



## “HOT TOPICS” IN EDUCATION LAW

Presented by: Paul M. Loya, Partner  
Meredith E. Brown, Partner/Trustee Peralta CCD



Association of Chief Business Officials  
California Community Colleges

Spring Conference  
May 22-24, 2017



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## HOT TOPICS AGENDA

- Education Law Update:
  - Part-time Faculty
  - An Overview – Transgender Students



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## HOT TOPICS AGENDA

### A PRACTICAL GUIDE TO DUAL ENROLLMENT (AB 288)



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### HOT TOPICS AGENDA

- Creating a Safe and Supportive Environment for All Students Irrespective of Immigration Status



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### HOT TOPICS AGENDA

#### PUBLIC RECORDS ACT

**AALRR Blogs** →

- Implementing Educational Technology
- Technology in Education — Not as Simple as “AUP”

**Cyber-Misconduct in the Digital Age** →

- Students
- Employees

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# Question & Answer Session

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## EDUCATION LAW UPDATE: Part-Time Faculty Transgender Students

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#CAL1606
Faculty • Process • Policy • Model • Standards • Procedures • Resources • Requirements • Best Practices

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### Part-Time Temporary Faculty

- 87482.5
  - Part time (67% or less) faculty “shall be” temporary
- 87482.9 (effective 1/1/02)
  - Made adjunct (part-time temporary) faculty “earning and retaining reappointment rights” a mandatory subject of bargaining
- Santa Monica CCD case (2015):
  - Court of Appeal holds that CBA giving reemployment rights except upon showing of “cause” is enforceable in grievance arbitration
- AB 1690 (signed by Governor 9/30/16, *before* SB 1379)
  - Adds Education Code section 87482.3 setting forth new minimum standards and bargaining requirements for evaluation, workload, and seniority of adjuncts
  - Effectively superseded by SB 1379 (next slide)


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### Part-Time Temporary Faculty

- SB 1379 (signed by Governor 9/30/16, *after* AB 1690)
  - Amends Ed Code 87482.3 (which was added by AB 1690)
  - Requires that specified minimum standards (length of service, number of courses taught, ‘availability, willingness and expertise’ of adjuncts) be established for reemployment preference for adjuncts
  - Requires that negotiations commence by 7/1/17
  - Negotiations must address terms of reemployment preference, including evaluation and termination policies
  - Expressly states part-time faculty assignments are temporary
  - Compliance is a condition of receiving funds allocated for the Student Success and Support Program in the annual Budget Act


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**Transgender Students: What We'll Cover**

- 1. An Overview: Transgender Students**
  - Key terms to understanding transgender issues
- 2. The Law**
  - California Law
  - Title IX of the Education Amendments of 1972 (Title IX)
- 3. Elements to Ensure Compliance**
  - Issue Areas to be Addressed to Comply with the Law
- 4. The Interactive Process**
  - A Suggested Process to Work with Transgender Students

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**Relevant Terms**

**Definitions**

- 1. Gender** means sex, and includes a person's gender identity and gender expression (Cal. Educ. Code § 210.7)
- 2. Gender Expression** means a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth (Cal. Educ. Code § 210.7)
- 3. Gender identity** refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth (May 2016 Dear Colleague Letter (DCL), Office for Civil Rights (OCR), U.S. Department of Education; *see also*, Frequently Asked Questions-Equal Opportunity & Access (CDE FAQ), California Department of Education)

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**Relevant Terms**

**Definitions**

- 4. Transgender** describes those individuals whose gender identity is different from the sex they were assigned at birth. (May 2016 DCL; *see also*, CDE FAQ)
- 5. Gender transition** refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. (May 2016 DCL)
- 6. Sex assigned at birth** refers to sex designation recorded on birth certificate. (May 2016 DCL)

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## California Law: Transgender Students

### “School Success and Opportunity Act”

California Code of Education § 221.5(f)  
 (California Assembly Bill (AB) 1266)  
 Effective January 1, 2014

- Pupils in elementary and secondary schools must be permitted to participate in sex-segregated programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records
- No identical higher education statutory language, HOWEVER . . .

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## California Law: Transgender Students

### “Equity in Higher Education Act”

California Code of Education § 66250 *et seq.*  
 (Amended by California Senate Bill 777 (2007) and Assembly Bill 887 (2011))

- **Effective January 2008** – Expanded prohibition against discrimination in “any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid” to include discrimination on the bases of gender, gender identity, and gender expression. (Cal. Ed. Code § 66270)
- **Effective January 2012** – Amended definition of “gender” to include a person's sex, as well as a person's gender identity and gender expression, and defined “gender expression” as meaning one's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth. (Cal. Ed. Code § 66260.7)

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## Title IX: The Text

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

(Title IX of the Education Amendments of 1972  
 (20 U.S.C. § 1681 *et seq.*) and related regulations  
 (34 C.F.R. Part 106).)

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## Federal Guidance

### 2016 Dear Colleague Letter on Transgender Students

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

- Issued jointly by OCR of U.S. Department of Education and the Civil Rights Division of the U.S. Department of Justice ("DOJ")
- DOJ and OCR "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations"
- Issues covered in guidance: safe and nondiscriminatory environment; identification documents, names, and pronouns; sex-segregated activities and facilities; and privacy and education records

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## Federal Guidance

### 2016 Dear Colleague Letter

- When student (or parent/guardian where appropriate) notifies administration that student will assert gender identity that differs from previous representations or records, school will begin treating student consistent with student's gender identity.
- Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as prerequisite to being treated consistent with gender identity.
- The desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.

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## Federal Guidance

### 2016 Dear Colleague Letter

- Title IX does not apply to admissions policies of private single-sex undergraduate colleges
- Title IX does not apply to the membership practices of social fraternities and sororities
- A college or university may provide separate housing for the sexes, but must allow a student to access housing based in their gender identity and may offer (but not require) separate housing as an alternative for any student that requests accommodations

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## States' Challenge Against Federal Government's Interpretation of Title IX

### Example: Texas, et al. v. United States of America, et al.:

- Certain states sued the federal government in federal district court, in part, over its interpretation of Title IX as, for example, described in its May 2016 Dear Colleague Letter.
- On August 21, 2016, a federal district court granted the states' motion for a preliminary injunction blocking the federal government's enforcement of its interpretation that Title IX protects an individual based on gender identity.
- On September 12, 2016, the federal government filed a motion requesting clarification of the court's preliminary injunction.
- On October 19, 2016, a district court issued a clarification of its preliminary injunction...

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## States' Challenge Against Federal Government's Interpretation of Title IX

### Preliminary Injunction Clarification:

1. **The Injunction is Nationwide:** Applies to all states including California and not just Plaintiff states.
2. **Scope of Injunction:** Only prevents government from using Dear Colleague to argue that the definition of "sex" as it relates to intimate facilities includes gender identity.
3. **NOTE:** Does not affect a school's obligation to investigate and remedy complaints of sexual harassment, sex stereotyping, and bullying.

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## States' Challenge Against Federal Government's Interpretation of Title IX

### Remaining Preliminary Injunction Issues:

The parties must submit briefs to discuss...

1. **Whether the injunction implicates Title VII**
  - specifically where school employees and staff may share intimate facilities with students.
2. **Effect on Workplace Discrimination**
  - how the injunction applies to the Occupational Safety and Health Administration and Department of Labor.

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## SCOPE OF TITLE IX WILL BE DETERMINED BY U.S. SUPREME COURT

**On Friday, October 28, 2016**, the U.S. Supreme Court announced it will review the decision of the Fourth Circuit Court of Appeals in a separate matter involving the rights of a transgender student under Title IX to use a restroom aligned with his gender identity (G.G. v. Gloucester County School Board)

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## Components of Compliance

1. Identification as a transgender student
2. Transitions
3. Harassment/bullying
4. Access to facilities
5. Athletic participation
6. Privacy concerns
7. Education records
8. Training

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## DCL in Conjunction with CDE FAQ Continue to Serve as Useful Tool—Identification as a Transgender Student

OCR May 13, 2016 Dear Colleague Letter:

- No medical diagnosis or treatment is required as a prerequisite for a student to be treated consistent with his/her gender identity.

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## Identification as a Transgender Student

- Transgender students are often unable to obtain identification documents that reflect their gender identity (e.g., due to restrictions placed on state law). Accordingly, requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

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## Identification as a Transgender Student

California Department of Education guidance...

- "Districts should accept and respect a student's assertion of their gender identity where"
  - "The student expresses that identity at school" or
  - "Where there is other evidence that this is a sincerely held part of the student's core identity," such as letters from family members or healthcare providers, photographs of students of public events or gatherings, or letters from community members such as clergy.

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## Identification as a Transgender Student

### HOWEVER...

- A school cannot require a student to provide any particular type of diagnosis, proof of medical treatment, or meet an age requirement as a condition to receiving the protections afforded under California's antidiscrimination statutes.
- Similarly, there is no threshold step for social transition that any student must meet in order to have his or her gender identity recognized and respected by a school.
- The fact that a student may express or present their gender identity in different ways in different contexts does not, by itself, undermine a student's assertion of their gender identity.

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## Transitions

1. Recognize potential length of transition phase
  - Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen during a relatively short period or over a long duration of time.
2. Respect privacy during this phase
  - Student may not tell friends and family at the same time.
3. Transition may develop in phases
  - Changes in name, dress, and facility use may develop at different times and must be respected.

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## Harassment/Bullying

### California Department of Education Suggestions:

1. Address Specific Types of Bullying:
  - Taunting for failing to conform to sex stereotypes;
  - Deliberately referring the name and/or pronouns associated with the student's assigned sex at birth;
  - Being deliberately excluded from peer activities;
  - Personal items related to gender identity stolen or damaged.
- CDE's School Success and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions, <http://www.cde.ca.gov/re/di/eo/faqs.asp>

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## Harassment/Bullying

### California Department of Education Suggestions:

2. Specific Efforts to Stop Bullying
  - Strong and clear policies and procedures for handling complaints of harassment
  - Consistent and effective implementation of those policies
  - Encourage members of the college/university community to report incidents of harassment
  - Clear and publicized process for investigating incidents
  - Implement appropriate corrective action to end the harassment and monitor the effectiveness of those actions

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## Harassment/Bullying: Federal Guidance

### 2010 Dear Colleague Letter on Bullying

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>

- May include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping.
- Can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity

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## Access to Facilities

- Title IX and California law do not require unisex or gender-neutral facilities.
  - Transgender students should be given the opportunity to use the facilities of their gender identity.
- However...
  - Gender-neutral facilities can be offered to all students who seek privacy.
  - Colleges and universities should not force or pressure transgender students to use general neutral facilities if they want to use the facilities consistent with their gender identity.
  - Gender-neutral facilities should not put a burden on the user (i.e., far from classrooms).

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## Athletic Participation

### National Collegiate Athletic Association

- “A transgender student-athlete at the college level should be allowed to participate in any sex-separated sports activity so long as that athlete’s use of hormone therapy, if any, is consistent with the NCAA’s existing policies on banned medications.”
- 2011 NCAA Policy on Transgender Inclusion  
<http://www.ncaa.org/health-and-safety/sport-science-institute/mind-body-and-sport-harassment-and-discrimination-lgbtq-student-athletes>

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## Athletic Participation

**California Community College Athletic Association :**  
 Makes reference to OCR May 2016 Dear Colleague Letter

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## Privacy Issues to Consider

- Any student who makes a request can be given privacy options (i.e., separate facilities, private areas within locker rooms, etc.).
- In granting access to sex-segregated facilities and activities, colleges and universities must be careful not to disclose information about a student's gender identity, assigned sex at birth, legal name, and legal gender.

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## Privacy Issues to Consider

- Colleges and universities need to balance the privacy and safety of other students with a student's right to self-identify his or her gender.
- All students have a right to keep their gender identity and assigned sex at birth private from others.
- The college/university should not disclose any of this information unless the student has authorized such disclosure or if the school is compelled by law.

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## Privacy Issues to Consider California DOE FAQ says...

