIFORNIA COMMUNITY COLLEGE ASSOCIATION, AN AFFILIATE OF THE CALIFORNIA TEACHERS ASSOCIATION

Mr. Kaljumagi, as President of the California Community College Association (CCCA), submitted a letter to the Chancellor's Office on April 25, 2022, containing a number of comments, the most relevant of which are summarized as follows:

- "While DEIA principles are undoubtedly critically important in California classrooms and campuses, the proposed regulatory changes ignore the obligations that community college districts have under the Educational Employment Relations Act. If implemented in their current form, the proposed regulations will force districts to violate collective bargaining law. We therefore urge that the regulations be reconsidered, to take into account community college districts' obligations under existing law."
    - **Chancellor's Office Response**: We agree with and thank CCCA for recognizing the importance of implementing DEIA principles in the California Community Colleges. However, we disagree that these regulations will force districts to violate collective bargaining law.
- In its letter, CCCA explains that under EERA, specifically, Government Code section 3543.2, subdivision (a), "procedures to be used for the evaluation of employees" are within the scope of bargaining and that a community college district must notify employees and negotiate changes to evaluation procedures prior to implementing any changes. The letter goes on to cite relevant decisions of the Public Employment Relations Board (PERB) finding public school employers liable when they have changed evaluation procedures without first negotiating with the unions.
    - **Chancellor's Office Response:** We agree that any changes to evaluation procedures that may be necessitated by the adoption of these regulations will be subject to bargaining between community college districts and their affected labor partners.
- CCCA's letter further asserts that "the proposed regulations do not account for the fact that EERA requires community colleges to bargain such changes with exclusive representatives. The proposed regulations, as currently framed, will thus force community college districts to run afoul of their legal obligations."
    - **Chancellor's Office Response**: We respectfully disagree with CCCA's characterization that the mere adoption of these regulations will force districts to violate EERA. It appears that CCCA views the regulations as being self-executing upon adoption and that changes to evaluation

procedures will occur automatically by operation of law. We view this process differently. Although the letter does not identify the specific regulatory language that would purportedly cause districts to violate EERA, we have surmised that it is likely subdivision (a) of section 53602, which provides: "District governing boards shall adopt policies for the evaluation of employee performance, including tenure reviews... etc." Given that the regulatory language instructs districts to adopt local policies upon adoption by the Board of Governors, and given that evaluation procedures are a negotiable subject, it follows that this language contemplates that local districts would begin the bargaining process upon adoption of these regulations. Moreover, there is generally a lag time of at least a few months between Board approval of a regulation, and its effective date, owing to Department of Finance review and the filing requirement with the Secretary of State. This anticipated delay would give local districts time to begin the bargaining process with their labor partners upon adoption by the Board. In addition, under California Code of Regulations, title 5, section 52010, community college districts have 180 days from a new regulation's effective date to align local policies. Accordingly, there is time built into the regulatory process for implementation.

- The letter concludes by asserting that "[t]he inclusion of DEIA principles in employee evaluations must not violate the law" and that "[a]ny changes to proposed regulations should make it clear that employers must meet their obligations under EERA, including the obligation to give notice and to bargain in good faith regarding changes to employee evaluations standards, procedures, and criteria."
    - **Chancellor's Office Response**: As stated in our previous response, we disagree with CCCA's view that adoption of these regulations will violate EERA. In addition, we decline to follow CCCA's recommendation to include language to remind employers of their obligation to give notice and bargain in good faith regarding changes to evaluation procedures. As previously mentioned, the duty to bargain is an independent statutory obligation of which districts are well aware. However, the proposed resolution of adoption references collective bargaining obligations which are likely to arise upon adoption of these regulations.

13. RAY SANCHEZ, FACULTY COORDINATOR, ACADEMIC SUCCESS CENTERS, COAST MADERA COMMUNITY COLLEGE

Ray Sanchez submitted a letter on April 25, 2022 containing a number of comments, which are summarized with responses below:

