



May 20, 2022

Regulations Coordinator
California Community Colleges
Chancellor's Office
1102 Q Street, Suite 4550
Sacramento, CA 95811-6549

Sent via Electronic Mail (regcomments@cccco.edu)

Dear Regulations Coordinator:

The Foundation for Individual Rights in Education—a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses—submits the following public comment concerning the latest draft of the Proposed Regulatory Action Amending Title 5 of the California Code of Regulations to include Diversity, Equity, Inclusion, and Accessibility Standards in the Evaluation and Tenure Review of District Employees.

On April 22, 2022, we submitted a formal comment expressing our analysis of the pending regulation's incompatibility with academic freedom and free speech. (Attached.) We explained 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).”

Modifications have been made to the proposal, but we are disappointed to see that it still violates the First Amendment rights of CCC faculty. Only one change relates to this concern:

Faculty members shall employ teaching, ~~and~~ learning, and professional practices ~~and curriculum~~ that reflect DEIA and anti-racist principles, and in particular, respect for, and acknowledgement, of the diverse backgrounds of students and colleagues to improve equitable student outcomes and course completion.

While the deletion of the term “curriculum” is a step in the right direction, this minor change is inadequate to resolve the significant constitutional problems presented by the proposed regulation.

These concerns must not be ignored. In *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), the Court identified academic freedom as “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” The Court grounded the strong protections afforded faculty speech within the college classroom on the fact that the “classroom is peculiarly the ‘marketplace of ideas.’” *Id.* “Our Nation is deeply committed to safeguarding academic freedom,” the Court reasoned, “which is of transcendent value to all of us and not just the teachers involved.” *Id.*

Given the inherent threat to academic freedom at the core of this proposed DEIA regulation, as explained in depth in our initial comment, FIRE again urges CCC to reject it and ensure its processes for evaluating faculty remain viewpoint-neutral and respect faculty members’ First Amendment rights to free expression, academic freedom, and freedom of conscience.

If we can be of any assistance, please contact us at (215) 717-3473.

Respectfully,



Joseph Cohn
Legislative and Policy Director



Aaron Terr
Senior Program Officer, Individual Rights Defense Program

w/attachment

ATTACHMENT



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Chancellor's Office
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Sacramento, California 95811-6549

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The Foundation for Individual Rights in Education—a nonpartisan nonprofit dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses—submits the following public comment concerning the Proposed Regulatory Action Amending Title 5, of the California Code of Regulations, to Include Diversity, Equity, Inclusion, and Accessibility Standards in the Evaluation and Tenure Review of District Employees.

The 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.

I. The Proposed Regulations

If enacted, the regulations would direct the CCC Chancellor to “adopt and publish a guidance describing DEIA competencies and criteria” to be “utilized in community college district performance evaluations of employees and faculty tenure reviews.”¹ The DEIA competencies and criteria would establish “a minimum standard for evaluating the performance of all employees.”² The “evaluation process shall provide employees an opportunity to demonstrate

¹ CAL. CMTY. COLLEGES BD. OF GOVERNORS, PROPOSED REGULATORY ACTION AMENDING TITLE 5, OF THE CALIFORNIA CODE OF REGULATIONS, TO INCLUDE DIVERSITY, EQUITY, INCLUSION, AND ACCESSIBILITY STANDARDS IN THE EVALUATION AND TENURE REVIEW OF DISTRICT EMPLOYEES § 53601 (Mar. 11, 2022), <https://www.cccco.edu/-/media/CCCO-Website/Office-of-General-Counsel/final-text-deia-eval-and-tenure-rev-reg-45-day-3-2022-ally.pdf?la=en&hash=7B552EC30DA94B9816943D000887332B9560D3A8> [<https://perma.cc/T3T5-B9X6>].

