

I. Introduction

This is about the abuse of authority by the Accrediting Commission for Community and Junior Colleges in performing the functions entrusted to it by the U.S. Department of Education, and the California Legislature. The Commission has violated nearly every Federal regulation which guides it, disregards its own policies, misrepresents its actions or legal requirements, fails to respect the law and public policy of the State, violates Federal common law due process and California common law fair procedure, and acts arbitrarily, capriciously, unfairly and inconsistently in evaluating colleges and districts throughout the State, thereby harming colleges, students, faculty and staff, boards of trustees and ultimately the People. And that is how it evaluated City College of San Francisco in June 2012. It does this by appointing evaluation teams dominated by administrators, infected by conflicts of interest as in its appointment of Peter Crabtree, president Beno's husband, to serve on the "independent" CCSF evaluation team, how it allows conflicts to affect its application of its Standards and judgments of colleges throughout the State, and how from the adoption of policies to their application it violates the law.

On July 2, 2012, this Commission¹ announced that City College of San Francisco had been placed on Show Cause sanction, an action taken by the Commission in June 2012. The Commission is scheduled to next consider the College's accreditation on June 6, 2013 or thereabouts. This is both a complaint and a third party comment in regard to the Commission's next review of CCSF.

The Complaint. The Department of Education requires recognized accrediting agencies to accept, consider and respond to any complaints made against them. (34 C.F.R. § 602.23 (c)(3)) Federal law also requires that ACCJC "review in a timely, fair and equitable manner, and apply unbiased judgment to, **any** ... complaint against itself and take follow-up action, as appropriate, based on the results of ... its review." (34 CFR § 602.23(c)(3)), emphasis added.) This document constitutes a Complaint. It alleges that ACCJC violated Federal and State law, Federal common law due process, State common law Fair Procedure, and the Commission's own policies in its evaluation of CCSF and in placing it on Show Cause sanction. For the reasons set forth herein, that sanction was wrongfully issued, and must be rescinded. We hereby request that the Commission consider this complaint as required by the law, and issue an order as set forth herein which, *inter alia*, restores the *status quo ante* the sanction of Show Cause.

¹ Generally referred to herein as the "ACCJC" (Accrediting Commission for Community and Junior Colleges), or the Commission.

This Complaint also identifies numerous policies, procedures and actions of ACCJC which constitute conflicts of interest or other violations, requiring the recusal of various ACCJC staff, commissioners and team members, as set forth more fully herein. We hereby request that such individuals be immediately recused.

The Third Party Comment. Under Federal regulations, regional accrediting bodies such as ACCJC are required to accept “third party comment” concerning an “institution’s ... qualifications for accreditation.” (34 C.F.R. § 602.23) In addition, ACCJC’s “Policy on Commission Good Practice in Relations with Member Institutions” (“Good Practice Policy”) requires that ACCJC “accept relevant third-party comment on the institutions ... in writing, signed, accompanied by return address and telephone number, and received no later than five weeks before the scheduled Commission consideration.”

This Third Party Comment is filed in accordance with 34 C.F.R. § 602.23 (b), and ACCJC Good Practice Policy. A third party comment is appropriate because (1) ACCJC placed CCSF on show cause sanction, in violation of Federal and State law as alleged and established herein, and (2) in violation of ACCJC’s own policies. CCSF is “qualified for accreditation” because, *inter alia*, the action taken to place it on show cause sanction is invalid and it warranted, at worst, a lesser sanction such as Warning. Accordingly, ACCJC’s review of CCSF has been prejudiced since Show Cause sanction reverses the burden of proof. Furthermore, ACCJC’s review of CCSF was seriously flawed by numerous procedural errors and violations of Federal law, Federal common law due process, and California common law fair procedure. Had these violations not occurred, CCSF would not be on Show Cause sanction.

In support of this Complaint and Comment, we submit the accompanying appendix of documents denoted herein as attachments. If there are any additional documents referenced in this document which you need that are not attached, kindly advise and we will provide them. We assume there is no need to provide the Commission with its own Standards, Requirements and Policies.

The Commission’s evaluation and action towards CCSF is illegal. It violates the Commission’s own policies and procedures, Federal law, Federal common law due process, and California common law fair procedure. As explained more fully below, CCSF should be removed from Show Cause sanction because that sanction is the result of the Commission’s violations.

The facts and issues surrounding the Commission’s violations are many and

include these:

- the actual or apparent conflict of interest resulting from the appointment of Peter Crabtree, President Beno's husband, to serve on the "independent" CCSF Evaluation Team, where he was placed in a position to review and weigh Commission reviews of CCSF during 2007, 2009 and 2010, set forth in letters signed by his wife. Mr. Crabtree had not been placed on an ACCJC evaluation team reviewing a California community college since 2002.
- President Beno and the Commission's mischaracterization of CCSF's 2006 review, the responses from CCSF and actions of ACCJC from 2007 to 2010. Even though CCSF was reaccredited in 2006, ACCJC recharacterized the College as having failed to correct deficiencies identified in 2006. No deficiencies had been identified then.
- ACCJC policy requires that the visiting evaluation team give a recommendation on action to be taken by the Commission, such as Warning, Probation, etc. Evidence suggests that the team evaluating CCSF in March 2012 did not give a recommendation for action to the Commission. If so, this violated ACCJC procedure. However, because ACCJC treats these recommendations as confidential, and does not give them to the college or public, the evidence is hidden from view.
- The Commission's conflicts of interest arising from commissioners and team leaders, particularly Steve Kinsella, who have been instrumental in having ACCJC evaluate colleges' success at "prefunding" estimated Other Post Employment Benefit liabilities calculated using a formula under Government Accounting Standards Board No. 45, while participating in the Community College League of California's Retiree Health Benefits Program Joint Powers Agency (JPA) trust. This trust was designed to accept prefunded "OPEB" contributions, to the financial benefit of the CCLC JPA. CCLC used statements by ACCJC President Beno to convince colleges to join the trust.

It was inconsistent of the Commission to evaluate CCSF for compliance with the "GASB 45" OPEB formula for prefunding, because the Commission policy says it does not enforce the policies of outside organizations, which is what GASB is.

ACCJC treated prefunding as a Standard, even though it was not included within the written Standards when CCSF was evaluated in March 2012. This criteria amounts to an underground regulation, not permitted by Federal law. Further, its use violates Federal law because it is not widely accepted.

ACCJC afforded no respect to California law and public policy, which provides through, inter alia, an Advisory from the State Chancellor's Office, that colleges such as CCSF are not required to prefund their OPEB liabilities as calculated under GASB 45 (the "Annual Required Contribution"), but may continue to use "pay-as-you-go" funding. ACCJC is required to respect California law.

- ACCJC disregarded California law governing reserves, demanding that CCSF maintain a reserve greater than State guidelines.
- ACCJC acted inconsistently in sanctioning CCSF for not having reserves above the State's recognized 5% figure, even though 5% is the public policy of California. In addition, ACCJC insisted it could determine a "prudent reserve" on an *ad hoc* basis, while inconsistently applying a 3% standard in Hawaii, a standard which ACCJC acknowledges is Hawaiian law.
- ACCJC's conflict of interest resulting from its partisan² political activity in supporting SB 1456, designed to change the mission of the community colleges and CCSF, at a time when CCSF was a leading opponent of the legislation, and while the Commission was evaluating CCSF, its partisan opponent. Further, ACCJC was opposing a college that is, by contract, a member of the the ACCJC. ACCJC had obtained confidential information from CCSF for years, such that ACCJC's opposition amounts to a breach of the fiduciary duty it owed CCSF.
- ACCJC's decision to forego its responsibility as an impartial decider, attempting to change the mission of the California community colleges through political lobbying, and lobbying and other actions to improve compensation for administrators

² As used in this complaint, partisan refers to hotly contested ideological issues or legislation, not to political parties.

- ACCJC’s practices of appointing evaluation teams dominated by managers and administrators, rather than peers, thereby contributing to the Commission’s actions to advance the interests of administrators at the expense of governing boards, students, employees and the public³
- ACCJC’s denial of due process and fair procedure to California community colleges, in regard to evaluating them, thereby injuring the beneficiaries of the agreement between ACCJC and its members - the students, employees and the public affected by sanctions issued by ACCJC
- ACCJC’s failure to remain impartial in regards to rights conferred on Unions and member institutions to negotiate over various matters, exemplified by actions such as President Beno’s threat, made in a public meeting on March 26, 2012, that the Commission, should it ever again disaccredit a California community college, will require all faculty to be dismissed, and allow them to get nothing but unemployment and a chance to reapply for work with a successor college
- ACCJC’s disrespect for the rights of elected public officials, by demanding that trustees forego their rights and not only “act” as a whole, but “speak” as a whole
- ACCJC’s hostility towards labor unions, which manifests itself in a refusal to accept the rights arising under California’s collective bargaining laws

These, and numerous other actions, statements, policies and practices of ACCJC, which directly implicate CCSF’s review, as well as all California community colleges, call into question ACCJC’s reliability as a regional accreditor.

This Complaint and Third Party Comment is being filed with the U.S. Department of Education and National Advisory Committee on Institutional Quality not only in regard to ACCJC’s actions towards CCSF, but to challenge ACCJC’s status as a reliable accreditor, and oppose its reaccreditation. We reserve the right to amend and supplement this Complaint as appropriate.

³ As used herein, “administrators” refers to managers and supervisors within the community colleges as those terms are defined by the Educational Employment Relations Act (Cal. Government Code § 3450 *et seq.*, and in decisions of the California Public Employment Relations Board. In general, managers are top-level administrators who have the authority to formulate and effectuate managerial policies and practices.

CCSF would have been wise to appeal Show Cause status, except that, in violation of State common law fair procedure and Federal common law due process, ACCJC does not allow member institutions to appeal sanctions other than disaccreditation. Nor could CCSF have known about all of this - ACCJC does not provide the transparency it pretends to support - many of its violations occurred in secret, and were not disclosed by the Commission..

This document serves multiple purposes. First, it is a *Third Party Comment*, filed in connection with the Commission's June 2013 actions under consideration in regard to City College of San Francisco.⁴ Second, it is a *Complaint* against the Commission in regard to its actions arising out of the review of CCSF that led to Show Cause status, and thereafter. The actions challenged include those noted above, and many more.

Third, this is also a *Complaint against the Accrediting Commission for California Community and Junior Colleges ("ACCJC")*, which is being filed with the Department of Education and other appropriate agencies and authorities, arising out of the Commission's policies and actions in adopting and applying Standards and Eligibility Criteria, in connection with the accreditation of all of California community colleges.

The Complaint and Comment involving CCSF is inextricably intertwined with the broader complaint against ACCJC's policies and practices. This is because the flaws in ACCJC's assessment of CCSF exemplify the flaws which generally infect the ACCJC, such as serious conflicts of interest, mischaracterization of Commission and college actions so as to support unjustified sanctions, disregard of the mission of community colleges, disregard of the public policy of California, improper criteria which conflict with Federal and State law, and arbitrary and inconsistent application of ACCJC Standards. We will generally discuss first the Complaint and Comment specific to CCSF, and then address the larger issues in the Complaint to ACCJC.

This Third Party Comment and the two Complaints are filed by AFT Local 2121, the California Federation of Teachers, AFT, AFL-CIO, Alisa Messer, Gus Goldstein, Chris Hanzo, Ed Murray and Allan Fisher.

A. The Authority to File a Third Party Comment in Regard to ACCJC's Consideration of CCSF's Accreditation

⁴ City College of San Francisco and the San Francisco Community College District are collectively referred to herein as "CCSF."

As already noted, this Third Party Comment is permitted under Federal regulations. Thus the ACCJC, as with other regional accrediting bodies, is required to accept “third party comment” concerning an “institution’s ... qualifications for accreditation.” 34 C.F.R. § 602.23.

ACCJC’s “Policy on Commission Good Practice in Relations with Member Institutions” (“Good Practice Policy”) requires that ACCJC “accept relevant third-party comment on the institutions ... in writing, signed, accompanied by return address and telephone number, and received no later than five weeks before the scheduled Commission consideration.” This Third Party Comment is filed in accordance with 34 C.F.R. § 602.23 (b), and ACCJC Good Practice Policy.

A third party comment is appropriate because (1) ACCJC wrongly and illegally placed CCSF on show cause status, in violation of Federal and State law, and (2) in violation of ACCJC’s own policies. CCSF is “qualified for accreditation” because, *inter alia*, the action taken to place it on show cause status is invalid and it warranted, at worst, a lesser sanction such as Warning. But for the ACCJC’s transgressions, CCSF should and would have been reaccredited.

Federal common law due process applies to the review of accreditors’ actions, and requires the accrediting body’s decision not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”, illegitimate, or reached “without observance of procedure required by law.” *Chicago School of Automatic Transmission v. Accreditation Alliance of Career Schools*, 44 F. 3d 447, 449-450 (7th Cir. 1994); *Foundation for Interior Design Educational Research v. Savannah College of Art & Design*, 244 F. 3d 521, 528 (6th Cir. 2001); *Falcone v. Middlesex County Medical Society*, 34 N.J. 582, 170 A. 2d 791, 800 (1961); *Blende v. Maricopa County Medical Society*, 96 Ariz. 240, 393 P.2d. 926, 930 (1964). Moreover, Federal and State law requires that an entity follow its own rules when implementing accreditation standards. *Chicago School of Automatic Transmission, supra.*, 44 F. 3d at 450-451.

The ACCJC performs a public service function, as it acknowledges throughout its policies, procedures and bylaws. Under California law, the Commission’s activities must meet the requirements of California common law fair procedure. California’s common law fair procedure doctrine parallels due process, and is equally prescriptive. If an accrediting body misapplies its evaluative procedures, as happened here, any resulting sanction is *null and void*. Errors at the team evaluation level are not cured by subsequent decisions by a reviewing body such as the Commission. *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal. 4th 1259, 1272 [error at hearing officer stage not cured by decision of board]; *Smith v. Selma Community Hospital* (2008) 164 Cal.

App. 4th 1478, 1512-1513; *Anton v. San Antonio Community Hospital* (1977) 19 Cal. 3d 802, 824-825.

B. The Authority to File a Complaint Against the ACCJC

As mentioned above, the Department of Education requires recognized accrediting agencies to accept, consider and respond to any complaints made against them. (34 C.F.R. § 602.23 (c)(3)) Federal law also requires that ACCJC “review in a timely, fair and equitable manner, and apply unbiased judgment to, **any** ... complaint against itself and take follow-up action, as appropriate, based on the results of ... its review.” (34 CFR § 602.23(c)(3), emphasis added.)

ACCJC’s “Policy on Complaints Against the Accrediting Commission for Community and Junior College’s”⁵ (referred to herein as the “Complaint Policy”) authorizes complaints to be filed “regarding the agency’s Standards, criteria, procedures or actions of staff or any other Commission representative.” However, ACCJC’s Complaint Policy is too narrow and in violation of Federal law, since it only authorizes *some* complaints.

ACCJC also decrees that “Formal complaints must “involve issues broader than a specific institutional matter or a specific educational team.” This too violates Federal law. However, it is worth noting that the actions taken toward CCSF are not unique to or the result solely of CCSF’s actions, but derive from policies and practices of ACCJC which are applied to all of California’s 112 community colleges.

This Complaint is therefore, under ACCJC’s non-compliant definition of a complaint, both a “Formal” complaint (to apply ACCJC’s designation) regarding the agency’s “Standards, criteria, procedures” and actions of staff and Commission representatives, which are applied generally to all of California’s community colleges, and an “informal” Complaint as to Commission actions specifically taken in regard to CCSF.⁶ As to the Department of Education, it is simply a “complaint.”

This Complaint against ACCJC is filed in accordance with 34 C.F.R. § 602.23 (c)(3) and ACCJC’s Complaint Policy. This Complaint alleges that the Commission has acted in violation of its Policies, Federal law, and State law, as more specifically alleged

⁵ Referred to as the “Complaint Policy” herein.

⁶ For convenience, the Third Party Comment, formal Complaint, and informal Complaint are collectively referred to herein as the “Complaint.”

herein.

As required by the Commission's Complaint Policy, this complaint is in writing, clearly states the nature of the Complaint, and is signed by the complainants and the representative of the complainants.

Furthermore, this Complaint is supported by substantial evidence, which is either submitted in the Appendix to the Complaint provided herewith, or otherwise indicated.

C. The Third Party Commentators and Complainants and Standing

Each complainant herein has standing to bring this Third Party Comment and Complaint before the ACCJC, the U.S. Department of Education, and with other appropriate agencies, authorities and forums.

AFT 2121⁷ is certified by the California Public Employment Relations Board, in accordance with the Educational Employment Relations Act (Cal. Govt. Code § 3540 *et seq.*) as the exclusive bargaining agent of a bargaining unit of more than 1,500 academic employees of the San Francisco Community College District. In that capacity, AFT 2121 has entered into a series of collective bargaining agreements with CCSF governing the wages, hours and working conditions of these employees. AFT 2121's collective bargaining agreement with the District expired on January 1, 2013 and the parties have been involved in negotiations for a successor agreement for much of 2012. AFT 2121 represents these academic employees in their employment relations with CCSF, and in regard to actions taken by this Commission.

AFT 2121 files this Complaint on its own behalf, and on behalf of the approximately 1,500 academic employees of CCSF, whom it represents. The academic employees represented by AFT 2121 have a direct interest in the outcome of ACCJC's accreditation reviews of CCSF, in that (1) disaccreditation would likely result in their loss of employment, and other adverse impacts; and (2) sanctions, including but not limited to Show Cause status, have had and continue to have a direct, adverse impact on their wages, hours and working conditions.

As a direct result of ACCJC's actions and directives toward CCSF and generally, CCSF has attempted to reduce the benefits and wages of bargaining unit members employed by CCSF, and has acted unilaterally to impose wage cuts and other reductions

⁷ The full name of Complainant AFT 2121 is San Francisco Community College Federation of Teachers, AFT Local 2121, CFT/AFT, AFL-CIO.

in working conditions and compensation. These actions, which are the direct result of actions taken by ACCJC, have caused considerable financial loss to AFT members, and to AFT 2121, and will continue to do so unless remedied. As a result, AFT 2121 and its members have suffered concrete and particular adverse impacts, which are actual or imminent. It is likely that such injuries will be partially redressed by the withdrawal of the Show Cause sanction.

Furthermore, the represented employees of the District, are third party beneficiaries of the contract between CCSF and the ACCJC, and are directly and adversely impacted, and will continue to be so impacted by ACCJC's breach of that contract, as established herein.

AFT 2121 also includes academic employees whose family members are students at CCSF, and who have a direct interest in the continued accreditation of CCSF. These students are third party beneficiaries of the Standards, Requirements and Policies of ACCJC, and the Federal statutes and regulations which regulate the accreditation of CCSF and the actions and accreditation of ACCJC.

Complainant California Federation of Teachers ("CFT") is the state-wide affiliate of AFT Local 2121, as well as other academic employee unions among Bay Area community college districts near CCSF, including the United Professors of Marin, AFT Local 1610, the Peralta Federation of Teachers, AFT Local 1603, the San Mateo Community College Federation of Teachers, AFT Local 1493, and the San Jose-Evergreen Faculty Association, AFT Local 6157. These other unions represent thousands of academic employees of these college districts. CFT, and many of its affiliates, have been directly involved in efforts to rectify prior abuses by the ACCJC.

In addition to the Complainants named herein, several others, including students and members of the public, have joined in this Complaint and will file appropriate documents with the ACCJC and Department of Education confirming their joinder.

It is necessary for these third parties to present the case that ACCJC had no cause to issue Show Cause to CCSF, to comment on the matter, and to present complaints relevant to the accreditation of CCSF and ACCJC's actions in general, as (1) there is no one else prepared to do so, due to the climate of fear resulting from ACCJC's actions towards those who complain about it;⁸ and, (2) to exhaust any and all administrative

⁸ See, e.g. the threatening demand letter sent in May 2006 by former Commission Chair Joseph Richey to the Peralta Community College District, Michael Mills (President of the Peralta Federation of Teachers), and the Berkeley *Daily Planet*, demanding a retraction and impliedly

remedies which may exist prior to initiating litigation, should it be necessary.

D. Summary of the Complaint Against ACCJC

The Complaint against ACCJC, as permitted by Federal law, alleges specific actions in regard to its review of CCSF, and allegations as to Commission policies and practices which occur more generally in ACCJC's actions. The actions complained about in relation to CCSF are also generally applicable to ACCJC's policies and actions towards California community colleges more generally.

Since a month after it was announced that AFT 2121 was placed on Show Cause sanction, AFT Local 2121, and the California Federation of Teachers, have examined the actions of ACCJC in regard to CCSF, and reviewed the Commission's policies, procedures and actions over the last several years.⁹

This review has been conducted in light of State law and Federal law requiring that ACCJC's "standards ... must be reasonable, applied with an even hand, and not in conflict with the public policy of the jurisdiction." *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools*, 432 F. 2d 650 , 655 (D.C. Cir. 1970), emphasis added; *Rockland Institute v. Association of Independent Colleges & Schools*, 412 F. Supp. 1015, 1016 (C.D. Cal. 1976)

Federal and State law recognizes that accrediting agencies are not free to do whatever they want. Among other things, they must "conform" their actions "to fundamental principles of fairness."¹⁰ These principles "are flexible and involve weighing 'the nature of the controversy and the competing interests of the parties'" on a case by case basis.¹¹ When the U.S. Supreme Court affirmed the right of private labor arbitrators to resolve labor disputes arising out of collective bargaining agreements, the U.S. Supreme Court cautioned that private arbitrators could not dispense their "own brand

threatening a defamation action due to criticism of ACCJC. (attached hereto as Attachment 1.A)

⁹ Collectively the entities and individuals submitting this Third Party Comment and Complaint are referred to as the "complainants."

¹⁰ *Medical Institute of Minnesota v. National Association of Trade and Technical*. 817 F. 2d 1310, 1314 (8th Cir. 1987)

¹¹ *Marlboro Corp. v. Association of Independent Colleges*, 556 F. 2d 78, 81 (1st Cir. 1977)

of industrial justice.” Neither can regional accrediting agencies.

When measured against these standards, ACCJC’s is out-of-compliance, and as a consequence, it’s actions toward CCSF (and other colleges) have had and will continue to have adverse effects upon tens of thousands of students, thousands of employees, community colleges and their districts, and the People of the State of California.

ACCJC is not merely a private, voluntary membership association.¹² Rather, the majority of its membership is public community colleges funded by and serving the People of the State. ACCJC is given an important role by the Federal government, to assure satisfaction of Federal Eligibility Requirements and Standards. It is also designated by the California community colleges as an accreditor, of the 112 community colleges.¹³ Thus, California community colleges are, by law, required to join the ACCJC. The means by which this occurs is contractual - the member colleges enter into a contract with ACCJC, and the terms of that contract appear in the Bylaws and Policies of the ACCJC. California’s many current and prospective community college students are beneficiaries of this contract. And the thousands of employees represented by employee unions are also directly impacted by, and beneficiaries of, this contract.

These community colleges play a crucial role in California’s system of public higher education. The People have invested billions of dollars, and entrusted a crucial part of the education of its residents, to this system. In regard to these educational activities, the People have reason to be concerned. ACCJC engages in activities which vitally affect the education, income, and welfare of tens of thousands of workers, students, and the community. It has been entrusted with considerable authority by the State and Federal government. Its actions affect the fundamental rights of students to obtain an education. It surely owes a fiduciary duty to its membership, and their employees and students.

It has become evident, however, that the Commission has acted improperly in regards to CCSF and the California community colleges in general, by engaging in conduct which violates specific Federal regulations and its own policies, as well fair

¹² Whether ACCJC qualifies as a quasi-governmental agency is not discussed in this document, and the Complainants and Commentators do not take a position on this issue at this time. For purposes of this document, at this time we assume for arguments sake that ACCJC is a private association, albeit one imbued with certain public purposes in accordance with California law.

¹³ See Cal. Code Regs., tit. 5, § 51016.

procedure and due process. It has abused its authority.

Criticism of ACCJC has mounted over the past decade. The criticisms appear through various articles¹⁴ critical of ACCJC; a Task Force created by the State Chancellor's Office; and protests and objections from throughout the State.

This Complaint establishes that ACCJC should not have placed CCSF on Show Cause status, and that it has erred in its application of its accreditation Requirements, Standards, and policies, and has violated Federal and State law. The Commission has routinely disregarded the public policy of the State, as well as the mission of the California community colleges. It has created a climate of fear among accredited institutions, because of its arbitrary and capricious actions, abuses of discretion, micro-management and its retaliatory reputation.

This brief summary is intended to outline the general scope of this Complaint and Comment. Specific citations to applicable Federal or State regulations, statutes or cases are cited in each section, where appropriate, and summarized in the Conclusion.

In 2006 ACCJC reaffirmed CCSF's accreditation, with some recommendations. Between 2006 and 2010, CCSF submitted three reports to ACCJC, which it accepted, in regard to recommendations. ACCJC, in turn, sent letters to CCSF signed by President Beno, commenting on aspects of these responses. ACCJC did not perform any interim evaluation visits. In 2012 ACCJC mischaracterized the events of 2006 to 2010, and after, asserting that CCSF had failed to address certain matters, and then relied on this mischaracterization to justify Show Cause sanction.

In 2011-2012, ACCJC appointed an evaluation team - the team is supposed to be independent of the Commission, but it was not. This was due to the ACCJC's appointment of Peter Crabtree, president Beno's husband, to the evaluation team. This appointment appears to be and is a conflict of interest, compromising the intended independence of the team.

The team visited CCSF in March 2012. It was not composed of "peer evaluators,"

¹⁴ See, e.g., *ACCJC Gone Wild*, by Martin Hittelman, reissued March 2013; *Focusing Accreditation on Quality Improvement*, February 2011, RP Group; "CCSF regulators-sensible or 'gone wild'?", March 5, 2013, S.F. Chronicle, Nanette Asimov; *What is the ACCJC? Facts and Analysis*, February 2013, Save CCSF/Fight Back; *Ongoing Concerns With The Accrediting Commission For Community and Junior Colleges*, Spring 2010, Academic Senate for California Community Colleges, Shaaron Vogel.

but was heavily weighted towards managers and administrators.

The evaluation team, and later the Commission, mischaracterized CCSF's 2006 evaluation, stating that the College was being sanctioned because it had failed to satisfactorily address recommendations it had been given in 2006's accreditation. However, these recommendations in 2006 were not to correct deficiencies, but ACCJC treated them as though they were. In fact, the suggestions were for "quality improvement," and a college is not required, to meet the Standards or Eligibility Requirements, to implement recommendations. Had there been such a requirement, Federal law requires that it be contained within the Standards or Eligibility Requirements. And ACCJC has never included such suggestions for quality improvement as mandatory, within its Standards and Requirements. Hence, the College could not be required to implement such suggestions. The fact is, CCSF did actually address each suggestion - it just did not implement the suggestions precisely - and it is not required by the Standards to do so. This mischaracterization of the events of 2006 and thereafter, and suggestions for quality improvement, prejudiced the review as it was a major motivating factor - one of two expressly noted by Beno in the July 2, 2012 action letter.

The team, near the end of its visit, was supposed to individually sign a form for recommendation for action by the Commission, which could have been reaccreditation, Warning, or a more severe sanction. Evidence indicates the team was not told it need not do so, and it did not do so. This violated Commission procedure.

ACCJC policy keeps this form secret from the College, students and the public - this policy denies common law fair procedure and Federal common law due process, because the College, students and the public are denied information about what action is under consideration before the Commission decides, the procedure is unfair.

ACCJC's procedures for the Commission's consideration of team evaluation reports offer insufficient time for review, and do not allow appeals, violating fair procedure and common law due process. Colleges, the public, employees and students are not even told what sanctions are under consideration by the Commission, also denying fair procedure.

ACCJC created another actual or apparent conflict of interest, and acted contrary to its role as an impartial accreditor, when during early 2012, it became embroiled in partisan political activity to change the mission of the community colleges, which would have directly affected CCSF's mission. In lobbying for SB 1456, ACCJC became an adversary of ACCJC. ACCJC leaders were also members of the advisory board of a private organization which opposed CCSF's position in regard to the mission.

ACCJC, in violation of the law, disregarded the public policy of California and sanctioned CCSF for not adequately prefunding its obligations for post-employment retiree health benefits, which ACCJC has incorrectly indicated is required by Government Accounting Standards Board # 45.

ACCJC's insistence that colleges, including CCSF, prefund a GASB-determined estimated future liability, results in part from an actual or apparent conflict of interest involving the Community College League of California Retiree Health Benefits program JPA "trust.". ACCJC has faulted colleges for not making such contributions to the CCLC JPA trust or similar trusts, while persons involved with the CCLC JPA trust have served and continue to serve on ACCJC teams making such recommendations, and/or on the Commission itself. CCLC, in a Special Report written by Steve Kinsella, the first chair of the JPA's board of trustees, relied in part of the threat of sanction, including a statement issued by Barbara Beno and included in the Report, which warned that "... the Commission has cited unfunded liabilities associated with retirement and other benefits as a factor in evaluation of institutional financial stability and ... required institutions to make plans to pay unfunded liabilities ... Governing board efforts to address GASB 45 will likely bring more institutions into alignment with existing accreditation standards ..." (Attachment 7B) About 10 members of the JPA Board have served on evaluation teams which assess prefunding, and those assessments coerce colleges to prefund their "OPEB" liabilities through mechanisms which include the CCLC JPA trust.

ACCJC has sanctioned or criticized colleges, including CCSF, for not prefunding their "GASB 45" calculated OPEB liabilities" despite an Advisory from the State Chancellor's Office confirming that colleges are not required to prefund but may use pay-as-you-go funding.

ACCJC's insistence on evaluating colleges' prefunding according to the GASB # 45 accounting calculation, conflicts with its ACCJC's policy of not evaluating compliance with the policies of other organizations, and is not actually a published standard of the Commission. Evaluating "OPEB" prefunding is not a widely accepted criteria, thereby violating Federal law. ACCJC and the CCLC have mischaracterized the GASB 45 accounting procedure as requiring prefunding. ACCJC assessment also violates California law concerning the full faith and credit of the State as it pertains to college districts.