- Mr. Sanchez states that "[w]e should have serious concerns over the proposed regulatory actions" and that "[t]ying concepts and philosophical assertions that are only fairly nascent in literature and heavily debated in the academy and society at large, to evaluation and tenure review, is unwarranted and reminiscent of a Berkeley loyalty oath.
    - **Chancellor's Office Response**: The Chancellor's Office respectfully disagrees with Mr. Sanchez's characterization that the concepts involved in DEIA competencies are "fairly nascent." While they are perhaps heavily debated in society at large, the majority of the stakeholders of the California Community Colleges are no longer debating and instead moving to action. We reject the characterization of these concepts as "reminiscent of a Berkeley loyalty oath."
- The remainder of Mr. Sanchez's letter appears to further call into question the concept of cultural competence by asking a series of apparently rhetorical questions about what its "theoretical underpinnings" and what it will mean on campuses. Mr. Sanchez then moves on to discuss some of the definitions in section 52510. However, rather than offer constructive suggestions for improving the proposed regulations, it appears his submission is mostly a critique of concepts and what he perceives was or was not considered in the development of the regulatory language. Mr. Sanchez asks, "Does anyone in our system question the assumptions undergirding the work of Kimberle Crenshaw, Richard Delgado, Ibram Kendi, and others? Or are their claims and theories beyond critique and established fact on the order of E=MC2?" Mr. Sanchez then shares unfortunate details of his life as a self-described troubled youth. In closing, Mr. Sanchez characterizes DEIA efforts as leading to tribalism and division "by stating explicitly" that white people are the oppressors and people of color are the oppressed. Mr. Sanchez makes clear that he does not support the proposed regulations and invites us to read a longer article further articulating his beliefs by following a link embedded in his letter.
    - **Chancellor's Office Response**: The Chancellor's Office respectfully disagrees with Mr. Sanchez's characterization of DEIA concepts and his critiques of the regulations. However, he provided no constructive suggestions for revising the regulations.

14. CASSIE MANCINI, LEGISLATIVE ADVOCATE, CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION

Ms. Mancini submitted a letter to the Chancellor's Office on April 25, 2022, containing a number of comments, which are summarized as follows:

- Ms. Mancini's letter indicated that CSEA appreciates "the Board of Governors' attention to issues related to diversity, equity, inclusion, and accessibility (DEIA)." Ms. Mancini further indicated that CSEA's concerns parallel those outlined by the joint letter submitted March 16, 2022 by the CCCA, CFT, and CCCI (See Comment 1 above). Ms. Mancini and CSEA "ask the Chancellor's Office to amend the proposed regulations as follows to clarify for community college districts the essential role that local bargaining units play when integrating DEIA criteria into employee performance evaluations and working conditions pursuant to these regulations.
    - **Chancellor's Office Response**: We thank CSEA for their comments and direct them to our response to the CCCA, CFT, and CCCI joint letter (See Chancellor's Office Response to Comment 1, above).
- "These suggested amendments are based on the revised regulations circulated to the DEIA committee workgroup on April 19, 2022. We appreciate the diligent efforts of the Chancellor's office and the workgroup to address concerns that the previously proposed text was inconsistent with requirements under the Educational Employment Relations Act (EERA). While this new language is certainly a step in the right direction, we urge the Board of Governors to further amend these regulations to make explicit that the impacts and effects of any change to employee minimum qualifications or to the standards for evaluating employee performance are mandatory subjects of collective bargaining as required pursuant to EERA."
    - **Chancellor's Office Response:** We appreciate the recognition of the DEIA Working Group's efforts to address DEIA and complete this important work. However, we respectfully disagree that there is a need to include an explicit reference to collective bargaining obligations in these regulations. As we have stated in response to a number of comments above, the duty to bargain subjects that are within the scope of bargaining is an independent duty arising from EERA and exists whether or not the proposed regulations mention it. As explained previously, given the time it typically takes regulations to become effective after adoption by the Board of Governors, there should be sufficient time for local districts to bargain any necessary changes to local evaluation and tenure review processes as a result of these regulations.

- **Section 53601(a)**: "The Chancellor shall adopt and publish a guidance describing DEIA competencies and criteria in collaboration with system stakeholder groups, which includes any exclusive bargaining representative representing more than 500 employees across the California Community College system. The DEIA guidance shall be maintained to include current and emerging evidence-based practices developed within the California Community Colleges, or described in DEIA-related scholarship."
    - **Chancellor's Office Response:** Ms. Mancini's suggested language appears intended to explicitly include larger exclusive representatives into the stakeholder groups to be included in collaboration to develop the guidance on DEIA competencies and criteria. However, the Chancellor's Office believes this language is unnecessary as bargaining groups are already included in Consultation Council and have been consulted outside of that context, including through membership on the Equal Employment Opportunity Diversity Advisory Committee (EEODAC).
- **Section 53601(b):** Ms. Mancini suggests that subdivision (b) be revised to read: "The DEIA competencies and criteria identified by the Chancellor shall not be adopted by any community college district until the exclusive bargaining representative has been given reasonable notice and an opportunity to bargain over the utilization of that criteria."
    - **Chancellor's Office Response**: As specified above, we do not believe it is necessary to include explicit reference to the parties' bargaining obligations in the regulatory language, as that duty is an independent duty that arises independently whether or not the regulations mention it. Moreover, the suggested language would omit language specifying that the DEIA competencies and criteria should be used as a reference for locally developed minimum standards for performance evaluations and tenure reviews. Accordingly, we will not accept the suggested revision.
- **Section 53602**: Ms. Mancini suggests adding a new subdivision (d), which would read: "Upon request of the exclusive representative, the parties shall negotiate those matters set forth in subdivisions (a)-(c) which are subject of negotiation under the provisions of Section 3543.2 of the Government Code."
    - **Chancellor's Office Response:** Again, as mentioned above, we do not believe it is necessary to include express language referencing the parties' bargaining obligations as it would serve as a mere restatement of existing legal obligations. Accordingly, we will not accept the suggested revision.