- A transgender student should be consulted to determine who can or will be informed of the student's transgender status, if anyone, including the student's family.
- With rare exceptions, schools are required to respect the limitations that a student places on the disclosure of their transgender status, including not sharing that information with the student's parents.

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## Education Records

### 1. Privacy Protections

- Family Educational Rights and Privacy Act (FERPA)

### 2. Segregation Policy

- Keep records that reflect birth name and assigned sex (i.e., birth certificate) in separate files

### 3. Name Changes

- Upon receipt of legal name change documentation, the student's official record must be updated accordingly.
- If the college/university has not received legal documentation, the school, in consultation with student, may update all unofficial school records (e.g., school IDs) to reflect the student's name and gender marker that is consistent with the student's gender identity.

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## Staff Training

- Provide staff training on governing laws with an emphasis on the rights of transgender students and related issues.
- Offer educational meetings and forums for students, parents, and the community.
- Encourage understanding of gender identity, gender expression, and related issues beyond mere compliance with the law.

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## Schools Should Engage in an Interactive Process

- When a student requests that the college or university implement measures to reasonably accommodate the student's **consistently asserted gender identity**, we recommend the school engage the student (and his/her parents, where appropriate), in an **interactive process** in order to identify and address potential issues.

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## Key Recommendation: Engage in an Interactive Process

- Interactive Process: The interactive process requires time in order to gather information from the student and to develop a plan to help implement a smooth transition.
- Topics for Discussion:
  - Relevant laws, policies/regulations
  - Preferred name/pronouns
  - Privacy interests of student and others
  - Only people who may be involved with student's transition aka "need to know" people
  - Restroom/locker room/dorm room access
  - Safe people/potential harassers
  - Trainings
  - Athletic participation

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Question & Answer  
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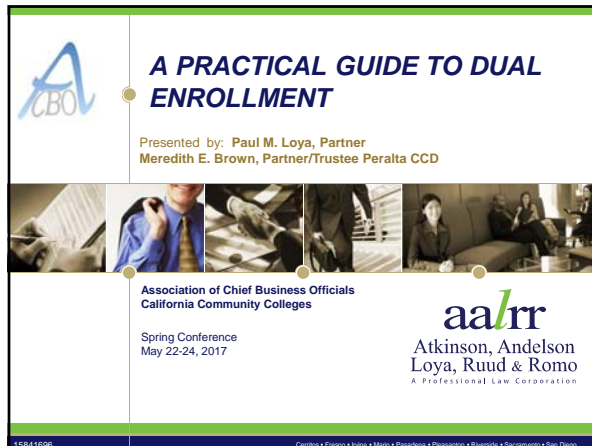
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# A PRACTICAL GUIDE TO DUAL ENROLLMENT



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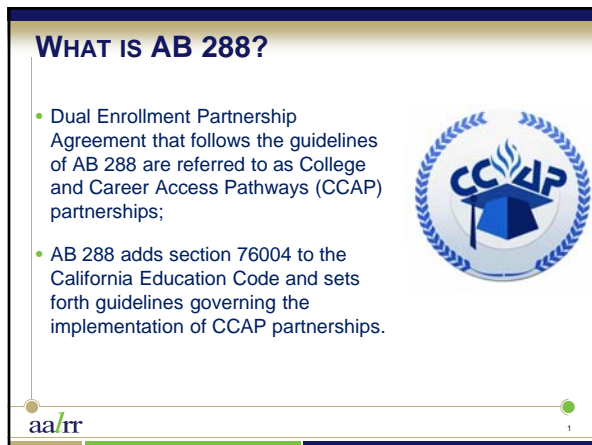
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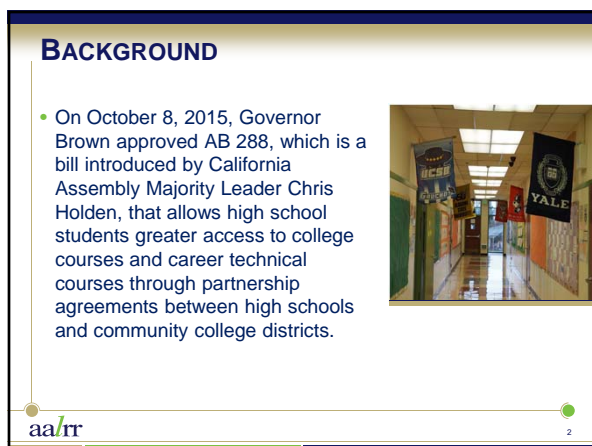
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## PEDAGOGICAL SUPPORT FOR DUAL ENROLLMENT

“The primary goal of providing college experiences to high school students is to increase the likelihood that students will finish a post-secondary credential. Correlational and quasi-experimental research provides suggestive evidence of dual enrollment's effectiveness in meeting goals such as college preparedness and completion.”

- Garet, M., Knudson, J. and Hoshen, G., 2014. *Early College, Continued Success: Early College High School Initiative Impact Study*, p.4.

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## PEDAGOGICAL SUPPORT FOR DUAL ENROLLMENT

- A correlational study conducted in Florida and New York City found that Dual Enrollment was associated with positive outcomes on a number of measures:
  - Students who had taken college classes during high school were more likely to earn high school diplomas, enroll in college, enroll in a four year college, enroll full-time, and persist in college than students without college experience.

Karp, M. M., Calcagno, J. C., Hughes, K. L., Jeong, D. W. & Bailey, T. (2007). *The Post-Secondary Achievement of Participants in Dual Enrollment: An Analysis of Student Outcomes in Two States*. St. Paul, MN: National Research Center for Career and Technical Education, University of Minnesota.

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## Dual Enrollment CTE Students vs. Non-Dual Enrollment CTE Students

All percentage figures have been rounded to the nearest whole number.

**FLORIDA\***

\*FE outcomes based on 38,478 students in the FE CTE subgroup.

Metric	Non-Dual Enrollment CTE Students	Dual Enrollment CTE Students
Postsecondary Enrollment after High School	54%	72%*
Pursuing Bachelor's Degree	22%	31%*
Persistence to Second Term	79%	82%*
Persistence to Second Year	71%	76%*

Postsecondary Credits Earned in 3 Years: 40 vs 55.4\*

First Year GPA: 2.41 vs 2.67\*

Cumulative GPA Over 3 Years: 2.35 vs 2.59\*

**THE CITY UNIVERSITY OF NEW YORK (CUNY)\***

\*CUNY outcomes based on 2,383 students who attended vocational high schools in NYC, and enrolled in CUNY in 2001 & 2002. ELS is a light on OLS regression was used to minimize the impact of DLE participants with controls for student and school characteristics.

Metric	Non-Dual Enrollment CTE Students	Dual Enrollment CTE Students
Pursuing Bachelor's Degree	28%	38%*
Persistence to Second Term	84%	85%*
Persistence to Second Year	61%	66%*

First Year GPA: 2.28 vs 2.41\*

Cumulative GPA Over 2 Years: 2.16 vs 2.19

Postsecondary Credits Earned in 3-4 Years: 47.4 vs 58\*

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## PEDAGOGICAL SUPPORT FOR DUAL ENROLLMENT

- In addition, the study found that students who received college credits during high school had higher college Grade Point Averages (GPAs) and earned more college credits within three years of high school graduation;
- Another correlational study using a large federal database found similar positive outcomes for Dual Enrollment students, including enrollment in college, persistence in college, and college graduation. (Swanson, 2008.)

Swanson, J.L., 2008. An analysis of the impact of high school dual enrollment course participation on post-secondary academic success, persistence and degree completion. ProQuest.



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## PEDAGOGICAL SUPPORT FOR DUAL ENROLLMENT

- A quasi-experimental study using a large federal database also found that Dual Enrollment participation increased the probability of attaining any post-secondary degree by 8% and a bachelor's degree by 7%; (An, 2012.)
- A quasi-experimental study of Dual Enrollment in Texas found that participation was associated with college attendance and completion. (Struhl & Vargas, 2012.)

Struhl, B., Vargas, J. (2012). Taking college courses in high school: A strategy for college readiness. Boston, MA: Jobs for the Future. Retrieved from [http://www.jff.org/sites/default/files/TakingCollegeCourses\\_101712.pdf](http://www.jff.org/sites/default/files/TakingCollegeCourses_101712.pdf)



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## PEDAGOGICAL SUPPORT FOR DUAL ENROLLMENT

- Dual Enrollment has also been associated with positive outcomes for students traditionally underrepresented in college. A correlational study found that Dual Enrollment was associated with gains in college enrollment and GPA for low-income students and lower achieving students in Florida. (Community College Research Center, 2012.)

Community College Research Center (2012). What we know about Dual Enrollment. New York: Community College Research Center, Institute for Education and the Economy, Teachers College, Columbia University. Retrieved from <http://ccrcc/columbia.edu/Publication.asp?UDI=1054>.



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## PEDAGOGICAL SUPPORT FOR DUAL ENROLLMENT

- A quasi-experimental study on the Concurrent Course Initiative (CCI) in California, which implements career-focused Dual Enrollment and targets students who are low income, struggling academically, and traditionally underrepresented in college, found that participants had higher graduation rates, were more likely to enroll in a four year college, had greater college persistence rates, accumulated more college credits as they progressed through college, and were less likely to enroll in basic skills courses in college than non-participants. (Hughes, Rodriguez, Edwards, & Belfield, 2012; Rodriguez, Hughes, & Belfield, 2012.)

Hughes, Rodriguez, Edwards & Belfield (2012). Broadening the benefits of dual enrollment: Researching underachieving and underrepresented students with career focused programs. New York: Community College Research Center. Teachers College, Columbia University.

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## WHY DUAL ENROLLMENT AND WHAT IS CHANGED BY AB 288?

- Research has shown that Dual Enrollment can be an effective means of improving educational outcomes for a broad range of students;
- AB 288 establishes the terms of a College and Career Access Pathways (CCAP ) partnership agreement under California Education Code section 76004, which reduces restrictions and removes fiscal penalties that may otherwise be present when providing Dual Enrollment courses.

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## HOW DOES AB 288 CHANGE DUAL ENROLLMENT?

- Unlike pre-existing statutes addressing Dual Enrollment, under a College and Career Access Pathways partnership agreement:
  - Dual Enrollment students pay no course fees or pay for course materials;
  - Dual Enrollment students may be assigned a course registration priority equivalent to middle high school students; (Cal. Code Regs., Tit. 5, §§ 58108(c)(2), 55530(c).)
  - A community college is eligible to receive allowances and apportionments from Section B of the State School Fund for a Dual Enrollment taught on a closed high school campus.

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# A PRACTICAL GUIDE TO DUAL ENROLLMENT

### How AB 288 CHANGES DUAL ENROLLMENT

- A district shall not receive a state allowance or apportionment for an instructional activity for which the partnering district has been, or shall be, paid an allowance or apportionment;
- The attendance of a high school student at a community college as a special part-time or full-time student pursuant to this section is authorized attendance for which the community college shall be credited or reimbursed pursuant to sections 48802 or 76002, provided that no school district has received reimbursement for the same instructional activity.

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### KEY ASPECTS OF A DUAL ENROLLMENT PARTNERSHIP AGREEMENT

Apportionment

College Credit and High School Credit

Instructors

Closed Campus

Course Materials

Cost Allocation Between School District and Community College Partner

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### LEGAL OPINION 16-02



- Introduction of Two Tracks: CCAP and Non-CCAP
- CCAP Track
- Non-CCAP Track: by Partnership Agreement or Individual Special Admit Enrollment
- Major Attributes of Each Track

*Addendum: Assembly Bill 288 (full text)*  
<http://extranet.cccco.edu/Divisions/Legal.aspx>

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# A PRACTICAL GUIDE TO DUAL ENROLLMENT


LEGAL OPINION 16-02



**I. Introduction of Two Tracks: CCAP and Non-CCAP**

- **CCAP Track** (under AB 288, which is as prescribed by Education Code section 76004); and/or
- **Non-CCAP Track** (continue to provide Dual Enrollment opportunities to students individually, continue or enter into an optional formal partnership agreement with local high school districts, as prescribed by Education Code sections 76001 and 76002).