ACCJC has disregarded the public policy of the State by antagonistic conduct toward employee organizations including a statement by President Beno that any college discredited will see the Commission no longer permit a "Compton solution," but will mean the termination of all faculty. ACCJC also encourages colleges to adopt policies

prepared by the CCLC, which violate the law.

ACCJC review of college's financial stability is arbitrary because it is inconsistent in how it evaluates grants funding and the maintenance of reserves, and disregards California law governing reserves.

The Commission's evaluation teams are not composed of peers, but are dominated by managers and administrators. The ACCJC acts to advance the interests of administrators, attempting to increase compensation for administrators, and increase their authority by restricting the activities and speech of school board trustees. ACCJC found that CCSF did not satisfy Standard IV, Governance and Leadership, because of actions by trustees which are authorized by State law.

E. The Third Party Comment as to CCSF

As already stated, the Complaint is also submitted as a Third Party Comment, in that it establishes CCSF should not have been placed on Show Cause sanction, and that many of the criticism of CCSF are legally unjustified.

Third Party Comment and Complaint Against the ACCJC In Connection With the Accreditation of CCSF

II. Background Concerning City College of San Francisco

City College of San Francisco, one of California's oldest and most prestigious community colleges, was placed on Show Cause status by action of the ACCJC on June 7 or 8, 2012, even though it had never before been sanctioned.

The harshness of the Commission's action against CCSF is demonstrated through its history of actions on all institutions. There was only one other instance of an ACCJC member institution that had no prior history of sanction jumping from a reaffirmed accreditation immediately to a "Show Cause" sanction.¹⁵ This was with a private junior college, Transpacific Hawaii College, which was put on Show Cause status in June 2008. Transpacific, despite no prior sanctions, was in deep trouble and it announced it was closing within two weeks of ACCJC's issuance of the Show Cause sanction. At its peak

¹⁵ College of the Sequoias, placed on Show Cause in January 2013, had been given Warning Status in 2006. Both Cuesta and Redwoods, placed on Show Cause in summer 2011, had previously been given numerous sanctions.

Transpacific had less than 300 students, and at the time of closure it had only about 80 students and fewer than 14 full-time faculty.

Transpacific Hawaii College is hardly precedent for what ACCJC has done to CCSF. By its own account, Transpacific “fell victim to the demographics currently in Japan,” and, “could not exist without a critical number of students.” (See Announcement of Closure, Attachment 2.A) This, of course, is not the case with CCSF.

The Commission has acknowledged the rarity of a serious sanction without first an attempt to rectify problems with a lesser sanction. ACCJC Chair Joseph Richey wrote in a letter in 2006 that asserted that one or more critics of ACCJC had defamed ACCJC, its president and another staff member, that it is a “rare exception” when an institution is not first placed under one or more of the less serious sanctions, before its accreditation is terminated. (Letter, Richey to Berkeley *Daily Planet*, May 22, 2006, p. 2; Letter, Richey to Michael Mills, President, Peralta Federation of Teachers, May 22, 2006) There is good reason for such rarity - the Show Cause sanction has serious adverse impacts, destabilizing the college - threatening its credit - causing students to flee - and other effects. And because this sanction cannot be appealed directly by a college or district, the sanction has always been “accepted” without legal challenge by any entity or anyone, so far.

Evidence of ACCJC’s failure to properly evaluate CCSF, and other colleges, is readily found.

* CCSF is well above the average in successfully educating academically needy students. While the state maintains a 41 percent completion rate for academically needy students, City College of San Francisco’s completion rate for the same demographic was 53 percent in the 2011-12 academic year .

* City College performs above the average for total completion rate for its students. The state average total completion rate is 47.97%, CCSF’s is 55.6%.

* Among the California community colleges, the average transfer “velocity” to a 4 year- institution is 38.2%. CCSF’s transfer velocity is 48.1%.¹⁶

* For those California community college transfer students who attend CSUs, the average GPA was 3.03 for the Fall 2011 semester. City College’s students who

¹⁶ See, e.g., Attachment 2.B. Information also available at: http://datamart.cccco.edu/Outcomes/Transfer_Velocity.aspx

transferred to CSU, were slightly above average of their peers in that category as well, with an average 3.08 GPA in the Fall 2011 semester.¹⁷

As is evident, City College is above average in not only helping students meet their academic goals, but also in instilling in them more knowledge and adaptability at their future four year universities than most of their community college peers.

ACCJC concluded that CCSF did not meet, or only partially met, 9 of the 11 Standards by which the Commission evaluates colleges. This certainly seems dreadful, and it resulted in CCSF being pilloried in the press. Except that on closer inspection, there is also a peculiar anomaly.

Over the last four years, ACCJC put 35 California community colleges - almost a third of the State's community colleges - on sanction. Of these, 21 were placed on Warning, and 10 were given Probation. A total of 4 were given Show Cause sanction status. Of the 21 placed on Warning, two failed all 11 Standards, and eight failed 9, just like CCSF.¹⁸ The average number of Standards which the Warned colleges failed was 6. One could ask, why wasn't CCSF given a Warning?

Of those California community colleges placed on Probation, one failed all 11 Standards, another failed 10, one failed 8, one failed 7, two failed 5, two failed 4, and one failed 3. Why wasn't CCSF given a lesser sanction? While there are numerous irregularities, certainly the involvement of President Beno's husband on the visiting team, and ACCJC's failure to obtain a visiting team recommendation, in violation of ACCJC policy, loom large. As for Show Cause, other anomalies appear. Redwoods had failed six standards, but it had a long history of sanctions. Sequoias had not met 9 and Cuesta 3.

Examining the number of Standards not met, so as to decipher a pattern or regular practice, cannot explain CCSF's Show Cause sanction. However, this Comment and

¹⁷ See, e.g., Attachment 2.B. Information also available at <http://www.asd.calstate.edu/performance/ccc/ccc1112/index.shtml>

¹⁸We refer to those which did not meet or partially met the Standards as "failing." Attached as Attachment 2.C is a table which differentiates between "not meeting" or "partially meeting" each Standard. As is evident, CCSF partially met all 9 Standards that it "failed." In contrast, Southwestern, which was put on probation, failed 5 standards and partially met 6. Solano, given a Warning in 2012, partially met 11 Standards, just like CCSF. Columbia, given a Warning in January 2012, partially met 10 Standards and totally did not meet one. Saddleback, which totally failed 3 and partly met 2, received a Warning in January 2011.

Complaint presents overwhelming evidence of factors which do account for CCSF's treatment: serious conflicts of interest within the ACCJC which affected the action it took and the criteria it measured; mischaracterization of CCSF's previous assessments by ACCJC; misapplication of Standards which are not written down, or not widely accepted; failure to follow critical procedures and denial of due process and common law fair procedure; and, many other violations of law and policy. Given the lack of transparency which accompanies an ACCJC review, these transgressions would not have been readily apparent to CCSF, students, employees or the public. And since there is no appeal from Show Cause sanction, the chances of discovery by CCSF or the public were nil, until now, and the filing of this Complaint and Comment.

In addition, it is widely recognized in California that most colleges are too fearful of further ACCJC's sanctions to challenge its decisions. ACCJC has enhanced its reputation in this regard by, *inter alia*, in 2005-2006 threatening litigation against its critics (see discussion below of letters sent by ACCJC's Chair to union president Michael Mills and the Berkeley *Daily Planet* and a trustee of the Peralta Community College District). And, in the case of CCSF, how a few brief comments by individuals associated with CCSF, during a KQED radio program on July 6, 2012, led to a written rebuke in the form of a press release, which was thereupon posted on the ACCJC website for all to see. Regardless of how reasonable their fears are, administrators, trustees and other college decision-makers have expressed their belief that ACCJC will retaliate if it is questioned.¹⁹ College officials, unions and employees speak openly of a reign of terror.

Furthermore, much of what ACCJC does is hidden behind a veil of secrecy. There is no other way to explain why Laney College Dean Peter Crabtree was placed on the CCSF evaluation team. Mr. Crabtree is ACCJC President Barbara Beno's husband, creating a serious conflict of interest which prejudiced the ACCJC's review of CCSF.

A. CCSF's Accreditation History

CCSF was first accredited by ACCJC in 1952. It has been continuously accredited since then. Its accreditation over the period from the 1950s until 2012 was uneventful: at

¹⁹ ACCJC's threatening letters to the Berkeley the *Daily Planet*, the Peralta Community College District and PFT president Michael Mills, in 2006, are the sort of activity which discourages challenge to ACCJC's actions. Furthermore, ACCJC policy allows it to judge a college on its "relations" with ACCJC, further discouraging colleges from disputing ACCJC actions. And ACCJC has taken to issuing press releases critical of colleges, such as occurred on July 6, 2012 as to CCSF. ACCJC has issued severe criticism of district trustees over the last few years, fueling beliefs that the Commission, and particularly its staff, engages in retaliation.

no time had CCSF been issued any sanctions, or found to be deficient in regard to any Eligibility Requirements or Standards.²⁰

B. Show Cause Sanction by ACCJC

At its meeting on June 7 or 8, 2012, the Commission voted to place CCSF on Show Cause sanction. On July 2, 2012, the ACCJC formally informed CCSF that it was being placed on “Show Cause”, the most serious sanction short of disaccreditation.²¹ The evidence shows that the evaluation team did not give a recommendation of action (i.e. Show Cause or a lesser sanction) to the Commission, as required by Commission procedures. The team chair apparently recommended Probation, and the Commission increased this to Show Cause.

Since the agreement between California’s community colleges and ACCJC was made in California, California law governs administrative decisions by non-governmental associations such as ACCJC, and requires that ACCJC provide sufficient information as to the basis of the action, so as to allow judicial review of adverse decisions. See discussion, *infra.*, of *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515 - 517. But nothing from ACCJC explained why CCSF was given Show Cause status, as contrasted with a lesser sanction.

Under ACCJC policy, there is no appeal from being placed on sanctions by the Commission, except for the “death penalty”: - disaccreditation. However, a lesser sanctions such as Show Cause invariably adversely affect a college. The Show Cause sanction issued to CCSF brought substantial harm to CCSF.

While Federal law allows a college two years to address deficiencies,²² and longer

²⁰ CCSF, like most California community colleges, is also accredited by specialized accrediting bodies, who accredit specific programs. For example, the California Board of Registered Nursing accredits nursing programs. CCSF is fully accredited by these bodies.

²¹ See ACCJC “*Policy on Commission Actions on Institutions*,” 2011 Accreditation Reference Handbook, p. 41 (“PCAI” herein)

²² If the ACCJC’s review indicates an institution is not in compliance with any Standard, ACCJC must “(1) immediately institute action against the institution ..., or (2) Require the institution ... to take appropriate action to bring itself into compliance with the agency’s standards within a time period that must not exceed ... (iii) Two years ...” See **34 CFR § 602.20(a)**.

when warranted,²³ ACCJC allowed CCSF just about 8 months to resolve deficiencies cited by the Commission, giving it until March 2013 to respond to the Show Cause letter

C. Harm Arising from Show Cause Sanction

Accrediting agencies such as ACCJC wield extraordinary power. Within days of the decision's announcement, CCSF began feel the adverse effects of the sanction. Since July 6, 2012, CCSF has experienced the following:

1. Foremost, the College's accreditation was put in jeopardy, with the burden of proof shifted to CCSF to prove it merits accreditation.

2. There was serious damage to CCSF's reputation, much of it the result of negative media accounts, many of which included mistaken assumptions or misunderstandings as to CCSF's status and the reasons.

3. Placement on Show Cause requires a college to prepare a "closure report," detailing its plans to close. The Report is detailed, and must explain how it will account for already enrolled students. CCSF's prepared and submitted such a Report on March 15, 2013, which was posted on media available to students. The Plan, consistent with the requirements of ACCJC, stated that students who had completed 75% of their education toward defined degrees or certificates, would be allowed to graduate from CCSF. The remainder - thousands of students - would need to find another college. For many this is not an option. The talk and reports about CCSF being on the verge of closing caused considerable anxiety by students, employees and residents of San Francisco.

4. The College suffered a reduction in nearly 15,000 students from Spring 2012 until Fall 2013. This translated into a loss of State funding. The impact of Show Cause, the Closure Report, and press speculation, certainly was a prime cause of this.

²³ The two-year period to satisfy Standards may be extended for good cause. Thus, "if the institution ... does not bring itself into compliance within the specified [two year] period, the agency must take immediate action unless ... for good cause [it] extends the period for achieving compliance." **34 CFR §602.20(b)**. The Department of Education's December 2011 "recommendations" to ACCJC declares that ACCJC "could consider granting an extension [of the two years] for good cause ... where deficiencies 'are not directly and immediately affecting educational quality, but have longer term direct or indirect effects on educational quality or integrity ...'" See Attachment 2.D.

5. Downgrading of District bonds by Moody's and Fitch's.²⁴

6. Micro-management of the District by the Commission, and District attempts to roll-back contractual benefits and unilateral reduction in employee compensation, leading to litigation.

7. Increased costs resulting from accreditation-induced changes that the District indicated were required to satisfy the Commission. The college employed consultants, prepared and filed several reports, hosted a "Show Cause" evaluation team visit, and certainly expended a huge sum to satisfy the demands of the sanction.

8. Destabilizing of labor relations, resulting in a unilateral reduction of faculty pay by 9% and the resulting Union grievance and unfair labor practice charge.

State funding for Community Colleges is based, in part, on the number of Full-Time Equivalent Students ("FTES") that a particular institution has. Drops in enrollment usually mean drops in funding. Many CCSF students expressed doubts they would be able to fulfill their education, so they chose not to enroll, further endangering CCSF's fiscal condition. CCSF's substantial drop in enrollment after being placed on Show Cause sanction created a potential loss of \$6.5 million. .

The negative publicity resulting from CCSF's sanction was a prime contributor to the drop in enrollment.²⁵

²⁴ On March 8, 2013, Fitch's ratings downgraded CCSF's 2002 General Obligation bonds, Series A, from A- to BBB+, with a note that the "Rating Outlook remains Negative." The Fitch's report indicated that the "key ratings drivers" were the "district's mixed progress with accreditation reforms, to date." See Attachment 2.E. CCSF's bonds were almost immediately downgraded after Show Cause status was announced, by Moody's. See Attachment 2.F.

²⁵ This situation led a State Assembly member to introduce legislation, AB 1199, to offset similar enrollment problems resulting from accreditation sanctions at institutions. Assemblyman Paul Fong's office stated, "Colleges receiving a severe accreditation sanction often suffer immediate reduction of their enrollment. This leads to a potential funding loss, putting pressure on the college's ability to make adjustments and recover its full accreditation." The SF *Examiner* noted that CCSF was the inspiration for Fong's actions, writing, "Fong's office said City College of San Francisco, whose accreditation is in limbo after receiving sanctions last year, was certainly a focus of the bill." Koskey, Andrea. "City College of San Francisco Approves Report Aimed at Keeping Accreditation." *The Examiner*, February 28, 2013. The legislation would create a "stabilization formula" for institutions sanctioned by ACCJC, allowing them to

The looming threat of disaccreditation stemming from the July 2, 2012 announcement was sensationalized in the media, painting a dismal picture of the college and its future. Some articles promoted untruths and misrepresentations that if taken at face value, had dire consequences for CCSF and the way the public viewed its future. For example:

“If CCSF lost accreditation, it could not transfer students’ course credits or degrees and certificates earned by students. It also could mean CCSF would lose federal funding and even potentially close” *San Francisco Examiner, July 10, 2012, pg. 2.*²⁶ See Attachment 2.G.

“One hundred days– that’s how much time City College of San Francisco has to begin fixing major financial mismanagement. The alternative could be an end to the school.” July 10, 2012. “City College has 100 days to fix major problems” *ABC-KGO News, July 10, 2012.*²⁷ See Attachment 2.H.

These and many other inaccurate statements, while not in and of themselves the responsibility of the Commission, could have been corrected by ACCJC. Having placed CCSF on Show Cause, it might have been able to mitigate some of the anxiety and harm. But while ACCJC is quick to respond to what it perceives as a college’s “misstatements” (in accordance with its Policy on Public Disclosure), the Commission did virtually nothing to assure that its actions and procedures were correctly conveyed to the public.²⁸

receive funding akin to their pre-sanction enrollment amounts to stave off adverse impacts resulting from student flight, provided that certain conditions were met.

²⁶ While it is true that colleges that are not accredited cannot give or transfer credits to their students, this restriction takes place *after* accreditation is terminated, and has no effect on any credits taken up to the point a college’s accreditation is revoked. This article fails to mention this important detail, purveying the misconception to all current and potential students that any of their earned credits could be voided, and any further attendance at CCSF may be futile.

²⁷ This statement is untrue. City College was given approximately 8 months from the time this article was written to prove that had corrected deficiencies. The 100 day deadline apparently refers to the “Special Report” CCSF was required to submit to ACCJC showing their *plan* to correct deficiencies. Given the vast amount of negative press against the college, detailing a seemingly broken system, this supposed 100 day deadline projected City College’s certain failure to the public.

²⁸ ACCJC’s Policy on Public Disclosure provides that “Should ... others issue selective and biased releases ... the Commission and its staff will be free to make all the documents public.

A perfect example of this were the newspaper accounts indicating that CCSF was on “the brink of closure” or was about to lose its accreditation, written just after Show Cause was publicly announced on July 2, 2012. ACCJC could have explained that the College could be given up to two years to correct deficiencies, and that for good cause, that period could be extended. ACCJC remained silent. While ACCJC indicates it relies on colleges to correct misstatements, its quick rebuke when some associated with the college tried to do that on July 6 logically would naturally dissuade the college from trying to offer much in the way of corrections. Further, a “correction” by CCSF would hardly carry the weight of a correction by ACCJC. In remaining silent, ACCJC bears responsibility for the negative public perception and the ensuing loss of students.

Partial List of Negative Media Reports Concerning CCSF

- July 4, 2012. *San Francisco Chronicle*: “City College of San Francisco on brink of Closure” See Attachment 2.I.
- July 6, 2012. *Washington Monthly Blog*: “City College of San Francisco to Lose Accreditation” See Attachment 2.J.
- September 13, 2012. *SF Gate*: “Broken System Dooms CCSF” See Attachment 2.K.
- October 24, 2012. *SF Gate*: “City College of San Francisco is in a fight for its life” See Attachment 2.L.
- November 7, 2012. *San Francisco Public Press*: “City College Still Risks Losing Accreditation Even After Local, State Measures Pass” See Attachment 2.M.
- March 26, 2013. *Yahoo! News*: “City College of San Francisco Fighting Uphill Battle to Survive” See Attachment 2.N.
- January 14, 2013. *SF Bay Guardian*: “Discord at City College as accreditation cliff nears” See Attachment 2.O.

As noted, the ACCJC’s policy allows it to make public comments to correct

In the event of such misrepresentation or failure to disclose, the Commission is free to ... provide accurate statements about the institution’s accredited state.” (Policy on Disclosure, II.C., 2011 Handbook, p. 90)

misinformation. Despite a continuing wave of misinformation in the media, of which the Commission was surely aware, it made only one “correction.” On July 6, 2012 it issued a press release which criticized unnamed representatives of CCSF for providing “misleading” information on a KQED Forum broadcast about the college’s accreditation. After that, ACCJC remained silent. One can easily imagine this was because the Commission wanted to “shame” the College.²⁹

D. Remedies and Changes Requested by Complainants

For the reasons set forth herein, we respectfully request that ACCJC take the following action:

1. Rescind its order of Show Cause as to CCSF, restore CCSF’s accreditation status to the level of Reaffirmed, which it maintained before the March 2012 review, withdraw all actions and reports arising out of the Show Cause sanction issued July 2, 2012, and institute a new review of CCSF.
2. Recuse from participation in any discussion, actions or decisions concerning CCSF, ACCJC President Barbara Beno, Commissioners Frank Gornick and Steve Kinsella, Vice Presidents John Nixon and Jack Pond, and such other commissioners, staff and evaluators as have the appearance of, or an actual, conflict of interest.
3. Recuse from any participation in ACCJC teams or on the Commission, or in any ACCJC matter concerned with financial resources, any and all trustees or alternate trustees of the CCLC Retiree Health Benefits program JPA.
4. Cease and desist misstating the 2006 review of CCSF and correct the misimpressions of CCSF’s actions to “address” suggestions made by ACCJC in 2006.
5. Take affirmative action to correct misstatements concerning the CCSF 2006 Reaffirmation of Accreditation and its aftermath.

²⁹ On March 11, 2013, ACCJC President Beno addressed the Northern California CEO Conference at the Ahwahnee Hotel in Yosemite. She told the assembled CEO’s that as regarded a recent sanction of a college for actions of its Board, “Our goal was to publicly shame them.” This comment is consistent with Commission actions towards the CCSF Board, and boards of other districts. (See, e.g., discussion of Santa Barbara City College, below.) Ms. Beno was also scheduled to meet with and address the Southern California CEOs in April 2013.

6. Modify its Policies and Procedures, as requested herein to remedy the violations of due process under Federal and State law, and ACCJC policies.

7. Cease and desist from requiring reserves beyond that suggested as acceptable by the Chancellor's Office of the Community Colleges.

8. Cease and desist evaluating a college's success at prefunding estimated OPEB liabilities.

9. Adopt fair procedures for the appeal of Show Cause sanctions.

10. Provide greater time for the Commission to consider recommendations for action on accreditation matters.

11. Provide sufficient reasons to satisfy fair procedure when the Commission increases a sanction to something more severe than recommended by an evaluation team.

12. Provide copies of team action recommendations to the college, students and the public.

13. Adopt effective procedures to identify all potential conflicts of interest.

14. Cease and desist from lobbying on legislation which do not directly affect the operations of the ACCJC.

15. For such other and further relief as is just and proper.

III. ACCJC Should Not Have Placed CCSF on Show Cause Status Because Its Action Rested on ACCJC's Mischaracterization of CCSF's Accreditation History From 2006 to 2012

At the core of ACCJC's decision to place CCSF on Show Cause sanction is the Commission's recreation of history. As we explain, the facts show that ACCJC has recharacterized ACCJC's review of CCSF in 2006. This action colored ACCJC's 2012 review. In 2006, CCSF had its accreditation reaffirmed. ACCJC gave CCSF eight "suggestions" on how it could improve. CCSF addressed these over the next six years, and submitted three reports to ACCJC detailing what it had done. In 2012 ACCJC took the position that CCSF's supposed failure to institute these suggestions to improve amounted to deficiencies in relation to ACCJC's standards. In this way, ACCJC adhered to the view that CCSF had to *conform to ACCJC's suggestions that were not about*

deficiencies.

The Commission's Policy on Commission Actions on Institutions (the "Action Policy") provides a brief description of what warrants Show Cause status:

"When the Commission finds an institution to be in substantial non-compliance with its Eligibility Requirements, Accreditation Standards, or Commission policies, or when the institution has not responded to the conditions imposed by the Commission, the Commission will require the institution to Show Cause why its accreditation should not be withdrawn at the end of a stated period by demonstrating that it has corrected the deficiencies noted ... In such cases, the burden of proof will rest on the institution ..." (2011 Action policy, p. 42, emphasis added)

As will become apparent, ACCJC cannot satisfy either ground. ACCJC's Show Cause letter dated July 2, 2012, provides the two overriding reasons as to why CCSF was placed on Show Cause status:

1. The College "failed to demonstrate" in its application for reaccreditation "that it meets the requirements in a significant number of Eligibility Requirements and Accreditation Standards."
2. The College failed to *implement* the eight *recommendations* of the 2006 ACCJC site visit evaluation team.

Neither of these reasons satisfies the requirements of the Action Policy for Show Cause status. As to the first reason, we will show that ACCJC reversed the burden of proof, and essentially required CCSF to prematurely satisfy the burden of proof applicable *after* a college has been placed on Show Cause status. In this way, the Commission improperly found that its own *inability to determine* whether the college met its requirements and standards, satisfied the grounds for placing CCSF on Show Cause status. However, we begin by discussing the second reason, the "recommendations" given to CCSF in 2006 when it was accredited, and what resulted from them. We show that, in relation to these recommendations, the undisputed evidence does not establish that CCSF satisfied the second ground for Show Cause, that a college "*has not responded to ... conditions imposed by the Commission.*"

A. CCSF Did Not Fail to Correct Deficiencies Identified in 2006, Because No Deficiencies Were Identified in 2006. ACCJC has Recharacterized

Suggestions to Improve as Deficiencies. ACCJC’s Reliance on This Mischaracterization Invalidates Show Cause Status.

ACCJC found in 2006 that CCSF *met or exceeded the Eligibility Requirements, Standards and Policies of ACCJC*, and thus reaccredited CCSF.³⁰ For the next six years, until June 2012, there was no finding by the Commission itself, that CCSF was deficient in meeting these Standards, Requirements or Policies. Yet to justify imposing the Show Cause sanction, the Commission relied on indications, in *letters written by its President Barbara Beno*, dated June 29, 2009 and June 30, 2010, that CCSF had been dilatory in resolving conditions imposed to deal with *deficiencies*. These conclusions were issued in violation of Commission Policy and Federal Law. As a result, the Show Cause status issued on July 2, 2012 is unjustified

In its “Show Cause” letter dated July 2, 2012, Commission president Barbara Beno described the two primary reasons as to why CCSF had been placed on Show Cause sanction: first, that it failed to demonstrate it met a significant number of Commission Requirements and Standards, *and second, that it failed for six years to implement recommendations made in 2006*. President Beno specifically wrote the following in July 2012:

“Show Cause was ordered ... because the College has failed to demonstrate that it meets the requirements in a significant number of Eligibility Requirements and Accreditation Standards. It has also failed to implement the eight recommendations of the 2006 evaluation team, five of these eight were only partially addressed and three were completely unaddressed. The College is ... expected to fully address all of the recommendations ... before the next comprehensive evaluation ...” (Show Cause Letter, p. 2, emphasis added)

Four days later, in a press release posted on the Commission’s website, ACCJC reiterated CCSF’s “failings”:

“CCSF *failed to implement* the eight recommendations of the 2006 evaluation team, three being completely unaddressed.” (ACCJC Press Release, July 6, 2012).

In connection with the latter assertion, ACCJC had in 2012, treated these 2006 “recommendations” as concerning CCSF’s supposed *deficiencies* in satisfying ACCJC

³⁰ See 2005 ACCJC Policy on Action Toward Institutions, in place at the time of the 2006 review, p.50; also see Section III, p. 54; Letter, Beno to Day, June 29, 2006

Standards. To do this, ACCJC rewrote history, as CCSF was *not* found by the Commission to be deficient in satisfying Standards in 2006, 2007, 2009, or even in 2010. We review the course of CCSF's experience with ACCJC from 2006 until Show Cause status was issued.

1. The Reaccreditation of CCSF in 2006

CCSF had its accreditation reaffirmed during every comprehensive evaluation through 2006. Until 2012, it had never been sanctioned by ACCJC. In contrast, nearly every other Bay Area community college has been on sanction status for one or more years during the last 10 years alone.³¹ CCSF's status as one of California's, and the nation's, premier community colleges, had until the 2012 sanction, never been questioned by ACCJC.

CCSF therefore had a full reaffirmation of accreditation when it entered into its next comprehensive evaluation in 2005. As part of the reaccreditation process it submitted a lengthy "self study" to ACCJC. A 14-person team of educators, appointed by ACCJC,³² visited CCSF in March 2006, and issued a lengthy report concerning CCSF in April 2006. Based on the "site visit team's" evaluation and recommendations, ACCJC reaffirmed CCSF's accreditation. The visiting team's detailed report confirmed that they had not observed any *deficiencies* at CCSF.³³

"The visiting team validated that *the college meets the eligibility requirements and complies with the standards of accreditation*, as required by [the ACCJC]."

³¹ See Attachment 3.A.

³² The team was led by Dr. Constance Carroll, Chancellor of the San Diego Community College District. It also included four faculty, three vice presidents, one president, one trustee, and four other managers.

³³ Had ACCJC identified deficiencies in 2006, it would have said so. ACCJC was and remains under a mandate, resulting from both Federal regulations and its own policies, to delineate when an institution has *deficiencies*. See 34 C.F.R. § 602.18(e) "The agency meets this requirement if the agency provides the institution or program with a detailed written report that **clearly identifies any deficiencies** in the institution's or program's **compliance with the agency's standards.**" (Emphasis added.)

(March 19, 2006 evaluation team report, p. 4, emphasis added)³⁴

The team recognized that CCSF was “one of the premier community colleges in the region,” and that the college’s activities surrounding the accreditation “reaffirmed the excellence of the college ...” (2006 Evaluation Team Report, p. 4.) The team also complimented the college’s “concerted effort to address the recommendations” of the 2000 accreditation evaluation team. (2006 Evaluation Team Report, p. 5)

The 2006 Evaluation Report “developed ... eight (8) recommendations intended to guide the college in *accomplishing certain goals and in assuring the high quality of its programs and services*. Recommendations #2, #3, and #4 are presented as overarching concerns that should receive the college’s focused attention and emphasis. The other[s] are also important ... to address ...” *Id.*, pp. 4-5. Recommendation #2 involved “Student Learning Objectives,” #3 involved “Financial Planning and Stability,” and #4 involved “Physical Facilities Contingency Plans.” Evaluation Team Report, p. 5.

The ACCJC, in a letter dated June 29, 2006, notified CCSF that its accreditation had been reaffirmed, with a requirement it complete a Progress Report and a Focused Midterm Report, which “should address all the team’s recommendations with special emphasis on” the three noted in Beno’s letter. ³⁵ The progress report was to focus on Recommendation #4, including reducing the percentage of its budget spent on salaries

³⁴ For purposes of convenience, we refer to all cited evaluation team reports by the date of visit, hence the CCSF 2006 Evaluation Report of the team, for a visit occurring from March 19 - 23, 2006, is cited as the “March 19, 2006 Evaluation Report.”