- Ms. Mancini concludes her letter by stating, “Finally, we would emphasize that recognizing collective bargaining in these regulations is especially vital for classified employees who, under these proposed regulations, may be required to demonstrate DEIA competencies without commensurate awareness or training in comparison to system faculty. Bargaining will help clarify exactly how classified employees are expected to demonstrate DEIA competencies within their existing job duties. Furthermore, CSEA wholeheartedly agrees that investments in professional development and training are the best way to improve DEIA competencies for both faculty and classified employees. The Chancellor’s office and Board of Governors should support local districts by funding on-going professional development trainings for classified employees in particular.”

    - **Chancellor’s Office Response**: As previously stated we do not believe express mention of collective bargaining obligations is necessary. We thank Ms. Mancini and CSEA for their comments regarding these regulations and sharing their concerns regarding training and professional development.

Responses to 15-Day Comments:

1. HELEN ACOSTA, CHAIR, COMMUNICATIONS DEPARTMENT, BAKERSFIELD COLLEGE

On May 6, 2022, Ms. Acosta submitted comments indicating that she “support[s] these changes 100%.”

- **Chancellor’s Office Response**: The Chancellor’s Office thanks Ms. Acosta for her comments.

2. JEFFREY MICHELS, PRESIDENT OF THE CALIFORNIA COMMUNITY COLLEGE INDEPENDENTS (CCCI)

On May 9, 2022, Mr. Michels submitted comments indicating that section 53602(a) should convey that the “DEIA competencies and evaluation criteria should serve as a MODEL for local bargaining and local discussions.”

- **Chancellor’s Office Response**: The Chancellor’s Office agrees that Mr. Michels’s comment reflects the Chancellor’s Office’s understanding of what

this provision should convey. Accordingly section 53602(a) has been revised to reflect that understanding by indicating that the competencies used should be those developed locally based on the Chancellor's Office's as a model and that the Chancellor's Office's may be used in the absence of locally-developed competencies and criteria.

3. HUMBERTO GALLEGOS, CHAIR, ENGINEERING & TECHNOLOGIES DEPARTMENT, EAST LOS ANGELES COLLEGE

On May 13, 2022, Mr. Gallegos submitted a recommendation that subdivision (a) of section 53605 be revised to read: "Faculty members are expected to employ teaching pedagogies that reflect support for students from all walks of life and in particular, respect for, and acknowledgement, of the diverse backgrounds of students and colleagues to improve student success."

- **Chancellor's Office Response**: The Chancellor's Office thanks Mr. Gallegos for his thoughtful recommendation; however, we decline to make the recommended changes because we believe the existing language better reflects the belief that all faculty members, including non-teaching faculty, should abide by these principles.

4. CASSIE MANCINI, LEGISLATIVE ADVOCATE, CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION

Ms. Mancini submitted a letter to the Chancellor's Office on May 17, 2022, containing a number of comments, which are summarized as follows:

- **Section 53403**: Ms. Mancini suggested that the Chancellor's Office revert back to the language originally proposed during the 45-day comment period which, in her view, "clearly states that incumbent employees shall not be disqualified from employment in their current position based on these changes to minimum qualifications."

    - **Chancellor's Office Response**: The Chancellor's Office has decided to withdraw the changes to section 53403 that had been originally proposed in the 45-day text. Accordingly, we decline Ms. Mancini's suggested revision.

- **Section 53601(a)**: Ms. Mancini's letter also suggests changes to section 53601, which would explicitly include "any exclusive bargaining representative representing more than 500 employees across the California Community College system" as a system stakeholder group.