**NOTE:** Once a college district wishes to benefit from any element of AB 288 that is not allowable or required under existing non-CCAP law, then the college district must adopt all the legal requirements set forth in AB 288.


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LEGAL OPINION 16-02



**II. CCAP Track**

- CCAP Can Be Established for Certain **Purposes** Only
- College May Offer **Closed Courses** on High School Campus
- College Must **Waive** Specified Fees Under Certain Circumstances
- Dual Enrollments Cannot Exceed **10% FTES Cap** Statewide
- CCAP Partnership Agreements Apply Only to **Public Schools**
- College District Should **Clearly State** "College and Career Access Pathways (CCAP) partnership agreement" to Trigger AB 288
- Districts May Voluntarily Agree to **Share** Average Daily Attendance (ADA) and/or FTES Funding Once Received
- Students May Receive **Credit** at Both the K-12 and the College Level
- Students in CCAP May Enroll in **Physical Education** as Long as the Courses Meet the Delineated Goals Set By AB 288
- Community College District Must Enter into Partnership with School Districts within its **Service Area**
- District is Required to Exempt Non-resident Special Part-time Students from **Non-resident Tuition Fee**, but **May Not Claim Apportionment** for Those Students
- High School Courses Must Not Displace or **Reduce Access** for Adults at the College


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LEGAL OPINION 16-02



**III. Non-CCAP Track: by Partnership Agreement or Individual Special Admit Enrollment**

- Basic Eligibility Requirements
- Open Course Requirements
- General Limitations on Admission or Enrollment
- Rules Related to Summer Sessions
- Restrictions on Physical Education Courses
- Documentation
- Other Issues
  - Dual credit at both the K-12 and the college level
  - Full-time students cannot be exempted from paying the enrollment fee


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COLLECTIVE BARGAINING

- Instructors must meet the minimum requirements for community college faculty in the subject discipline of the course being taught.
- Both the school district and community college district partners must comply with local collective bargaining agreements and all state and federal reporting requirements regarding the qualifications of the teacher or faculty member teaching a CCAP partnership course offered for high school credit. (Section 76004(l).)

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COLLECTIVE BARGAINING

- **TIP:** Talk with your legal counsel and meet with your teachers union prior to presenting a Dual Enrollment Agreement for board approval;
- Attempt to work with the classified personnel and certificated personnel directly to mitigate any working conditions that may possibly be impacted by the Dual Enrollment Agreement.

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INSTRUCTIONAL MINUTES

- A student enrolled in high school and community college through a Dual Enrollment Partnership is considered to have met the high school district's instructional minute requirement based upon the following Education Code sections, read collectively:
  - 48800.5
  - 48802
  - 46146
  - 46146.5
  - 46147

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# A PRACTICAL GUIDE TO DUAL ENROLLMENT

### INSTRUCTIONAL MINUTES

48800.5.

(a) A parent or guardian of a pupil, regardless of the pupil's age or class level, may petition the governing board of the school district in which the pupil is enrolled to authorize the attendance of the pupil at a community college as a special full-time student on the ground that the pupil would benefit from advanced scholastic or vocational work that would thereby be available. If the governing board denies the petition, the pupil's parent or guardian may file an appeal with the county board of education, which shall render a final decision on the petition in writing within 30 days.

*(b) A pupil who attends a community college as a special full-time student pursuant to this section is exempt from compulsory school attendance under Chapter 2 (commencing with Section 46100) of Part 26.*

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### INSTRUCTIONAL MINUTES

48802.

(a) For purposes of allowances and apportionments from Section B of the State School Fund, a community college shall be credited with additional units of average daily attendance attributable to the attendance of pupils at the community college as special part-time students pursuant to this article and as set forth in Section 76002.

*(b) A school district whose pupils attend a community college as special part-time students pursuant to this article shall, for purposes of allowances and apportionments from Section A of the State School Fund, continue to receive credit for attendance by those pupils computed in the manner prescribed by law, and a pupil's attendance at school for the minimum schoolday shall be deemed a day of attendance for purposes of making the computation.*  
*(Amended by Stats. 2003, Ch. 786, Sec. 3. Effective January 1, 2004.)*

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### INSTRUCTIONAL MINUTES

46146.

(a) A day of attendance in grades 11 and 12 is 180 minutes of attendance if the pupil is also enrolled part time in classes of the California State University or the University of California for which academic credit will be provided upon satisfactory completion of enrolled courses.

*(b) A day of attendance for any pupil who is also a special part-time student enrolled in a community college under Article 1 (commencing with Section 48800) of Chapter 5 of Part 27 and who will receive academic credit upon satisfactory completion of enrolled courses is 180 minutes of attendance.*

*(c) Notwithstanding any other provisions of law, for purposes of computing the average daily attendance of a pupil described in subdivision (a) or (b), the 180-minute minimum schoolday permitted by this section shall be computed and reported as attendance for three-quarters of the full 240-minute minimum schoolday prescribed by Section 46141. Commencing with the 1995-96 fiscal year, if a pupil described in subdivision (a) or (b) is in attendance for more than 180 minutes, the average daily attendance of the pupil shall be computed and reported by determining the percentage of the full 240-minute minimum schoolday prescribed by Section 46141 that the pupil was in attendance at the school. No more than one full day of attendance may be reported for any pupil for any schoolday pursuant to this subdivision.*  
*(Amended by Stats. 1996, Ch. 298, Sec. 1. Effective July 25, 1996.)*

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# A PRACTICAL GUIDE TO DUAL ENROLLMENT

## INSTRUCTIONAL MINUTES

[46146.5.](#)

(a) A day of attendance for a pupil enrolled in grade 11 or 12 at an early college high school or middle college high school is 180 minutes of attendance if the pupil is also enrolled part time in courses of the California State University or the University of California for which academic credit will be provided upon satisfactory completion of enrolled courses.

*(b) A day of attendance for a pupil enrolled in an early college high school or middle college high school, who is also a special part-time student enrolled in a community college under Article 1 (commencing with Section 48800) of Chapter 5 of Part 27, and who will receive academic credit upon satisfactory completion of enrolled courses, is 180 minutes of attendance.*

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## INSTRUCTIONAL MINUTES

[46147.](#)

Notwithstanding the 180-minute minimum day requirement of Section 46144, the governing board of any school district may permit a 12th-grade pupil in his or her last semester or quarter, as the case may be, before graduation, who is enrolled in a work experience education program approved under the provisions of Article 7 (commencing with Section 51760) of Chapter 5 of Part 28 and who would complete all of the requirements for graduation by attending high school, except courses of physical education, for less than 180 minutes each day, to attend high school for less than a minimum day of 180 minutes, upon the written request of a parent or legal guardian or upon his or her own request if the pupil is 18 years of age or over. If a pupil attends classes for less than 180 minutes per day pursuant to this section, the number of minutes actually attended per day shall be rounded down to the nearest multiple of 60. The average daily attendance allowed for that pupil's attendance shall bear the same proportion to one day of attendance as the number of minutes of attendance per day bears to 180. (Amended by Stats. 1983, Ch. 498, Sec. 79. Effective July 28, 1983)

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## AGREEMENT GUIDELINES



**"AB 288 (Dual Enrollment)  
College and Career Access Pathways (CCAP)  
Partnership Agreement Guidelines  
for Apportionment Eligibility"**

[http://extranet.coccol.edu/Portals/1/Legal/Guidelines/AB\\_288\\_College\\_and\\_Career\\_Access\\_Pathways\\_Apportionment\\_Eligibility\\_Guidelines\\_3-11-16.pdf](http://extranet.coccol.edu/Portals/1/Legal/Guidelines/AB_288_College_and_Career_Access_Pathways_Apportionment_Eligibility_Guidelines_3-11-16.pdf)

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### ELIGIBILITY FOR STATE APPORTIONMENT FUNDS

“The attendance of a high school pupil at a community college as special part-time or full-time student pursuant to this section is authorized attendance for which the community college shall be credited or reimbursed pursuant to Section 48802 or 76002, provided that no school district has received reimbursement for the same instructional activity.”

*Education Code section 76004(s)*

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### MORE ON APPORTIONMENT

- Education Code section 76004(r) provides that “[a] district shall not receive a state allowance or apportionment for an instructional activity for which the partnering district has been, or shall be, paid an allowance or apportionment.”
- The language of section 76004 applies specifically to CCAP partnership agreements and appears to require that a community college district must bear the course related costs in order to receive apportionment funding for a Dual Enrollment course.

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### COLLEGE CREDIT AND HIGH SCHOOL CREDIT

- A student may receive high school credit and college credit for a Dual Enrollment course.
- Education Code section 48800 provides that a student will receive credit for the community college courses that he or she completes at the level determined appropriate by the governing boards of the school district and community college district.
- Education Code section 76001 provides that credit for the courses completed by a student enrolled in a community college course shall be at the level determined to be appropriate by the school district and community college district governing boards.

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COLLEGE CREDIT AND HIGH SCHOOL CREDIT

- A CCAP/AB 288 Agreement requires certification that a qualified high school teacher teaching a course for college credit has not displaced or caused the termination of an existing community college faculty member teaching the same course at the partnering community college. (Education Code section 76004(j)); and
- AB CCAP/288 Agreement requires certification by the partnering community college district that a community college course offered for college credit at the partnering high school campus does not reduce access to the same course offered at the partnering community college district. (Education Code section 76004(k)(1))

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COLLEGE CREDIT AND HIGH SCHOOL CREDIT

- AB CCAP/288 Agreement requires certification that the school district and community college district partners have complied with local collective bargaining agreements and all state and federal reporting requirements regarding the qualifications of the teacher or faculty member teaching a CCAP course offered for high school credit. (Education Code section 76004(l).)

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COST ALLOCATION BETWEEN COMMUNITY COLLEGE AND HIGH SCHOOL PARTNERS

- The Community College pays for the Dual Enrollment course and course fees:**
  - Under a CCAP agreement the community college pays for the course and is eligible to receive reimbursement through state apportionment.
- However, a district shall not receive a state allowance or apportionment for an instructional activity for which the partnering district has been, or shall be, paid an allowance or apportionment. (Education Code section 76004(r).)

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### COST ALLOCATION

- *The school district cannot receive reimbursement for the Dual Enrollment course:*

**“**The attendance of a high school pupil at a community college as a special part-time or full-time student is authorized attendance for which the community college shall be credited or reimbursed pursuant to Ed Code sections 48802 or 76002, provided that no school district has received reimbursement for the same instructional activity.”

*Education Code section 76004(s)*

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### COST ALLOCATION

- *The school district pays for course materials:*
  - A high school pupil enrolled in a CCAP course shall not be assessed any fee that is prohibited by Education Code section 49011.
  - The school district pays for course materials under Education Code section 49011.

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### INSTRUCTORS – COMMUNITY COLLEGE REGULATIONS ARE APPLICABLE

- The community college courses taught under Dual Enrollment must comply with the regulations that govern community colleges.
- Instructors must meet the minimum requirements for community college faculty in the subject discipline of the course being taught. (Cal. Code Regs., Title 5, § 53410.)

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### **DUAL ENROLLMENT COURSES TAUGHT ON A CLOSED HIGH SCHOOL CAMPUS**

- Education Code section 76002 provides that a community college course taught on a high school campus must be open to the public in order for the community college district to receive apportionment funds for the course.
- Under a CCAP agreement a community college may limit enrollment in a community college course solely to eligible high school students if the course is offered at a high school campus during the regular school day; and the community college will be eligible to receive State apportionment funds for the closed course taught on the high school campus. (Education Code section 76004(o)(1)(2).)

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### **LIMITING PUBLIC ACCESS TO SCHOOL DISTRICT CAMPUSES**

- California Penal Code section 627.2 prohibits outsiders from access to school grounds when school is in session, except to proceed expeditiously to the office of the principal for the purpose of registering. The school district board may by resolution may limit the period that the campus is open to the public to the time immediately before, immediately after and during the time that the Dual Enrollment course is being held pursuant to Penal Code section 627.2.
- The Board may also restrict the route that outsiders may use to reach the principal's office to register, pursuant to Penal Code section 627.6.