³⁵ ACCJC has a “hierarchy” of accredited institution. Thus, as is evident from reading ACCJC’s “Policy on Commission Actions on Institutions”, when ACCJC reaccredits a college the accreditation is “reaffirmed,” and this reaffirmation can fall into any of three categories:

- i) “Reaffirm accreditation”
 - ii) “Reaffirm accreditation, *and request a Progress Report*”
 - iii) “Reaffirm accreditation, *and request a Progress Report with a visit*”
- (See Policy on Commission Action on Institutions, section III - Handbook, 2005 ed., pp. 53-54, emphasis added)

CCSF’s June 2006 reaffirmation of accreditation required a “progress report,” but did not require a visit. Thus, CCSF was in the *second* category of reaffirmed institutions.

and benefits, and address funding for retiree health benefit costs.”³⁶

Despite the indisputable absence of any findings of CCSF non-compliance with the Standards and Eligibility Requirements in 2006, or in any Commission actions between 2006 and 2012, the Commission’s July 2012 decision treated the recommendations made for quality improvement as *deficiencies*, and incorrectly alleged that the College had not adequately addressed these concerns. As will be evident, CCSF not only did do what was legitimately asked of it, but ACCJC acted in excess of its authority when treating the recommendations for “quality improvement” as mandatory, and using them as a large part of the justification for their decision to issue a show cause sanction on CCSF.

2. The Differences Between Deficiencies and Recommendations

To understand ACCJC’s mischaracterization, it is important to recognize that there are significant differences between *deficiencies* and *recommendations*. Deficiencies are characterized by a failure to comply with a Standard or Requirement. Recommendations made when deficiencies have not been found are *suggestions for quality improvement*, and do not reflect an institution’s failure to comply with any standards.³⁷ Here is the precise language of the Policy, which is the key to this distinction:

“The *Commission also has the responsibility to communicate its findings* derived from the site visit to the institution; *ensure that the external Evaluation Report of Educational Quality and Institutional Effectiveness (formerly Team Report) identifies and distinguishes clearly between statements directly related to meeting the Accreditation Standards and those representing suggestions for quality improvement ...*” *Id.*, 2011 Policy, Handbook p. 103)

A requirement for institutions to have their accreditation reaffirmed under the ACCJC is that they *meet or exceed the Standards and Eligibility Requirements* of the Commission. As such, *any recommendations* made to institutions that have had their accreditation reaffirmed are for suggested *quality improvement* purposes only, just as the Policy on Rights and Responsibilities says. This truth is confirmed throughout the

³⁶ As discussed later, salaries and benefits are a negotiable subject under State law, and the State has advised districts that they are not required to pre-fund retiree health benefits, but may address them on a pay-as-you-go basis. (See, e.g., Advisory memo, Attachment 3.B.)

³⁷ See “Rights and Responsibilities of ACCJC and Member Institutions in the Accrediting Process” 2011 Handbook, p. 103. The same distinction appears in the 2012 Handbook, at p. 115.

Commission's policies, which describe the recommendations made to institutions that have been awarded a reaffirmation of accreditation as, "directed at *strengthening the institution, not correcting situations where the institution fails to meet the Eligibility Requirements, Accreditation Standards and Commission Policies,*" or as identifying, "a small number of issues, which if not addressed immediately, *may* threaten the ability of the institution *to continue to meet* the Eligibility Requirements, Accreditation Standards, and Commission Policies." *The trouble is the Commission and evaluation teams ignored the crucial distinction between a Standard which is required and an recommendation for quality improvement.* CCSF was snared by this.

In each review of a college, it is a requirement for reaffirming accreditation that the evaluated institution has been found to meet all Standards and Requirements, verifying that the recommendations issued in these instances do not signal any deficiencies identified in the institution.

Federal law supports this conclusion, requiring that *deficiencies* in relation to any Standard or Eligibility requirement be *clearly identified*. The law expressly provides that an accrediting agency must, "[Provide] the institution or program with a detailed written report that **clearly identifies any deficiencies** in the institution's or program's **compliance with agency standards.**" (34 CFR §602.18 (e), emphasis added.)

The regulations make clear that deficiencies characterize *only a failure to comply with Standards or Requirements*, and are *distinct from recommendations* for quality improvement. When taken in conjunction with ACCJC policy which requires that sanctions be issued to institutions that are deficient in compliance with Standards or Requirements,³⁸ it is beyond question that any recommendations made to institutions when their accreditation is reaffirmed can only be for *suggested improvement purposes only*.

Consider the fact, with rare exceptions, *every* ACCJC member institution is issued a series of recommendations during their comprehensive evaluation. This is not because every single institution has been found deficient, or non-compliant in some way. Rather, this implies that many of the recommendations that the Commission issues are made *not* to ensure institutions correct deficiencies, but for the purposes of suggesting areas in where an institution can *improve*. This was the case with City College of San Francisco.

³⁸ See "Policy on Commission Actions on Institutions" which states, "In the case that a previously accredited institution cannot demonstrate that it meets the Eligibility Requirements, Accreditation Standards, and Commission policies, the Commission will impose a sanction." (2011 Accreditation Reference Handbook, p. 38; 2005 Handbook, p.50)

In 2006 the Commission’s evaluation of CCSF yielded a decision of reaffirmation of accreditation to the institution. No sanctions were imposed, because *no deficiencies* were found. ACCJC’s policy clarifies the form of reaccreditation given to CCSF:

“[The Commission may identify a] small number of issues of some urgency which, if not addressed immediately, *may* threaten the ability of the institution to *continue to meet* the” Standards and Requirements.”(Emphasis added)

Thus, the ACCJC’s recommendations made to CCSF were for quality improvement purposes, and are distinct from deficiencies that must be corrected in order to comply with standards.

3. ACCJC’s “Requirement” that Recommendations Made for Quality Improvement Must Be Implemented Is Improper and Exceeds ACCJC’s Authority Under the Law

Despite the sharp distinction between a *deficiency* from Standards or Eligibility Requirements, and a *recommendation* for quality improvement, ACCJC practice and to an extent its policy *wrongly and inconsistently* treats both as equally mandatory.

In the case of recommendations issued to correct deficiencies – which are issued in conjunction with a sanction – the Policy states that the Commission will act to terminate accreditation if an institution “fails to come into compliance within a two-year period.”

For recommendations made for quality improvement – issued when an institution has been found to be in compliance all Standards and Requirements – the Commission states that, “Resolution is expected within a one to two-year period.” Regardless of this particular assertion that all of its recommendations are mandatory, this policy and practice is in violation of Federal law. **The ACCJC cannot legally require that such recommendations to improve are mandatory.** Yet it is instructing its team evaluators that they are mandatory.

The Commission **cannot** require institutions to comply with criteria in excess of their own stated Standards and Eligibility Requirements; this is supported by **34 CFR §602.18(c)** which declares that to meet federal regulations an accrediting agency, “bases decisions regarding accreditation and preaccreditation on the agency’s **published standards.**” (Emphasis added) These standards are contained *solely* within the Commission’s Accreditation Standard and Eligibility Requirements, and do not extend to the varying notions, opinions or concerns of Evaluation Teams, or the Commission’s particular concerns such as OPEB/ARC prefunding on the particular day of an

institutional evaluation.

Furthermore, ACCJC promises colleges that it will “limit oversight required by federal statute and regulations to issues expressly required by that mandate.” (ACCJC’s Policy on Commission Good Practices in Relations With Member Institutions, Policy Element # 12.)

It is both illegal, inconsistent, arbitrary, unfair and an abuse of discretion, for the Commission to extend an Institution’s responsibility beyond what the specific Standards require. **In institutions like City College, recommendations are branded as areas for improvement in one cycle, and then later, even if substantial improvements have been made, are treated as serious violations in the next cycle if not completely addressed.** This is arbitrary and an abuse of discretion, in that it creates a system that where even if an institution is improving, it is falling behind. Also arbitrary and unfair, and an abuse of discretion, is that when treating each recommendation to an institution with the same force as a Standard or Eligibility Requirement, **every single institution has a different set of standards and requirements to satisfy.**

Indeed, the requirement that recommendations for quality improvement must be followed the same as Standards and Requirements creates a system where the highest quality institutions are held to the strictest of standards, and as seen in CCSF’s case, can improperly and suddenly escalate the severity of accreditation decisions. Furthermore, in treating recommendations for quality improvement as if they were a standard or requirement, ACCJC also violates **34 CFR §602.18(b)** which requires that an accrediting agency “has effective controls against the inconsistent application of the agency’s standards.” As stated above, *when the recommendations issued to each college obviously vary from institution to institution, the particular standards to which each college is held are different as well.*

Yet, ACCJC practice and opinions on this matter are persistently in conflict with the law. In a January, 2010 letter to Chancellor of the California Community Colleges, Jack Scott, Barbara Beno stated,

“Institutions whose response to accreditation requirements is one of **minimal compliance** have not fully embraced the purpose and value of accreditation... Improvement and Compliance occur together. (Attachment 3.C.)”

This belief is in noticeable disharmony with another Commission quote that noted the,

“The basic philosophy underpinning accreditation is that institutions should be free to develop their own objectives and ways of defining success within the framework of the Commission’s Standards. The system of peer review and the regulations of the U.S. Department of Education *reject the idea of establishing phases or stages of compliance*, but within that caveat there is room for rubrics that define what constitutes *meeting the Standards* and what *demonstrates a high level of excellence.*” (See *Quality Assurance: A Formative Review* p. 20, Attachment 3.D, emphasis added)

It is this sort of schizophrenic interpretation of the Standards and Requirements which has prompted the avalanche of sanctions against California community colleges, and the legitimate belief of colleges and employees, that for ACCJC under Barbara Beno, “its my way or the highway.” This is a major reason why the Commission, as presently administered, is unreliable as a regional accreditor.

The ACCJC is aware that it can only issue sanctions in regard to non-compliance with Eligibility Requirements or Standards. **While it has the authority to make “suggestions” of how colleges can improve, it is not within its purview to make those “suggestions” or “recommendations” mandatory, if the college has demonstrated that its meets the Requirements and Standards.**

Under Federal law, ACCJC cannot enforce its suggestions for improvement, with the same force as its suggestions to satisfy Eligibility Requirements or Standards, and any Commission policies asserting that it can violates Federal Law. CCSF has fallen victim to this illegal policy, and any consideration of the 2006 suggestions or the 2007, 2009 or 2010 aftermath, as a basis for sanction, violates the law. Yet this was a predominant reason for the Show Cause sanction.

4. CCSF’s Implementation of ACCJC Recommendations- The Events of 2006-2007

In order to hold CCSF accountable to the 2006 recommendations in the way that it had during the 2012 review, the Commission would have had to at some point between 2006 and 2012 made a finding that CCSF had become deficient to a Standard or Requirement. Despite some mischaracterizations by the Commission President, Barbara Beno -- who is not actually a voting member of the Commission, but rather a member of the Commission Staff – the Commission made no such finding in regard to City College.

On March 15, 2007, CCSF submitted a Progress Report, prepared by Chancellor Day, Research Director and the CCSF Accreditation Liaison Officer Robert

Gabriner, and the Vice Chancellor for Finance and Administration, Peter Goldstein.³⁹ This report explained how CCSF was going about addressing recommendation 4: Financial Planning and Stability.

President Beno's June 29, 2007 letter to CCSF. On June 29, 2007, ACCJC responded to CCSF's Report with another brief letter signed by President Beno, stating that the Commission accepted its March 2007 Report, with a requirement that CCSF complete a Focused Midterm Report, due in 2009 (this had already been required in 2006, and is standard practice for the second "level" of accreditation)

President Beno added that the Report "should address all the team's recommendations with a special emphasis on ... Rec. 4" [Financial Planning/Stability] "All the teams' recommendations" obviously meant the eight recommendations presented in the June 29, 2006 letter. The only specific recommendation mentioned, however, is No. 4 - Financial Planning and Stability. The letter then simply repeats the same paragraph from the 2006 letter. *The letter does not identify any deficiencies*, nor any concerns about the CCSF response to Recommendation #4 contained within the Progress Report. Had there been findings of deficiencies, certainly it was the Commission's obligation to say so.

5. CCSF's Implementation of ACCJC's Recommendations- The Events of 2008-2009

On March 15, 2009, CCSF submitted the required "Focused Midterm Report" to ACCJC in which it reviewed in great detail all that it had been doing to address the eight 2006 recommendations from the 2006 ACCJC Report. Prepared by the new Chancellor Don Griffin, Goldstein, and two other Vice Chancellors, the Report was discussed with District governance bodies, the Trustees and the Senate, consistent with ACCJC's expectations and Policy on Good Practice in Relations With Member Institutions.⁴⁰ ACCJC announced, in its Summer newsletter, the actions the Commission had taken. As to CCSF the only action was to "accept" CCSF's Focused Midterm Report. (See Summer 2009 ACCJC Newsletter, p. 8)

Letter 2 from ACCJC: President Beno's June 30, 2009 letter to CCSF

³⁹ Gabriner had been the Accreditation Liaison Officer during the 2005-2006 comprehensive evaluation process.

⁴⁰ The Report addressed both the Team's general recommendations, as well as the "WASC recommendations with special emphasis."

Recharacterizes the 2006 Suggestions. The response from ACCJC to the College’s Midterm Report, a June 30, 2009 letter from President Beno, is quite short - barely a page and a half. It explained that the Commission had reviewed CCSF at its June 9-11, 2009 meeting, and that the “purpose of this review was to assure that the recommendations made by the [2006] evaluation team were addressed ...”

Even though those 2006 recommendations, and the subsequent letters from 2006 and 2007, made no mention of deficiencies, Beno indicated to CCSF in the June 30, 2009 letter, that:

“I wish to inform you that under U.S. Department of Education regulations, institutions *out of compliance with standards or on sanction* are expected to *correct deficiencies within a two-year period* or the Commission must take action to terminate accreditation. City College of San Francisco must *correct the deficiencies noted by June 2010.*” (Emphasis added.)

This comment is ambiguous and confounding because the Commission had not as of 2009 found CCSF was “out of compliance with standards” nor “noted” any deficiencies, nor issued a sanction to CCSF. The letter certainly implies that the Commission was *now* interpreting some or all of its 2006 Recommendations (e.g. Nos. 3 and 4), or perhaps all eight 2006 recommendations, as deficiencies or a failure to meet Standards. **But the Commission never made any such finding in 2009, or at any time before CCSF’s March 2012 review.** Note that ACCJC is under a duty. The law requires that ACCJC: “Provides the institution ... with a detailed written report that **clearly identifies any deficiencies in the institution’s compliance with the agency’s standards.**” (34 CFR 602.18) It is indisputable that ACCJC never “clearly” identified any deficiencies - after all, ACCJC reaffirmed CCSF’s accreditation in 2006, and it could not do that if ACCJC had deficiencies. Nor were any deficiencies properly identified before the 2012 review.

A change in the status of the recommendations for quality improvement to “deficiencies” would have to be noted in an official finding by the Commission, and no such finding was ever made. In fact, it is Commission practice to institute a sanction immediately if a deficiency is found at *any point* during the 6-years between comprehensive site-visits. This is demonstrated through the many instances where the Commission instituted a sanction mid-accreditation cycle on a college with reaffirmed accreditation.⁴¹ Obviously, there is a serious disconnect between the actions of the

⁴¹ The Commission has taken action to institute a sanction on a college with reaffirmed accreditation mid-cycle on the following colleges: Berkeley City College, Marin, Copper

Commission (to accept the 2006, 2007 and 2009 Reports and not take any action to issue sanctions), and the recharacterizations in the June 30, 2009 letter from President Beno. This discrepancy adds fuel to the belief that the Commission staff acts *ultra vires and has lax internal controls*, relying on the Commission to rubber-stamp their actions.

The biggest problem with the 2009 Beno letter is that, despite her peculiar reference to “*deficiencies*”, none were noted in her letter, or before.⁴² (Just as no deficiencies had been identified in the 2006 ACCJC reaccreditation letter, the 2006 Team Report, or the 2007 ACCJC letter.)

The failure to clearly or properly identify any supposed deficiencies, if they existed, violates not just Federal regulations (e.g. **34 CFR § 602.18**), but also violates ACCJC’s policy. ACCJC’s “Rights and Responsibilities” policy requires the Commission to “clearly” distinguish statements directly relating to meeting Standards and those representing suggestions for quality improvement ...”⁴³ And as noted above, for the ACCJC, suggestions and recommendations are synonymous.

President Beno’s 2009 letter confirms that the Commission “accepted” CCSF’s Focused Midterm Report, and again referred to the previously-announced “requirement that the College complete a follow-up Report” by March 15, 2010. Beno wrote that, “The Follow-Up Report should demonstrate *status toward resolution* of Recommendation 4 [Financial Planning/Stability] and resolution of Recommendation 3 [SLOs] ...” What does “status toward resolution mean - that the resolutions must be implemented a particular way, or fully? Beno’s comments are too obtuse for clarity - they violate the requirements of the law and Policy.

Under ACCJC polices, there was no basis for CCSF to “appeal” Beno’s 2009 letter. Nonetheless, the Commission did not impose any sanction, nor did it assert that the

Mountain, Laney, Los Angeles Southwest, MiraCosta, Modesto, Moorpark, Riverside City, San Joaquin Valley, Shasta, Solano, Cuesta, Diablo Valley College, Lassen, Orange Coast, Victor Valley, College of Alameda, El Camino, College of the Redwoods, Feather River, Palo Verde, and San Joaquin Delta

⁴² Whether anyone from CCSF raised this inconsistency with ACCJC is unknown.

⁴³ See ACCJC’s “Rights and Responsibilities of ACCJC and Member Institutions in the Accrediting Process” 2011 Handbook, p. 103; the same statement occurs at p. 117 in the 2008 *Handbook*, in place at the time the 2009 letter was written.

Commission had made a finding identifying any deficiencies. *Had* it done so, CCSF would have had no more than two years to correct the deficiencies. The events of 2010 add further confusion to ACCJC's behavior, and undermine further ACCJC's 2012 decision to put CCSF on Show Cause.

6. ACCJC's New Demand Regarding Retiree Health Benefits- The Events of 2010

On March 15, 2010, CCSF submitted an incredibly detailed and comprehensive Accreditation Follow-Up Report. Prepared by Chancellor Griffin, the Senate president, and apparently managers and faculty, the Report addressed the sole two recommendations from 2006 that Beno had indicated the college should focus on. At its Summer 2010 meeting, ACCJC accepted the Report at its June 9-11, 2010 meeting. In reporting actions it had taken against colleges, again there was *no* action reported against CCSF.

Letter 3: Beno's June 30, 2010 letter to CCSF. Beno's June 2010 letter, which followed CCSF's Focused Mid-term Report, reported that the Commission had *accepted* CCSF's Report. And, importantly, Beno's letter made *no mention* of any of the Recommendations from the June 2006 Commission letter. *Nor does it assert* that CCSF was in any way deficient. How could it, as no deficiencies were identified, and the Commission had made no finding of deficiencies? Anyone reading this letter, particularly CCSF's employees, could reasonably conclude that CCSF had now satisfactorily *addressed* the "recommendations" noted in Beno's June 2006 letter.

CCSF's 2010 Report focused on the specific items mentioned by President Beno in her 2009 letter, "Student Learning Outcomes" and "Financial Planning and Stability."⁴⁴ Though Beno's June 2010 letter in response did not mention Recommendation 4, it did communicate that the "Commission" had a "Concern" that CCSF should develop a better financial strategy,⁴⁵ and, "request[ed] that the College provide information.... in its next report, the comprehensive self study, due in Spring 2012." **Again, no finding of non-**

⁴⁴ Her letter stated that the "Commission has a concern about whether the college's financial resources are sufficient ..." and that unless the unfunded retiree liability was "funded" then "eventually" it might be difficult to meet Standard III.D. The letter also requested information about how future contributions for unfunded liabilities would be handled (citing "ER 17 and Standard II.D.1.(b) and (c)).

⁴⁵ A financial strategy matching outgoing expenditures with "ongoing revenue," maintained the "minimum prudent reserve level," reduced the percentage of CCSF's budget utilized for salaries and benefits, and addressing future health care costs.

compliance or deficiency was made in regard to CCSF. Instead the Commission was concerned that certain financial patterns might “eventually” make it difficult to meet the requirements of Standard III.D.. Eventually when? In 5 years, or 10, or 20 or 30?

The ACCJC Standards and Eligibility Requirements make no mention of whether or not colleges are required to respond to “concerns,” nor do they state the premise on which the Commission may express a “concern.” What is clear, however, is that if a deficiency has been found by the Commission, that it must communicate it to the institution and issue a sanction. That was not the case here.

Nor may the Commission convert a “concern” over a college’s alleged deviation from a policy into a deficiency - as noted above, Federal regulations are clear: accreditors are asked to determine whether an institution is in compliance with agency standards, and clearly identify any deficiencies.

Beno’s June 30, 2010 letter is dominated by the issue of retiree health benefits (discussed extensively below). She writes about the District, like other colleges, not meeting the “Annual Retired Contribution” to “Other Post Employment Benefits” (“OPEB”), which was a product of Government Accounting Standards Board #45 (“GASB 45”), and asks CCSF to indicate how such monies will be paid into an “irrevocable trust.”⁴⁶ But her reference to this “contribution” cannot be characterized as a deficiency in meeting the Standards, given the history described above.

As for the topic of Student Learning Outcomes, the letter made no mention of the previous recommendation, and instead included only a “Commission Reminder” that all colleges were expected to meet the Standards by Fall 2012 (months after the CCSF’s review and the Commission’s vote on sanction).

Regardless, between 2006 and 2012, CCSF submitted *three* reports to ACCJC (in 2007, 2009 and 2010), confirming that the College had discussed, addressed and responded expeditiously to ACCJC’s eight recommendations for improvement. ACCJC both explicitly and implicitly acknowledged this.

⁴⁶ The Commission provides no public information as to whether it considered and decided on what “concerns” to express in such letters. However, it is worthwhile to recognize that this Commission meeting would have been attended by recently appointed Commissioners Steve Kinsella and Frank Gornick, both periodically active in the Community College League of California’s Retiree Health Benefits JPA, and both with a conflict of interest resulting from their roles within the JPA and ACCJC, discussed further below.

7. Show Cause Status is Tainted By ACCJC's Misrepresentations of the Events of 2006 to 2012

As shown above, CCSF was identified as satisfying ACCJC's Eligibility Requirements and Standards in 2006. It was not identified in 2006 as having "deficiencies." From 2007 through 2010, CCSF filed three reports detailing its response to the eight suggestions for improvement. At no time between 2006 and June 2012, was CCSF explicitly found to be deficient. Yet ACCJC's President, Barbara Beno, had written to CCSF in 2009, strongly suggesting it had deficiencies, an action which appears to be beyond the scope of her legitimate authority since there was no Commission visit and no Commission finding. As such, the use of CCSF's alleged failure to fully implement the 2006 recommendations as a contributor to their Show Cause sanction, is improper. Yet that is what happened. Hence, much depends on the interpretation and credibility of letters from President Beno, from 2006 through 2010.

ACCJC is barred by Federal Law from using criteria in excess of ACCJC's *published* standards and Eligibility Requirements as a basis for their accrediting decisions. See **34 CFR §602.18 (c)**.⁴⁷ The recommendations made by the ACCJC and their Evaluation Teams are by nature variable from institution to institution. Treating these recommendations as the equivalent of Standards creates a system of requirements that is different in scope and expectation for each institution that the Commission accredits, thereby violating **§602.18 (b)**. This law mandates that the ACCJC must have "effective controls against the inconsistent application of the agency's standards" as well as the overarching theme of **§602.18** which is "ensuring consistency in decision-making."

Despite this regulatory framework ACCJC has improperly asserted both in its policies and in the CCSF decision (and in others) that its recommendations are mandatory, and that they carry the same weight and impact as the Standards and Eligibility Requirements. In the July 2012 Show Cause decision letter, the Commission stated, "City College of San Francisco has not demonstrated an ability to address evaluation team recommendations in a timely manner and thereby has not demonstrated consistent and reliable compliance with Eligibility Requirements and Accreditation Standards," and that this served as a basis of their decision to institute the Show Cause sanction. In stating this, ACCJC **admitted** that its decision regarding CCSF's accreditation status was in violation of the law.

⁴⁷ **34 CFR § 602.18 (c)** provides that the agency satisfies Federal regulations if it "[b]ases decisions regarding accreditation ... on [its] published standards."

The Commission's issuance of the Show Cause sanction was based largely on CCSF's supposed reaction to the 2006 reaccreditation and suggestions. In so doing, the ACCJC engaged in arbitrary, capricious and unreasonable conduct, and an abuse of discretion, that violated federal law, and issued "findings" not supported by substantial evidence.

Beno herself has no authority under ACCJC Policy to determine a college is deficient in meeting standards. That is a job for the Commission itself, and such a finding must be communicated properly with the college. Additionally, ACCJC, whenever it finds deficiencies, is duty bound to impose sanctions. But no sanction was issued against CCSF. Yet, the Commission is now relying on the unsupported assertion on June 30, 2009 that CCSF was "out of compliance with standards," and that it was deficient, as evidence of CCSF's failures.

ACCJC is hardly unaware of the correct protocols. For example, one year after Santa Barbara City College had been reaccredited in 2010, a complaint was lodged by a political group intent on recalling recently elected trustees ("Take Back SBCC"). ACCJC conducted an "investigation," appointed an investigative team, the investigative team issued a "report," and the Commission itself found Santa Barbara to be in violation of Standards, and issued a Warning, followed by a Warning Letter from President Beno dated January 2012. (Attachments 7.W.3. - 7.W.5.) Nothing like this occurred in regard to CCSF.

In relying primarily on this supposed history of failing to satisfy conditions imposed by ACCJC, **based heavily on four letters written by Barbara Beno**, the Commission violated its own policies and Federal law, by elevating recommendations to being "deficiencies" requiring correction.

B. CCSF Also Did Not Fail to Address Recommendations Made In 2006

The Show Cause letter conflates deficiencies and recommendations. And as to recommendations, it confuses its Standard that they be addressed, with lock-step implementation. Recall that the President wrote CCSF that it had failed to *implement recommendations*. **This is out of line with the Commission's published Standards.**

The Commission's Standard IV requires that the "Institution moves *expeditiously* to *respond* to recommendations made by the Commission." 2011 Handbook, p. 24 (emphasis added) However, when it comes to recommendations, the Commission emphasizes in its Policy that they must be *addressed*, not that they must be followed. To be precise, the policies indicate that a college must "discuss, "respond" "expeditiously,"

and “address” recommendations. **The term “implement” is not mentioned in the policies.** Nonetheless, the Commission’s relies on a *failure to implement* suggestions as grounds for sanction. This is no mere technical distinction.

CCSF did take action to *respond* to the 2006 recommendations. This is evidenced by the fact that the 2012 Evaluation Team found that the college had “partially-addressed” five out of the eight recommendations, and by the information supplied in the three reports CCSF filed between 2007 and 2010. The fact that City College did not fully “implement” the 2006 recommendations is not a legitimate basis to find it out of compliance with this Standard. As will be discussed further in this complaint, the specifics contained within the remaining three recommendations exceed ACCJC’s authority, and are in violation of California public policy. Recommendations 4,5, and 6 -- the three recommendations which City College was found to have “not addressed,”-- all rely on the judgement that CCSF’s reserves were “inadequate” to justify their interpretation that the recommendations had not been implemented. This inadequacy was determined by the fact that City College was not maintaining a reserve level in excess of the State mandated 5%.⁴⁸ Recommendation 4 also finds that CCSF did “not address” its requirements because it failed to pre-fund OPEB, which the ACCJC is also not legally allowed to require.

Recommendations need not be implemented, only responded to, but the Commission’s teams, instructed to the contrary, have learned the lesson well, and continue to condemn colleges in lock-step with the Commission’s mischaracterization of the Standards.

A recommendation is ordinarily understood to be the “giving of advice or counsel.” Most of the counseling ACCJC offers is vague. For example, as to the eight recommendations made in 2008, several are particularly open-ended:

“Recommendation 2: Planning and Assessment- The team recommends that the college **build upon its continuing planning** and assessment efforts and **develop an integrated process of institutional planning** and assessment that combines strategic planning, educational planning, facilities planning, technology planning, and personnel planning in a manner that links these planning processes to annual budgets. Planning should be based upon the findings of instructional and non-instructional program review, which should include clear criteria for resource reallocation and/or program and service development, expansion, or termination”

⁴⁸ See the Team’s assessment of CCSF’s response to Recommendation 4, which reads, “While the reserve meets the minimum California community college requirement, it is well below a minimum prudent level.” (2012 Evaluation Report, p.14)

“Recommendation 5: Physical Facilities Contingency Planning - The team recommends that the college **ensure the development of adequate contingency plans**, which should be implemented in a timely manner in order to reduce potential exposure to losses.”

In fact, this particular recommendation was so open-ended that the 2012 Evaluation Team notes that City College seems to have misunderstood it. While CCSF focused on “emergency preparedness and public safety,” the Evaluation Team insisted that this recommendation was in relation to maintaining “sufficient cash flow and reserves to maintain stability and deal with unforeseen incidents.”

“Recommendation 7: Technology Planning - The team recommends that all unit technology plans be brought up to date and that a unified college wide technology plan be developed. **This plan should be integrated with facilities and budget plans**. Funds for technology acquisition and maintenance, including regular replacement of outdated hardware, should be integrated into the institution's budget.”

City College was found to have “responded to the first part of the recommendation”, however, it was found to have not “integrated plans for technology,” because it relied on “bond and grant funding for the acquisition and replacement of hardware.” Bond and grant funding are substantial and important parts of any higher institution’s budget.⁴⁹ The recommendation noticeably did not bar the College’s use of grants to address “Technology Planning.” Like many of the other recommendations, the open-endedness of Recommendation 7 left CCSF vulnerable to a myriad of extraneous and illegitimate criticism.