    - **Chancellor's Office Response**: The Chancellor's Office declines to make the requested revision because it does not believe it is necessary to specifically enumerate the system stakeholder groups who shall consult on the adoption of DEIA competencies and criteria.

- **Sections 53601 & 53602:** Ms. Mancini suggests adding a new subdivision (c) to section 53601 specifying that the DEIA competencies and criteria identified by the Chancellor shall not be adopted by any community college district until bargaining over the issue has taken place. She further suggests adding a new subdivision (d) to section 53602 which would explicitly state that the matters in subdivisions (a) through (c) are subject to negotiations under Government Code section 3543.2, which is part of the Educational Employment Relations Act (EERA).

    - **Chancellor's Office Response**: The Chancellor's Office declines to make the suggested additions because it is unnecessary to restate bargaining obligations which may already be required by other provisions of law, including, but not limited to the Educational Employment Relations Act (EERA).

5. TYESHA THOMAS, DIRECTOR OF DIVERSITY, EQUITY, AND INCLUSION, CITRUS COLLEGE

On May 17, 2022, Ms. Thomas suggested revising section 53403 to remove he/she pronouns, making the language more inclusive.

- **Chancellor's Office Response**: The Chancellor's Office thanks Ms. Thomas for her suggestion and agrees to incorporate her revision to make the language more inclusive.

6. ERIC KALJUMAGI, PRESIDENT, CALIFORNIA COMMUNITY COLLEGE ASSOCIATION, AN AFFILIATE OF THE CALIFORNIA TEACHERS ASSOCIATION

Mr. Kaljumagi, as President of the California Community College Association (CCCA), submitted a letter to the Chancellor's Office on May 18, 2022, reiterating and resubmitting comments he had previously submitted on April 25, 2022 in response to the 45-day public comment period. Mr. Kaljumagi's primary contentions in the May 18, 2022 letter are that the Chancellor's Office failed to respond to or address the Association's concerns that the proposed regulations violate the intent of EERA because procedures to be used for the evaluation of employees are within the scope of representation. Included in the resubmitted comments, are a number of suggested edits to various sections of the proposed regulations. Mr. Kaljumagi lists this rationale for the bulk of the comments and suggested revisions. For example, he states repeatedly that various provisions are "related to evaluation – a mandatory subject of bargaining" and that "[t]he regulation as drafted does not include statutory requirements concerning the mutual agreement between the exclusive representative of the professional employees of the school district and the governing board of the district."

- **Chancellor's Office Response**: The Chancellor's Office thanks Mr. Kaljumagi for his submission but again, respectfully disagrees with the primary contention that the proposed regulations violate EERA and that they must contain express reference to bargaining obligations. As we pointed out in our previous responses to other similar comments, the Board of Governors is not a public school employer subject to the duty to bargain under EERA, so it is free to enact regulations that will implicate the duty to bargain at the local level without itself having to bargain over its actions. This regulatory action is designed to allow for local implementation through the adoption of policies by local governing boards, in keeping with the community colleges local governance model. The proposed regulatory action expressly contemplates local policy adoption which would undoubtedly include collective bargaining at the local level. Nothing in the proposed regulations precludes local bargaining. Moreover, the duty to bargain over mandatory subjects is a statutory obligation that exists independent of the actions of the Board of Governors and, where it is triggered, would apply whether or not the Board of Governors explicitly mentioned it in its regulations. Because we disagree with the premise underlying Mr. Kaljumagi's suggested revisions, we decline to incorporate them into the proposed regulations.

7. BELINDA LUM, PH.D., PROFESSOR OF SOCIOLOGY, SACRAMENTO CITY COLLEGE; CHIEF NEGOTIATOR, LOS RIOS COLLEGE FEDERATION OF TEACHERS, AFT LOCAL 2279

Ms. Lum submitted a letter on behalf of the Los Rios College Federation of Teachers on May 19, 2022 commenting on the inclusion of "accessibility" competencies in the proposed regulations. Ms. Lum's letter was a general critique on the inclusion of accessibility within the framework of diversity, equity and inclusion. Ms. Lum states that while they "support the work of accessibility," they think it is incredibly important that the subject matter of accessibility be examined separate from DEI criteria." Finally, Ms. Lum and the Los Rios College Federation of Teachers "strongly encourage the Board of Governors to spend additional time to create deliberate, intentional, and realistic competencies related to accessibility before including them into the Title V regulation revisions."