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### **CCAP PARTNERSHIP AGREEMENT CERTIFICATIONS**

- The CCAP Partnership Agreement shall certify that:
  - Any community college instructor teaching a course on a high school campus has not been convicted of any sex offense as defined in section 87010, or any controlled substance offense as defined in section 87011. (Education Code section 76004(h))
  - Any community college instructor teaching a course at the partnering high school campus has not displaced or resulted in the termination of an existing high school teacher teaching the same course on that high school campus. (Education Code section 76004(i))

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### CCAP PARTNERSHIP AGREEMENT CERTIFICATIONS

“The CCAP Partnership agreement shall certify that . . .

. . . a qualified high school teacher teaching a course offered for college credit at a high school campus has not displaced or resulted in the termination of an existing community college faculty member teaching the same course at the partnering community college campus.”

*Education Code section 76004(j)*

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### CERTIFICATIONS BY THE COMMUNITY COLLEGE IN A CCAP PARTNERSHIP AGREEMENT

- The CCAP Partnership Agreement shall include a certification by the participating community college district that:
  - The community college course offered for college credit at the partnering high school campus does not reduce access to the same course offered at the partnering community college campus; (Education Code section 76004(k)(1))
  - A CCAP/AB 288 community college course that is oversubscribed or has a waiting list shall not be offered in the CCAP partnership. (Education Code section 76004(k)(2))

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### CERTIFICATIONS BY THE COMMUNITY COLLEGE IN A CCAP PARTNERSHIP AGREEMENT

- The CCAP Partnership Agreement shall certify that:
  - Participation in a CCAP partnership is consistent with the core mission of the community colleges pursuant to section 66060.4, and that pupils participating in a CCAP partnership will not lead to enrollment displacement of otherwise eligible adults in the community college. (Education Code section 76004(k)(3))
  - Both the school district and community college district partners comply with local collective bargaining agreements and all state and federal reporting requirements regarding the qualifications of the teacher or faculty member teaching a CCAP partnership course offered for high school credit. (Education Code section 76004(l))

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**CERTIFICATION—INTERVENTION/REMEDIAL COURSE**

“The CCAP Partnership agreement shall certify that . . .

. . . any remedial course taught by community college faculty at a participating high school campus shall be offered only to high school students who do not meet their grade level standard in math, English or both on an interim assessment in grade 10 or 11, as determined by the partnering school district, and shall involve a collaborative effort between the high school and community college faculty to deliver an innovative remediation course as an intervention in the student's junior or senior year to ensure the student is prepared for college-level work upon graduation.”

*Education Code section 76004(n)*

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**Question & Answer  
Session**

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### Creating a Safe and Supportive Environment for all Students Irrespective of Immigration Status

Presented by: **Paul M. Loya, Partner**  
**Meredith E. Brown, Partner/Trustee Peralta CCD**



Association of Chief Business Officials  
California Community Colleges

Spring Conference  
May 22-24, 2017



Atkinson, Andelson  
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## Overview

- ✓ The Need to Reaffirm Support of Students in the Face of the New Presidential Administration
- ✓ Diversity of Population
- ✓ Right to Public Elementary and Secondary Education Irrespective of Immigration Status, *Plyler v. Doe*, 457 U.S. 202 (1982)
- ✓ Financial Aid for Immigrant Students
- ✓ Key Privacy Protections, i.e., Family Educational Rights and Privacy Act ("FERPA")
- ✓ Status Update: Deferred Action for Childhood Arrivals ("DACA")



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## Overview

- ✓ Current Federal Immigration Enforcement Policy at Sensitive Locations
- ✓ January 25, 2017 Executive Order regarding "Sanctuary Jurisdictions"—Threat to Federal Funding?
- ✓ February 20, 2017 Implementation Memorandum
- ✓ Actions Taken to Support Students at Federal, State, and Local Levels



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## Student Enrollment and Immigration – A California Story

*California community colleges were founded with the goal of fostering excellence and guaranteeing educational access for all. Now **one in every five** community college students in the nation attends a California community college. **Over 67 percent** of California community college students are people of diverse ethnic backgrounds and **roughly 53 percent are female**. The vitality and stability of California will thrive in direct proportion to its ability to foster a productive sense of acceptance in this diverse, multicultural environment and the economic viability of the California community college system depends, in part, on the stability of our enrollment in this diverse environment.*

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## Understanding the Diversity of the Immigrant Population

Federal immigration status may vary substantially from person to person based upon personal circumstances. The range of immigration status categories includes, but is not limited to:

- **Lawful Permanent Resident** — "Any person not a citizen of the United States who is living in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant. Also known as 'Permanent Resident Alien,' 'Resident Alien Permit holder,' and 'Green Card holder.'" Source: USCIS.
- **Undocumented** — A foreign national residing in the United States without legal immigration status.
- **Refugee** — "Generally, any person outside his or her country of nationality who is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution based on the person's race, religion, nationality, membership in a particular social group, or political opinion." Source: USCIS.
- **Asylee** — "A foreign national in the United States or at a port of entry who is unable or unwilling to return to his or her country of nationality, or to seek the protection of that country because of persecution or a well-founded fear of persecution. Persecution or the fear thereof must be based on religion, nationality, membership in a particular social group or political opinion." Source: USCIS.

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## What is the Law Regarding Access to Education and Immigration Status?

### • Elementary/Secondary Public Schools

#### – *Plyler v. Doe*, 457 U.S. 202 (1982)

- **Landmark U.S. Supreme Court Case:** No state may deny access to a public elementary and secondary education to any child based on immigration status under the Equal Protection Clause of the 14<sup>th</sup> Amendment of the United States Constitution.

- Guidance on School Enrollment Procedures issued by the Office for Civil Rights ("OCR") of the U.S. Department of Education, and the Civil Rights Division of the U.S. Department of Justice in 2011 and updated in 2014. See updated guidance here:

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf>

#### – **Federal Anti-Discrimination Laws**

- No student, moreover, should be subject to discrimination, harassment, and/or bullying under Title VI of the Civil Rights Act of 1964 and other federal anti-discrimination laws. See Guidance on Harassment and Bullying issued by OCR on October 26, 2010 here: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>

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### In-State Tuition and Financial Assistance for Undocumented College Students

- **Twenty states have laws granting in-state tuition rates for undocumented students:**
  - California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Texas, Utah, Washington, Hawaii, Michigan, Oklahoma, Rhode Island
- **Five states offer financial assistance to undocumented students:**
  - California, New Mexico, Minnesota, Texas, Washington
- **Six states bar in-state tuition benefits to undocumented students:**
  - Alabama, Arizona, Georgia, Indiana, Missouri, South Carolina

Source: National Conference of State Legislatures (2015)

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### California Law and Financial Aid

#### The California Dream Act

- The California Dream Act allows undocumented and non-resident documented students who meet the eligibility requirements of AB 540 to apply for and receive private scholarships funded through public universities, state-administered financial aid, university grants, community college fee waivers, and Cal Grants.
- The California Student Aid Commission ("CSAC") processes the application and any aid received can only be used at eligible California public or private institutions.

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### California Law and Financial Aid

- **AB 540** - Creates an exemption from the payment of non-resident tuition for certain non-resident students who have attended high school in California and received a high school diploma or its equivalent.
- **AB 540 students are those who:**
  - Have attended a California high school for a minimum of three years; or
  - Attain credits in California from a California high school equivalent of at least three or more years of full-time high school coursework and a total of three or more years of attendance in California elementary, middle, and/or secondary schools
  - Graduated or will graduate from a California high school or attainment of the equivalent thereof (e.g. General Education Development ("GED"), High School Equivalency Test ("HiSET"), or Test Assessing Secondary Completion ("TASC")
  - Will register or enroll in an accredited and qualifying California college or university, if applicable, complete an affidavit stating that the student has or will file an application to legalize immigration status as soon as eligible; and
  - Do not hold a valid non-immigrant visa (F, J, H, L, A, B, C, D, E, etc.)\*\*

\*\*If you have Temporary Protected Status or hold a "U" Visa you may be eligible under the California Dream Act.

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## California Law and Other Matters Pertaining To Student Enrollment

- **SB 150** - Community college districts are required to exempt non-resident special part-time students from the requirement to pay non-resident tuition for community college credit courses. These students also have apportionment eligibility.\*
- **Agricultural Employment and In-State Tuition Exemption** – Pursuant to Title 5 CCR §54048, a student claiming residence shall provide evidence that the student's parent with whom the student is living, or the student himself, earns a livelihood primarily by performing agricultural labor for hire in California and other states and has performed such labor in California for at least two months in each of the preceding two years and lives within the district.

\*Education Code § 76140. This non-resident tuition exemption does not apply to a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, admitted pursuant to 76001, 76003 or 76004.

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## Federal Financial Aid for Eligible Non-Citizens

- Federal financial aid is available for eligible non-citizens under specific circumstances. Generally, you are an eligible non-citizen if you are in one of the following categories:
  - a) U.S. Permanent Resident, with a Permanent Resident Card (formerly known as an Alien Registration Receipt Card or "Green Card")
  - b) Conditional Permanent Resident (I-551C)
  - c) Other eligible non-citizen with an Arrival-Departure Record (I-94) from the Department of Homeland Security showing any one of the following designations: "Refugee," "Asylum Granted," "Indefinite Parole," "Humanitarian Parole," or "Cuban-Haitian Entrant"
  - d) A citizen of the Republic of Palau (PW), the Republic of the Marshall Islands (MH), or the Federated States of Micronesia (FM)

NOTE: Undocumented students, including DACA recipients, are not eligible for federal financial aid, but they may still be eligible for state or college aid under AB 540, in addition to private scholarships under the California Dream Act.

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## Key Privacy Protections and Related Restrictions

- What are key student privacy protections and related restrictions on sharing information under federal and state law?
  - Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g



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**FERPA**

Family Educational Rights and Privacy Act  
("FERPA"), 20 U.S.C. § 1232g

What is an Education Record?

- Education records are records that are directly related to a student and that are maintained by an educational agency or institution or a party acting for or on behalf of the agency or institution. They include but are not limited to grades, transcripts, class lists, student course schedules, health records and student discipline files. The information may be recorded in any way, including, but not limited to, handwriting, print, computer media, videotape, audiotape, film, microfilm, microfiche, and e-mail.

Source: <http://familypolicy.ed.gov/faq-page>. See also Joint Guidance of the U.S. Departments of Education and Health and Human Services on the Application of FERPA and HIPAA to Student Health Records (2008), <https://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>.

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**FERPA**

Family Educational Rights and Privacy Act ("FERPA"),  
20 U.S.C. § 1232g

What must a consent to disclose education records contain?

- FERPA requires that a consent for disclosure of education records be signed and dated, specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made. 34 CFR § 99.30. As such, oral consent for disclosure of information from education records would not meet FERPA's consent requirements.

Source: <http://familypolicy.ed.gov/faq-page>

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**FERPA**

Family Educational Rights and Privacy Act ("FERPA"),  
20 U.S.C. § 1232g

May colleges comply with a subpoena or court order for education records without the consent of the eligible student?

- Yes. FERPA permits disclosure of education records without consent in compliance with a lawfully issued subpoena or judicial order. See 34 C.F.R. § 99.31(a)(9)(i) and (ii).
- However**, a college must generally make a reasonable effort to notify the eligible student of the subpoena or judicial order before complying with it in order to allow the eligible student the opportunity to seek protective action, unless certain exceptions apply.

Source: <http://familypolicy.ed.gov/faq-page>

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## FERPA

Family Educational Rights and Privacy Act ("FERPA"),  
20 U.S.C. § 1232g

- **Exceptions to the requirement of prior notification apply to:**

- 1) A federal grand jury subpoena or other subpoena issued for a law enforcement purpose if the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;
- 2) An ex parte order obtained by the United States Attorney General (or designee not lower than Assistant Attorney General) concerning investigations or prosecutions of an act of terrorism or other specified offenses. See 34 C.F.R. § 99.31(a)(9)(ii).