Though one may not interpret the following recommendations as “open-ended” City College was determined as only having “partially-addressed” these recommendations because, though following the actual text in the request of the recommendations, they had not established explicit policies for them. This requirement is noticeably absent from the recommendations themselves:

Recommendation 1: Mission Statement -The team recommends that the college

⁴⁹ Below we discuss the ACCJC’s comments in 2012 on grants funding and point out that concurrently with the evaluation of CCSF in 2012, the Peralta colleges were evaluated and commended for their successful applications for grants funding; and, a sizable amount of that funding was involved a dean - Peter Crabtree, Barbara Beno’s husband. The same Peter Crabtree who was appointed to the CCSF evaluation team for 2012, discussed below.

regularly **review and approve the mission statement in a discrete process** to ensure that it is clearly addressed.

Recommendation 8: Board of Trustees Evaluation- The team recommends that the Board of Trustees **establish a method of self evaluation**, determine the schedule for this process, and complete self evaluations on a regular basis.

While it is true that a few are more specific, these are mostly beyond the jurisdiction of ACCJC, or flatly conflict with the public policy of California, State law, or the mission of CCSF and the colleges.

“Recommendation 4: Financial Planning and Stability- The team recommends that the college develop a financial strategy that will: match ongoing expenditures with ongoing revenue; maintain the minimum prudent reserve level; reduce the percentage of its annual budget that is utilized for salaries and benefits; and address funding for retiree health benefits costs.”

“Recommendation 3: Student Learning Outcomes- The team recommends that the college ensure that student learning outcomes are fully institutionalized as a core element of college operations, with specific focus on curriculum and program development.”

As we discuss below, ACCJC disregarded California public policy in regard to both the subject of reserves, and funding retiree health benefit future “liabilities.” (Actually, CCSF paid its retiree health benefits “costs” on a pay-as-you-go basis, as the State advised it could do.) As for “student learning outcomes” and the amount of budget spent on salaries and benefits, these both raise issues that require collective bargaining negotiations and agreements.

C. ACCJC’s Recharacterization Takes On Greater Significance In View of Various Irregularities in the 2012 Evaluation

The sheer number of irregularities which confounded the 2012 assessment of CCSF is almost incomprehensible. Just weeks before the team visit, Barbara Beno had openly supported legislation to change the mission of the community colleges, especially San Francisco, when she lobbied in support of SB 1456, discussed below.

The fact is, CCSF had responded to the suggestions made in 2006, and afterward, the Commission ignored CCSF’s actions to “address” the recommendations, and there is no written board policy which requires that a college adopt or implement

recommendations - only that it *address* them. There is a reason the Department of Education adopted regulations requiring evaluations to be based on **clear, written and published standards** - to avoid the sort of mischaracterization and arbitrary action that resulted here.⁵⁰ Whether by sloppiness, inexperience, or design, ACCJC had no right to rely upon an unwritten “practice” **that a college given a recommendation better implement it exactly like ACCJC later decides it should have been done.**

D. ACCJC’s Decision Improperly Shifted the Burden of Proof to CCSF

Federal law demands that ACCJC “apply its standards consistently.” ACCJC failed to do this when it determined CCSF warranted the Show Cause sanction, because it shifted the burden of proof to ACCJC to demonstrate it warranted continuation of accreditation, when the burden is on ACCJC to find that it does not merit continued accreditation.

ACCJC treats colleges on show cause sanction very differently than colleges which are accredited. The Action Policy provides that a college which has been found to have deficiencies in meeting Standards or Requirements shall be placed on one of the three different sanction levels: warning, probation or “Show Cause.”

The Commission Policy provides that a college that is placed on “Show Cause” thereafter has the burden of proving it satisfies ACCJC standards, indicating that ACCJC has the burden of proof when it places a college on one of the three sanction levels, particularly the Show Cause standard. The language of the Policy underscores that Show Cause is a more serious sanction than warning or probation, and that when a college is placed on Show Cause, the burden of proof lies with a college to be removed from that sanction:

“In such cases [of Show Cause status] the burden of proof will rest on the institution to demonstrate why its accreditation should be continued.”
(Commission Action on Institution, Accreditation Reference Handbook, p. 42)⁵¹

When the Show Cause provision is considered in the context of ACCJC’s policies,

⁵⁰ Clear standards are required by **20 USC § 1099b (a) (6)(A)(I)**; published standards are required by **34 CFR § 602.18 (c)**; and the standards must be provided in written materials according to **34 CFR § 602.20**.

⁵¹ All references to Handbook pages are to the 2011 Handbook, in effect when CCSF was reviewed by the Commission, unless otherwise referenced.

it becomes apparent that the Commission shifted the burden of proof for CCSF, which was accredited, because when a college has already been accredited, the burden rests with the Commission to establish that a college no longer warrants fully accredited status, thereby justifying sanctions such as Warning or Probation. In fact, there is no Commission policy which provides that the burden of proof to establish that a college should be continued as fully accredited rests with an institution seeking reaccreditation. To the contrary, and logically, ACCJC policy presently provides that the lesser sanctions of warning, probation or show cause are not instituted unless “the Commission finds” that an institution is deficient. It is only once a college is on Show Cause that the burden shifts. Specifically, the Policy states,

“C. Order Show Cause. When the Commission finds an institution to be in substantial non-compliance with Eligibility Requirements, Accreditation Standards, or Commission policies, or when the institution has not responded to the conditions imposed by the Commission, the Commission will require the institution to Show Cause why its accreditation should not be withdrawn at the end of a stated period by demonstrating that it has corrected the deficiencies noted by the Commission and is in compliance with the Eligibility Requirements, Accreditation Standards or Commission policies. In such cases, the burden of proof will rest on the institution to demonstrate why its accreditation should be continued ...” (Policy on Commission Actions on Institutions, pp. 41-42, emphasis added.)

The Commission has not provided anywhere else in its policies for the “burden of proof” to avoid a sanction, to sit with an already accredited institution, unless the College is already on Show Cause status.⁵² ACCJC has thus acted in a way that it “plainly inconsistent” with the terms of its Policies. The policy wording which places the burden of proof on a college which is on Show Cause would be superfluous unless it signifies a significant shift of the burden of proof. Furthermore, when a college is not accredited, Commission policy indicates that it carries the burden of proving it merits accreditation. Thus, a college seeking accreditation must “demonstrate” that it meets all the Standards and policies. (Action Policy, I. “Actions on Institutions that are Applicants for Candidacy ...”)

As is evident, the Commission policies materially differentiate between colleges on Show Cause status, and those not on Show Cause. Despite this difference, ACCJC

⁵² Elsewhere we discuss whether a shift in the burden of proof, in view of the lack of any appeal from Show Cause status, satisfies Federal common law due process or Constitutional due process.

placed the burden of proof on CCSF to demonstrate that it met Commission standards and requirements even though CCSF had a full reaffirmation of accreditation in Spring of 2006. In determining that CCSF had not met its burden of proof, the Commission explained:

“Show Cause was ordered ... because the College has failed to demonstrate that it meets the requirements outlined in a significant number of Eligibility Requirements and Accreditation Standards.” Sanction Letter, p. 1.

In the Show Cause letter, the Commission affirmed its faith in and reliance on the Report of the Evaluation Team.⁵³ Review of the site visit team’s evaluation report confirms that they frequently remarked that while a “mountain” of evidence was presented in regard to the various Requirements and Standards, the team was “unable” to “verify” that CCSF met the these factors.⁵⁴ Since it was “unable to verify” whether CCSF still met the Standards and Requirements, the *status quo* of accreditation should have remained in effect. Alternatively, the Team or Commission could have sought further clarification or information. It did neither.

Instead of affirmatively “finding” that had CCSF did not meet the Standards and Requirements, it relied instead on its team of experts’ inability to verify CCSF’s meeting standards, and its conclusion that CCSF had “failed to demonstrate” it met the Commission’s Standards and Requirements. In this way, it reversed the burden of proof.

The level of deference accorded to an agency’s interpretation of its own regulations is based, in part, on the thoroughness of the agency’s consideration and validity of its reasoning, it’s consistency, the agency’s care, and the persuasiveness of the

⁵³ “For specific reference to the Eligibility Requirements and Accreditation Standards that CCSF was found by the evaluation team and the Commission not to meet ... the institution is referred to the Evaluation Report which connects each of its findings, conclusions ... to the Eligibility Requirements and Accreditation Standards.” (July 2, 2012 Show Cause letter, p. 2.)

⁵⁴ For example, “the team was unable to verify if such a [financial] model was used for planning...” (Evaluation Report, p. 14); “The visiting team could not confirm that City College of San Francisco adheres to the Eligibility Requirements and Standards of the Accrediting Commission.” (*Id.*, p. 19); “Whether the institution provided information that is complete and accurate ... is unclear based on allegations that were not proved or disproved during the visit.” *Id.*,p. 19]; “... it is less clear how effective this dialogue has been ...” (*Id.*, p. 24); “It is ambiguous whether human resources planning is integrated with institutional planning.” “Moreover, not enough data exists to systematically assess the effective use of human resources ...” “As a result, it is unclear whether or not the goals have been achieved or assessed.” (*Id.*, p. 47)

agency's position. *U.S. v. Mead Corp.* (2001) 533 U.S. 218, 228; *Bowen v. Georgetown University Hospital* (1988) 488 U.S. 204, 212-213; *Regents of the University of California v. Heckler*, 771 F.2d 1182, 1189 (9th Cir. 1985)

Here, the ACCJC has reached a plainly erroneous conclusion, inconsistent with its policies and procedures, converting suggestions for improvement into deficiencies, and relying on the College's supposed disregard of those "suggestions" to justify Show Cause status. Moreover, as explained below, it is also appropriate to consider the other errors which accompanied this conclusion and are discussed below. These included the conflict of interest resulting from the appointment of Barbara Beno's husband to the Evaluation Team, the failure of the Commission to follow its own rules for a team recommendation, the Commission's reliance on unwritten "standards" - OPEB prefunding - which are not widely accepted, its inconsistent application of numerous policies, its repudiation of California law and public policy, its violation of California common law fair procedure, and the other failures denoted herein.

Accordingly, the Show Cause decision is arbitrary and capricious, and an abuse of discretion, and not supported by substantial evidence. Hence, the decision to place CCSF on show cause status must be reversed.

IV. ACCJC's Review of CCSF was Prejudicially Affected by ACCJC's Serious Conflicts of Interest

A. Introduction

ACCJC's review of CCSF in 2012 was prejudiced by serious conflicts of interest which violate Federal and State law and ACCJC regulations. These conflicts not only prejudiced CCSF's review, but also establish that ACCJC is not sufficiently reliable to serve as an accreditor under Federal requirements. These apparent and actual conflicts were the result of deliberate actions by ACCJC's president, staff and commissioners.

These conflicts involved:

(1) the appointment Barbara Beno's husband, Peter Crabtree, to serve on the "visiting" evaluative team, where he was required to review, interpret and apply conclusions set forth in four letters from his wife to CCSF from 2006 to 2010, which were at the core of ACCJC's issuance of Show Cause, thereby compromising the independence of the team and the Commission;

(2) the involvement of the Commission itself and several of its officials, including

President Beno, in publicly supporting controversial partisan legislation in 2012 (S.B. 1456), when it was actively opposed by CCSF and student and faculty groups;

(3) the domination of managerial employees and administrators in the CCSF evaluation process (as is typical of ACCJC evaluation teams), as opposed to peers; and

(4) the sanctioning of CCSF based, in part, on its failure to prefund retiree health benefit liabilities, a criticism arising out of the interrelationship of the ACCJC and the Community College League of California's Retiree Health Benefit program Joint Powers Authority. This conflict involves several individuals, who were involved with both the ACCJC and the JPA, over the same issue - whether the district was prefunding the "Annual Required Contribution" as determined by GASB 45 to cover estimated future retiree health benefit liabilities. First to consider is Steve Kinsella, who is now and has been since 2009 a Commissioner (and frequent site-visit Team member) of ACCJC, is now the Vice Chair of the Commission, and was the founding director and Chair of the CCLC JPA (and remains an alternate JPA board member). As founder and first chair of the JPA, Kinsella solicited colleges to place funds in the JPA. He has had some involvement with the JPA since its creation - either as a member of the board, an alternate member, or the President of a district which belongs to the JPA. His college, Gavilan, invests prefunded contributions in the JPA. Mr. Kinsella, as an evaluation team chair, and member of ACCJC's *ad hoc* task force on the financial Standard, oversaw Reports which encouraged colleges to prefund their estimated OPEB liabilities according to the GASB 45 calculation for the Annual Required Contribution. As a commissioner, Mr. Kinsella presumably followed his obligation to take a position on the accreditation or sanction of colleges. This meant he would have been presented with Evaluation Reports which assessed colleges for prefunding, or not prefunding the GASB 45 "ARC." Mr. Kinsella has also been extensively involved in the JPA, which is set up to receive these contributions. In 2009 a team Kinsella led criticized Palomar Community College, which had joined the CCLC JPA, for not paying enough into the JPA for prefunding.

A second member of the Commission, who has served as a member of the JPA board, and hence appears to have a conflict of interest, is Dr. Frank Gornick. Mr. Gornick became a member of the Commission on July 1, 2009. After that he served as chair of three teams involving the Peralta Community College District in April, 2012, and Sacramento City College in October 2009.⁵⁵ Gornick is the Chancellor of the West Hills District, and thereby has a stake in the JPA. His college has a representative on the Board. Mr Gornick was appointed to the JPA board in or before 2008, although it is unclear how long he remained on the board, whether he is or also was an alternate

⁵⁵ Gornick had previously been chair of San Bernardino Valley College in October 2008.

member. Clearly, he believes in the JPA's mission. As a Team Chair, Gornick's teams issued Reports indicating that colleges needed to take action to identify their OPEB liability and determine *how they would pay through prefunding*.⁵⁶ As a Commissioner, Gornick presumably did his duty and took a position on whether various colleges should take action to identify and satisfy their "Annual Required Contribution" per GASB 45, which in some cases meant placing funds into the JPA which Gornick has been associated with, in his official capacity.⁵⁷

Both Kinsella and Gornick, as Commissioners and/or team members, participated in actions or evaluations which effective or expressly encouraged colleges' to pre-fund the ARC for their "GASB 45-determined" OPEB liabilities. And as board members or alternate members of the CCLC Retiree Health Benefit JPA they either encouraged colleges to join the JPA, or oversaw the JPA which accepted such prefunded contributions from California community colleges. To be precise, they were also board members, or alternate members, of the JPA when it received "irrevocable" contributions of public funds from some community college districts, and, when serving on the board, had some fiduciary responsibility for the JPA's investment decisions. The CCLC JPA also received various fees from member colleges, both startup fees, annual fees, and contribution fees based on the amount of money invested by a district. We estimate these fees at about \$100,000 per year, in recent years, collectively for the colleges participating and paying into the JPA trust.⁵⁸

Besides Kinsella and Gornick, nearly a dozen ACCJC team members who evaluated colleges' prefunding of their "OPEB liabilities" also served as members of the CCLC Retiree Health Benefits JPA board.⁵⁹

⁵⁶ See Peralta Follow-Up Visit Report, April 16-17, 2008, p. 3; see also Peralta Special Visit Report, April 19, 2010, pp. 3-4, 6-7.

⁵⁷ ACCJC does not publish for public review the actions voted upon by individual commissioners, or even the outcome of the vote. This lack of transparency contributes to the atmosphere which tolerates, if not encourages, conflicts of interest.

⁵⁸ A affiliated local of Complainant CFT has requested documents from the JPA which should shed further light on the fees it has collected from California community colleges. The CCLC JPA has been slow to provide requested information. We will amend or supplement this Complaint/Comment when such information is obtained.

⁵⁹ Public information indicates that these include Joe Wyse, Steve Crow, Ken Stoppenbrink, James Austin, Mazie Brewington, Tom Burke, Bonnie Dowd, Sue Rearic, and Kimberly Allen.

CCSF reported that it had *joined* the CCLC JPA in its 2009 Mid-term Report, and in the 2010 Follow-up Report. However, in each report CCSF acknowledged that “The College **did join the investment consortium sponsored by the Community College League for this issue but has not deposited any money into the fund.**” (Mid-team Report, pp. 14; Follow-up Report p. 20, emphasis added) The first Commission review of a CCSF Report that Commissioners Gornick and Kinsella participated in was also the first review where the Commission, “notes that colleges not making the minimum payment of Annual Required Contribution (ARC) are now accumulating unfunded liabilities,” and issued a “Commission Concern” requesting that CCSF “provide information about how the Annual Required Contribution is being handled and **funds in an amount at least equal to the ARC will be paid into an irrevocable trust fund.**” (Emphasis added) Again, since it was detailed in the CCSF Evaluation Report, Commissioners Gornick and Kinsella knew full well that the “irrevocable trust fund” referred to by CCSF was the CCLC JPA in which they were board members or alternate members, or CEO’s of their districts which belonged to the JPA.

The next of these conflicts we will discuss involve the appointment of Barbara Beno’s husband, Peter Crabtree, to the CCSF Evaluation Team for 2012.

B. Barbara Beno’s Husband, Peter Crabtree, Was Appointed to the Visiting Team for CCSF, Thereby Creating an Actual or Apparent Conflict of Interest

Barbara Beno has served as ACCJC’s president for more than 10 years. Her husband is Peter Crabtree, a dean at Laney College. Crabtree has virtually no experience as a team member in ACCJC accreditation evaluations - just once, 10 years ago, he was assigned to evaluate a California community college.⁶⁰ In the case of CCSF he was placed on the team, and had a prominent role in the evaluation process. Putting Crabtree on the team was like putting Beno on the team. This appointment destroyed the independence of the team and the integrity of the evaluation process, particularly given the procedural irregularities which followed. As we show, Crabtree’s presence on the team constitutes an actual or apparent conflict of interest which prejudiced a fair review of CCSF and raises serious questions about the judgment of the Commission and its president.

The seriousness of this conflict warrants detailed review. Sometime in the Winter of 2011, ACCJC appointed a chair and some members of the team which would

⁶⁰ This information is based on an extensive and diligent search of the public record, and it is conceivable he may have been appointed to teams not located.

eventually evaluate CCSF in March, 2012. The chair, President Sandra Serrano from Kern Community College District, was appointed in time to attend the team chair orientation on December 2, 2011, and most of the team was appointed in time to attend the team orientation on February 7, 2012. The team visit, originally planned to begin on March 12, actually began on March 11. And among the 17 team members, ACCJC Staff, over whom President Beno presides, had appointed Peter Crabtree, her husband. Exactly when he was appointed is not publicly known.

When the team assembled in San Francisco at the Handlery Hotel, the team members went through the formality of introducing each other, even though a few came from the same college. When Crabtree introduced himself he did not mention he was married to the Commission president.⁶¹

The “Team Selection” process, as described in July 2011, involved “Commission staff develop[ing] the teams from a roster of experienced educators who have exhibited leadership and balanced judgment ... Each team is selected to provide experienced, **impartial professionals** ... The Commission seeks a balance of experienced and first time evaluators ...” (Team Evaluator Manual, 2011 ed., p. 5)

1. The Evidence of Crabtree’s Role and Responsibility Demonstrates His Conflict of Interest

As should have been readily apparent, Crabtree could not be “impartial” due to his marriage to president Beno, a polarizing figure in the accreditation process in California, and who had issued four evaluative letters to CCSF, in 2006, 2007, 2009, and 2010. As we have already shown, the interpretation given to those letters by the evaluation team and the Commission was a major factor in the issuance of Show Cause. In other words, Crabtree was called upon to review, weigh and rely on assessments, concerns and directives authored by his wife, information we have already shown was mischaracterized the 2006 “recommendations” for quality improvement as “deficiencies.” It should be stressed that the letters Beno wrote in 2007, 2009 and 2010, following Reports of their actions to address the 2006 “recommendations,” were written by Beno without the benefit of a team evaluation. In other words, no team of educators was formed for these reviews. There is no paper trail to indicate the extent to which Beno, as opposed to the

⁶¹ While presumably some of the administrators on the team were aware Crabtree and Beno were married, it came as news to some team members when they learned of the relationship after July 6, 2012. Many faculty and administrators who have subsequently learned of this situation have expressed shock at Crabtree’s appointment, believing it is an obvious conflict of interest.

Commissioners, chose the words or opinions expressed in those letters. Given the wide discretion afforded Beno as ACCJC president, it should rightfully be assumed the words are hers. **On its face, Crabtree was weighing his wife's opinions.**

Mr. Crabtree, as noted already, had rarely served on evaluation teams. His last team service had been in 2006, when he served on the team for Kapi'olani Community College in Hawaii. Before that he had served on the 2004 team for the Sunnyvale campus of the private Brooks College, and in 2002 he had been on the team evaluating San Joaquin-Delta Community College. In other words, it had apparently been 10 years since he had served on a team evaluating a California community college.

Even had he possessed much experience on community college evaluations teams, Crabtree's ability to fairly, consistently and independently apply the Accreditation Standards and Requirements, was presumptively compromised due to his spousal relationship with President Beno. Allegations of conflict of interest arising from their marriage and institutional relations within the Commission had already once been filed with the Department of Education.⁶² The complaint, filed on or about December 22, 2005 by Chancellor Elihu Harris of the Peralta Community College District, alleged that Beno had a conflict of interest involving evaluation of Peralta's colleges, and that Mr. Crabtree publicly "leaked" confidential information about a future Commission sanction to Laney College. That is, the complaint asserted that Crabtree disclosed what the Commission was going to do in an assessment of Laney college in the Peralta District, **before** the Commission had convened to review or vote on any evidence regarding the matter. Nonetheless the content of the "leak" proved to be true (Laney was sanctioned), suggesting the enormous influence President Beno has over the Commission. The Complaint was submitted to Rod Paige, Secretary of Education, John Barth in the Department's Accreditation Office, Joseph Richey (the Chair of the ACCJC), Ralph Wolff (of WASC) and Judith Easton of the Council for Higher Education Accreditation. Harris explicitly alleged:

"... prior to the Commission's meeting in January 2005, Ms. Beno's husband stated to Laney College employees that the colleges would be sanctioned. We find it troubling that Ms. Beno's husband knew that the Commission would place the four colleges on warning even prior to both the colleges' presentation to the Commission and the Commission's decision. It appears that our fate was sealed even before the Commission had a chance to deliberate." (Letter, Chancellor

⁶² Chancellor Harris' complaint alleged, specifically, breach of confidentiality in regard to remarks allegedly made by Crabtree concerning future Commission actions, discussed *infra*. See attached Harris complaint (Attachment 4.B).

Harris to Paige *et al.*, December 22, 2005)

This complaint should have been at the forefront of Beno and the Commission's staff's mind when considering whether or not to place her husband on an evaluation team. Similarly, it should have given Crabtree pause.

Though it is unnecessary to demonstrate exactly what impact Crabtree had on the CCSF evaluation, since as we show below it is an apparent or actual conflict under the law regardless, it must be presumed that Mr. Crabtree had considerable influence over the team's inquiries and assessment. He should be presumed he had, through his marriage to Beno, obtained information about her philosophy and interpretations of accreditation Standards. In view of the ACCJC's opinion of the Student Success Task Force and SB 1456, and CCSF's opposition to it, it must be presumed he was aware of his wife's opinions concerning the role played by CCSF.

For any team members aware of his marriage to Beno, his opinions may have carried extra weight. And for team members unaware of his marriage, it is conceivable that the lack of this knowledge may have led to them to give his opinions more weight than warranted. His presumptive influence is confirmed by the many interviews he was assigned to conduct during the team's March 2012 visit, and his assignment to interview CCSF's witness on grants (the team and Commission found that CCSF's reliance on grants funding was proof of fiscal instability).

Moreover, there is evidence that in the days before the Team Evaluation Report was finalized in or around late April 2012, Crabtree had some influence over the team's final assessment, by suggesting that the Team's Evaluation Report contain stronger criticism than an earlier draft of the Report.

Mr. Crabtree held an important position on the CCSF team, one which would reasonably be understood to have a direct impact on the team's evaluation of CCSF.

* Perhaps the single most damning fact is that Mr. Crabtree, as a member of the 2012 Evaluation Team, *was responsible for reading, interpreting and relying on the contents of the four letters written by his wife in 2006, 2007, 2009 and 2010, in the context of CCSF's response to recommendations from ACCJC.*⁶³ The team

⁶³ The Evaluation Report confirms that "The team made extensive efforts to prepare for the visit ... most team members attended a team orientation provided by the Commission on February 7, 2012 ... Prior to the team visit, team members carefully read the college's self-evaluation and related documents, including the recommendations of the previous accreditation

reviewed the eight recommendations of the 2006 evaluation team, and the team found that the college had “failed to implement the eight recommendations of the 2006 evaluation team ...”⁶⁴ Mr. Crabtree was therefore required to pass judgment on the meaning, weight, and validity to be placed on those four significant letters. The last three of these letters, which were crucial to CCSF’s Show Cause sanction, were written by Ms. Beno **without an underlying visiting team report to offer guidance**. In other words, the only evidence of the Commission’s reaction to them were the letters written by his wife. Hence, Mr. Crabtree’s wife’s credibility and judgment- in either reaching the conclusions appearing in those letters or accurately interpreting or relaying comments of the Commission - were unquestionably a central issue in CCSF’s 2012 evaluation, as shown by the July 2, 2012 letter from Beno to CCSF.

* Crabtree met with the CCSF Department Chairs Council (one of five team members who did so), the CCSF Board of Trustees (along with three other team members), privately with the Vice Chancellor of Administration and Finance, privately with Peter Goldstein, CCSF’s Vice Chancellor for Administration and Finance, David Liggett of Facilities, and Kristie Charling of Grants; the Vice Chancellor of Academic Affairs (the only team member scheduled to meet her), the Dean of Curriculum (the only team member to meet him), the Architecture Chair, the Engineering Chair, the CTE Coordinator, the Business Department Chair, the Computer Science Chair, the Computer Networking Chair, the English Department Chair. Obviously, he had a large role in the evaluation. Altogether, Mr. Crabtree appears to have been assigned to more meetings and activities than any other team member, save one. (Attachment 4.C.)

* Mr. Crabtree was scheduled to, and apparently visited the main Ocean Campus, as well as Mission, Evans, Southeast and Airport, a total of five campuses. Only two or three team members visited three or more campuses. (Attachment 4.C. & 4.D.)⁶⁵

evaluation team that visited the college in 2006.” Team Report, p. 3. In addition, team members confirm the team was provided the 2007, 2009, and 2010 college reports and ACCJC letters in response from President Beno.

⁶⁴ See 2006 Recommendations, the 2012 Report showing the Recommendations reviewed, and the letter from Beno to CCSF dated July 2, 2012.

⁶⁵ Note that Crabtree’s assignments to “Science Basement” is in a building located on the Ocean Campus.

* Mr. Crabtree was assigned to evaluate Standard II - Student Learning Programs and Services, for the Technical Education programs; and Standard III - Resources, in regard to Physical Resources. Student Learning Outcomes have been ACCJC's and Ms. Beno's crusade for the last decade. Standard III - Resources, was one of the Standards which had a substantial impact on CCSF's being sanctioned. (Attachment 4.E.)

* The team's report is composed of the opinions and assessments of the individual team members. There are 11 sub-parts of the four Standards. (Attachment 4.E.) Of these, there was 1 evaluator of four "standards" sections, 2 evaluators of 6 sections, and 3 evaluators of one section.⁶⁶ Crabtree was assigned to two Standard's sections, as were managers Buechner, Elam, James and Haley. The three faculty on the team each were assigned one Standard section. In other words, Crabtree was given a comparatively large responsibility.

* Even though he had not served on a California community college evaluation team in 10 years, with his total experience of 3 teams overall, he appears to be one of the most or the most experienced member of the team.

The Commission's Policy on Public Disclosure, adopted in 2010 and in 1999 and edited in January 2010, was in effect during the 2012 assessment of CCSF. This Policy decreed that,

"The Commission and the institution should maintain appropriate levels of confidentiality during the various stages ... that lead to the Commission's decision." (2010 ed., Policy on Public Disclosure, p. 1)

However, with Crabtree serving on the Team, and Beno working directly with the Commission in its judgment of CCSF - she typically sits with them during their confidential deliberations - she wrote the Show Cause letter to CCSF of July 2, 2012 - and she explained the ACCJC's sanctions to the public - this confidentiality of the various stages is presumptively impaired. In addition, since Show Cause was issued - as an indicator of Beno's involvement - there is evidence, expressed during collective bargaining negotiations between AFT 2121 and CCSF, that she has communicated with CCSF's Interim Chancellors Fisher and Scott-Skillman over actions CCSF should take to

⁶⁶ Buechner evaluated Standard IA; Elam did III.A, James did III.D., and Haggerty did IV.B.; Buechner and Munoz did I.B.; Stewart and Raby did II.B.; Chen and Haley did II.C.; Elam and Crabtree did III.B.; Haley and James did III.C.; and Lacy and Flood did IV.A.; and Redding, Crabtree and Brower did II.A. Munoz, Flood and Brower are faculty.

satisfy the Commission.

Another peculiar situation is that Frank Gornick was the chair of the ACCJC team evaluating Peralta in April 2012, and in that capacity he evaluated and complimented Peralta on what a good job it was doing to obtain grants. And one of the principal investigators over more than one of those grants is Peter Crabtree. In June 2012, Gornick was on the Commission when it rendered its judgment about both CCSF and Peralta. There is evidence that while CCSF was being criticized for depending too much on grants, Peralta was being applauded for its success in obtaining nearly \$30 million in grants. This confluence of facts, along with Gornick's involvement with the CCLC JPA, strongly suggests that Gornick had no business adjudicating CCSF or being on the Peralta team.

Given the ACCJC's policies, and the procedure for institutional assessment, there is no policy allowing individual team members to express their views to Commission staff in regard to the Commission's assessment and the staff's assessment and recommendation. ACCJC's policy indicates then that the recommendation of the staff, and the decision of the commission, is based on the *team's* report. Crabtree's unique ability to have the "ear" of the Commission President presumptively compromised the weight to which the report and conclusions of *the Team* were given.

Managerial and administrative influence was substantial, as should be expected given the appointment of just three faculty out of 17 team members. It was hardly a team of peers, as ACCJC policy requires. Of course, on this point, CCSF's team is a microcosm of ACCJC's overall practice, which we discuss below, of stacking the deck with administrators. In general, faculty have little influence on assessments of districts and are denied any role as leaders of evaluation teams or the individual Standards' assessment.