² *Id.* § 53602(c)(1).

their understanding of DEIA and anti-racist principles, including how the employee has operationalized DEIA in the performance of their job responsibilities.”³

The regulations would require faculty to “employ teaching and learning practices and curriculum that reflect DEIA and anti-racist principles.”⁴ The term “‘anti-racist’ refers to policies and actions that lead to racial equity.”⁵ The regulations define “cultural competency” as “the practice of acquiring and utilizing knowledge of the intersectionality of social identities and the multiple axes of oppression that people from different racial, ethnic, and other minoritized groups face.”⁶

In line with these objectives, CCC’s DEI Implementation Workgroup released recommendations for DEIA competencies and criteria, which similarly require faculty members to adopt particular ideas about “anti-racism,” “equity,” “internal biases,” and “structures of oppression and marginalization,” and to apply these ideas in their teaching, research, and service activities.⁷

II. The Proposed Regulations Would Violate Faculty Members’ First Amendment Rights

The proposed regulations would unconstitutionally require faculty to profess allegiance to and to promote a contested set of ideological views.

As a public community college system, CCC is bound by the First Amendment,⁸ under which the government “may not compel affirmance of a belief with which the speaker disagrees.”⁹ It follows that the “government may not condition employment on taking an oath that one has not or will not engage in protected speech, such as criticizing government policy or discussing political doctrine.”¹⁰

This principle applies with particular force at public institutions of higher education, as free speech is the “lifeblood of academic freedom.”¹¹ Universities “occupy a special niche in our constitutional tradition,”¹² and academic freedom is an area “in which government should be extremely reticent to tread.”¹³ As the Supreme Court of the United States explained when overturning legal barriers to faculty members with “seditious” views:

³ *Id.* § (c)(6).

⁴ *Id.* § 53605(a).

⁵ *Id.* § 52510(d).

⁶ *Id.* § 52510(h).

⁷ CAL. CMTY. COLLEGES, DIVERSITY, EQUITY AND INCLUSION COMPETENCIES AND CRITERIA RECOMMENDATIONS (2021), <https://www.thefire.org/diversity-equity-and-inclusion-competencies-and-criteria-recommendations>.

⁸ *Healy v. James*, 408 U.S. 169, 180 (1972).

⁹ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

¹⁰ *Dalack v. Vill. of Tequesta*, 434 F.Supp.2d 1336, 1344 (S.D. Fla. 2006) (citing *Cole v. Richardson*, 405 U.S. 676, 680 (1972)).

¹¹ *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).

¹² *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

¹³ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.¹⁴

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.

For example, the regulations' definition of "cultural competency" indicates faculty members must accept and apply certain ideas about "intersectionality" and "axes of oppression" based on particular group identities. The proposed regulations would also force faculty to incorporate "anti-racist principles" (which refer to "policies and actions that lead to racial equity") into their "teaching and learning practices." These criteria use explicitly ideological terms and concepts that map onto certain political beliefs and are the subject of widespread public debate.¹⁵

The DEI Implementation Workgroup's recommended competencies amplify our concerns about the violation of faculty members' rights. Faculty members would, for instance, have to acknowledge the correctness of certain beliefs (e.g., the role of racial and cultural identities in "creating structures of oppression and marginalization," and the harm caused by one's "internal biases") and actively promote CCC's ideological conception of DEIA in their teaching, research and service activities, such as by "[d]evelop[ing] and implement[ing] a pedagogy and/or curriculum that promotes a race-conscious and intersectional lens."¹⁶

Two faculty members who both strongly oppose racism may each have very different ideas about its meaning, how to combat it, and whether particular ideas about "equity," "intersectionality," "internal biases," and "structures of oppression" have merit.¹⁷ The First

¹⁴ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up).

¹⁵ See, e.g., Conor Friedersdorf, *Can Chloé Valdary Sell Skeptics on DEI?*, THE ATLANTIC (Jan. 31, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/can-chloe-valdary-sell-skeptics-dei/617875> ("Advocates [of DEI programs] insist that formal instruction in anti-racism yields more inclusive, equitable institutions. Skeptics object to what they characterize as coerced indoctrination in esoteric theories, or charge that prominent consultants like Robin DiAngelo, author of the best-selling *White Fragility*, traffic in false and divisive racial stereotypes."); Jane Coaston, *The intersectionality wars*, VOX (May 28, 2019), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> (describing the political debate over the implications and uses of the term "intersectionality").