Source: <http://familypolicy.ed.gov/faq-page>

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## Status Update on Deferred Action for Childhood Arrivals ("DACA")

### What is DACA?

- DACA is neither law nor regulation, but rather the result of executive action taken by the President Barack Obama Administration on June 15, 2012.
- DACA provides deferred removal (deportation) action for qualifying undocumented individuals for a two-year period, subject to renewal. DACA beneficiaries are also eligible to receive work authorization.
- DACA does not provide lawful status or otherwise provide any pathway to citizenship for its beneficiaries.
- Since its announcement on June 15, 2012, an estimated 861,000 undocumented individuals have benefited nationwide from DACA.

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## Who is Eligible for DACA?

- Were under the age of 31 as of June 15, 2012;
- Came to the United States before reaching 16th birthday;
- Have continuously resided in the United States since June 15, 2007, up to the present time;
- Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
- Had no lawful status on June 15, 2012;
- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development ("GED") certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

Source: <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca#guidelines>

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## What is the Public Policy Rationale for DACA?

- DACA is rooted in the U.S. Department of Homeland Security's use of prosecutorial discretion to ensure that limited enforcement resources are focused "on the removal of individuals **who pose a danger to national security or a risk to public**," and not, by way of example, individuals who were brought to this country as children through no fault of their own and are now key contributing members of our community seeking a higher education.

Source: Frequently Asked Questions, United States Citizenship and Immigration Services, <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>

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## What Will Be the Future of DACA?

- It is unclear. President Donald Trump had repeatedly criticized DACA as being "unconstitutional" and vowed to end it when he assumed the Office of the Presidency.
- However, no clear timeline has been provided with respect to when DACA would come to an end or whether any relief would be provided to the estimated 861,000 individuals who have benefited from DACA to date. President Trump has made statements that some relief may be provided to DACA recipients, but there is no certainty on this front.
- Unlike a federal law or regulation, President Trump can take immediate action and rescind the June 15, 2012 Department of Homeland Security memorandum on DACA.
- When questioned during his January 10, 2017 U.S. Senate confirmation hearing for U.S. Attorney General, then U.S. Senator Jeff Sessions refused to respond directly about the future of the 861,000 DACA recipients.

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## Should Eligible Individuals Still Apply for DACA?

- Each individual should make his/her own personal decision in consultation with his/her immigration attorney, but a growing consensus exists in support of the following recommendation:
  - Individuals **should not submit first-time DACA applications** because it remains unclear how the Trump Administration will use the information requested by the application for immigration enforcement purposes, i.e., residential address; **also**, the DACA application approval process takes an estimated three months and DACA may no longer exist by that time.

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## Use of Information Submitted by DACA for Enforcement Purposes?

- An area of concern is whether the Trump Administration will use the information provided by DACA beneficiaries during the application process for immigration enforcement purposes.
- The policy of the Obama Administration had been not to share this information for immigration enforcement purposes unless serious criminal, fraud, or national security concerns are presented.
- **However**, whether or how the information submitted by DACA beneficiaries will be used by the Trump Administration for immigration enforcement purposes is pure guesswork at this time.

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## Immigration Enforcement at Sensitive Locations, i.e., Colleges

- Immigration enforcement at "Sensitive Locations" is guided by the *Memorandum on Enforcement Actions at or Focused on Sensitive Locations* issued on October 24, 2011 by U.S. Immigration and Customs Enforcement ("ICE") and *Memorandum on Enforcement Actions at or Near Certain Community Locations* issued on January 18, 2013 by U.S. Customs and Border Protection ("CBP").
- The Sensitive Location Memoranda of ICE and CBP remain in effect and provide that enforcement actions at locations such as colleges "should generally be avoided," and "require either prior approval from an appropriate supervisory official or exigent circumstances necessitating immediate action."

Sources: *Memorandum on Enforcement Actions at or Focused on Sensitive Locations*, dated October 24, 2011, U.S. Immigration and Customs Enforcement, <https://www.ice.dhs.gov/docid/100922-policy.pdf>; and *Memorandum on Enforcement Actions at or Near Certain Community Locations*, January 13, 2013, U.S. Customs and Border Protection, <https://www.ice.dhs.gov/enforcement/sensitive-loc>. See also Sensitive Locations FAQ, <https://www.cbp.gov/border-security/sensitive-locations-faq>.

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## What Does "Sensitive Location" Mean?

- Locations covered by these policies would include, but not be limited to:
  - Schools, such as known and licensed daycares, pre-schools and other early learning programs; primary schools; secondary schools; post-secondary schools up to and including colleges and universities; as well as scholastic or education-related activities or events, and school bus stops that are marked and/or known to the officer, during periods when school children are present at the stop;
  - Medical treatment and health care facilities, such as hospitals, doctors' offices, accredited health clinics, and emergent or urgent care facilities;
  - Places of worship, such as churches, synagogues, mosques, and temples;
  - Religious or civil ceremonies or observances, such as funerals and weddings; and
  - During public demonstration, such as a march, rally, or parade.

Source: Sensitive Locations FAQs, <https://www.ice.dhs.gov/enforcement/sensitive-loc>

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## Immigration Enforcement at Sensitive Locations

- Enforcement actions covered include: "(1) arrest; (2) interviews; (3) searches; and (4) for purposes of immigration enforcement only, surveillance."
- **However**, ICE, may carry out enforcement actions under the Sensitive Locations Memorandum "when one of the following **exigent circumstances** exists:
  - The enforcement action involves a national security or terrorism matter;
  - There is an imminent risk of death, violence, or physical harm to any person or property;
  - The enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
  - There is an imminent risk of destruction of evidence material to an ongoing criminal case."

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## Immigration Enforcement at Sensitive Locations

- It is important to highlight once again that, like DACA itself, the Sensitive Locations Memoranda are not governing law.
- However, the principles set forth in the Sensitive Locations Memoranda have been followed by past Democratic and Republican administrations.
- Recent statements made by the Trump administration and ICE have indicated that the Sensitive Locations Memoranda remain in effect.
- However, note that the Sensitive Locations Memoranda can be rescinded or amended at any time by the Trump administration.

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## Transporting Undocumented Persons

- Section 1324 of Title 8 of the United States Code sets forth immigration offenses, including, transporting or moving an undocumented immigrant within the United States.
- Under governing law, no violation of Section 1324 will be found where the evidence does not establish that a **direct and substantial relationship exists between the transportation and the furtherance of the undocumented immigrant's presence in the United States.**
- The "mere transportation of a person known to be [an undocumented immigrant] is not sufficient to constitute a violation." The "transportation must be 'in furtherance of such violation of law.'" *United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977) (case involved foreman transporting workers from one job site to another).
- In light of the *Moreno* decision and related case law, transporting undocumented students by college employees during the course and scope of employment should not be a violation of Section 1324.

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## College Employees are Expected to Perform the Duties of Their positions

- College employees should continue to perform the duties of their positions.
- Colleges should develop a clear protocol to address any requests made by an ICE agent or other federal immigration enforcement official.
- For example, requests for access to a campus or student records should be immediately referred to the Office of the President/Chancellor who, in consultation with Campus Counsel, will determine whether any law enforcement request is lawful, e.g., supported by a judicial warrant, court order, or subpoena.

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## College Defense of Personnel in Civil and Criminal Action

- **Defense of Civil Action:** "[U]pon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity."

*Cal. Gov't Code § 995*

- **Defense of Criminal Action:** A public entity may provide for the defense of a criminal action or proceeding if the action is brought on account of an act/omission within the scope of employment or the public entity determines that such defense would be in the best interest of the agency and the employee acted in good faith and in the apparent interest of the agency.

*Cal. Gov't Code § 995.8*

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## What Does "Sanctuary Campus" or "Safe Haven" Mean?

- What does "Sanctuary Campus" or "Safe Haven" mean?

- The term "Sanctuary Campus" or "Safe Haven" has been used increasingly to describe efforts that have been undertaken by elementary, secondary, post-secondary and other educational institutions to support students, particularly those who are undocumented and fear being removed (deported) from this country, or otherwise discriminated against based on religion, i.e., members of the Muslim community.



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## What Does “Sanctuary Campus” or “Safe Haven” Mean?

- Note that the term “Sanctuary Campus” or “Safe Haven” does not have a single meaning. Some educational institutions have decided to avoid the term when describing their affirmative efforts to support their undocumented students, including DACA beneficiaries, because the term is subject to multiple interpretations. The focal point is the affirmative efforts done on behalf of undocumented students—not the title assigned to a given board resolution or policy.
- Accordingly, to understand what is meant by the term “Sanctuary Campus” or “Safe Haven,” one needs to review, for example, a specific board resolution and/or policy adopted by a Trustee Board or other educational institution to determine the scope and breadth of actions that said educational institution has decided to undertake to support its undocumented students, including DACA recipients, and other students.

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## January 25th Presidential Executive Order re Sanctuary Jurisdictions

- On January 25th, President Trump signed an executive order that seeks, in part, to deny federal funding to “sanctuary jurisdictions” that **“willfully refuse to comply with 8 U.S.C. § 1373.”**
- Section 1373 of Title 8 of the Immigration and Nationality Act prohibits state and local governmental entities from restricting communication with federal immigration enforcement authorities regarding the citizenship or immigration status of individuals.
- The executive order further provides that “appropriate enforcement action” will be taken by the U.S. Attorney General against any entity that violates Section 1373 or has a **“statute, policy, or practice that prevents or hinders the enforcement of federal law.”**
- The executive order, moreover, does not define “sanctuary.”

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## January 25th Presidential Executive Order re Sanctuary Jurisdictions

- At minimum, the executive order signals that a governmental entity would be deemed a “Sanctuary Jurisdiction” by the Trump Administration if:
  - It fails to comply with Section 1373; or
  - Has a **“statute, policy, or practice that prevents or hinders the enforcement of federal law,”** which is certainly a broad definition that could be subject to multiple interpretations.
- Under the executive order, the U.S. Secretary of the Department of Homeland Security has the discretion “to the extent permitted by law” to designate a governmental entity as a “sanctuary jurisdiction.” It is unclear what precise criteria will be used to make this designation.

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### January 25th Executive Order re Sanctuary Jurisdictions

- **NOTE:** President Trump has repeatedly described "Sanctuary Jurisdictions" as "Sanctuary Cities" that refuse to honor federal detainer requests or immigration holds made of local law enforcement by federal immigration enforcement authorities, such as agents of the U.S. Immigration and Customs Enforcement ("ICE"), before an undocumented immigrant is released from custody.

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### April 25th Court Order – Prohibits Enforcement of Portion of Executive Order Denying Federal Funds to Sanctuary Jurisdictions

- The United States District Court for the Northern District of California granted the motion brought by the City and County of San Francisco and Santa Clara County for a nationwide preliminary injunction enjoining enforcement of Section 9(a) of Executive Order 13768, 82 Fed. Reg. 8799 (Jan.25, 2017).

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### Key Points of the Court Decision

- The Constitution vests spending powers in the Congress, not the President, so the Executive Order cannot constitutionally place new conditions on federal funds.
- The Tenth Amendment requires that conditions on federal funds be unambiguous and timely made, and bear some relationship to the funds at issue.
- Federal funding that bears no meaningful relationship to immigration enforcement cannot be threatened merely because a jurisdiction chooses an immigration enforcement strategy of which the President disapproves.

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## Key Points

- The Court found that the counties challenging the Executive Order are suffering irreparable harm because the Executive Order has caused and will cause them constitutional injuries by:
  - Violating the separation of powers doctrine;
  - Depriving them of their Tenth and Fifth Amendment rights, and
  - Causing budget uncertainty by threatening to deprive the counties of hundreds of millions of dollars in federal grants that support core services in their jurisdictions.

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## Threat to Federal Funding?