2. The Evidence of President Beno's Role and Responsibility Demonstrates Her Conflict of Interest

The Bylaws of the Commission provide that its president shall be its Chief Executive Officer, responsible for the general supervision, direction and control of the operations of the ACCJC, including its business and accreditation operations. In other words, broad responsibility. (Bylaws, Article VII, Section 6) Some of the president's specific duties are specified in various ACCJC documents, and others appear from Commission practice.⁶⁷ The following duties are specified in various Manuals and

⁶⁷ There does not appear to be a public job description of her responsibilities.

policies;

- Selecting Visiting teams in conjunction with other staff members (Team Evaluator Manual 2.3)
- Supporting Visiting Teams (Quality Assurance: A Formative Review 2008)
- Provide Information to Review Committees (part of appeal process) (Policy on Review of Commission Actions)
- Reviewing Reports (Quality Assurance: A Formative Review 2008)
- Staffing Review Committees (Policy on Review of Commission Actions)
- Engaging in the national debate on accreditation (practice and various events)
- Reviewing the “statement of reasons” necessary to be deemed as valid in order to be granted an appeal. If staff decides, and the Commission chair concurs, that the statement of reasons is deficient, then appeal is denied, the decision is final, and “not subject to the WASC appeals process.” (Policy on Review of Commission Actions)
- Review public complaints against institutions (Policy on Student and Public Complaints Against Institutions)
- Approve staff consulting with outside organizations or institutions other than member institutions (Policy on Conflict of Interest)
- Process conflict of interest complaints (Policy on Conflict of Interest)
- Give conferences to member institutions, government, and the public on subjects related to quality assurance and institutional improvement (Policy on Public Disclosure and Confidentiality in the Accreditation Process)
- Process Whistleblower Complaints (WASC Constitution Article VIII)

As president of ACCJC, Beno is, through her role in Quality Assurance, and given Federal regulations, charged with assuring uniformity of treatment of CCSF with other colleges, to avoid any inconsistency in the application of Commission Standards and Requirements. Yet in reviewing the CCSF Team Evaluation Report, she would have been aware that the Report *bore her husband's contributions*, and she naturally would have given weight to her husband's conclusions in her discussions with the Commission (and with him). Likewise, Commissioners aware of their marriage might have given his personal views greater weight. And, for the reasons we have advanced, there is a logical risk that he would have shared information with Ms. Beno, that might have had influence.

Given the Commission's public pronouncements and policies regarding its strong policy to avoid even the appearance of conflicts of interest, in order to preserve the integrity of Commission decisions and processes, as well as the conflict alleged as to Beno and Crabtree (at Laney College) in December 2005, it is inconceivable that this conflict was unrecognized.

As president, Barbara Beno has considerable influence over the interpretation and application of Commission policies, and she appears to take an active role in the application of “underground” standards. Having been president of ACCJC for more than a decade, Beno is the Commission’s most well-known spokesperson, and regularly appears before public meetings and private gatherings within the community college community, where she offers her views to the public and interested persons and parties. Among the many appearances she has made which are cited in this Complaint are a public meeting at the College of the Redwoods on March 26, 2012; the Community College League of California on January 26, 2013; the Association of Chief Business Officers of the California Community colleges on October 29, 2011; and the Northern and Southern California CEO’s in March and April 2013. Beno frequently comments directly to colleges and college communities. For instance, she visited Mira Costa College in 2008, where she met with administrators and the faculty, then reviewed and expressed “concern” over college policies (Attachment 4.F.). She also wrote letters to the Legislature on legislation.

In her speaking engagements, Beno generally talks about the accreditation process and the Commission’s application of the Standards. At the NORCAL CEO’s meeting in March 2013 she addressed accreditation, in a talk which was wide-ranging:

"The Department of Education and Congress do not fully understand the community college mission."

"The Department of Education and Members of Congress are always asking me to tell them exactly how many colleges we have 'decertified.' They are using that as a measure of the Commission's effectiveness."

"The Department of Education has complained that colleges have been bouncing between sanction and full accreditation. This bouncing back and forth is evidence of [a] college's dishonesty in mid-term reports and such. They believe colleges are not being truthful in dealing with the Commission, thus, necessitating our developing a new standard focusing on institutional integrity."

"We are no longer 'approving' mid-term reports, we're just 'receiving' them ... because colleges are complaining that they had just had their 'accreditation reaffirmed' with their mid-terms and then get put on sanction a few years later with no warning when they have their regular visit. Well, if the information in your mid-term ... as we've discovered with many colleges ... isn't accurate, it is not the Commission's fault when colleges are put on sanction. We don't have adequate staff to complete thorough reviews of mid-terms, this is why we're just in "receipt"

of them, rather than "approving" them."

As regards a recent sanction of a college for actions of the Board, she said ... "Our goal was to publicly shame them."

In her remarks to the public and college community at Redwoods on March 26, 2012, she reportedly spoke for the Commission. One observer noted she said words to the effect that,

The college had not done what was required of it, that its promises were "no good", and that the **Commission had been** too generous with the College ... the "show cause," was "legally impregnable." **The Commission felt** CR's "failure" to do what was expected of it could "harm the Commission in being a reliable authority," so that the college had to "do it or get out of the club."

She also reportedly said,

There is a hypothesis that the State would not let you close ... that if you re taken over by another college, all employees would keep their jobs and, of course, the Commission, once, in Compton, let Compton keep its unions and employees. That has not worked well for El Camino. **The Commission will not do that again.** If you close, you can become an employee under their own processes, **but the Commission will not allow bargaining units to keep their collective bargaining contracts - you get unemployment and a chance to apply for jobs with the new college.** (See Attachment 4.F.1)

As is evident from these examples, Beno, in her own words, speaks for the Commission.

Beno has also been the recipient of one other charge involving a conflict of sorts. She was accused in May 2010 by Jack Scott, then Chancellor of the Community Colleges, and the State Chancellor's "Accreditation Task Force," that she "handpicked commissioners who tend to support" her views.⁶⁸ As a result of this accusation, the Department of Education required ACCJC to take steps to *end the favoritism* in the appointment of commissioners, although many favorites remain on the Commission.

Ms. Beno's powerful influence within the ACCJC is evident from the wide variety

⁶⁸ See, e.g., Letter, Jack Scott to David Bergeron, May 6, 2010 (Attachment 4.G.)

of activities she engages in, such as presenting training at meetings of the CCLC and frequently writing articles about accreditation for the ACCJC *News*. Ms. Beno and her staff are responsible for appointing all evaluation team members, and for drafting amendments or revisions of Standards. She signs every action letter, and has the authority to initiate investigations. Her various duties for the ACCJC, as well as her frequent implications that her word is representative of the views of the Commission delineate how enmeshed she is with its activities in evaluating institutions and issuing accreditation decisions. As such, it would be improper for her to serve on an evaluation team, as it would compromise the independent review required by **34 CFR §602.17(e)**⁶⁹.

Because Mr. Crabtree is the spouse of ACCJC president Beno, his participation as a member of the evaluation team appears to be, had the potential to be, and actually was, a conflict of interest which calls into question the impartiality of the Report, and the subsequent actions of Ms. Beno and the Commission. Appointing her husband to the CCSF team was a conflict of interest. It is also akin to appointing herself to evaluation team, and thereby violates the federal requirement that an accreditation agency must conduct an independent analysis of site-visit reports. We next review the evidence we have discussed, in view of the applicable legal standards.

3. The Actual or Apparent Conflicts Between Beno and CCSF, and by Extension Her Husband Crabtree

As previously discussed, the conflict of ACCJC's placing President Beno's husband on the CCSF Evaluation Team is broader than President Beno's role as the President and chief spokesperson for ACCJC. President Beno was also responsible for writing four crucial letters concerning CCSF's activities in response to recommendations made in 2006. In the last three of these letters, Beno, without a formal finding of the Commission, erroneously recharacterized the 2006 suggestions for quality improvement as "deficiencies." This interpretation, eventually adopted by the 2012 evaluation team and the Commission itself, greatly enhanced the degree to which CCSF was found to be violating Commissions Standards and directives.

Mr. Crabtree, as a member of the 2012 Evaluation Team, was responsible for reading and digesting the contents of those four letters written *by his wife*, in the context of CCSF's response to recommendations. He was required to pass judgment on the meaning, interpretation, and validity to be placed on those four significant letters. As we

⁶⁹ Requires that the agency "**conducts its own analysis** of the self-study and supporting documentation furnished by the institution or program, **the report of the onsite review...**" [emphasis added.]

have emphasized, the last three of these letters, which were crucial to CCSF's Show Cause sanction, were written by Ms. Beno without an underlying visiting team report to offer guidance. Hence, Crabtree's wife's credibility - in either reaching the conclusions appearing in those letters or accurately interpreting or relaying comments by the Commission - might well have been an issue in CCSF's 2012 evaluation.⁷⁰

Regardless of whether Crabtree actually shared his views with the team, or emphasized CCSF's alleged "failures" to address "recommendations" as recharacterized by his wife in her letters of 2007, 2009 and 2010, the ACCJC's policies indicate the Commission has a legitimate interest in preventing views about the college from being provided outside the established team assessment process, during the review itself. The appointment of Crabtree to the team destroyed the wall which is supposed to exist between the evaluation team and the Commission staff, who have a role in presenting the team's assessment to the Commission, who are free to discuss colleges' assessments with commissioners, and who write the Commission's sanction letter.⁷¹ ACCJC, its president, and Crabtree, should have known better that to create this apparent and real conflict of interest.

Beno through her activities as President of the ACCJC and as a Trustee for the Campaign for College Opportunity aggressively supported the recommendations of the Student Success Task Force, and SB 1456. City College was vocal and active in opposition, marching on the State Capitol and interrupting a meeting where the Board of Governor's was to elect to adopt the Task Force's recommendations. Just two weeks after CCSF's disruptive appearance at the January 9, 2012 Board of Governor's meeting, ACCJC came out as a partisan opponent of the views expressed by CCSF. CCSF's refusal to reconsider its "mission" became one of the subjects of ACCJC's criticism of the college in the Team evaluation. And in April 2012, as the team evaluation was being prepared, Beno wrote, on behalf of ACCJC, to about two dozen legislators urging support for the legislation (SB 1456) opposed by CCSF's Board of Trustees. As discussed later in this complaint, the efforts of City College and other community college constituencies around the state, greatly reduced the effectiveness of the Task Force and SB 1456 as

⁷⁰ The Commission issued no written decision or finding in 2007, 2009 or 2010 in response to CCSF's three reports. Hence, under ACCJC's procedures, the three letters from Ms. Beno about CCSF would need to be viewed as her opinions, or her interpretation of what Commissioner's expressed about CCSF's reports. As such, the weight afforded those three letters would necessarily, for Mr. Crabtree, mean that he would be assessing his wife's credibility.

⁷¹ See *Ortiz v. Los Angeles Police Relief Association* (2002) 98 Cal. App. 4th 1288, 1313.

originally envisioned. The fight over this policy continued during the time of Crabtree's participation on City College's site-visit and the Commission deliberation on its future. It would not be proper given this circumstance, for Beno to partake in the evaluation of City College. Thus, it was not proper that her husband did.

Barbara Beno and the ACCJC have repeatedly enforced an incorrect interpretation of GASB 45 amongst its member institutions. Two of the Commissioners for the ACCJC also served on the Community College League of California's JPA, to which the Commission repeatedly directed colleges to input funds. As discussed in this Complaint, the ACCJC's interpretation of GASB 45 is wildly inaccurate, and beyond the scope of ACCJC's power to require of their member institutions. Furthermore, it directly conflicts with an Advisory from the State Chancellor's Office. Mr. Crabtree would have been beholden to his wife's view on how to apply this particular "standard," which would have prejudiced his review of CCSF.

Additionally, as we have emphasized earlier, President Beno, Dean Crabtree and the ACCJC should have been especially sensitive to conflicts of interest arising out of their marriage, since their relationship has previously contributed to an allegation of conflict of interest, by former Peralta Chancellor Elihu Harris, in the ACCJC's actions toward the colleges of the Peralta Community College District. Chancellor Harris also alleged, *inter alia*, that

"... prior to the Commission's meeting in January 200[6], Ms. Beno's husband stated to Laney College employees that the college would be sanctioned. We find it very troubling that Ms. Beno's husband knew that the Commission would place the four colleges on warning even prior to both the colleges' presentation to the Commission and the Commission's decision. It appears that our face was sealed even before the Commission had a chance to deliberate." *Id.* at p. 2.⁷²

Again, it is a particularly troubling allegation that Crabtree had inside knowledge, from his wife, that the Commission would be issuing Laney a sanction *before* the Commission had held its meeting to decide whether it would issue a sanction.⁷³ The situation alleged by Harris would logically have prompted ACCJC and president Beno to

⁷² Chancellor Harris complained about several other ACCJC actions, including the ACCJC's staff's "concentrated campaign against our colleges," selecting visiting Team members without granting the colleges the courtesy of participating in the selection process, and dictating a visitation date without confirming college availability.

⁷³ We emphasize that we are unclear on the outcome of the Harris' complaint.

avoid other potential, apparent or actual conflicts with Crabtree. Instead, they opened themselves up to the appearance of a conflict. *While we have no way to ascertain the truth of Chancellor Harris' accusation, and make no judgment as to whether or not Beno breached confidentiality or Crabtree acted as alleged, what matters is that the accusation was made.* That establishes the sensitivity of the situation in which one spouse is in a position to breach confidentiality, to the detriment of a college such as Laney, or, as here, CCSF. Hence, ACCJC should have been especially cognizant of the issue.

In sanctioning CCSF based on the assessments of a team which included Mr. Crabtree, ACCJC prejudiced a fair review of CCSF. Because this married couple have different last names, the conflict was not readily apparent to all of those on the evaluation team. Those who were aware, if any, also presumably failed in their responsibility to raise the conflict of interest issue, as required by ACCJC policy cited above.

4. The Role of the Team Evaluators Is Crucial to Accreditation

The Commission places enormous responsibility on the evaluation team and its evaluators. They have no choice. The Commissioners, unless a rare occasion when one is placed on a team (and then they should be recused) never interview anyone or collect any evidence. That is the role of the evaluation team. Hence, the Commission is dependent on what appears in the team Report. This is evident from the 2011 Team Evaluator Manual. The Manual emphasizes that evaluation teams are crucial to non-governmental accreditation, and that the evaluation team has enormous responsibility for the evaluation. (2011 Team Evaluator Manual, p. 3)

Evaluation teams are appointed by the ACCJC from a roster. Any team member who participates in a team's evaluation, is making assessments which are presented to the Commission, along with a team recommendation. The Commission presumably reaches its own opinions as to what action, if any, to take towards a college. That is what the policy provides.

The Commission itself does not conduct its own investigation into a college's qualifications for accreditation, nor does the Commission gather its own information. It does not interview the numerous employees who were interviewed by the evaluation team. Rather, *the Commission relies on the team, including the team's impartiality, independence and expertise.* The team represents the Commission. As previously discussed, it would indisputably be improper for the Commission's president to serve on a team, especially this team given her prior letters and actions, and then have the

Commission rely upon the President's assessment as part of the team.⁷⁴ But in placing Ms. Beno's husband on the team, the Commission effectively put Ms. Beno on the team. Given the broad interpretation of conflict of interest which applies under State and Federal law, it must be presumed that her views influenced the assessments of Mr. Crabtree. The requirement that Team evaluators be impartial and independent from the Commission is reiterated many times throughout their policies.

An evaluation team member is expected to provide "an *independent review* of an institution." (Team Evaluator Manual, Article 3.1, 2011 ed.) The Evaluator Manual emphasizes that:

"Team members have a special **responsibility to maintain the integrity of the evaluation process** and outcomes which enables private, nongovernmental accreditation to meet its goals. Quality assurance to the public and institutional improvement for institutions can only be achieved through the conscious commitment of those who participate." (Team Evaluator Manual, p. 4, 2011 ed., emphasis added)

"Each team is selected to provide experienced, **impartial professionals** appropriate for the institution being evaluated ..." (2011 Team Evaluator Manual, p. 5, emphasis added)

"The evaluation team provides an **independent peer review** of an institution ..." (Team Evaluator Manual, July 2011, p. 6, emphasis added)

"Evaluators must also be analytic and use evidentiary materials, have strong interpersonal skills, be able to **apply Accreditation Standards to institutions objectively**, ... and work well as members of the team." (ACCJC News, Special Edition, February 2011, p. 6, emphasis added)

"In short, **the evaluator must be diagnostic, impartial**, and ultimately, able to make recommendations for improvement to the institution." (Team Evaluator Manual, 2011 Ed., p. 9)

Crabtree's spousal relationship with President Beno violates these policies. The team is supposed to be composed of a variety of "experienced, impartial educators,"

⁷⁴ Ms. Beno was chair of three teams visiting Hawaii colleges in 2003, 2004 and 2005, and of Compton Community College District just before it was disaccredited. We have argued below that her service on these teams was improper.

selected with great care by the Commission staff. (*Id.*, p. 5) The Manual relates in detail the multiple tasks of the team evaluators: conduct comprehensive visits, reviews data and records, “identify members of the college community to interview and prepare interview questions based on identified issues,” “assess the Self Study Report ...,” “assess the institution’s educational outcomes,” (*Id.*, pp. 7-9) Team evaluators prepare “written statements on their assignments.” These form the ultimate team report, which includes recommendations for improvement. (*Id.*, pp. 15, 17 - 23.

The team evaluators “are required to attend a team training workshop” before the visit, and chairs attend a special workshop. *Id.* The team is required to review “copies of all previous team reports, any Progress Reports, and Commission action letters.” They are also responsible for, “Evaluat[ing] the college using the Accreditation Standards, confirm[ing] and find[ing] evidence for the college’s assertions in its Self-Study Report,” (Team Evaluator Manual., pp. 3-4) The chair is required to review the most recent annual report and a summary of complaints against a college. *Id.* p. 6)

To summarize, the Team, with Peter Crabtree playing an important role, was required to read, understand and then evaluate CCSF in view of their understanding of President Beno’s four letters from 2006 through 2010, which are an important part of the history of ACCJC’s assessment of CCSF. This situation is akin to a jury in a criminal trial, which is pondering fate of a defendant, weighing the testimony of witnesses, one of whom is the *juror’s wife*. Obviously people would realize that this conflict disqualified the juror from hearing the matter. How then, could the Commission have appointed Peter Crabtree to the Evaluation Team? It is readily apparent why this appointment calls into question the integrity of the Commission’s review of CCSF, and its integrity in general. Furthermore, Crabtree’s mere presence on the site-visit team violates Commission policy that Evaluation Teams be “independent” and “impartial.”

The Team’s Recommendation of Action

One of the teams most important duties is to decide upon, prepare and then sign the teams’ “Confidential Recommendation to the Commission.” (*Id.*, p. 15 and Appendix A) As the Team Evaluator Manual explains,

“The team will also make a decision on its confidential recommendation to the Commission for action on the Institution’s accredited status. This will NOT be shared with the institution. The team will make a recommendation to: a. Reaffirm accreditation ... b. Reaffirm Accreditation with a Follow-Up Report ... c. Reaffirm Accreditation with a Follow-Up Report and Visit ... d. Defer action ... e. Issue a Warning ... f. Impose Probation ... g. Order Show Cause ... h. Terminate

Accreditation.” (Team Evaluator Manual, 2011 ed., pp. 15-16, emphasis added except as to “NOT,” the “all capital emphasis” being in the original).

The team holds a “exit meeting” with the college community. However, the team is cautioned that it cannot share its confidential recommendation with the college:

“Note. Under no circumstances should the visiting team’s confidential recommendation concerning candidacy or accreditation of the institution be revealed. **This recommendation will be acted upon by the Commission before the official outcome of the visit is determined.**” (Team Evaluator Manual, 2011 ed., p. 16, emphasis added)

Where is this recommendation? The recommendation is not made public, nor given to the college - we argue, below, that this policy violates common law fair procedure under California law. But the absence of proof a team recommendation was made leaves room for doubt. In the instant matter, evidence establishes that there was no signed, team recommendation of *action by the Commission* (although there was a team recommendation as to the Standards). Contrary to policy, evidence shows that the team did **not** make a team action recommendation. We ask the Commission and the Department of Education to produce whatever documents were signed by the team to resolve this presumed dispute, and we request an opportunity to inspect any such documents produced by ACCJC in response to this request.

While in the case of City College no legitimate, signed recommendation was reportedly made by the evaluation team, *had the Commission received* a recommendation from the evaluation team, it would have been tainted by Mr. Crabtree’s conflict of interest. And without one, his comments to his wife still would have presumptively had an effect. Moreover, he was a primary investigator, and had a part in the teams Evaluation Report. Information he obtained and interpreted would have formed a part of it.

Given the evaluators’ sizable responsibility for evaluation and recommendation, it is apparent why ACCJC relies on the impartiality of the evaluators it selects for the team. This presents the question as to why in the case of CCSF, and in other instances, ACCJC has placed individuals on teams who are *not* impartial, or have the appearance of not being impartial. No legitimate answer is apparent.

ACCJC has a duty to avoid conflicts of interest

Under the scheme of private accrediting agencies reviewing governmental entities,

such as the California community colleges, the law demands that systems be in place, to prevent conflicts of interest within the accreditation process. Federal law expressly requires that accrediting bodies have “[c]lear and effective controls against conflicts of interest or the appearance of conflicts of interest by the agency’s ... (iii) Evaluation team members ... (v) Administrative staff, and (vi) Other agency representatives.” 34 C.F.R. § 602.15(a)(6)

Besides the above regulation, ACCJC is also required to avoid conflicts of interest under the doctrine of Federal common law due process. *See, e.g., Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 876. Furthermore, as a California nonprofit organization, ACCJC is also required by California’s doctrine of common law fair procedure, to avoid conflicts of interest. *See, e.g., Smith v. Selma Community Hospital* (2008) 164 Cal. App. 4th 1478, 1512; *Mennig v. City Council* (1978) 86 Cal. App. 3d 341, 351; *City of Fairfield v. Superior Court* (1975) 15 Cal. 3d 194, 217.

ACCJC Policy is To Avoid Conflicts of Interest or Their Appearance

As required, by **34 CFR § 602.15(a)(6)**, ACCJC has adopted several policies which address conflicts of interest. It appears to have adopted a conflict of interest policy by at least 1997, which was subsequently revised and edited in 1999, 2001, 2005 and 2006. It was the 2006 version of this Policy which was in effect when CCSF underwent review in 2012. Having dealt with this Policy so frequently, it seems inconceivable the ACCJC would place Crabtree on the team. That he was apparently not introduced to the team when they assembled in San Francisco as Barbara Beno’s husband, is certainly suggestive of chicanery. It is likely that every person on that team would have had a reaction to this information, regardless of thier views of president Beno.

ACCJC’s “Policy on Conflicts of Interest for Commissioners, Evaluators, Consultants, Administrative Staff, and Other Agency Representatives” (2011 Handbook, pp. 125-127, referred to herein as “Conflict of Interest Policy) provided, in part, that:

“The Commission will *not knowingly invite or assign participation in the evaluation of an institution anyone who has a conflict of interest or the appearance thereof.*” *Id.*, p. 125, emphasis added.

The ACCJC should be especially sensitive to actual or apparent conflicts of interest for evaluation team members, since its policies explicitly recognize the responsibility it places on itself to avoid conflicts and maintain impartiality:

“The Commission has the responsibility to assure that evaluation team members

are **impartial, objective and without conflict of interest.**” (Policy on Rights and Responsibilities of ACCJC and Member Institutions, 2011 Handbook, § D, p. 102, herein the “Rights Policy”, emphasis added)

The 2011 Conflict of Interest Policy, in place at the time of the CCSF site-visit and Commission action, affirmed that “the intent of the Commission is to ... make all of its decisions in an atmosphere which avoids even the **appearance of a conflict of interest.**” (“Conflict of Interest Policy”, 2011 Handbook p. 125, emphasis added)

In a *Special Edition* of the ACCJC *News* published in February 2011, the Commission highlighted how it ensures that its decisions are “fair and unbiased, and that its evaluation teams are unbiased.” It emphasized that, “**team evaluators with a conflict or potential conflict are not permitted to serve on a team, and are removed from an evaluation team**” when a conflict is identified. *Id.*, emphasis added. Here, the Commission staff made the appointment, and hence was fully aware that Crabtree had been appointed to the team. Regardless of whether she personally approved, and it seems inconceivable she was out of the loop - knowledge should be imputed to Beno. In other words, Beno knew or should have known her husband was serving on the Team.

The Commission policy identifies several actual or apparent conflicts, although the list confirms that it is not exhaustive. And while the Policy explicitly recognizes that no one may participate in an evaluation of an institution who has a “close personal or familial relationships with a member of the institution/district,” there can be no doubt that a marriage or other close personal or familial relationship between a member of the evaluation team and the Commission itself, or a high-level staff member such as its president, constitutes both the appearance of, and an actual, conflict of interest. It certainly violates the principle that Evaluation Teams be “independent” and “objective.”

Again, much of the evidence that the Evaluation Team reviewed was personally authored to Beno, and Crabtree would have been especially beholden to its perspective. Furthermore, Barbara Beno, because of her heavy involvement supporting SB 1456 and the Student Success Task Force’s Recommendations, in opposition to City College, had a bias against CCSF that could have colored her husband’s perception of the school. Despite all its pronouncements about avoiding even the potential for or appearance of a conflict, ACCJC, Ms. Beno and Mr. Crabtree, disregarded this precept in appointing Peter Crabtree to the CCSF evaluation team.

5. The Appointment of Peter Crabtree Was An Actual or Apparent Conflict of Interest

Impartiality is a element of due process under any standard, whether Federal common law due process or California's common law of fair procedure. See, e.g., *Marlboro Corp. v. Association of Independent Colleges*, 556 F. 2d 78, 82 (1st Cir. 1977); *Auburn University v. Southern Association of Colleges and Schools, Inc.*, 489 F. Supp. 2d 1362 (N.D. Ga. 2002)

Both ACCJC's president, Barbara Beno, and Peter Crabtree, a presumptively influential member of the CCSF evaluation team, failed in this responsibility. Again, the appointment of Crabtree to the Evaluation Team is akin to appointing Beno herself. Besides violating Federal regulations and ACCJC policy, Mr. Crabtree's action if failing to recuse himself violates California's common law prohibition against conflict of interest. California's law construes that prohibition broadly to include *any interest*, "other than perhaps a remote or minimal interest," which might influence official duty. See *People v. Honig* (1996) 48 Cal. App.4th 289, 317, 55 Cal. Rptr.2d 555.

Conflict of interest statutes and policies are based upon "[t]he truism that a person cannot serve two masters simultaneously" *Thomson v. Call* (1985) 38 Cal. 3d 633, 637, 214 Cal. Rptr. 139, 699 P.2d 316. Federal common law due process and California law on common law fair procedure both dictate that a tribunal deciding a matter meet "currently prevailing standards of impartiality." *Wong Yang Sung v. McGrath* (1949) 339 U.S. 33, 50; *Appelbaum v. Board of Directors* (1989) 164 Cal. App. 3d 648, 657. Personal embroilment in a dispute voids the resulting decision. *Mennig v. City Council* (1978) 86 Cal. App. 3d 341, 351; *City of Fairfield v. Superior Court* (1975) 15 Cal. 3d 194, 217; *Taylor v. Hayes* (1974) 418 U.S. 488, 501-503.

Here, Barbara Beno was "embroiled" in the accreditation of CCSF - she had personally endorsed legislation to change the mission of CCSF (discussed *infra.*), had opposed CCSF before the Legislature, and was a member of an organization (Campaign for College Opportunity), which opposed CCSF's vision of its mission and that of the community colleges. Furthermore, she was embroiled in one of the larger issues involved in the CCSF sanction, its handling of GASB 45 "liabilities," where the Commission was entwined with a JPA which benefitted from its position on GASB 45 (discussed *infra.*).

Ms. Beno has strongly held views about how the Standards and Requirements, which she is not shy about sharing, should be interpreted and applied, and has been an outspoken critic of unionism. CCSF's union, AFT 2121, has a reputation as one of the most effective and powerful in the State, and has negotiated contractual protections uncommon throughout California community colleges.

Ms. Beno or her staff was responsible for selecting the team, and she has been

active in supporting administrators, and seeking to reduce the power of governing boards, such as CCSF's board.

Peter Crabtree was given and exercised considerable authority in the evaluation of CCSF. As a team member, it was his duty to read and weigh the Commission's actions towards CCSF in 2006 and afterwards. Every one of the Commission's four letters was signed by his wife. As discussed, Crabtree's appointment compromised the independence which is supposed to accompany a team of educational evaluators. Crabtree could not give his undivided and absolute loyalty to treat CCSF fairly, due to his allegiance to Ms. Beno, his wife. California's conflict-of-interest statutes, like most such statutes across the nation, are concerned with what "might have happened" rather than merely what actually happened. They pay close attention to conduct which "tempts dishonor." *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 570, 25 Cal. Rptr. 441, 375 P.2d 289.⁷⁵

Conflict of interest laws and policies are aimed at removing or limiting the possibility of any personal influence, either directly or indirectly, which might bear upon an official's decision. *Stigall, supra.*, at p. 569. By including Mr. Crabtree on the team, prejudice or bias must be imputed to him, which thereby affected the work and conclusions of the evaluation team.

These statutes are aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer's undivided and un-compromised allegiance. *Thomson v. Call, supra*, 38 Cal.3d at p. 648, 214 Cal. Rptr. 139, 699 P.2d 316. Their objective "is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision...." *Stigall v. City of Taft, supra*, 58 Cal.2d at p. 569, 25 Cal. Rptr. 441, 375 P.2d 289. These policies recognize that a person cannot serve two "masters" simultaneously. *Lexin v. Superior Court* (2010) 47 Cal. 4th 1050, 1073.

In the case of married officials, it has "long been held that a person's interest in a spouses employment and income is a financial interest within the meaning" of California's broad conflict of interest law, Government Code section 1050. *People v. Honig, supra.*, 48 Cal. App. 4th at 319.