- **Chancellor's Office Response**: The Chancellor's Office thanks Ms. Lum for her submission; but declines to postpone the inclusion of accessibility within the DEIA framework. The language included in the regulations provides a definition of the term, not the competencies associated with the term. The determination of any competencies related to accessibility would be determined at the local level. Finally, the concept of accessibility in general was not revised in the proposed regulations after the 45-day public comment period, such that it would not be appropriate to revisit changes to those provisions at present.

8. JIM MAHLER, PRESIDENT OF THE COMMUNITY COLLEGE COUNCIL (CCC) OF THE CALIFORNIA FEDERATION OF TEACHERS (CFT)

Mr. Mahler submitted a letter to the Chancellor's Office on May 20, 2022. The letter contained a number of comments; which will be summarized below.

- Mr. Mahler's first contention is that because the evaluation criteria are subject to mandatory bargaining, the proposed regulations violate the right to bargain.

    - **Chancellor's Office Response**: The Chancellor's Office respectfully disagrees with Mr. Mahler on this point. As explained in our previous

responses to other similar comments, the Board of Governors is not a public school employer subject to the duty to bargain under EERA, so it is free to enact regulations that may implicate the duty to bargain at the local level without itself having to bargain over its actions. In such cases, local districts would still be obligated to bargain those terms and conditions before implementing.

- Mr. Mahler further contends that the proposed modifications to the minimum qualifications exceed the grant of authority to the Chancellor's Office and violate academic freedom.

    - **Chancellor's Office Response**: The Chancellor's Office respectfully disagrees with Mr. Mahler's contention regarding the authority of the Chancellor's Office. As previously stated in response to another commenter, the Chancellor's Office is acting within its "full authority to adopt rules and regulations necessary and proper to execute the functions specified in this section as well as other functions that the board of governors is expressly authorized by statute to regulate." (Ed. Code, sec. 70901, subd. (c).) These functions include, in relevant part, "[e]stablishing minimum standards for employment of college district employees." (Ed. Code, sec. 70901, subd. (b)(1)(B).).

      Accordingly, we believe the Chancellor's Office and the Board of Governors act within their authority in enacting the proposed regulations as minimum standards with respect to evaluation and tenure review. With respect to violating academic freedom, as we have pointed out to various other commenters, we disagree with that analysis and decline to make changes to the proposed regulations based on those assertions.

- Mr. Mahler's letter also contends that the proposed regulations should not include accessibility as those standards are defined by the state and federal law.

    - **Chancellor's Office Response**: The Chancellor's Office respectfully disagrees with Mr. Mahler's contention. Notwithstanding, as stated in our response to comment 6 above, the concept of accessibility in general was not revised in the proposed regulations after the 45-day public comment period, such that it would not be appropriate to revisit changes to those provisions at present.

9. JOE COHN, LEGISLATIVE AND POLICY DIRECTOR, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE)

Mr. Cohn submitted a letter to the Chancellor's Office on May 20, 2022, in response to the revisions made to the proposed regulations after the 45-day public comment period. As previously stated in his April 22, 2022 letter, Mr. Cohn asserts that although some of the revisions we previously made "are a step in the right direction," he continues in his belief that the proposed regulations violate the First Amendment rights of the faculty. Mr. Cohn and FIRE continue to urge that the Board of Governors reject the proposed regulations.

- **Chancellor's Office Response**: The Chancellor's Office continues to respectfully disagree with Mr. Cohn's analysis and denies that the proposed regulations would violate faculty members' First Amendment rights or academic freedom. We stand by our response (response 9, above) to Mr. Cohn's April 22, 2022 letter submitted during the 45-day public comment period.

10. PHIL HU, EXECUTIVE DIRECTOR, SAN JOSE/EVERGREN FEDERATION OF TEACHERS, AFT 6157

Mr. Hu submitted a letter to the Chancellor's Office on May 20, 2022 commenting on the inclusion of "accessibility" competencies in the proposed regulations. Generally, the letter requested that the Board of Governors "separate the issues of 'Diversity, Equity, and Inclusion (DEI)' from 'Accessibility.'"

- **Chancellor's Office Response**: The Chancellor's Office thanks Mr. Hu for the submission, but declines to postpone the inclusion of accessibility within the DEIA framework. The language included in the regulations provides a definition of the term, not the competencies associated with the term. The determination of any competencies related to accessibility would be determined at the local level. Finally, the concept of accessibility in general was not revised in the proposed regulations after the 45-day public comment period, such that it would not be appropriate to revisit changes to those provisions at present.

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