- Based on the application of the 10th Amendment and related case and statutory law, a college is not likely to jeopardize its receipt of federal funding if it were to adopt a board resolution and/or related policies in support of its undocumented students.
- The same holds true with respect to any action taken by colleges to reaffirm their commitment to, for example, adhering to federal antidiscrimination or privacy laws. The college cannot be denied federal funding for following these laws.
- Note, however, federal legislation has been introduced to make colleges ineligible for federal funding if they, for example, provide in-state tuition to undocumented immigrants (H.R. 483).

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## Threat to Federal Funding?

- The enforcement of immigration law is reserved to the federal government. Colleges do not have an affirmative obligation to enforce our nation's immigration laws.
  - The "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program" or scheme under the Tenth Amendment, i.e., federal immigration enforcement. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012).
- Congress' power under the Spending Clause "does not include surprising [recipients of federal funding] with post acceptance or 'retroactive' conditions." *National Federation of Independent Business, et al., v. Sebelius*, 132 S.Ct. 2566, 2606 (2012).
- Conditions placed on federal grants should be related to the federal interest in a particular national program. See *South Dakota v. Dole*, 483 U.S. 203. Providing educational services is unrelated to enforcing immigration laws.

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### Federal Lawsuits Filed

- **January 31, 2017**—*City and County of San Francisco v. Donald Trump, et al.*, (Complaint for Declaratory and Injunctive Relief)(U.S. District Court, Northern District of California)
- **February 3, 2017**—*County of Santa Clara v. Donald Trump, et al.*, (Complaint for Declaratory and Injunctive Relief)(U.S. District Court, Northern District of California)
- **March 22, 2017**—A total of 34 cities and counties filed an amicus brief in support of the County of Santa Clara's motion for injunctive relief, including the County of Los Angeles, Berkeley, Oakland, Santa Ana, and City of Los Angeles.
- **March 23, 2017**—A total of 18 school districts, 13 charter schools, and 3 community colleges, including San Diego Community College District, Palomar College, and Southwestern College, filed a motion for leave to file an amicus brief.

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### Homeland Security Implementation Memorandum

- On February 21, 2017, U.S. Department of Homeland Security Secretary John Kelly issued an Implementation Memorandum on Enforcement of the Immigration Laws to Serve the National Interest.
- According to that Memorandum, regardless of the basis of removability, Department of Homeland Security personnel should prioritize removable aliens who fall within seven categories.

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### Homeland Security Priority Categories

1. Have been convicted of any criminal offense;
2. Have been charged with any criminal offense that has not been resolved;
3. Have committed acts which constitute a chargeable criminal offense;
4. Have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency;
5. Have abused any program related to receipt of public benefits;
6. Are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or
7. In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

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## Homeland Security Memorandum

### Question on Applicability to DACA Recipients

- Some news outlets and others incorrectly stated that the February 21, 2017 implementation memorandum was an affirmative position taken by the Trump administration regarding the future of DACA. It was not—the future of DACA still remains uncertain.

### Impact on DACA Recipients?

- The Q&A re DHS Implementation of Executive Order states that the implementation memorandum does not impact DACA recipients;
- Need to remain ever vigilant as to potential impact on DACA recipients.

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## Examples of Federal Actions Taken: The BRIDGE Act

- On January 12, 2017, U.S. Senators Lindsey Graham (R-SC) and Dick Durbin (D-IL) announced the reintroduction of bipartisan legislation focused on protecting young undocumented individuals if DACA were to be discontinued under the Trump administration. Companion legislation has been introduced in the House. The original legislation had been introduced in the 114<sup>th</sup> Congress.
- Similar to DACA, the **Bar Removal of Individuals who Dream and Grow our Economy ("BRIDGE") Act** seeks to provide temporary relief from deportation and work authorization to qualifying individuals.
- The BRIDGE Act is not law at this time and it remains unclear whether it will be passed by both houses of the U.S. Congress.

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## Example of Federal Actions Taken: National Letter for Support

- More than 600 presidents of private and public colleges and universities across the nation signed a statement in support of DACA/undocumented students, including the California State University Chancellor, the President of the University of California, and the President of Stanford University.
  - Statement in Support of the Deferred Action for Childhood Arrivals (DACA) Program and our Undocumented Immigrant Students

<https://www.pomona.edu/news/2016/11/21-college-university-presidents-call-us-uphold-and-continue-daca>

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## Examples of State Actions Taken: Legislation

### • CA Legislation—Senate Bill 54 (the California Values Act)

- Introduced by California Senate President Pro Tempore Kevin De Leon. Passed the Senate on April 3, 2017.
- Among other objectives, the California Values Act seeks to prohibit California law enforcement agencies from:
  - Using agency or department resources to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement.



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## Examples of State Actions Taken

### • CA Legislation—Senate Bill 6 (Due Process for All Act)

- Introduced by Senator Ben Hueso
- Among other objectives, the Due Process for All Act:
  - "[W]ould require the [California Department of Social Services] to either contract with qualified nonprofit legal services organizations, or contract with a nonprofit agency to administer funding to nonprofit legal services organization subcontractors, to provide legal services to individuals in removal proceedings who are not otherwise entitled to legal representation under an existing local, state, or federal program."
  - "[W]ould establish the California Universal Representation Trust Fund to accept donations from private foundations and other philanthropic entities for the purpose of expanding the number of individuals that may be provided legal services pursuant to these provisions."

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## Examples of State Actions Taken

### • CA Legislation—Senate Bill 31 (The California Religious Freedom Act)

- Introduced by Senator Ricardo Lara
- Among other objectives, the California Religious Freedom Act seeks to prohibit a state or local agency or public employee from:
  - "Provid[ing] or disclos[ing] to federal government authorities personal information regarding the religious beliefs, practices, or affiliation of any individual for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity."
  - "Us[ing] agency money, facilities, property, equipment, or personnel to assist in creation, implementation, or enforcement of any government program compiling a list, registry, or database of personal information about individuals based on religious belief, practice, or affiliation, or national origin or ethnicity, for law enforcement or immigration purposes."

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## Examples of State Actions Taken: Issuance of Principles/Statements

- **Issuance of Principles/Statements:** Principles in Support of Undocumented Students, including DACA Recipients, and/or Against Registry Have Been Issued by:
  - **The California Community Colleges Chancellor's Office;**  
<http://californiacommunitycolleges.cccco.edu/Portals/0/DocDownloads/PressReleases/DEC2016/PR-Principles-12-5-16-FINAL.pdf>
  - **The University of California ("UC") system, and**  
<https://www.universityofcalifornia.edu/sites/default/files/Statement-of-Principles-in-Support-of-Undocumented-Members-of-UC.pdf>
  - **The California State University ("CSU") system.**  
<http://www.csuom.edu/president/documents/2016/COMemo111716.pdf>

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## Examples of Additional State Actions Taken

- ✓ On November 29, 2016, the Chancellor's Office of California Community Colleges and the UC and CSU systems issued a joint letter to then President-elect Trump in support of DACA  
<http://californiacommunitycolleges.cccco.edu/Portals/0/DocDownloads/PressReleases/NOV2016/UC-CSU-CCC-DACA-Letter-FINAL-11-29-16.pdf>
- ✓ The Community College League of California Reaffirmed its Post Election Commitment to Educational Opportunity for All  
[http://www.cclleague.org/files/public/GovtRel/PostElection\\_Board%20Statement.pdf](http://www.cclleague.org/files/public/GovtRel/PostElection_Board%20Statement.pdf)
- ✓ California Governor Jerry Brown has vowed to defend California.
- ✓ California Attorney General Xavier Becerra has similarly vowed to defend California.
- ✓ The California State Legislature hired former U.S. Attorney General Eric Holder "to advise on potential legal challenges with the Trump administration."

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## Examples of Local Actions Taken:

- Districts, postsecondary education institutions, charter schools, municipalities, and other entities are demonstrating their support for undocumented immigrants, including DACA recipients, in different ways, including the adoption of board resolutions and/or policies.
- January 2017 Los Angeles County Office of Education Resolution (Promote Safe and Healthy Learning Environments for all Students with Los Angeles County)  
<http://www.lacoe.edu/Portals/0/LACOE/Resolution%20No%20%2018%20-%20Safe%20Schools.pdf>
- List of "Safe Haven" Districts—CalSchoolNews.org  
<http://www.calschoolnews.org/safe-haven-districts>

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## What are Other Campuses Doing?

### Examples

- Reaffirming to faculty, staff, students and families in your community, your college's values of diversity and inclusion and make clear that unlawful discrimination against students will not be tolerated.
- Distributing resources to students, educating them about their right to a safe and inclusive educational environment.
- Establishing protocols if ICE were to request access to campus or student information, i.e., immediately refer to Chancellor/ President who will consult with counsel.
- Reminding faculty, staff, and campus security that student information is private and not to be shared except in specific legally defined circumstances and pursuant to established protocols involving consultation with legal counsel.

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## What are Other Campuses Doing?

### Examples

- Establishing a space where college personnel and students can receive updated educational/informational resources about issues affecting undocumented students.
- Developing partnerships with community stakeholders and low-cost/pro bono legal service providers.
- Cautioning students and their families about the potential dangers of using immigration consultants and notarios—who are not attorneys—to handle their immigration-related matters.

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## University of California Guidance to Employees Regarding Immigration Enforcement Actions on Campus

The University of California has issued a FAQ for University employees about possible federal immigration enforcement actions on University property. Some of the frequently asked questions and answers addressed in the advice provided by UC are summarized here:

**Can UC prevent federal immigration enforcement officers from coming on campus or entering hospitals, clinics or other University property?**

- **Generally, no.** UC is a public university and a large portion of UC property is open to the general public. UC does not have authority to prohibit federal immigration enforcement officers from coming on campus or entering health facilities to enforce federal law. The areas on campus that are open to the general public are also open to federal immigration enforcement officers.

Source: <https://www.universityofcalifornia.edu/content/frequently-asked-questions-federal-immigration-enforcement-actions>

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## University of California Guidance to Employees Regarding Immigration Enforcement Actions on Campus

Why federal immigration enforcement officers might seek access to the campus, and what authority do they have?

- The immigration officers who seek to apprehend and remove (or "deport") an individual unlawfully present in the United States are most often officers of U.S. Immigration and Customs Enforcement (ICE), who are part of the agency's Enforcement and Removal Operations (ERO). U.S. Customs and Border Protection (CBP) officers could also seek to apprehend and remove individuals on certain campuses.
- These ICE and CBP officers work for the Department of Homeland Security (DHS) and they are typically acting on civil, not criminal, authority. The warrants these officers carry to apprehend individuals are generally administrative warrants that do not authorize officers to enter limited access areas of the University without consent. In some cases, ICE and CBP officers may be exercising criminal enforcement powers or may work with criminal law enforcement officers who may present a criminal arrest or search warrant that gives them greater authority to enter UC premises that are not open to the general public. Execution of judicial warrants does not require consent.

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## University of California Guidance to Employees Regarding Immigration Enforcement Actions on Campus

- ICE and CBP officers may appear on campus for reasons unrelated to apprehending and removing an individual they believe is unlawfully present in the United States. For example, many international students participate in the U.S. State Department's Student and Exchange Visitor Program (SEVP). The University is required to report certain information about SEVP students to ICE, and ICE may come to UC campuses to meet with SEVP students and /or University staff who have responsibilities under the SEVP program. ICE and CBP may also come on campus in connection with regulations that do not involve alleged immigration violations.
- It is a mistake to assume that any ICE employee visiting campus is present to apprehend or remove a member of the UC community. False rumors about ICE enforcement actions on campus can spread anxiety and panic. If you observe ICE employees on campus and have concerns about their activities, call Campus Police.

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## University of California Guidance to Employees Regarding Immigration Enforcement Actions on Campus

What should I do if a federal officer asks me for or gives me a subpoena for personally identifiable private information or records about a student, employee or patient?