The court in *People v. Honig* explained,

"In enacting the conflict-of-interest provisions the Legislature was not concerned

⁷⁵ *Stigall* interpreted California Government Code section 1090, which codified some of the common law prohibitions on public officials having a conflict of interest.

with the technical terms and rules applicable to the making of contracts, but instead sought to establish rules governing the conduct of governmental officials. (*Stigall v. City of Taft, supra*, 58 Cal.2d at p. 569, 25 Cal. Rptr. 441, 375 P.2d 289.) Accordingly, those provisions cannot be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose. (*Id.* at pp. 569, 571, 25 Cal. Rptr. 441, 375 P.2d 289; *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237, 69 Cal.Rptr. 251.) *Honig, supra.*, 48 Cal.App.4th at 314-315.

Here, the spouse, Beno, was directly involved in ACCJC's review of CCSF, writing the Show Cause letter of July 2, 2012. She wrote the 2006 letter containing the controversial "recommendations," and the 2007, 2009 and 2010 letters, which recharacterized how CCSF was to address those "recommendations." She has been reported by CCSF to have given direction to it since the sanctions letter was issued. She has expressed that the Commission is under pressure from the Federal government to sanction colleges, and to not give them much time to meet Standards.

The "Show Cause" sanction of CCSF brought several benefits to ACCJC - apart from the national attention, it brings money - from ACCJC's continuing assessment of fees to CCSF. Conflict of interest "*cannot be given a narrow and technical interpretation that would limit [its] scope and defeat the legislative purpose.*" *People v. Honig, supra.*, 48 Cal. App.4th at 314 (emphasis added) In *Honig*, the court construed the "financially interested" element in section 1090 to include not only financial benefits a governmental official personally received, but also those accruing to a nonprofit organization employing the official's spouse. Rulings under section 1090 are appropriate precedent for interpreting common law fair procedure.

6. Summary of Conflict Resulting from Crabtree's Appointment

The involvement by Ms. Beno and her husband in the evaluation of CCSF violated the Commission's Conflict of Interest Policy, and the common law conflict of interest doctrine which is recognized in California as a component of fair procedure. It also violated Federal regulations and Federal law. This conflict of interest, both apparent, potential, and actual, prejudiced a fair review of CCSF. The assignment of Crabtree to the Team demonstrates a "foreclosure of fairness" as a practical or legal matter, requiring the Show Cause sanction to be set aside. *Applebaum v. Board of Directors, supra.*, (1980) 104 Cal. App. 3d 648, at 657.

We have discussed this conflict in considerable detail because of the disastrous harm suffered by the College, its students, the employees and the public, and the

seriousness of this conflict.

Under the circumstances here, Mr. Crabtree could not give his undivided and absolute loyalty to serving impartially on the evaluation team, and treat CCSF objectively, due to his allegiance to his wife. The Show Cause sanction is null and void, and must be rescinded, and CCSF restored to the *status quo* before this conflict took place.

C. ACCJC’s Participation in Lobbying for Partisan Legislation, Especially Legislation Opposed by CCSF, Is Inconsistent With Its Role and Responsibility as an Impartial Accreditor, and Created a Conflict of Interest with CCSF and Breached Its Fiduciary Duty

In December of 1959, the Board of Regents of the University of California and the State Board of Education, unanimously approved the “Master Plan” for Education in California. As one of its principal architects remarked, it was “the high step forward in higher education in the State of California.” That speaker, Governor Pat Brown, would sign it into law in Spring 1960.⁷⁶ One of the core features of the Plan was “universal access to higher education. It is this feature which the Commission and its president decided to challenge. In so doing, it engaged in a conflict of interest. While interest groups and trade associations are free to take sides over such public policies, an accreditor mandated to impartially judge colleges and respect the State’s mission cannot also seek to change it. And it definitely cannot do so when its principal opponent is the college it is then accrediting, City College of San Francisco. But that is what happened.

1. Introduction - ACCJC, the Student Success Task Force and SB 1456

This conflict of interest and breach of fiduciary duty involving ACCJC and its evaluation of CCSF, arises out of the Commission’s action in engaging in partisan political activity on one side of this contentious and very public community college issue, when CCSF (and other colleges and labor organizations) were on the other side. CCSF was not just any opponent - it was the leader of the opposition. The Commission’s decision to publicly take sides in such a partisan public issue, at the same time it was evaluating the leading opponent of legislation that ACCJC supported, is the type of behavior which makes it an unreliable accreditor under Federal law. It also should have disqualified it from evaluating CCSF during 2012. After all, CCSF is a member of the ACCJC, and in that capacity the Commission receives, during evaluations, information

⁷⁶ *California Rising: The Life and Times of Pat Brown*, Ethan Rarick, University of California Press, 2005, pp. 147, 163.

from CCSF about its mission. Given all of this, ACCJC never should have entered this ring for this fight.

During 2011 and 2012, ACCJC actively and publicly supported the controversial recommendations made by a task force created by the State Chancellors Office, the “Student Success Task Force,” and its resulting legislative bill, SB 1456. This bill, as originally proposed, attempted to significantly change the *mission* of California’s community colleges and California’s Master Plan for Education. Most controversial was the proposal, considered radical by many within the community college system, to eliminate “open access” to the California community colleges. “Open access” has been at the core of the community college system, a part of California’s Master Plan for Education, for more than half a century. Opposing the proposals of the Task Force and SB 1456 were several organizations, but CCSF was among the most public and outspoken.

ACCJC’s partisan advocacy for SB 1456, occurring concurrently with ACCJC’s review of its member CCSF, and prevented ACCJC from serving as an impartial accreditor of California’s community colleges, especially of CCSF. As we discuss below, ACCJC’s lobbying activities violated specific Federal laws and regulations, Federal common law due process, and California common law fair procedure. We address these violations in this section, for efficiency purposes.

Notwithstanding ACCJC’s having adopted numerous conflict of interest policies, these policies have not prevented ACCJC’s involvement in hotly contested, partisan California legislation, of which SB 1456 is a prime example. In this sense, ACCJC appears to view itself as being like any other trade association, oblivious to its role as an impartial evaluator.

To fully appreciate the seriousness of ACCJC’s advocacy for SB 1456 and the Task Force’s recommendations, it is worthwhile to review the historical mission of the California community colleges, the mission which SB 1456 was originally designed to significantly change, the mission which created led to this partisan dispute, and the history of the Task Force and SB 1456.

2. Support and Opposition: S.B. 1456, the Student Success Task Force and ACCJC’s Involvement in Partisan Advocacy

As explained below, the open-access mission of the California community college came under intense debate in 2011 and 2012, when diametrically-opposed bills were introduced to cope with the impact of the economic recession, strained financial

resources, and proposals to eliminate California’s mission of open access to the community colleges and “improve” student success.

A primary moving party behind “rationing” higher education by changing the mission was the Student Success Task Force, created by the State Chancellor’s Office, the Campaign for College Opportunity, the Community College League of California, the Association of California Community College Administrators, several community college districts, and various trade associations and interest groups.⁷⁷ ACCJC was among the key supporters of SB 1456 which appeared by mid-January 2012, and which expressed a distinctly narrowing view of the mission of California’s community college system.

On the opposition side stood those who advocated for retaining the historic “open access” mission. Although this group included a number of faculty organizations, its titular leader was City College of San Francisco.⁷⁸ This was evident from the huge number of CCSF students, faculty, and associations which addressed the Board of Governors meeting on January 9, 2012. But it was not only these folks - the Board of Trustees and administrators within CCSF also worked to oppose SB 1456. It is worth summarizing how that situation arose.

3. Background of the Student Success Task Force Recommendations and SB 1456

The Student Success Task Force, announced by the California Community Colleges in January 2011, was aimed at developing a strategy “to help community college students to succeed”⁷⁹ and to deal with the monumental costs of the rescission. The 20 members of the Task Force were appointed by the Chancellor’s Office and included

⁷⁷ While the term “rationing” was applied by various parties, some groups described the bills as “focusing funding on core services related to matriculation ...” and reforming a de facto rationing system. (See, e.g., Scott Bray, ACCCA to Senator Lowenthal, March 16, 2012, Attachment 4.H., and Press Release, February 1, 2012, California Community Colleges Chancellor’s Office, Attachment 4.I.)

⁷⁸ These included the Faculty Association for the California Community Colleges (FACCC), the Academic Senate for the California Community Colleges, the Community Colleges Independents’ Association (CCCI), the California Federation of Teachers (CFT), and the California Teachers Association (CTA) (See Attachment 4.J., p.11).

⁷⁹ Press Release, California Community Colleges Chancellor’s Office, January 18, 2011, p. 1 (Attachment 4.K.)

mostly college administrators or board members, and four faculty representatives.⁸⁰ From the beginning it appeared to some that the Task Force already knew what it wanted. Regardless, it was dominated by management, with 11 administrators, 3 board members, and the 4 faculty representatives.

The Task Force did not start with a clean slate. The managerial and administrative members already had a goal in mind, even though they held more than a dozen public meetings and hearings during 2011. The first draft of their proposals was issued on April 30, 2011, and a second draft in December 2011. To garner support for its recommendations, the Task Force, led by the State Chancellor Jack Scott, toured the State for two weeks, holding press conferences and town hall meetings. The message was clear that they had in mind significantly limiting the historic mission of the community colleges:

“Education leaders are touring the state to promote a new master plan for community colleges. It’s called the ‘Student Success Task Force,’ and it calls for refocusing the state’s 112 community colleges to emphasize goal completion, rather than the historic priority of open access to all.” (Editorial, November 2, 2011, *Visalia Times*, Attachment 4.M.)

These proposals generally adhered to the notion that the Master Plan and mission needed to be drastically changed, to minimize if not eliminate the open access rule, and change the focus of the community colleges to adults ages 18-24, especially those with clearly defined vocational goals, as opposed to the lifelong learning model in place for decades.

Among the more controversial proposals of the Task Force were these that limited funding for students:

(1) It would have required students to decide on their program of study shortly after enrolling in the in the community colleges *or else they would not qualify for Board of Governor’s Fee Waivers*. To be specific, they would have been required to declare a major by the end of their second term. In contrast, students at UC and CSU are not required to declare a major until the end of their second year.

(2) It declared that progress and academic performance be rewarded in a different way. Thus, *students that had made greater progress toward their specific*

⁸⁰ 23 members if one includes ex Officio members Jack Scott and Amy Suplinger. (Attachment 4.L.)

educational goals, would be prioritized in class enrollment, and those that had not would lose their enrollment priority.

(3) It would have *created a disincentive for students to change majors or “linger” in the community colleges.* Thus, students with more than 110 units and those with less than a 2.0 grade point average would be ineligible to receive fee waivers from the Board of Governors. Heretofore, the community colleges had recognized and served “life-long learners.”

Eventually, some of the more controversial Task Force Recommendations were proposed in legislation, in a bill known as SB 1456. The original version of SB 1456 that was supported by the ACCJC notably contained many more stringent requirements for obtaining Fee Waivers from the Board of Governors than were contained in the ultimately Chaptered version of the bill. Board of Governors Fee Waivers are given to financially needy students as a method of helping them pay for school. This fee waiver system had historically been viewed by many as central to helping California achieve its open access mission, as promised in the Education Code and the California Master Plan for Higher Education. As discussed, this was one of the most contentious issues in the Task Force’s Recommendations.

4. The Open Access Mission of California’s Community Colleges

The Mission of the California Community Colleges, like California’s two other higher education systems (the University of California, and California State University) was outlined decades ago in the Master Plan for Higher Education, and codified in the California Education Code. Central to the tenets of the Community Colleges’ mission was that the colleges’ admit “anyone capable of benefitting from instruction.”⁸¹ This ambitious goal of universal access was reaffirmed in 1988, in the community college’s landmark legislation, A.B. 1725.⁸² Thus,

"(c) The community colleges embody an historic commitment to provide an opportunity for college instruction for all Californians capable of benefitting from

⁸¹ See former Education Code section 5706, which required that junior colleges “accept any high school graduate and any other person over eighteen years of age ... capable of profiting from the instruction offered.” See also “A Master Plan for Higher Education in California, 1960 - 1975”, published by the California State Department of Education, Sacramento CA., 1960; and see, Stats. 1988, ch. 973, § 1 (c).

⁸² Stats. 1988, ch. 973 *et al.*

instruction. The community colleges have historically found their mission in the statewide scheme for higher education, the Master Plan for Higher Education, and in local commitments to meet the needs of different communities--urban and rural, middle class and poor. From these sources have come the conviction, and the fact, that the community colleges ought to provide high quality lower division instruction for purposes of transfer to baccalaureate institutions, and a wide range of courses and programs to meet vocational and basic education needs. The community colleges have been notable because they are local and accessible ...” Id., § 1(c).

The California Education Code sets forth this mission, which emphasizes the access rights of California’s residents:

“It is the intent of the Legislature that public higher education in California strive to provide educationally equitable environments that **give each Californian, regardless of ... economic circumstances, ... a reasonable opportunity** to develop fully his or her potential.” (Education Code § 66030 (a), emphasis added)

Section 66201 expands on this legislative commitment to equal opportunity:

“... The Legislature hereby reaffirms the commitment of the State of California to provide an appropriate place in California higher education for **every student who is willing and able to benefit from attendance.**” (Emphasis added.)

Section §70900 likewise emphasizes this right of access with particular regard to the Community College system:

“SEC. 5. The Legislature finds and declares the following **with regard to access** to the California Community Colleges, and the importance and value of success to those who participate in the system:

(a) **It is the responsibility of this state to provide to every Californian the opportunity to realize** his or her intellectual, emotional, and vocational potential. To fulfill this responsibility, and to ensure that California enjoys a healthy economy and society, **open access** to a quality community college system must be affirmed for a diverse student population, which includes, but is not limited to, ... **persons at a variety of income levels, ...**

(c) **Open access to community colleges must be assured for all adults who can benefit from instruction ...**” (Stats. 1988, Chap. 973, section 5, note to Ed. Code

§ 70900, emphasis added)

These commitments are also expressed in the California's Master Plan for Higher Education. Originally adopted in 1960, the Master Plan has been reviewed and readapted every decade for over 50 years, each expressing California's fundamental commitment for educational access for all. The 1973 Report of the Joint Committee on the Master Plan for Higher Education included as Recommendation #1:

“Equal and universal accessibility for persons of both sexes and all races, ancestries, incomes, ages and geographies.” (Emphasis added)

The 1987 Master Plan included as Recommendation # 7:

“Educational equity must have the commitment of the Governor, Legislature, the segmental governing boards, and the California Education Round Table and be a **principal element in every aspect of institutional operations.**” (Emphasis added)

This resolute commitment of open access to higher education, specifically in regard to California's community colleges, makes the ACCJC's supported changes to the colleges' mission through its endorsement of the Task Force's recommendations, and of SB 1456, especially discordant. In particular, the recommendation that students with more than 110 credits and less than a 2.0 grade average should no longer be afforded Fee Waivers from the Board of Governors, indicated to many a marked reversal of the California community college's historical ideal of open access. And while anyone may envision such proposals coming from various trade associations and interest groups, particularly those proposing a “rationing” of public education, the difficulty here is that they were supported by an accreditor which is supposed to remain *neutral* in contests between competing factions to adopt or change public policy.

Board of Governors' Fee Waivers are awarded to all California Community College students who have financial need, regardless of academic progress or performance. (Attachment 4.N.) This system allows all students and potential students to have an equal opportunity to receive higher education. Revoking fee waiver privilege significantly modifies this principle.

It is certainly true that a financially needy student and a financially well-off student can exhibit equally as poor of a performance in the community colleges as each other. Financially stable students, however, can afford to further their education through their own resources — the elimination of a financial aid program based on their academic

performance would have virtually no effect on their pursuit of higher education. But for students with serious financial need, the elimination of the Fee Waiver program may effectively end their ability to continue to pursue a higher education, as they would no longer be able to afford classes.

Additionally, the provision of the original Task Force Recommendations that proposed to award greater access to needed classes to those students that are progressing efficiently toward their educational goals, would have created a system that made it harder for students that fell behind to ever catch up.⁸³ This, the opponents argued, would have created disparate opportunity for students in different economic positions, is in conflict with the original mission of the California community colleges, and violated the much articulated principle that California community colleges provide access to anyone capable of benefitting from instruction, regardless of economic circumstance.

ACCJC's support of the Task Force's Recommendations, and efforts in 2012 to alter the California Education Code through SB 1456, attempted to alter California's decades-long historical commitment to open access and mission, created an obvious conflict of interest, given the opposition position taken by CCSF (and some other California community colleges).

5. The Student Success Task Force Recommendations and Opposition from CCSF

As mentioned, the reformatory nature of the Task Force Recommendations incited strong opposition and support. The supporters argued that these recommendations would improve the performance of California's Community Colleges in helping students obtain their academic and vocational goals. The opponents claimed that the practical effect of many of the recommendations would be to restrict access to students seeking to further their education.

Throughout California, debate ensued in the community college community concerning the Task Force's initial proposals. Among other things, various district's, acting through their governing boards, took sides on the recommendations.

CCSF's Board of Trustees Adopts a Resolution Opposing the Task Force

⁸³ Some of the opponents of the proposed elimination of these Fee Waivers considered this change would fall hardest on students from economically disadvantaged backgrounds.

On October 27, 2011, the **San Francisco Community College District's Governing Board** unanimously adopted a Resolution rejecting the Task Force's recommendation and proposal as being inconsistent with CCSF's mission. (Attachment 4.O) The Resolution stated, in part, that:

WHEREAS, the draft report and recommendations of the California Community Colleges Task Force on Student Success contains numerous assertions, assumptions and recommendations that are **contrary to the value and mission statements contained in the City College of San Francisco Strategic Plan** and Annual Plan; and

WHEREAS, **the entire educational community of City College of San Francisco is opposed** to the draft report and the recommendations of the ... Task Force ...

WHEREAS, the draft report and recommendations would **deny access to a community college education to many different communities and reduce local autonomy** to serve those communities ...

RESOLVED that the Board of Trustees of the San Francisco Community College District reject Task Force for Student Success proposal and ...

BE IT FURTHER RESOLVED that the Board of Trustees ... recommends that California Community Colleges should adopt no policies because we believe that this historically successful model will best ensure our students' success."

The Resolution noted the originators were Trustee John Rizzo and Student Trustee Jeffrey Fang. The Resolution was adopted by a unanimous vote on October 27, 2011, after Rizzo and others spoke against the Task Force proposals.⁸⁴

CCSF Rallies Against the Task Force

On November 14, 2011, CCSF students, employees and one trustee held a large rally opposing the Task Force's recommendations. The rally garnered considerable media attention. At the rally a press release from Board President Rizzo was released. (Attachment 4.P.) It included several comments condemning the Task Force proposal. It

⁸⁴For a video of the statement, see <http://www.youtube.com/watch?v=SHjBJ-ipLtl&feature=youtu.be>

quoted State assemblyman Tom Amiano as stating:

“These draconian changes would prevent thousands from attending community colleges, affecting most heavily the poor, people with disabilities, and people for whom English is a second language. California needs more people trained, not less.”

The Release also quoted Trustees President Rizzo:

“Many of the Task Force recommendations are from the right wing ideology of shrinking government. They don’t address student needs and accelerate the defunding of education.”

The District’s Chancellor, Donald Griffin also spoke against the Task Force. The Press Release quoted him as declaring that City College had been successful and that the Task Force should be looking at the kinds of programs CCSF had developed “as a model for the state.” (*Id.*, Attachment 4.P)

Attached to the Press Release was a Fact Sheet asserting that the Task Force recommendations “are meant to radically defund the community college system ...” and that the Task Force, “partially funded by the Lumina Foundation, with ideas from the right-wing American Legislative Exchange Council ...” The recommendations would force “tens of thousands of California taxpayers to pay out-of-state tuition (which the report calls ‘full-fare] tuition).” The Fact Sheet criticized most of the key features of the Task Force. (Attachment 4.P, p.2)

The Council of Faculty Organizations Opposes the Task Force

On January 5, 2012 CoFO, the Council of Faculty Organizations, wrote to the Board of Governors criticizing the Task Force recommendations. (See Attachment 4.Q.) CoFO includes most of California’s community college faculty organizations.⁸⁵ Together these organizations effectively represent nearly every academic employee of the California community colleges, except for managers and supervisors. CoFO noted that

⁸⁵ The Academic Senate for California Community Colleges, the Community College Association/California Teachers Association (“CCA/CTA), the Community College Council of the California Federation of Teachers (CCC/CFT), the California Community College Independents (CCCI), and the Faculty Association of California Community Colleges (FACCC). (*Id.*)

each of the five organizations had submitted a separate letter to the Board, objecting to the recommendations of the Task Force.

The CoFO letter referred to those objections and related the strong opposition of CoFO's constituents to the recommendations. It urged the Board to,

“... heed the warnings of students and faculty that several proposals have the potential to result in discriminatory practices and risk undermining our ability to serve students. All of our organizations have sent detailed letters reflecting specific concerns, many of which, unfortunately, have not been adequately addressed by the Task Force. You have a responsibility to review those letters in depth and to reject any proposal that would reduce equity in access or would do more to harm students than to help.”

The CoFO letter emphasized that “responses from students and faculty to the Task Force document as a whole have been overwhelmingly negative... Many of the recommendations in the report could as easily inhibit student success as enhance it (and it is this risk to which students and faculty have responded ...’

The letter added,

“Because the Task Force Report is not a consensus document, and because the recommendations have not won unqualified support from any college constituency group, it becomes especially crucial ... that the next steps include broad participation from all college stakeholders. ¶ The Task Force recommendations appear to reduce or limit the community college mission. These aspects of the Report should be the subject of public dialog and debate. No task force should fundamentally change the California Master Plan for Higher Education; Master Plan changes should be debated publicly.” (*Id.* pp. 1- 2)

CCSF Publicly Leads Opposition to the Task Force at the Board of Governors Meeting On January 9, 2012

Four days later, on January 9, 2012, the Board of Governors held a public hearing to consider adopting the 23 recommendations of the Task Force. While more than 50 interested people and organizations attended, and addressed the Board, the meeting was dominated by the students and faculty *from CCSF*, who strenuously objected to the Task

Force's recommendations.⁸⁶ The youtube videos of the meeting demonstrate the vociferous opposition of City College.⁸⁷

A total of 22 students, 13 of them CCSF students, spoke against the Task Force proposals, including Jeff Fang, the Student Trustee. Fang explained that the Student Association opposed it because the proposals would not help students in need.⁸⁸ Other student speakers explained how the Task Force's definition of success was contrary to their experience, that as a whole the recommendations missed the mark, and how they would harm students. Not a single student witness supported the Task Force's recommendations. Some of the students who spoke exceeded their allotted time, or felt their time was cut short, and there were a handful of acrimonious exchanges involving some CCSF students.

Besides the students, 23 faculty addressed the Board. Of those, 10 were from CCSF. All of these opposed the recommendations, including the President and Secretary of the CCSF Academic Senate, and former AFT 2121 president Ed Murray.⁸⁹ The few speakers in favor of the recommendations included Scott Lay, the CEO of the CCLC, Michele Siqueiros the Executive Director of the Campaign for College Opportunity, and a representative of MALDEF. After hearing from the speakers, and despite the opposition from faculty and students, the Board of Governors voted to "accept" the recommendations. (Attachment 4.R.⁹⁰)

As of January 9, 2012 the divide was clear, with faculty, students and CCSF on one side, and the Community College system, and numerous trade and other associations on the other. CCSF had been one of the most, if not the most, vociferous opponent. Such contentious disagreements are the price of democracy; but what happened next is not - the

⁸⁶ Most of the hearing can be viewed at:
http://www.ccsf.edu/Info/Student_Success_Task_Force/bog.html

⁸⁷ See, e.g., http://www.ccsf.edu/Info/Student_Success_Task_Force/bog.html

⁸⁸ See <http://www.youtube.com/watch?v=s3gPNC3FIDw>

⁸⁹ Other speakers against the recommendations included Will Bruce, on behalf of the Community College's EOPS Association, Jonathan Lightman of FACCC, and Dr. Ron Norton Reel, the president of the Community College Association of the California Teachers Association.

⁹⁰ The year on the date of this Press Release appears in error. The date is listed as January 9, 2011, however, the document references events that occurred in January 2012.

“judge” of CCSF, the ACCJC, was about to enter the dispute, taking the side of the Task Force.

6. The ACCJC Shows Up as an Opponent of CCSF and Supporter of Changing the Mission of California’s Community Colleges

In opposition to the opponents of the Task Force Recommendations and SB 1456, multiple organizations participated in, and issued various proclamations of support of the Task Force Report and ensuing legislation, each with the common goal of promoting this particular brand of education reform. Throughout the issuance of the final Task Force recommendations, and SB1456's nascent stages, the **Accrediting Commission for Community and Junior Colleges** officially and publicly expressed its support for the bill. Additionally, at least three members of the ACCJC offered additional support of the Task Force and SB 1456 through their participation on the Board of the Campaign for College Opportunity, an organization that also enthusiastically supported the Task Force Recommendations and legislation from their earliest stages. This multi-dimensional support proves just how far reaching ACCJC’s interest in the Student Success Task Force and SB1456 really was.

Soon after the January 9 meeting, the Task Force issued a report dated January 17, 2012 entitled “Advancing Student Success in the California Community Colleges.” This Report detailed the recommendations which would have significantly altered the mission of the California community colleges, and would have meant significant changes for CCSF. The Task Force also distributed two newsletters touting its proposal and its supporters.

The first newsletter, issued January 24, 2012 (Attachment 4.S.), bemoaned the loss of State funding and explained that the Task Force’s recommendations “create new efficiencies ...” in the face of severe budget cuts and exclusion of students because of fiscal problems. After describing the Task Force’s recommendations, the Newsletter identified the “Key Supporters” of the Task Force, beginning with,

“The Campaign for College Opportunity, Alliance for a Better Community, Accrediting Commission for Community and Junior Colleges ...” (Emphasis added)

In other words, within two weeks of the January 9 hearing, at which students and faculty from CCSF and elsewhere had publicly and vociferously expressed their opposition, the Task Force publicized that ACCJC was a “key supporter” of the Task Force’s controversial recommendations. And it did this on the eve of the team training

held on February 7, 2012 for the CCSF reaccreditation evaluation. Again, several members of the ACCJC offered additional support and endorsement to the Task Force by their participation in the Campaign for College Opportunity, also listed as an early supporter.

Soon after, the Task Force issued another Newsletter, for February 2012. The front page featured statement entitled, "Support Growing for Student Success Task Force Recommendations." It gave a partial list of organizations "voicing support for the Task Force recommendations," and **the second one listed was ACCJC**. As with the January Newsletter, the Campaign for College Opportunity was also listed. (Attachment 4.T.) At this point, the CCSF evaluation team visit was just six weeks away.

Despite extensive opposition from students and faculty, the Task Force and Legislative supporters moved forward with legislation to implement some of the Task Force's recommendations. Opponents strategy including developing a different bill to counter the controversial changes, such as those directed at the colleges' mission. Among the leaders in the counter-legislation was the FACCC. On February 17, 2012, AB 1741, the alternative, the "Student Success Infrastructure Act of 2012", had been introduced by Assembly Member Bonilla. This counter-bill was supported by the CFT, CCCI, FACCC, CTA, the Statewide Academic Senate, and others. It was opposed by the State Chancellor's Office.

The Task Force-backed bill, SB 1456, was introduced in the State Senate on February 24, 2012, as the "Student Success Act of 2012." The Bill contained some of the most controversial provisions of the Task Force's recommendations, which had garnered such strong opposition from faculty and students, especially at the Board of Governors meeting on January 9, 2012. The original bill proposed to solve the problem of the colleges' low degree completion and transfer rates by implementing some of the Task Force recommendations that rewarded those students that were academically successful and showed sufficient progress toward obtaining their degree or transfer, and punishing those that did not⁹¹.

On April 9, 2012, just three weeks after the site visit to CCSF by the evaluation team appointed by ACCJC, Barbara Beno, on behalf of the ACCJC, wrote strong letters of support to each of the State senators who belonged to the

⁹¹ The punishment being revocation of eligibility for Board of Governor's Fee Waivers.

Senate Education Committee, urging adoption of SB 1456.⁹² (Attachment 4.U.)
Beno's letter wrote on behalf of the Commission, stating:

"I am writing to express the Accrediting Commission for Community and Junior Colleges' strong support for SB 1456 ..., the Student Success Act of 2012. This ambitious piece of legislation stems from recommendations put forth earlier this year by the Student Success Task Force and demonstrates a commitment to both eliminating barriers to student success and adopting the type of scalable student-centered changes that our state desperately needs."

Beno sent this letter just 9 days before the Senate Education Committee considered, and passed, the bill, at their committee hearing.

Not mincing words, ACCJC expressly emphasized its important status: "*ACCJC accredits all of the California community colleges.*" Then it stated,

"SB 1456 has the potential to greatly improve community college completion, taking critical student support strategies that have long been proven to work in helping students reach their college goals ... In a resource-starved environment, SB 1456 is exactly the type of innovative reform that can help promote successful student outcomes." *Id.*

ACCJC added,

"We strongly urge you to support SB 1456 .. when it comes before you in the Senate Education Committee. We hope you will join the growing number of equity advocates, students, educators and business leaders urging you to adopt the proven policies and practices that can truly put students first. The time is now; we cannot afford to wait." (*Id.*, emphasis added)

SB 1456 was heard by the Senate Committee on Education on April 18, 2012. The Bill Analysis dated April 17, 2012, delineated the support and opposition. (Attachment 4.J.) The supporters included several organizations, and once again ACCJC was listed, along with the various associations: the Campaign for College Opportunity, the

⁹² These included Senators Alan Lowenthal, Sharon Runner, Elaine Alquist, Loni Hancock, Robert Huff, Carol Liu, Curren Price, Joe Simitian, and Juan Vargas. Lowenthal was the author of SB 1456.