¹⁶ DIVERSITY, EQUITY AND INCLUSION COMPETENCIES AND CRITERIA RECOMMENDATIONS, *supra* note 7.

¹⁷ See, e.g., Erica Goldberg, *"Good Orthodoxy" and the Legacy of Barnette*, 13 FIU L. REV. 639, 654 (2019) ("[S]ome professors may believe in a more classical liberal understanding of racial justice and

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.

By demanding rigid ideological conformity on issues of public and academic debate, CCC would shrink the universe of ideas that can be studied or expressed on its campuses, "cast[ing] a pall of orthodoxy over the classroom"¹⁸ in defiance of decades of Supreme Court precedent.¹⁹ The proposed regulations would severely infringe on faculty members' freedom of inquiry and freedom to teach without fear of reprisal for failing to advance institutionally approved viewpoints.²⁰ Faculty must retain wide latitude to think and speak freely. They must be judged on their academic merit, not on whether they agree with CCC's ideological positions.

Robust protection of academic freedom benefits faculty across the ideological spectrum, including proponents of DEIA. Numerous state legislatures have recently introduced bills that would ban the teaching of certain "divisive concepts" or otherwise regulate how race and sex are addressed in the classroom, including, for example, the concept that "[m]embers of one race, color, national origin, or sex cannot or should not attempt to treat others without respect to race, color, national origin, or sex."²¹ That prohibition would ban arguments for affirmative action on the basis that the state deems it inherently racist to ever treat people differently based on those enumerated factors. Because the First Amendment protects academic freedom, the legislative curricular bans are unconstitutional. The example of these bills illustrates that government attempts to prescribe an orthodoxy are inherently political and ultimately unconstitutional because they rely on viewpoint-based determinations. Faculty can neither be *prohibited* from teaching or expressing agreement with certain ideological perspectives nor *required* to do so.

To further illustrate our concern by analogy, we trust CCC would readily recognize the problem with evaluating faculty based on their affirmation of the importance of "colorblindness" or "patriotism," or their incorporation of those values into their pedagogy. Just as with DEIA, such a standard necessitates inherently political or moral viewpoint-

nondiscrimination, in which members of all groups have shared, universal rights, and where too much of an emphasis on achieving group-based diversity, making group-based generalizations, or targeting group-based remediation is both divisive and unfair.").

¹⁸ *Keyishian*, 385 U.S. at 603 (cleaned up).

¹⁹ See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("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 or force citizens to confess by word or act their faith therein.").

²⁰ See *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001) (rejecting as "totally unpersuasive" the "argument that teachers have no First Amendment rights when teaching").

²¹ See Greg Gonzalez, *Not all 'anti-CRT' bills are created equal: Differences in Florida and Mississippi bills show how legislatures can avoid constitutional pitfalls*, FIRE (Feb. 16, 2022), <https://www.thefire.org/not-all-anti-crt-bills-are-created-equal-differences-in-florida-and-mississippi-bills-show-how-legislatures-can-avoid-constitutional-pitfalls>; Joe Cohn, *New wave of bills on race and sex stereotyping violate academic freedom*, FIRE (Jan. 26, 2022), <https://www.thefire.org/new-wave-of-bills-on-race-and-sex-stereotyping-violate-academic-freedom>.

dependent assessments that impose negative consequences on faculty with beliefs and commitments that differ from those of the college or their evaluators. This is an unacceptable and unconstitutional result at public institutions of higher education.

III. Conclusion

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.

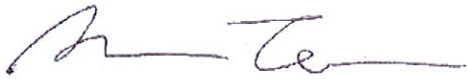
FIRE calls on CCC to reject the proposed regulations, ensure its processes for evaluating faculty remain viewpoint-neutral, and respect faculty members' First Amendment rights of free expression, academic freedom, and freedom of conscience.

Thank you for your attention to our concerns. If we can be of any additional assistance, please contact us at joe@thefire.org.

Respectfully submitted,



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