- Personal and personally identifiable information in University records, and those records themselves, are protected by a wide variety of privacy laws (FERPA) and (HIPAA) to name a few. As a University employee, you are required to maintain the confidentiality of personal and personally identifiable information, and records containing such information. The University generally requires federal immigration enforcement officers and other law enforcement officers to produce a valid subpoena authorizing the disclosure of student or patient records that contain personal or personally identifiable information.
- Ask the officer for their name, identification number and agency affiliation; ask for a copy of any warrant or subpoena presented, inform the officer that you are not obstructing their process but need to contact Campus Counsel for assistance, and contact Campus Counsel.

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# Question & Answer Session

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## California Public Records Act (CPRA)

Presented by: Paul M. Loya, Partner  
Meredith E. Brown, Partner/Trustee Peralta CCD



Association of Chief Business Officials  
California Community Colleges

Spring Conference  
May 22-24, 2017



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## California Public Records Act



Agenda

- ✓ CPRA Overview
- ✓ *San Jose v. Superior Court of Santa Clara County*
- ✓ CPRA Exemptions
- ✓ Deadlines for Responding
- ✓ Making Electronic Documents Available for Inspection
- ✓ Roadmap for Responding to a CPRA Request

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## CPRA Overview

- Basis for the CPRA:
  - **Government Code Section 6250**
    - "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."
  - **Proposition 59 (Cal. Const., Art. 1, § 3(b))**
    - Requires that statutes or other types of governmental decisions, including those already in effect, be broadly interpreted to further the people's right to access government information and narrowly construed if it limits the right of access

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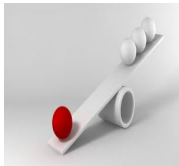
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### CPRA Overview

- **The General Rule:**
  - Unless an individual's right to privacy outweighs the public's interest in disclosure, or if disclosure is exempted by statute, a record retained by a public agency in the course of business must be disclosed upon request. (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 [60 Cal.Rptr.3d 445].)
  - General policy favors disclosure
  - A very powerful tool



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"This case concerns how laws, originally designed to cover paper documents, apply to evolving methods of electronic communication. It requires recognition that, in today's environment, not all employment-related activity occurs during a conventional workday, or in an employer-maintained workplace."

(*City of San Jose v. Superior Court of Santa Clara County* (2017) Case No. S218066.)

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### City of San Jose v. Superior Court

- Are writings concerning the conduct of public business beyond the CPRA's reach merely because they were sent or received using a non-government account?
  - Answer: No. When a public employee uses a personal account or device to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act. (*City of San Jose v. Superior Court of Santa Clara County* (2017) Case No. S218066.)

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### City of San Jose v. Superior Court

- In *San Jose*, the California Supreme Court focused on the definition of “public record” under the CPRA:

- 1) A writing,
- 2) With content relating to the conduct of the public’s business, which is
- 3) prepared by, or
- 4) owned, used, or retained by any state or local agency.

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### City of San Jose v. Superior Court

- Element 1: “A writing...”

- “Writing means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation . . .” (Government Code § 6252(g).)
- It was undisputed in *San Jose* that the items at issue constituted writings.
- The Court compared traditional notions of a “writing” to modern realities:
  - Then: “physically identifiable”; “sent through mail or by carrier”; “fairly formal”; “focused on the business at hand”
  - Now: “email, text messaging, and other electronic platforms”; “ease and immediacy”; “tendency to share fleeting thoughts and random bits of information”; “varying degrees of importance”; “broad audiences”

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### City of San Jose v. Superior Court

- Element 2: “With content relating to the conduct of the public’s business, which is...”

- Work-related versus purely private communications
- “[A]t a minimum, a writing must relate in some substantive way to the conduct of the public’s business.”
- Does not include “every piece of information the public may find interesting.”
- Excludes communications that are primarily personal in nature.
  - E.g., a public employee casually discussing a colleague’s personal shortcoming through email will often fall short of becoming a public record.

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### City of San Jose v. Superior Court

- **Element 3: "Prepared by, or..."**

- When employees are conducting agency business, they are working for the agency and on its behalf.
- A writing prepared by a public employee conducting agency business has been "prepared by" the agency, even if the writing is prepared using the employee's personal device.

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### City of San Jose v. Superior Court

- **Element 4: "Owned, used, or retained by any state or local agency."**

- Includes records in an entity's actual or *constructive* possession.
- Constructive possession: If agency has the right to control the records, either directly or through another person.
- Records do not lose public record status because they are located in an employee's personal account.
- A writing has been "retained by" an agency even if the writing is retained in the employee's personal account.

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### City of San Jose v. Superior Court

- **CA Supreme Court's Limited Guidance for Agencies:**

- 1) When faced with a CPRA request seeking records believed to be in an employee's personal account or device, the agency should communicate the request to that employee.
  - Rely on employee to search his or her own files
  - Train employees
  - Submit an affidavit
- 2) Preventative Measures - Agencies should develop policies that reduce the incidence of public records being maintained solely in private accounts and devices.
  - Require all emails involving agency business, sent by an employee through a private account, be copied to the employee's agency email account.
  - Discourage employees from using personal accounts to conduct agency business.

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### City of San Jose v. Superior Court

- **What should be included in an employee affidavit?**
  - Employee's signed declaration, under penalty of perjury.
  - Description of the scope of the request.
  - Description of all devices and accounts that employee searched.
  - A detailed description of whether the employee found responsive records and which records the employee disclosed to the agency.
  - A detailed description of any records withheld, with the basis for withholding the records.
  - Employee's reassurance he/she does not know of any other records located on a private device/account that would be responsive to the request.

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### CPRA Exemptions

- **Is the public record discloseable?**
  - Remember the "General Rule"
  - Proposition 59
  - Two Categories of Exemptions
    - Exemptions under Government Code section 6254
    - "Catchall" Exemption under Government Code section 6255

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### CPRA Exemptions

- **Exemptions contained in Government Code section 6254**
  - Contains a multitude of exemptions
  - Based on two general principles
    - 1) Individual privacy interests
    - 2) The government's need to perform its assigned functions in a reasonably efficient manner

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## CPRA Exemptions

- Government Code section 6254(c)
- "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"
  - However, just because a document is in a personnel file does not make it a "personnel document" exempt from disclosure
- This exemption comes into play frequently with school districts

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## CPRA Exemptions

### • Disciplinary Documents/Investigations

- Only allegations that are not "well-founded" and not "of a substantial nature" are exempt. Courts have interpreted this to mean that only "baseless or trivial" allegations are exempt. (*Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041.)
- Lesser standard for the reliability of an investigative report for public officials than it would for a non-public official under the rule in *Bakersfield, supra*. (*BRV v. Superior Court* (2006) 143 Cal.App.4th 742.)
- In *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal.App.4th 1250, the court found the teacher occupied a "position of trust and responsibility as a classroom teacher, and the public has a legitimate interest in knowing whether and how the District enforces its sexual harassment policy."

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## CPRA Exemptions

### • Other CPRA Exemptions

- Government Code section 6254(a)
  - "Preliminary drafts, notes, or inter-agency or intra-agency memoranda which are not retained in the ordinary course of business are exempt, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure." (Emphasis added.)

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## CPRA Exemptions

### • Other CPRA Exemptions

- Government Code sections 6254(b) and 6254.25
  - “Documents specifically prepared for litigation to which the agency is a party . . . .” These documents are exempt until the pending litigation or claim has been finally adjudicated or otherwise settled
    - Included may be investigation reports prepared in anticipation of or in preparation for litigation

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## CPRA Exemptions

### • Other CPRA Exemptions

- Government Code section 6254(k)
  - “Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.”
    - This includes documents reflecting deliberative or policy-making processes, as well as attorney-client privileged material.
    - This also includes documents protected by other provisions of the Education Code (e.g. Sections 49073 through 49079 concerning confidentiality of student records) and federal law (e.g. Family Educational Rights and Privacy Act).

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## CPRA Exemptions

### • Catchall Exemption: Government Code Section 6255

- “The agency shall justify withholding any record by demonstrating . . . that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”
  - Case-by-case basis if document does not fall within a specific exemption under Section 6254
  - Balancing test (public v. public) differs from basis for statutory exemptions (private v. public)

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## CPRA Exemptions

- **Catchall Exemption: Government Code Section 6255**
- Proceed with caution
  - If a plaintiff brings lawsuit under CPRA and prevails, award of attorney fees is mandatory. (*Los Angeles Times v. Alameda Corridor Transp. Auth.* (2001) 88 Cal.App.4th 1381 [107 Cal.Rptr.2d 29].) A plaintiff “prevails” if the litigation motivated agency to release documents. (*Motorola v. Dep’t of Gen. Servcs.* (1997) 55 Cal.App.4th 1136 [64 Cal.Rptr.2d 477])
- If in doubt, consult legal counsel

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## Deadlines for Responding

- Upon receipt of a CPRA request, a public agency has 10 days to determine whether the request seeks discloseable public records. (This does not mean that documents need to be produced within 10 days.)  
(Government Code section 6253(c).)
- If the 10th day falls on a Saturday, Sunday or holiday, then the next business day shall be considered the tenth day for purposes of providing an initial response.  
(Government Code section 6800.)
- A request may be denied if “the burden and cost of preparing documents for review is so onerous as to clearly outweigh public interest in disclosure.”  
(*ACLU v. Deukmejian* (1982) 32 Cal.3d 440.)

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## Deadlines for Responding

- In “unusual circumstances,” the public agency may take up to 14 additional days to determine whether the request seeks discloseable public records. (Government Code section 6253(c).)
- “Unusual circumstances” include the need to search for documents at other locations, the need to search a voluminous amount of material, and the need to consult with another agency, among others.
- If the public agency needs additional time, it may do so unilaterally. No need to request an extension.

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## Deadlines for Responding

- If the public agency determines that the request seeks discloseable documents, it must provide an estimate as to when they will be made available. (Government Code section 6253(c).)
  - There is no requirement that the documents be made available at the time of determination.
  - Best practice: provide documents at time of determination (if feasible).

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## Deadlines for Responding

- Fees Charged for Costs of Duplication
  - Release of discloseable documents may be conditioned upon payment of direct duplication costs. (Government Code section 6254(b).)
  - A public agency is entitled to payment of a fee covering "direct costs of duplication," or a statutory fee if applicable, and must make the records "promptly available" upon payment of such fees. (Government Code section 6253.9(c).)
  - "Direct cost of duplication"
    - Includes the cost of running the copy machine, and conceivably also the expense of the person operating it.
    - Excludes administrative charges, e.g., for staff time involved in searching the records, reviewing records for information exempt from disclosure, and deleting/redacting such exempt information.

(North County Parents Organization v.  
Department of Education (1994) 23 Cal.App.4th 144, 148.)

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## Deadlines for Responding

- If the public agency determines that the request seeks non-discloseable documents, it must provide the identity and title of the person responsible for denying the request. (Government Code section 6253(d).)
  - Keep in mind, however, that the public agency has an obligation to assist the public in identifying discloseable documents. (Government Code section 6253.1.)
- To the extent that it can be accomplished, non-discloseable information should be redacted from a document containing otherwise discloseable information. (Government Code section 6253(a).)

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## Making Electronic Documents Available for Inspection

- (a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person ... [however]
- (e) Nothing in this section shall be construed to permit an agency to make information available only in an electronic format.

(Government Code section 6253.9.)

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## Making Electronic Documents Available for Inspection

- The agency shall make the information available in any electronic format in which it holds the information.
- Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies.
- As a general rule the cost of duplication is limited to the "direct cost" of producing a copy of a record in an electronic format.

(Government Code section 6253.9)

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## Making Electronic Documents Available for Inspection

- The *requestor* must bear the cost of producing, and the cost of programming and computer services, when:
  1. Necessary to produce an electronic record that is produced only at otherwise regularly scheduled intervals, or
  2. The request would require data compilation, extraction, or programming to produce the record.

(Government Code section 6253.9.)

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## Making Electronic Documents Available for Inspection

- Agency is not required to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format.
- Agency is not required to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.

(Government Code section 6253.9.)