Association of California Community College Administrators, California Competes,⁹³ the Community College League of California, and others. Among the community college districts now supporting it were Santa Monica and Long Beach, and the Chancellor of San Diego. Other supporters included various business and educational-related groups. The Committee unanimously approved the bill.

However, the opposition of the CoFo groups was having an effect and the bill soon after began to be whittled down.⁹⁴ Then, on May 25, 2012, another Legislative report was prepared regarding SB 1456. It again listed a long list of supporters - including the State Board of Governors, the State Chancellor, and ACCJC.

Among the other supporters were more than 20 membership associations who consistently attempt to influence opinion and legislation in the field of education, including the Association of California Community College Administrators, California Competes, and several college districts: San Diego, Kern, Long Beach, Los Angeles, Los Rios, San Bernardino and State Center.

By the end of April 2012 it was obvious that the bill, as originally conceived, was doomed. The opposition had proven effective. Amendments entered by the State Senate on April 26, 2012, the revision session immediately preceding the Commission's June 6-8, 2012 meeting, were the first to dramatically reshape the BOG Fee Waiver requirements.⁹⁵

In response to concerns raised by students, faculty and CCSF, the State Senate amended the Student Success Task Force Bill to remove the "maximum unit cap" and the requirement that students "Upon enrollment, identify a degree, certificate, transfer, or career advancement goal," from the waiver requirements. Also distinguishable from the original bill, was the requirement that the "minimum uniform academic standards" and

⁹³ California Competes, an interest group funded by grants from the Gates Foundation, the Lumina Foundation, and other organizations, has a "reform" agenda which has included attacking CCSF's faculty and its shared governance processes.

⁹⁴ Besides CCSF, the boards of trustees of another district, also a member of ACCJC opposed the Task Force. This was San Jose/Evergreen Community College District. See April 17, 2012 Senate Committee Analysis, at: http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_1456&sess=PREV&house=B&author=lowenthal

⁹⁵ Contrast the February 24, 2012 version of SB 1456 (Attachment 4.V.) and the April 26, 2012 Amended Senate SB 1456. (Attachment 4.W.)

other conditions for BOG Fee Waiver eligibility, be developed by the Board of Governors, *in consultation with students, faculty, and other key stakeholders.*

The Amendments went even further to ensure that the new requirements would only be implemented “as campuses develop and implement the student support services and interventions *necessary to ensure no disproportionate impact to students based on ethnicity, gender, or socioeconomic status.*”[Emphasis added.]

These late April changes to the Student Success bill replaced the most contentious and obstinately held views of the Task Force and supporters with the views of the protesting faculty, students, and institutions that had fought so hard to prevent the Task Force from altering the California Community College mission. Considering that these particular recommendations were the most vocally advocated against, and that they had survived -- the October Draft Recommendations of the Task Force; the December Final Recommendations of the Task Force; the January Unanimous Approval by the Board of Governors of the Task Force Recommendations; and the Introduction into the text of the original Bill-- the revision of these fundamental points signaled a victory on the part of the protesters, and a failure of the Task Force and its many supporters, including the ACCJC (and the Campaign for College Opportunity that many Commission members and Staff also participated in).

Regardless, on June 13, 2012 **president Beno, again on behalf of ACCJC**, wrote to several members of the State Assembly expressing “strong support for SB 1456 ...” (Attachment 4.X.)⁹⁶ On June 18, 2012, another analysis issued, this time for the Assembly Education Committee.

At the very same time the CFT withdrew its opposition to SB 1456 in June 2012 (Attachment 4.Y.), the Commission took action against the original bill’s and the Task Force’s most vocal and effective opponents, City College of San Francisco. (See July 2, 2012 Beno letter to Fisher). In issuing Show Cause sanction, ACCJC put CCSF at risk of disaccreditation, despite ample evidence (cited herein) showing that CCSF excels at “student success.” Unlike Redwoods and Cuesta, which had been placed on Show Cause during the January 2012 ACCJC meeting, and which had been sanctioned numerous times, CCSF had never before been sanctioned before.

As we explain below, ACCJC’s action in taking sides on this highly

⁹⁶ Her letter went to Assembly Member Marty Block and members Olsen, Achadjian, Brownley, Fong, Galgiani, Lam, Miller and Portantino, who served on the Assembly Education Committee. A copy of her letter is in the Appendix.

partisan legislation, is improper.

7. Additional Support of SB 1456: ACCJC's Involvement With The Campaign for College Opportunity and the Community College League of California

ACCJC participates, through its President Barbara Beno, its Vice Chair - Commissioner Steve Kinsella, and its Vice President John Nixon, in a membership or trade association known as the *Campaign for College Opportunity*, which advances a partisan agenda regarding the community colleges, and which strongly supported the original vision of SB 1456 and the Task Force. It also works closely with the Community College League of California, which also supported the original version of SB 1456.

The Campaign for College Opportunity (“CCO”) is a California non-profit corporation, founded in 2003 by the Community College League of California, the California Business Roundtable, and the Mexican-American Legal Defense Fund (which also supported the original version of SB 1456). Its triple purpose is declared as (1) obtain support for public education, (2) highlight the challenges and opportunities facing California education, and (3) support policy solutions and reforms.⁹⁷ These three founders of the CCO supported the recommendations of the Task Force and the original version of SB 1456.⁹⁸ The CCO acknowledges that, “at the forefront of our work is an ambitious policy agenda.” *Id.* The CCO was identified by the Task Force as a key sponsor of SB 1456 in February 2012.⁹⁹

In 2012 and currently the Advisory Board of the CCO consists of “experts that strongly support our work and provide us with critical strategic advice as we press forward with solutions.” The Advisory Board includes ACCJC President Barbara Beno, ACCJC Commissioner and Vice Chair, and CCLC JPA Board member Steven Kinsella, and John Nixon (Vice President, team chair, and former commissioner of the ACCJC)

⁹⁷ See the CCO website as: <http://www.collegecampaign.org/about-us/>

⁹⁸ MALDEF and the CCLC spoke in support of the recommendations at the January 9, 2012 meeting, and all three organizations appear as supporters in the lists included in the Task Force’s January and February 2012 newsletters, and the bill analysis cited above.

⁹⁹ CCO has also supported other legislation, including AB 1500 (Middle Class Scholarship Fund), SB 1052 and 1053 (Textbook Affordability Act), SB 1289 (Private Student Loans), SB 721 (Statewide Goals for Post-Secondary Education), AB 2190 (California Higher Education Authority), SB 1062 (Stronger Chancellor’s Office).

(Attachment 4.Z).

In our discussion of OPEB liability, we identify ACCJC's as being an "institutional partner" of the CCLC. CCLC strongly supported the Task Force recommendations and the original version of SB 1456.

Thus, throughout 2012, and to this day, ACCJC, through three of its most prominent officials (Beno, Kinsella and Nixon), has been intertwined with the CCO. And, during this same period, it has been a "conference partner" of CCLC. As we assert below, ACCJC's involvement with both CCO and CCLC also appear to create a conflict of interest.

8. ACCJC's Advocacy for SB 1456 Created a Conflict of Interest, Which is Prohibited by ACCJC Policy, Due Process and Federal Law. This Conflict Presumptively Prejudiced its Evaluation of CCSF, Thereby Disqualifying It As An Evaluator of its Opponent CCSF. It also Breached ACCJC's Fiduciary Duty to its Members Such as CCSF.

ACCJC recognizes and publicizes its role as an *impartial* arbiter. In a Power Point presentation given by ACCJC's president Beno and Associate Vice President Norval Wellsfry, to the "Association of Chief Business Officers" of the California Community colleges on October 29, 2011, one slide discusses the "process for comprehensive review." The slide declares that the "19 Commissioners render a judgment on the accreditation status." Opposite these words are the iconic "scales of justice." The scales are perfectly balanced in the picture. President Beno and ACCJC Vice President Nixon's presentation to the CCLC on January 26, 2013 utilized the same "scales of justice" slide.

What the "scales of justice" slide does not mention is that a judge cannot be impartial, nor a judge appear to be, when she takes sides against one she is judging, or when one judges one's opponent in a current or recent matter. *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868. Such action amounts to the appearance of, or actual, conflict of interest. But that is how it was with the ACCJC and CCSF.

ACCJC's decision to actively support controversial legislation to significantly modify the mission of the California community colleges, and the Master Plan for education, knowing full well that a college it was about to evaluate was an active opponent, evoked considerable debate during 2012. The issue was noticed by some who attended the January 9, 2012 Board of Governors meeting, and not just those from CCSF. CCSF's opposition to the Task Force had also been a subject of common knowledge

within the somewhat insular California community college “community.” And those discussing it questioned whether ACCJC should have endorsed one side in the contentious partisan debate over the mission of California’s community colleges.

When ACCJC issued Show Cause status to CCSF in early June 2012, many who had opposed the contentious recommendations of the Task Force, and SB 1456, could quite properly suspect that the sanction may have resulted from CCSF’s role in the Task Force/SB 1456 opposition. This suspicion is enhanced by the Commission’s actions toward CCSF: in misrepresenting the Commissions and CCSF’s actions from 2006 to 2012, its failing to obtain the recommendation of the visiting team in regard to Commission action, in its assignment of Peter Crabtree to the CCSF evaluation team, and other irregularities discussed herein. Equally suspicious is that the ACCJC’s assessment of CCSF brings pressure on the College to modify its mission, to scale back in a way similar to what would have been compelled had the original SB 1456 passed. This raises the question, is the Commission attempting to re-shape CCSF into its image of what it believes the College’s mission should be, as opposed to the mission envisioned by CCSF’s trustees, students and the residents of San Francisco?

Regardless, ACCJC’s conflict of interest is readily apparent.

First, ACCJC’s advocacy for the Task Force recommendations and SB 1456 violated the conflict of interest requirements of 20 USC section 1099b, **34 CFR section 602.15(a)(6)**, and its own policies, because it places ACCJC as an *adversary* of CCSF, a college it accredits but which prominently opposed the original version of SB 1456.

Second, ACCJC is under a legal duty to *respect the declared mission of California’s community colleges*, a duty which is imposed by **20 USC § 1099b(a)(4)(A)** and **34 CFR § 602.18**. However, SB 1456 was designed to *significantly change the mission* of the community colleges to conform to the vision of the Task Force, and apparently ACCJC. Concurrently with the Commission’s support of the reform, students, faculty, and faculty organizations overwhelmingly opposed this change in Mission. ACCJC therefore did not respect the colleges’ Mission, despite the law’s command, when it took sides in a bruising political battle over what the mission should be, and then publicly and prominently acted in an effort to convince the Legislature to adopt ACCJC’s vision of the colleges’ mission.

One cannot mistake the breadth of this statutory requirement, nor underestimate the probable inability of the ACCJC to carry out their duty to apply and enforce standards which reflect the stated mission of colleges, when it engages in political efforts to undermine or change that mission.

Third, ACCJC's action also violated the Federal common law of due process. As we explain, the essence of an ACCJC review is *impartiality*. *Tumey v. Ohio*, 273 U.S. 510 [officers acting in a quasi-judicial capacity are disqualified by their interest in a controversy]. Due process also demands that ACCJC be fair and devoid of the appearance or existence of a conflict of interest. That fundamental rule of due process was violated by the Commission.

Fourth, CCSF is a member of the ACCJC, and its mission is evaluated periodically by ACCJC based on information supplied by CCSF. ACCJC, as noted below, has a fiduciary relationship with CCSF. How can ACCJC satisfy that relationship when, with knowledge of CCSF's mission, it undertakes to forcibly change that mission by lobbying the Legislature?

Finally, ACCJC's advocacy of SB 1456 violated the requirements of 20 USC section 1099b, which requires that ACCJC be independent of trade associations or membership organizations. ACCJC worked on the same side, indeed, in parallel with, two trade organizations which publicly supported the Task Force and the bill: the Community College League of California and the Campaign for College Opportunity. ACCJC works closely with the CCLC. A dozen or more members of the CCLC Retiree Health Benefits JPA trust are associated with ACCJC - two are commissioners (Kinsella and Gornick), and several, noted above, have served on ACCJC evaluation teams. Kinsella served on the ACCJC's *ad hoc* task force to review and revise the Financial Resources Standard used to evaluate institutions for accreditation. Beno, Kinsella and Nixon are advisory board members of the Campaign for College Opportunity. ACCJC is described as a "conference partner" of the CCLC, and indeed they do participate jointly in presentations at CCLC conferences. In other words, ACCJC was not really independent of these trade associations. ACCJC has worked in concert with CCLC in many ways.

These conflicts of interest directly affected ACCJC's issuance of a Show Cause sanction to City College because the political battle between ACCJC and CCSF occurred during the same time period that ACCJC was evaluating CCSF. This evaluation found fault with CCSF's failure to "readjust" its mission in challenging economic times - that is, reduce offerings for life long learners, and focus on a narrow subset of community college students. Furthermore, not long after SB 1456 was amended to eliminate the severe changes that CCSF had protested, ACCJC voted to place CCSF on show cause status. And it did so through an assessment which involved another serious conflict of interest (Beno's husband serving on the ACCJC evaluation team), and procedural irregularities described in this Complaint and Comment.

ACCJC's advocacy actions were not limited to SB 1456. Its recent years its

lobbying expenses were reported by it as \$54,913 in fiscal year 2008-2009, \$17,424 in 2009-2010, and \$19,018 in 2010-2011.¹⁰⁰ While it was advocating for a significant and controversial change in the colleges' (and CCSF's) mission, it was advocating for changes in State pension laws to benefit retired administrators, by allowing them to double-dip - collect large pensions and large salaries as temporary community college administrators (SB 178, discussed below) It has publicly supported other legislation.¹⁰¹

ACCJC has also partnered with the politically-active CCLC for several years, and it has urged colleges to adopt CCLC-drafted Board policies which we allege violate California or Federal law. (discussed *infra.*). Moreover, ACCJC's president and other powerful officers remain as prominent supporters of the Campaign for College Opportunity, which continues to lobby on contentious political issues dealing with community college education.

9. ACCJC's Actual or Apparent Conflict of Interest Is Apparent

ACCJC is forbidden to engage in apparent or actual conflicts of interest by **34 CFR section 602.15(a)(6)**, **20 USC section 1099b**, and its own policies. This stricture is so important that it appears in **20 USC section 1099b**, and in **34 CFR § 602.15(a)(6)**, which requires ACCJC have "Clear and effective controls against conflicts of interest, or the appearance of conflicts of interest, by the agency's—(i) Board members, (ii) Commissioners, (iii) Evaluation team members ... (v) Administrative Staff ...". Furthermore, ACCJC policy repeatedly emphasizes the necessity of avoiding actual or apparent conflicts of interest.

As discussed in the "Crabtree" conflict section above, while ACCJC falls all over itself in adopting conflict of interest policies, what it does not do is observe them. ACCJC's "Policy on Conflicts of Interest for Commissioners, Evaluators, Consultants, Administrative Staff, and Other Agency Representatives" (2011 Handbook, pp. 125-127, referred to herein as "Conflict of Interest Policy) provides that:

"The Commission will *not knowingly invite or assign participation in the*

¹⁰⁰ See ACCJC Tax Returns for 2009, 2010 and 2011, attached hereto as Attachments 4.AA., 4.AB. and 4.AC.

¹⁰¹ ACCJC opposed SB 823 in 2007. In this instance, the bill addressed the obligation of accrediting bodies, including ACCJC, to provide information about member institutions to the attorney general without the consent of the institutions. If any legislation would be appropriate for lobbying by ACCJC, this would be it, as it dealt with ACCJC's obligation to file documents.

evaluation of an institution anyone who has a conflict of interest or the appearance thereof.” Id., p. 125, emphasis added.

This section certainly applies to ACCJC in general. In publicly supporting SB 1456 and the Task Force’s 22 recommendations, which were opposed by the students, faculty, administration and Board of CCSF, the Commission created a conflict of interest. Other college board opposed these recommendations, meaning that had ACCJC reviewed them it would also have created additional conflicts.

At its meeting in January 2012, ACCJC amended its conflicts policy to declare that “the intent of the Commission is to ... make all of its decisions in an atmosphere which avoids even the *appearance of a conflict of interest.*” (“Conflict of Interest Policy”, p. 132. 2012 Handbook) And then, at the same meeting, ACCJC acted to create an actual, as well as the appearance of, conflict by deciding to support a vision of the colleges Mission which CCSF and various community college constituencies were vigorously opposing. It’s decision to support SB 1456 was adopted in an atmosphere in which it unquestionably appears to be a conflict of interest.

ACCJC’s Conflicts of Interest Policy explains that,

“The Accrediting Commission believes that those who engage in accreditation activities must make *every effort to protect the integrity of accrediting processes and outcomes.*” (*Id.*)

Had it made “every effort,” this conflict would have never occurred. ACCJC’s Conflicts Policy claims that the Commission acts to:

“Maintain the credibility of the accreditation process and confidence in its decisions.

Assure that decisions are made with fairness and impartiality;

Avoid allegations of undue influence, relationships which might bias deliberations, decision or actions; and situations which could inhibit an individual’s capacity to make objective decisions;

Make all of its decisions which avoids event the appearance of conflict of interest ...” (2011 Accreditation Reference Handbook, p. 129)

But it is obvious that in entangling itself with the many ideological opponents of CCSF, students, faculty and others, ACCJC had engaged in a relationship which might inhibit objective decision-making and violate each rung of its Conflict’s Policy listed above. It certainly has this appearance.

The responsibility for assuring there is no conflicts rests first with the Commission staff, and second with the Commissioners themselves, who owe a fiduciary duty to member institutions such as CCSF, and to the students and public. The law is settled that a private association has a fiduciary relationship with its members. *Berryman v. Merit Property Management, Inc.*, (2007) 152 Cal. App. 4th 1544, 1558; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal. App. 3d 642, 650-651. As noted elsewhere, the students and public are third party beneficiaries of this relationship. But ACCJC's staff and Commission failed in this duty, and concurrently engaged in a conflict of interest.

Despite all of these laws and policies, ACCJC still picked sides in a contentious political dispute, involving legislation which would have affected the future of CCSF and other California community colleges. In doing so, it put itself in an awkward, untenable position. It concurrently oversaw the accreditation review of CCSF while being touted as and presenting itself as an opponent of the views and actions of CCSF, including its trustees, students, senate, faculty union, and faculty. This is never more clear than at the State Board of Governors meeting on January 9, where CCSF came out in force against the Task Force's recommendations, and just two weeks later ACCJC was announced by the State Chancellor's Office as one of the "key" supporters of the Task Force and the soon to be introduced SB 1456.

In the midst of the ACCJC opposition to CCSF and support for the original version of SB 1456, the CCSF site visit team was selected, it was trained by ACCJC, it was apparently informed that CCSF had not responded to the Commission's suggestions and deficiencies previously identified, and the site visit had occurred on March 11-15, 2012. Indeed, three members of the team were selected from Kern (the team chair, her assistant, and the finance manager), and Kern was supporting the bill that CCSF was opposing.

The Commission staff, including Beno, would soon be reviewing the Evaluation Team's Report and recommending that the sanction recommended by the team be increased. The presentation of a Staff recommendation to increase the sanction in this situation carries the inference of bias, because ACCJC had no business making a decision to sanction its political opponent, CCSF.

ACCJC put itself in this position by taking a political stand. It appears to have decided to publicly endorse and support SB 1456 and the Task Force recommendations, knowing full well that CCSF was leading the opposition. ACCJC crossed the line when, soon after the January 9 meeting, it lent its name to the support of SB 1456 and the Task Force, authorizing its inclusion as a supporter on the Bill Analysis, and also when its president, Barbara Beno, wrote impassioned letters of support to many, if not all, legislators. In taking these actions, the sanctions issued to CCSF are infected by

ACCJC's conflict of interest.

The law governing conflict of interest, as discussed above in relation to the appointment of Beno's husband to the CCSF evaluation team, is to be broadly construed. When it comes to taking sides in political disputes, and then judging your political opponent, the law is clear. The Commissioners of the ACCJC owe a *fiduciary duty* to the students of California's community colleges. Here, students overwhelmingly opposed SB 1456 and the controversial recommendations of the Task Force, which would have substantially modified the open access mission of the colleges, to the detriment of students. The Commissioners breached their duty to students when they eschewed their role as impartial evaluators, and entered the political arena on the opposite side.

ACCJC should never have put itself in this position. Yet it did and this disqualifies it from judging CCSF until the conflict is cured. It also requires that the *status quo* be restored and that the sanction of Show Cause be withdrawn.

a. ACCJC Disrespected the Mission of California's Community Colleges thereby Violating Federal Law and Taking Sides

ACCJC should be required to accept the mission of colleges it evaluates. Here that mission is determined ultimately by the State. In attempting to legislatively change the State's and thereby the colleges' missions, ACCJC interfered in matters which are the exclusive prerogative of the Legislature, students, faculty, colleges and the public. They are a matter of public concern, and regardless of the ACCJC's view of proposed reforms or legislation, **as the judge, it must recuse itself from participation.** This simple rule was ignored by ACCJC. Yet ACCJC acts contrary to its role as impartial accreditor when it becomes directly involved in publicly supporting or opposing the mission of the colleges.

To be sure, in its role as accreditor, ACCJC is privy to plenty of information about how the community colleges operate and the impacts of open access. ACCJC receives information from colleges which it deems is confidential. It conducts confidential deliberations where it discusses the information. It holds closed sessions to consider all sorts of actions which are informed by the information it uses. As such, it is no ordinary participant when it enters into public debate or lobbying - it has an advantage. This means, it can give its own "spin" to the information it has received from the 112 colleges, and it can speak with what it argues is an authoritative voice. It has no right to do this - it violates not just its role as an impartial evaluator and accreditor, it violates its fiduciary duty to its constituent members and the beneficiaries of that - the students, employees and the public. *Oasis West Realty L.L.C. v. Goldman* (2011) 51 Cal. 4th 811, 825-826.

In *Oasis West*, a former attorney for a client decided to “lend his support,” to a citizens’ group opposed to an amendment to the General Plan of the City of Beverly Hills, which was being modified by the City Council to benefit a commercial real estate development. Goldman, a citizen of the City, assisted a citizens’ group - the “Citizens Right to Decide Committee,” which was attempting to qualify a ballot measure to overturn the City’s approval of the project. Goldman engaged in typical political activities - he wrote a letter urging city residents to sign the petition to place a referendum on the ballot to reverse the council. He also walked the city and collected 5 or 6 signatures, spoke to 10 citizens, left notes for a few and addressed the city council. Goldman was sued for breach of fiduciary duty and breach of contract. The Supreme Court agreed Goldman could not publicly participate in the public forum. He was required to subordinate his personal interests.

While ACCJC is not a lawyer, and is not governed by the attorney-client rules of professional conduct, it is not your typical judge because it still has a fiduciary relationship with the member colleges who belong to it. It receives information in confidence about their mission, it evaluates reviews each college’s mission in every comprehensive review, as it reviewed CCSF in 2006 and again starting in 2011, when CCSF submitted its self evaluation to the Commission. Under these circumstances, it cannot engage on one side of a political controversy in which one or more of its member institutions, or their trustees or executives, are on the other. And ACCJC traded on its status as the accreditor of the community colleges in an effort to elevate or imbue its opinion with greater weight. And unlike Goldman, its advocacy was included in the legislative analyses and widely distributed. GGG

When ACCJC evaluated CCSF in 2012, the scales of justice ACCJC’s staff is fond of showing in its slide show presentations should have been tilted heavily to one side, and the blindfold should have been off.

b. The Commission Breached Its Fiduciary Duty and Violated Federal Common Law Due Process and California Common Law Fair Procedure Through the Appearance or Actual Conflict of Interest and Its Actions

Due process requires an agency to “follow its own rules.” *Western State University of Southern California v. American Bar Association*, 301 F. Supp. 2d 1129, 1135 (CD Cal. 2004), relying on *Yesler Terrace Community Council v. Cisneros*, 37 F. 3d 442, 448 (9th Cir. 1994) Here, ACCJC did not follow its own rules on conflict of interest. As described above, ACCJC’s policies forbid conflicts of interest. ACCJC created a conflict by taking sides and publicly endorsing the Task Force and SB 1456.

Accordingly, it violated Federal common law of due process.

Federal common law due process is designed to assure fairness. In the context of accreditation reviews, it is concerned with “protecting the public interest,” and cannot act arbitrarily, capriciously or unreasonable in its activities. *Thomas M. Cooley Law School v. American Bar Association*, 459 F. 3d 705, 712-713 (6th Cir. 2006); *Chicago School of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools and Colleges*, 44 F. 3d 447, (7th Cir. 1994); *Western State University of Southern California v. American Bar Association*, 301 F. Supp. 2d 1129 (C.D. Cal. 2004) California common law fair procedure, as already noted, is congruent.

Moreover, the Department of Education demands that “The agency must demonstrate that the procedures it uses throughout the accrediting process satisfy due process.” (34 CFR 602.25)

The Supreme Court recognizes that “It is axiomatic that a “fair trial in a fair tribunal is the essence of due process.” *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 876, citing *In re Murchison* (1955) 349 U.S. 133, at 136. As the *Capperton* majority explained, recusal is proper when a conflict of interest arises - whether it is financial or familial conflict, or where a judge is compromised because of participation in another proceeding. *Id.* at 880. The question presented to the Supreme Court in *Massey* was whether the circumstances presented a situation where “experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.[citation]” *Id.* at 878. The court explained that the law is concerned with “a more general concept of interests that tempt adjudicators to disregard neutrality.” *Id.*

While the instant situation is not identical to those discussed by the Supreme Court, there is no doubt the same disqualifying features exist. Here, ACCJC was supposed to be the neutral evaluator of CCSF. If it is not neutral, that is critical, for under ACCJC’s system, there is no appeal from any sanction except disaccreditation.

Unlike lesser sanctions such as Warning or Probation, the sanction of Show Cause causes immediate harm, and places a huge burden on districts, threatening their very existence. Given this lack of appeal from a sanction of Show Cause, the burden is on the accretor to be scrupulously impartial. ACCJC has consistently failed this standard. First, it placed President Beno’s husband on the visiting team, in an influential position. Second, it evaluated CCSF while it was opposing CCSF over the College’s mission. If this is not an actual conflict of interest, it clearly is an apparent conflict of interest. Common sense tells that the judge cannot be an adversary of the judged, particularly

while the judging is taking place!

ACCJC and Beno's lobbying can be compared to what it would have been like if the the judge in the first "trial of the century", *Tennessee v. Scopes*, was publicly urging the Legislature to adopt a law stricter than the Butler Act,¹⁰² by declaring it illegal for a teacher to even mention the Theory of Evolution or refer to Charles Darwin by name, while pondering Mr. Scope's sentence.

ACCJC should not have been both an advocate for SB 1456, and an evaluator of CCSF, one of the principal opponents of SB 1456. Particularly because ACCJC reviews CCSF's mission. President Beno wrote both the advocacy letter to the Legislature supporting a change in California community college's mission, and the sanction letter dinging CCSF for, among other things, not reconsidering its mission. The July 2, 2012 Show Cause letter contains several comments which appear to subtly allude to the College's decision to stick to the open access mission. Thus, the Commission is "concerned" about CCSF's "ability to successfully adapt to the changing resource environment ..." and the college, "through review of the institutional mission," has not paid "adequate attention to the impact on quality as the resources have declined while broad breadth of the mission has been maintained." (July 2, 2012 Show Cause letter, p. 2) Hence, this "failure to react to ongoing reduced funding," and "leadership weaknesses" have "kept City College ... from adapting to its changed and changing fiscal environment." Actually, its leadership was quite successful. Not only did it help prevent ACCJC from changing the mission of the community colleges, and CCSF, but recent data demonstrates that CCSF is one of the most successful colleges in terms of student success (Attachment 2.B.).

Having entered the public debate, and the legislative battle ground, ACCJC is the last entity that could judge CCSF impartially.

ACCJC never should have entered the public debate on the colleges' mission. Having done so, the decision to issue the Show Cause sanction is tainted, and should be reversed.

It was not a viable option to disqualify the entire Commission when it came time to vote – ACCJC's only option was to not become involved in the public battle over the Task Force's recommendations and legislation, to not have its CEO and other leaders

¹⁰² The Butler Act, adopted in Tennessee in 1925, declared it unlawful for any public school or college teacher to teach any theory that denies the story of "divine creation," or teach that man is descended from a lower order of animals.

become members of the advisory board of a lobbying association. But disqualification should never have been necessary - the Commissioners and ACCJC's staff should have recognized the inherent conflict in lobbying for SB 1456 and the Task Force, and it should have avoided joining the political battle against the position advanced by CCSF. Perhaps ACCJC has simply become too used to conflicts, what with its partnering with the CCLC, its advocacy of the CCLC's policies, and its pursuit of CCLC's objectives in regard to OPEB funding, its forceful efforts to advance the interests of management and administration, its domination by managers and administrators at the expense of a true peer system. Regardless of the mistakes that have led to ACCJC's conflicts, their effects are apparent. Having made them, ACCJC should not now be allowed to sanction CCSF - the status quo should be restored and a new review is called for, one in which those with conflicts are recused. There is obviously good cause for this resolution of matters.

The fact that Beno and two other ACCJC members (Kinsella and Nixon) have a conflict of interest arising from their involvement with CCO, further makes the case that the entire ACCJC should have been recused more powerful, since "even the appearance of unfairness cannot be permitted." *Lacey v. Maricopa County*, 693 F. 3d 896, 933 (9th Cir. 2012), citations omitted. In *Lacey*, an *entire* District Attorney's office was disqualified because the chief attorney had a conflict. Here, the conflict of Beno, Kinsella and Nixon, as well as the Commission for its support of SB 1456, was sufficient to disqualify all of ACCJC.

Because ACCJC's violated due process, its actions towards CCSF must be rescinded and steps taken to recuse those involved and to initiate a new review, starting with restoration of the status quo ante the violations, as previously discussed.