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## Making Electronic Documents Available for Inspection

- Effective January 1, 2017, the CPRA allows an agency to direct a member of the public to the website location where public record is posted, thus complying with the access requirement. (Government Code section 6253(f).)
- However, if the requesting party is unable to access or reproduce the record from the website, the agency must "promptly provide a copy of the public record."

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## A Roadmap for Responding to CPRA Requests

- Upon receipt, set a deadline 10 days out for review of the records and a "prompt" initial response
  - Remember: 10 days from *receipt* of request
  - Even if it appears that there are grounds for extension of time to respond, an initial response must be provided within 10 days

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## A Roadmap for Responding to CPRA Requests

- Determine whether the document seeks discloseable records
  - Does request seek “public records”?
  - Are the records likely to be stored on employee devices or accounts?
  - If so, notify employee and require the employee to search and return an affidavit with all discloseable documents.
  - Statutory Exemption? Catchall?
  - Over-burdensome? “Needle in a haystack”?
  - Can non-discloseable information be redacted?

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## A Roadmap for Responding to CPRA Requests

- Respond on or before 10th day, or “promptly” thereafter
  - Need additional time? If so, state how much additional time is needed (up to 14 days). Provide response by that date.
  - Does request seek discloseable and/or non-discloseable documents?
  - If denied, identify grounds as to why and the person responsible for denial.
  - If granted, provide estimate as to when documents will be available.
  - If granted, provide costs of duplication (if known). Release of documents may be conditioned upon payment of costs.

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## A Roadmap for Responding to CPRA Requests

- Release documents upon payment
  - Make sure information is properly redacted, if applicable
  - Provide access to responsive documents during normal office hours

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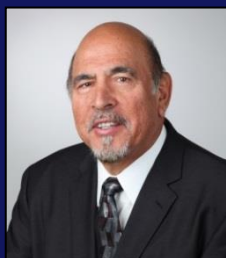
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**Practice Areas**  
Education Law

**Bar Admissions**  
California

#### Education

J.D., University of California, Berkeley  
B.A., California State University, Hayward

#### Court Admissions

U.S. Supreme Court  
U.S. Court of Appeals, Ninth District  
U.S. District Court, Northern and Eastern Districts  
of California

### Experience

Paul Loya is a partner in the firm's Pleasanton and Sacramento offices. Mr. Loya represents private and public employers as legal counsel and as labor management negotiator. He represents schools and colleges in all matters, including litigation, PERB proceedings, general law matters, business matters, and dismissal cases.

Mr. Loya has handled complex litigation, including successful trial and appellate advocacy through the California and U.S. Supreme Courts, involving matters from employee dismissals, federal civil rights trials, and student discrimination cases to tax, fee assessment, and environmental impact cases. He was lead counsel in a precedent-setting case in which a California tenured teacher was fired solely for incompetency. He has also represented public entities in many other areas of law, from environmental issues to public construction matters. Mr. Loya has represented 22 community college districts and has served as chief negotiator for eight districts with over 17 different unions. He has advocated for community colleges in numerous court and PERB cases.

### Education

Mr. Loya earned his undergraduate degree in mathematics from California State University, Hayward. He received his Juris Doctor from the University of California, Berkeley (Boalt Hall). He was a member of the Law Review and was honored as a Major Walter Dinkelspiel Scholar. He chaired the La Raza Law Students Association, which started legal centers for Spanish-speakers in Richmond and San Francisco.

### Memberships

Mr. Loya is a member of the State Bar of California, Alameda County Bar Association, Eastern Alameda County Bar Association, and La Raza Lawyers of the East Bay and San Francisco. Mr. Loya currently serves on the Attorneys' Advisory Committee to the CSBA Legal Alliance and is an active member of the California Hispanic Chamber of Commerce.

### Awards and Recognitions

*San Francisco Magazine* recognized Mr. Loya as a Law and Politics Northern California "Super Lawyer." *Bay Area Lawyers* recognized Mr. Loya as a top litigator.

**Publications and Speaking Engagements**

Mr. Loya has lectured on various aspects of employment law throughout California, including at the University of California, the University of Southern California, and for a variety of employer groups at the state and national levels. Mr. Loya has been extensively involved in training in higher education, including at CCLC trustee and administrator conferences and conferences for community college CEOs. He conducts Brown Act training for individual districts and at ACHRO and other conferences.

Mr. Loya has written numerous articles on school law and collective bargaining. He is a contributing author of *California Public Sector Labor Relations*, a Matthew Bender publication.





## Meredith E. Brown

### Partner

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#### Practice Areas

General Litigation  
Construction – Public Sector  
Construction – Private Sector

#### Bar Admissions

California

#### Education

J.D., Boston University School of Law  
B.A., Cornell University

#### Court Admissions

U.S. District Court, Northern District of California  
California Supreme Court

### Experience

Meredith Brown has more than 25 years of experience representing public agencies and private institutions. Ms. Brown's principal areas of specialization are:

- General litigation
- Construction law (including hospital construction)
- Business law for private and public entities
- Contracts and public procurement
- Local government law for California public agencies
- Business litigation
- Environmental law

Ms. Brown provides advice to both private and public clients. She has defended private clients in land use, nuisance, and California Environmental Quality Act claims. She has negotiated public and private partnerships relating to shared fund and maintenance of sports fields and a public library that allowed youth sports groups and local communities' access to public facilities that otherwise would be unavailable due to funding shortfalls.

Ms. Brown has developed general conditions and special provisions for multi-million-dollar construction projects. She has also provided claims avoidance counseling and defense for public entities conducting large capital programs involving multiple complex construction and joint development projects. Ms. Brown drafted procurement procedures; analyzed and resolved construction bid protests; and drafted and trained school district staff on the use of Requests for Proposals and contract templates. She has experience drafting and negotiating leases, joint use agreements, and memoranda of understanding for public entity clients with a heavy construction and procurement volume.

Ms. Brown served on the board of a private independent school accredited through the Western Association of Schools and Colleges and has developed policies and procedures for public and private educational and community service organizations. She currently serves as a member of the board of trustees for a public community college. She has practiced construction and business litigation on behalf of nationally recognized public and private clients, and has represented a number of large and small public entities in the San Francisco Bay Area.

In 2001, she was appointed by the Oakland Unified School District as the special facilities counsel with regard to legal compliance issues, procurement, and school-related facilities projects including school modernization, deferred maintenance, school construction and construction litigation.

From 2002-2008, Ms. Brown provided legal advice to the Oakland Unified School District Measure B Independent Citizens' Bond Oversight Committee and drafted the bylaws and guidelines for the General Obligation Bond Oversight Committee, which were approved by the Fiscal Crisis and Management Assistance Team.

Ms. Brown has served as legal counsel in numerous public agency board meetings, court proceedings, and administrative hearings, including hearings before the City of Oakland and the Fair Political Practices Commission. She has also served as a member of the Alameda County Transportation Commission Advisory Committee.

In addition to serving as an advocate, Ms. Brown has extensive adjudicative experience, having served as an Alameda County Limited Jurisdiction Judge Pro Tem from 2009 until 2013. As a Judge Pro Tem, Ms. Brown managed a courtroom setting, accepted testimony, and reviewed evidence in reaching her decisions. In 2013, Ms. Brown was elected to serve on the trustee board of her local community college district.

Ms. Brown is well versed in Brown Act compliance issues and also provides training to educational institutions on Title IX compliance.

### **Education**

Ms. Brown earned her Juris Doctor at Boston University School of Law. While in law school, she served as a clerk for United States Magistrate Joyce London Alexander, First Circuit in Boston, Massachusetts. She received her Bachelor of Science degree from Cornell University.

### **Memberships**

State Bar of California

Alameda County Bar Association

### **Publications**

Ms. Brown is the co-author of "Recent Legislation Implementing Dual Enrollment Partnership Agreements," published in the fall 2016 newsletter of the Association of Chief Human Resource Officers/Equal Employment Officers (ACHRO/EEO).

### **Community Involvement**

- Pacific Region Diversity Committee Representative for the Association of Community College Trustees.
- President of the African American Community College Trustees Caucus of the California Community College League
- President of the Alameda County Democratic Lawyers Club. Delegate to the 2008 National Democratic Party Convention in Denver, Colo. Member of the Metropolitan Greater Oakland Democratic Organization, and a board member of the National Women's Political Caucus, Alameda County.
- Member of the Oakland Chamber of Commerce, the Oakland African-American Chamber of Commerce, and the Oakland East Bay Small Business Council.
- President of the Oakland Montclair Soccer Club, a coach of its girls' Under-10 team and a former coach of the Oakland Grass Valley Soccer Club. Coaches the girls' U-10 Skyline Lacrosse Club (serving Oakland, Piedmont and Alameda).
- Member of the Junior League service club and has been an annual volunteer for the Junior League literacy program "Shooting Stars" implemented in Oakland public schools.
- Junior Classical League Chaperone/Volunteer for Certamen and State Convention.

### **Speaking Engagements**

Ms. Brown has provided training to professional groups on such topics as Dual Enrollment, construction delivery methods, faculty diversity practices, and supporting immigrant students under the new presidential administration.

Ms. Brown's recent presentations include:

- *Creating a Safe and Supportive Environment for All Students Irrespective of Immigration Status*, Asian Pacific Americans in Higher Education (APAHE) (April 7, 2017)
- *Supporting Immigrant Students and Creating a Safe Campus Environment Under the New Presidential Administration*, Community College League of California (Jan. 29, 2017)
- *Lease Lease-Back and Construction Delivery Methods and Local Vendor Contracting Policies*, Allan Hancock Joint Community College District (Jan. 10, 2017)
- *A Practical Guide to Dual Enrollment*, Community College League of California (Nov. 19, 2016)
- *AB 288 Dual Enrollment*, Community College League of California (March 2016)
- *Best Practices for Achieving a Diverse Faculty in California*, California Community Colleges Chancellor's Office (Oct. 14, 2015)

## *Proven Leader in the Representation of Community Colleges*

### **Firm History and Qualifications**

AALRR is a full-service law firm with 165 attorneys in eight offices throughout California. We have provided quality legal services and strategic advice to educational institutions for over 37 years. We represent over 450 school districts, county offices of education, community colleges, California State University campuses, UC Regents and private universities. We serve private and public sector clients in the areas of education, employment, labor, construction, real estate, general business, business litigation, corporate, taxation, bankruptcy and immigration law.

We pride ourselves on our diversity and inclusivity, for which we have been recognized numerous times. In 2015, the *Law360 Minority Report* named us the most diverse law firm in the country for equity partners.



***We are known for the exceptional quality of our legal services and our commitment to client satisfaction.***

### **Areas of Experience**

#### **Personnel Management**

Layoffs, Contract Administration, Wage and Hour, Leaves, Workers' Compensation, Unemployment Insurance, Employment Discrimination, Dismissals, Employee Discipline and Discrimination Complaints, Technology

#### **Labor Relations**

Collective Bargaining, Grievance Processing, Arbitrations, Mediation, Fact-finding and Unfair Labor Practice Defense Before PERB

#### **Litigation**

Public Entity Defense of Claims of Discrimination, Harassment, First Amendment, Whistleblower and Retaliation and FLSA

#### **Governance**

Board Policy Development, The Brown Act, and Board Relations

#### **Student Issues**

Discipline, Disabled Students, Grievances, Records and Technology

#### **Technology**

Labor/Employment/Student Issues, Data Storage and Security, Network/Connectivity, Purchasing/Licensing Agreements and Intellectual Property

#### **Title IX**

Advise on compliance with Title IX, the Clery Act and related regulations, develop and/or revise sexual misconduct policies to comply with new legislation, and investigate campus sexual violence, harassment and discrimination complaints

#### **Facilities**

**Contracts and Bids** - Contract Preparation, Bid Specification, Breach of Contract, Bid Protests, Claims  
**Construction Claims** - Construction Defects, Builder Liability, Engineering and Design Failures, Soil Erosion, Stop Notices, Bond Claims, Delay Claims  
**Real Property** - Developer Fees, CEQA, Eminent Domain, Joint Use Facility Agreements, Leases, Sales & Exchanges, Redevelopment Matters, Environmental Regulation

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