10. Conclusion on ACCJC's Lobbying Conflict of Interest and Breach of Duty

The original SB 1456 Bill supported by the ACCJC notably contained many more stringent requirements for obtaining Fee Waivers from the Board of Government than in the ultimately Chaptered Bill. As discussed, this was one of the most contentious issues in the Task Force's Recommendations. CCSF led the opposition to SB 1456, as was its right to do. The CCLC and other organizations of administrators enjoy this right, as does the Campaign for College Opportunity. But a judge like the ACCJC, when it had before it the application of CCSF for reaccreditation?

ACCJC's review of CCSF was, and remains, prejudiced by the role the Commission undertook in a bruising, long, and costly partisan political battle. On the one side stood ACCJC and its allies, including the CCO, CCLC, the Chancellor's Office, and

other organizations with a political agenda. On the other stood CCSF, CFT, CCCI, CTA, the State Academic Senate, FACCC, with an equally partisan agenda. There was no requirement for ACCJC to enter the fray. In doing so, it discarded its position as an impartial arbiter.

ACCJC's conflict could not be waived by the public, or the students, or CCSF. It existed in June 2012 and it continues to this day, as ACCJC has appointed another team, is again evaluating CCSF, and is ruling in light of the Show Cause status ordered last year. ACCJC should not be in a position to rule on its political opponent. For the reasons set forth above, the sanction should be withdrawn.

D. The Commission and ACCJC's Evaluation Teams are Dominated by Managers and Administrators, Violating Policy Requiring That Evaluations Be Performed by Peers

Below we set forth the ACCJC's violation of policy and due process, resulting from ACCJC's appointment of commissioners and evaluation teams, which are dominated by managers and administrators. As we explain below, the former community college managers who dominate the Commission and its staff, appoint teams to reflect their interests. This also amounts to a conflict of interest.

E. Conflicts of Interest Summary

ACCJC, contrary to its policies, does not take conflicts of interest seriously. These conflicts occur at the highest levels - those identified here involved the ACCJC president, who has (1) appointed her husband to serve on an important evaluation, one accompanied by numerous violations of ACCJC policy and Federal law; (2) persisted in taking actions toward CCSF despite her conflict with CCSF's Governing Board, students, faculty and other employees over the Student Success Task Force legislation, (3) and in creating an evaluation team top-heavy with administrators. This later action is illustrative of ACCJC's strong bias in favor of the interests of managers and administrators. Given these conflicts, it apparent that ACCJC, as currently operated, has proven incapable of implementing an effective conflict of interest policy, and hence is unreliable as an accreditor of community colleges.

As a result of these conflicts of interest, the Show Cause sanction should be rescinded, and the Commission should institute a new, fair review of CCSF.

V. Lack of Fair Procedures and Transparency Prejudiced the Review of ACCJC, Denied Due Process and Conceals That ACCJC Disregarded its Own

Procedure in Evaluating CCSF – It Did Not Obtain a Signed Team Action Recommendation

Federal and State law, as well as ACCJC’s own policy, demands that ACCJC **strictly follow its policies in evaluating member colleges**. This principle is the essence of due process and fair procedure, and assures the integrity of a reviewer which provides a public service such as ACCJC. ACCJC is paid millions of dollars each year to honestly and fairly evaluate public community colleges, and it widely distributes its assessments. Therefore, it assumes a special obligation to adhere to fair procedures.

Due process, deriving from Federal common law, and California common law fair procedure, along with ACCJC’s own regulations, require the ACCJC to comply with its published procedures. *Marlboro Corp. v. Association of Independent Colleges*, 556 F. 2d 78, 81 (1st Cir. 1977); *Rockland Institute v. Association of Independent Colleges and Schools*, 412 F. Supp. 1015, 1016 (C.D. Cal. 1976); *Fine Mortuary College, LLC v. American Board of Funeral Service Education*, 473 F. Supp. 2d 153 (D. Mass. 2006) The standards for due process and fair procedure are essentially the same. See *Anton v. San Antonio Community Hospital* (1977) 19 Cal. 3d 802, 815 [*Anton I*], holding that common law fair procedure is comparable to due process. See also *Ascherman v. Saint Francis Memorial Hospital* (1975) 45 Cal. App. 3d 507, 511-512; *Gaenslen v. Board of Directors* (1985) 185 Cal. App. 3d 563, 567.

One of ACCJC’s most important procedures involves the visiting team of educators giving their recommendation to the Commission, on what **action should be taken on an application for re-accreditation**. The team can recommend reaccreditation, or any of the four sanctions (warning, probation, show cause or disaccreditation). Such action recommendations *should* be afforded considerable weight, coming from a team of *peer* educators.¹⁰³

ACCJC’s procedure calls for the evaluation *team to submit a written, signed “confidential” recommendation to the Commission*. As the 2011 Team Evaluator Manual mandates,

“Team’s Confidential Recommendation to the Commission ...

The team will also **make a decision on its confidential recommendation to the Commission for action on the institution’s accredited status.**”

¹⁰³ As we note *infra.*, ACCJC actually fails miserably in appointing *peer* reviewers - most of the reviewers - nearly 80 % - come from a 3 % segment of the college community - administrators and managers.

(2011 Team Evaluator Manual, p. 15, emphasis in original)

In CCSF's March 2012 evaluation, an issue exists about whether this "confidential recommendation" "for action" on CCSF's accredited status, actually was made. This confusion results from ACCJC's policy to keep this part of the process *confidential* from the college and the public, and the fact there is evidence that it was not done. What is supposed to happen is that the team meets and collectively attempts to decide upon an action to recommend. After that, each team member is supposed to sign this recommendation.

Evidence indicates that an administrator serving on the team indicated that the team did not need to make a team recommendation for action. It was mentioned that CCSF was living on credit and had "maxed out," its credit card, so that any sanction would have to come from the Commission alone.¹⁰⁴ Evidence suggests that a recommendation of Warning was the oral consensus of the team. If Warning or Probation had been the recommendation, this would raise serious questions as to why the Commission chose to increase the sanction level. Lack of clarity over what actually occurred in regard to a team recommendation of action casts doubt on the integrity of the process, and illustrates the problems caused by ACCJC's refusal to provide a copy of the team's recommendation to the college and the public.

As we discuss below, there is no justification for keeping the team's recommendations secret - they should be given to the college and available to the public. Regardless, it remains unclear as to whether there was "team" recommendation, signed by the team members, as required by ACCJC policy. ACCJC needs to produce that recommendation.. The absence of a duly signed and dated *team recommendation*, for any reason, would be a serious procedural error which, in and of itself, would require reversal

¹⁰⁴ We are willing to provide this evidence to the Department of Education. The Commission should not claim that team members are forbidden to discuss whether Commission procedures were followed during the visit. First, disclosure is in the interest of assuring that the Commission complied with its policies. At this point, it is well known that ACCJC issued Show Cause, so no interest is served by keeping such a recommendation, if it exists, confidential. Moreover, to be technical, ACCJC's Policy on Public Disclosure, discussed later, does not forbid revealing that a *procedure* required by the ACCJC was not used. The express intent of the Public Disclosure policy in effect in March 2012 was to "assure the accuracy and appropriateness of institutional information which is made public." Here, the entire "Self Evaluation Report," the Team Evaluation Report and the Commission's sanction letter, and all backup data, is already public information, and posted on the CCSF website. Finally, the Commission's Public Disclosure and Confidentiality Policy, adopted June 8, 2012, should not apply to this team evaluation, and in any event would not authorize non-disclosure of any procedural irregularity.

of the resulting Commission action - in this case, Show Cause status.

Federal law requires, when implementing accreditation standards, that an institution is *required* to follow its own rules. *Chicago School of Automatic Transmission, supra.*, 44 F. 3d at 450-451. An action reached “without observance of procedure required by law” is invalid. California law governing common law fair procedure is equally prescriptive. Hence, if an accrediting body misapplies its evaluative procedures, any resulting sanction is *null and void*. Subsequent review by the Commission itself would not cure the violation. *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal. 4th 1259, 1272 [error at hearing officer stage not cured by decision of board]; *Smith v. Selma Community Hospital* (2008) 164 Cal. App. 4th 1478, 1512-1513 [not inconceivable a governing body might wish to terminate privileges for improper reasons having no bearing on quality of care]; *Anton v. San Antonio Community Hospital* (1977) 19 Cal. 3d 802, 824-825; *Anderson v. San Mateo Community College District* (1987) 87 Cal. App. 3d 441.

As provided for in ACCJC policy, the Site Visit Team is supposed to submit a signed recommendation to the Commission on what action should be taken. Commission policies dictate that all Evaluation Team members **sign** the confidential action recommendation form which states the Team’s recommendations as to whether an institution’s accreditation should be Reaffirmed, Placed on Warning, Probation, Show Cause, etc. This policy is contained within the Commission’s *Team Evaluator Manual*, which is distributed to Team Members, and available to institutions and the public via the Commission’s website. The particular policy mandating that all Team Members must sign the confidential recommendation— verifying that a discussion took place, and that the team arrived at a consensus – or not -- has been in place since at least 2004. Both the 2004 and 2011 *Team Evaluator Manual* (in effect at the time of the CCSF Site Visit) read the same:

“Team members also sign the confidential recommendation” (Team Evaluator Manual, 2004 ed. p.14; 2011 ed., p. 15)

“This Manual is designed to be used by persons serving as members of evaluation teams visiting institutions... The evaluation visit format described in this Manual is used by all teams visiting institutions seeking reaffirmation of accreditation or initial accreditation.¹⁰⁵” (2004 p.3; 2011 p.3)

¹⁰⁵The 2004 *Team Evaluator Manual* does not contain the words, “teams visiting”, which is almost certainly meant to reflect the same meaning in the 2011 statement, since the institutions are not the ones performing the evaluations, and thus would not need a Manual on how conduct

Despite this longstanding policy that each team evaluator sign the confidential action recommendation, this procedure may not have been followed in the case of CCSF's 2012 evaluation. In contrast, the evidence indicates that the team did not agree upon specific Standards recommendations.

Because the Commission makes team documents public only on a selective basis, the entire record of the team's visit is not available to the public. However, our allegation can be verified by ACCJC or the Department of Education. And, if it is true that there was no team *action* recommendation properly determined, and signed by each member of the evaluation team, then a crucial part of the evaluation procedure was not followed.

ACCJC places great weight on the judgment and experience of its Evaluation Teams of educators. The evidence which ACCJC reviews, except for the college's self-evaluation and earlier documents concerning Commission actions, is almost entirely composed of evidence gathered and reviewed by the evaluation team. The Team Evaluator Manual extolls the importance of the Evaluation Team to the accreditation process.

As discussed in the Crabtree conflict of interest section, above, the Evaluation Team provides "an independent peer review" of the college. (2011 Team Evaluator Manual, p. 6) This review, "lies at the heart of the accreditation process." (Id., p. 7) And as discussed above, the team makes a confidential recommendation on the reaffirmation of accreditation or sanction. Such a recommendation plainly carries enormous weight under the scheme adopted by ACCJC. And, under ACCJC policy, a team is required to make this recommendation. Colleges, their students, and the public, expect such recommendations to be made. Furthermore, as explained earlier, this team recommendation is supposed to be signed by each member of the team. (Team Evaluator Manual, 2011 ed., p. 15, emphasis added.)

Finally, this team recommendation is supposed to be reviewed and acted upon by the Commission itself. The rules also make this a requirement:

"This recommendation must be acted upon by the Commission before the official outcome of the visit is determined." (Team Evaluator Manual, p. 16)

This requirement is unambiguous. It is apparent that it is not the Team Chair's recommendation, but the *Team's action recommendation*, signed by each team member,

one properly.

that shall be “acted upon by the Commission.” If ACCJC’s decision to place CCSF on Show Cause status occurred in violation of this important step within ACCJC’s evaluation policy, the procedure employed would have been in violation of ACCJC’s own requirements. The resulting decision would be unfair, arbitrary and capricious, and illegitimate. As a consequence, the Show Cause decision would need to be set aside and the *status quo* reinstated. There is ample legal precedent for such a result.

In *Anderson v. San Mateo Community College District* (1987) 87 Cal. App. 3d 441, the court held that a failure to evaluate a probationary faculty member for tenure in accordance with contractual procedures warranted reversing a decision to dismiss an employee. 87 Cal. App. 3d at 445 - 448. In *Hackethal v. Loma Linda Community Hospital Corp.* (1979) 91 Cal. App. 3d 59, the court ordered a hospital to reinstate a physician whose staff privileges had been taken away without a proper administrative proceeding. In *Applebaum v. Board of Directors* (1980) 104 Cal. App. 3d 648, 659 - 660 personal embroilment of some persons in a decision led to reversal of a hospital’s decision to expel a member.

The Commission’s failure to evaluate CCSF in accordance with its contractual procedure, as set forth in its written policy, would warrant reversal of the Show Cause decision. The *Anderson* court quoted extensively from settled law recognizing that fair procedures and criteria “minimize the risk of arbitrary or prejudiced decisions and decisions based on incomplete or inaccurate facts or misunderstandings.” 87 Cal. App. 3d at 447, quoting from *American Federation of Teachers v. Oakland Unified School District* (1967) 251 Cal. App. 2d 91, at p. 97.

ACCJC policy indicates the great weight afforded the decisions and action recommendations of the expert evaluation team. Notwithstanding our challenge to the composition of such teams, if ACCJC did not obtain a signed action recommendation, the review was flawed. For these reasons we request the Commission make public any signed “team” action recommendation.

VI. ACCJC’s Accreditation Procedures and Policies Violate Federal Common Law Due Process and California Law On Common Law Fair Procedure Due to a Failure to Disclose Team and Chair Recommendations, the Rationale for Commission’s Increasing Sanctions That Teams’ Recommend, in Not Allowing Appeals of Show Cause Sanctions, and Affording Insufficient Time for Commission Review of College Applications

Crucial aspects of ACCJC’s Policies and Procedures prejudiced a fair review of CCSF, and violated Federal common law due process and California law on common law

fair procedure. These violations affect every assessment of every California community college. They are:

1. Team recommendations of ACCJC action are not provided to the college, students and the public at a meaningful time, much less at all.
2. The Commission's rationale for increasing a penalty beyond what has been recommended by the evaluation team is not provided to the college or the public.
3. Colleges are not permitted to appeal the Show Cause sanction, despite clear and convincing evidence of substantial harm to the college, its students, employees and the public, from being placed on Show Cause status.
4. The Commission's procedure of providing the team and backup documents to the Commission as little as one day before deliberations, denies due process and fair procedure.

This section of the complaint discusses each of these violations.

A. ACCJC's Policy of Secrecy Concerning Team Recommendations Violates Federal Due Process and State Common Law Fair Procedure

ACCJC considers the *Team Evaluation process* to be at the core of assessment, and a critical part of this process is the team's recommendation of the action the Commission should take, be it reaffirmation of accreditation or a sanction (e.g. Warning, Probation or Show Cause). The team of educators is selected and trained by ACCJC, and generally consists of several experienced evaluators. The team is trained by ACCJC. And, the team is usually assigned an experienced chair, who also attends specialized training. The team is commanded to review, before the site visit, previous ACCJC actions and previous team reports and college self-study reports. The team plots out its visit to assure it obtains and reviews extensive evidence. Then it visits the college for as many as five days. In the case of CCSF all of this was true.

The CCSF evaluation team had 17 members, and it spent five days at CCSF. The team included one chancellor, one superintendent-president, two vice presidents, one vice chancellor, one associate vice chancellor, six deans, a trustee, one director, one department chair, and two rank-and-file faculty. The team assembled considerable evidence, conducted as many as 100 meetings, met with over 100 individuals, including administrators, trustees, faculty, staff, students, and visited each campus.

We have discussed above the requirement that this team decide upon, prepare and then sign the team's "Confidential Recommendation to the Commission." (*Id.*, p. 15 and Appendix A) The Team Evaluator Manual explains the process,

"The team will also make a decision on its confidential recommendation to the Commission for action on the Institution's accredited status. This will NOT be shared with the Institution. The team will make a recommendation to: a. Reaffirm Accreditation ... b. Reaffirm Accreditation with a Follow-Up Report ... c. Reaffirm Accreditation with a Follow-Up Report and Visit ... d. Defer action ... e. Issue a Warning ... f. Impose Probation ... g. Order Show Cause ... h. Terminate Accreditation." (Team Evaluator Manual, 2011 ed., pp. 15-16, emphasis added except as to "NOT," the all capital emphasis being in the original).

The team members are expected to **sign** the recommendation:

"Team members also **sign the confidential recommendation**" (Team Evaluator Manual, 2004 ed. p.14; 2011 ed., p. 15, emphasis added)

"This Manual is designed to be used by persons serving as members of evaluation teams visiting institutions... The evaluation visit format described in this Manual is used by all teams visiting institutions seeking reaffirmation of accreditation or initial accreditation." (2004 p.3; 2011 p.3)

Our inquiries confirm that it appears to always be the case that the team members individually sign the team recommendation. However, the recommendation is kept secret from the college and the public:

"Under no circumstances should the visiting team's confidential recommendation concerning candidacy or accreditation of the institution be revealed. This recommendation will be acted upon by the Commission before the official outcome of the visit is determined." (Team Evaluator Manual, 2011 ed., p. 16, emphasis added)

The CCSF team was supposed to give a recommendation, and each team member was supposed to sign it. Had it done so, as required by ACCJC policy, there is substantial evidence the recommendation would have been for a Warning sanction.

ACCJC policy violates due process by keeping secret these team recommendations. Federal Common Law Due Process and California Common Law Fair Procedure are flexible concepts, which aim to assure the "respondent" in a

proceeding receives (1) time and adequate notice describing the reasons for a proposed action, (2) an effective opportunity to defend, (3) representation by counsel if desired, (4) an impartial decision-maker, (5) a decision based on fair rules, and (6) a statement of reasons for the decision and the evidence relied upon. *Goldberg v. Kelly* (1970) 397 U.S. 254, 266-271; *Saleeby v. State Bar* (1985) 39 Cal. 3d 547, 565-568; *Valenzuela v. Board of Civil Service Commissioners* (1974) 40 Cal. App. 3d 527, 563-564.

The extent due process is required turns on various factors, such as the private interests at stake, the risk of erroneous deprivation, the harm from the sanction, and the administrative burden, if any. These factors are examined to ascertain whether particular procedures provide *meaningful* due process. *Matthews v. Eldridge* (1975) 424 U.S. 319, 335; *Goss v. Lopez* (1975) 419 U.S. 565, 580-584.

In the case of ACCJC's assessment of California community colleges, there has been for more than a decade, a regime of continual sanctioning of many California community colleges. This process has taken a toll - the harm has been enormous, to the students, the finances of the colleges, and the public interest. As discussed above, the harm from CCSF being placed on Show Cause status includes (1) reversing the burden of proof in regard to CCSF's qualification for accreditation, (2) students shunning the college, causing enrollment drops, and loss of State funding (3) damage to the college's reputation, and (4) loss of monies from downgrades in bonds. In addition, the college has been forced to (1) devote more resources into meeting questionable standards, and (2) paying more funds to the ACCJC. Across the State, the harm from ACCJC's approach has led to the questionable hiring of more than 150 administrators whose primary or sole responsibilities are to deal with accreditation matters. In CCSF, the college is being coerced into hiring more than a score of administrators to replace department chairs.

The risk of erroneous deprivation to CCSF rights from ACCJC's secrecy is great. In the case of CCSF, the events of 2006-2012 were misrepresented, thus enhancing the Show Cause sanction; the important team action recommendation may have been dispensed with; and President Beno's husband was placed on the team. Moreover, one of the weightiest allegations against CCSF, arising out of its OPEB pre-funding, derives directly from a serious conflict of interest involving ACCJC and its "conference partner" the Community College League. Further, how can public confidence exist when ACCJC is evaluating a college whom it opposed in a critical, partisan legislative battle? These risks are enhanced by ACCJC's lack of transparency, its disregard of basic rules governing impartiality, the threats of its President, and its inconsistency.

From ACCJC's standpoint, there is no administrative burden in supplying colleges and their constituents with timely copies of the team action recommendation. One of the

most fundamental principles of due process and fair procedure, is the opportunity to be heard at a meaningful time, and in a meaningful manner. *Armstrong v. Manzo* (1965) 380 U.S. 545, 550. But the opportunity to be heard is meaningless without meaningful notice. These rights, notice and an opportunity to be heard, are “reciprocal” rights.

In the case of ACCJC, the necessary due process was not provided due to Commission policy. Colleges receive a copy of the Team’s report, and have 15 days to submit corrections of errors. There is no notice of the action recommended by the team, and hence insufficient information on the severity of any sanctions under consideration. Thus, the college receives insufficient information from which to decide whether it should appear at the Commission in order to dispute the factual conclusions. And there is no notice whatsoever to the public. Finally, there is no opportunity to disagree with proposed sanctions. Knowledge of the team report, and a chance to offer corrections, does not provide meaningful notice if the sanctions under consideration are withheld from the College. The sanction discussion occurs entirely behind closed doors, the college (and the public) barred from entrance.

ACCJC’s current scheme does not satisfy California or Federal law, given the extreme harm which results from the sanction of Show Cause or disaccreditation.¹⁰⁶ For the aforementioned reasons, the ACCJC’s policies in this case fail Federal and California due process and fair procedure requirements, and the sanction of Show Cause should be rescinded, and the *status quo* restored.

B. The Rationale for Increasing a Penalty is Not Disclosed by ACCJC

If the team had issued a recommendation of Warning, and the Commission had increased the sanction to Show Cause, then it should have provided a rationale. In reality, evidence indicates that Team Chair Sandra Serrano made a recommendation for Probation, and that the Commission (1) disregarded the absence of a Team Recommendation signed by all team members as Policy requires, and (2) disregarded Serrano’s recommendation and increased the sanction to Show Cause. Yet there is no written record of these events provided to CCSF or the public. This is because the process under which the Commission imposes a sanction greater than that recommended by a team (or, in this case, a team chair) is cloaked in secrecy. Whether the president or staff makes a formal or informal written or oral suggestion, or simply informally discusses options or communicates with select commissioners, is not revealed, nor

¹⁰⁶ We take no position at this time on whether a higher level of due process should accompany Warning or Probation, as the necessary facts, especially dealing with harm, are not yet developed.

regulated.

This failure of transparency prevents the students and public from effectively commenting on the Commission's proposed actions when such opinions might impact the eventual action taken. In other words, if a team recommends Probation, and there is a risk that the Commission might increase this sanction, the public and the College might have a lot they want to say as to the sanction level.

Had the Commission been required to provide a rationale for rejecting the CCSF team's recommendation, it would have been painfully obvious that the ACCJC had mishandled the evaluation of CCSF. Instead, it appears this issue caused barely a ripple.

The secrecy ACCJC imposes on the team recommendation process denies common law due process and fair procedure to colleges under review, and the affected students. California law requires that regulatory entities, public or **private**,¹⁰⁷ which engage in quasi-adjudicatory functions (as with ACCJC) are *required* to issue findings and conclusions which explain the rationale for a decision.¹⁰⁸ The purpose of such findings and conclusions is to “**bridge the analytic gap** between the raw evidence and the ultimate decision and order.” *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515 - 517, emphasis added. Such detailed information enables the public to discern the analytic route the agency traveled from “evidence to action.” *Id.* at p. 515.

The ACCJC's own policies,¹⁰⁹ Federal common law, as well as the HEA and its

¹⁰⁷ See, e.g., *Gaenslen v. Board of Directors* (1985) 185 Cal. App. 3d 563, 573; *Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal. App. 4th 1098, 1112.

¹⁰⁸ While no “administrative hearing” is required, ACCJC accepts and the circumstances disclose that it does engage in quasi-adjudicatory action when it assesses an institution and issues a decision. This status is apparent from the ACCJC's procedures, its decisions themselves, its policies, and the many public presentations ACCJC has given over the last decade.

¹⁰⁹ See, e.g., ACCJC's Policy on Commission Good Practice in Relations with Member Institutions, 2011 ed., Nos. 17 (detailed written report) and 20 (due process concerning accrediting decisions made by the Commission); see also ACCJC's policy on “Rights and Responsibilities of ACCJC etc.”, which provides the “Commission also has the responsibility to notify institutions ... give reasons for the actions” in writing. (Handbook 2011 ed., p. 103, No. D.)

regulations,¹¹⁰ also demands that the accrediting body provide sufficient explanation for its actions so as to avoid inconsistency in decision-making. “[T]he orderly functioning of judicial review requires that the grounds upon which an administrative agency proceeded be clearly disclosed and adequately supported.” *Medlock Dusters, Inc. v. Dooley* (1982) 129 Cal. App. 3d 496, 5012, relying on *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515 - 517.

Thus,

“... a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. [Citations.]” *Topanga, supra*, at p. 516

The failure of ACCJC to clearly delineate the justification for overruling the expert site-visit evaluation team’s recommendation violates Federal common law due process and California’s law on common law fair procedure. And the failure of ACCJC to indicate that its commission recommends a more severe sanction, and the rationale, violates the *Topanga* doctrine, and hence both fair procedure and due process.

C. ACCJC’s Failure to Provide for Appeal of the Show Cause Sanction Violates Due Process and Fair Procedure

ACCJC does not allow a college to appeal Show Cause status. As a result, there is also no opportunity for students, employees or the public, to offer their views on the appropriateness of this severe and inherently harmful sanction. Under California law, which controls the contract between ACCJC and its member institutions, ACCJC must provide due process for imposing this sanction.

While ACCJC’s appeal policy may satisfy the HEA, the Higher Education Act, the Act is not preemptive. *Keams v. Tempe Technical Institute*, 39 F.3d 222, 225-226 (9th Cir.1994); *Fine Mortuary College, LLC v. American Board of Funeral Service Education*, 473 F. Supp. 2d 153, 160 (D. Mass. 2066). Thus, ACCJC has obligations under both Federal common law due process and California’s common law fair procedure doctrine which apply to appeals. The HEA, and regulations adopted under it, does not preempt state law contract claims. *Keams v. Tempe Technical Institute*, 39 F.3d 222, 225-226 (9th Cir.1994) *Fine Mortuary College, LLC v. American Board of Funeral Service Education*, 473 F. Supp. 2d 153, 160 (D. Mass. 2066). Indeed, the ACCJC should comply with the

¹¹⁰ See 34 C.F.R. §§ 602.18 - 602.21.

requirements of both the HEA and State law, as the HEA looks to State law for contractual purposes. *Keams, supra.*, at 225-226.

It has been settled law in California since 1894, that sanctions *less* than dismissal by a private association, *are subject to due process protection, including the right to adequate notice of allegations, and a fair opportunity to present a defense.* In *Salkin v. California Dental Association* (1986) 176 Cal. App. 3d 1118, 1122-1124, 224 Cal. Rptr. 352, relying on *Ellis v. American Federation of Labor* (1941) 48 Cal. App. 2d 440, 443-444; and, *Grand Grove of United Ancient Order of Druids of California v. Garibaldi Grove, No. 71, of United Ancient Order of Druids* (1896) 105 Cal. 219.

In *Salkin* a private association was sued in mandate after it censured a member, who alleged the procedures employed had been unfair. The Association defended by arguing that review of the disciplinary procedures of private associations was only available when the punishment involved expulsion or exclusion from membership. The Court reversed, holding that the argument that appeal was available on upon expulsion was “supported neither in logic, nor, as we shall see, in law.” *Id.* at 1122.

The California Dental Association argued it was not subject to suit because it is a “constituent organization” in which membership is voluntary, and membership is not required in order to practice as a dentist. The court had no difficulty rejecting this defense, explaining that the association was of “quasi-public significance,” and even if they were not, the discipline was of “public” significance. That is certainly true here - indeed, the matter has been subject to extensive news coverage, there have been demonstrations concerning the action, the ACCJC itself has issued public press releases and released information about CCSF’s sanction, and has an importance which “transcends” ACCJC.

ACCJC, like the Dental Association, is “tinged with public stature or purpose.” ACCJC constantly reminds the public and the community colleges of its larger public purpose, to assess colleges’ adherence to standards, and to improve quality. For instance, it declares:

“The Commission **serves the public interest** by providing information on its actions to institutions, the public, and students.” (Statement on the Benefits of Accreditation, 2011 Accreditation Reference Handbook, p. 32, ¶ 2)

“Actions of the Commission regarding the accredited status of institutions as described in the Policy on Commission Actions on Institutions **are public actions.**” (Policy on Disclosure, 2011 ed., p. 89)

“The Commission provides **to the public** an assurance that through external evaluation the institution conforms to established standards of good practice in higher education, and that its credits, certificates, and degrees can be trusted.” (*Id.*, p. 33)

“The ACCJC and its member institutions **shall provide information about the results of institutional accreditation reviews to students, the public**, employers, government agencies and other accrediting bodies. Students and others rely on accreditation status as an indicator of educational quality, and **there is growing public interest in accreditation** processes and the outcomes of accreditation reviews for individual institutions.” (*Id.*)

“The Commission believes that the two major responsibilities of institutional accreditation are **quality assurance to the public** ... The purpose of this policy is to strengthen the ability of institutions and the Commission to fulfill mutual obligations to inform, to educate and to **enhance the level of public confidence** in higher education institutions ...” (See ACCJC Policy on Public Disclosure and Confidentiality in the Accreditation Process, 2011 ed., p. 87, ¶ 1)¹¹¹

“... the goals [of accreditation] are: 1. To make a meaningful contribution to the body of information **available to consumers** of higher education services ... 3. **To enhance public understanding** of institutions of higher education through peer review ...” (*Id.*, p. 87)

ACCJC’s Policy on Public Disclosure etc. states that the Commission “maintains a website which informs members and the public about the Commission and its practices ...” The Commission indicates also that its newsletter is “available to the public on the ACCJC website.” (*Id.*) Further, “A list of upcoming comprehensive evaluation visits is available to the public upon request.” And, “The Commission publishes handbooks, manuals and other materials which describe the Commission and its process; these are available to the public, on the ACCJC website.” *Id.*

Moreover, the Policy on Public Disclosure explains that the “Commission and Commission staff make presentations before organizations ... and the public at large.” *Id.*

¹¹¹ Ironically, ACCJC amended this policy in 2012, so it now states that its responsibility is, inter alia, to “**provide transparency in accreditation** in a manner that will **enhance public confidence in the educational quality of accredited institutions** and protect the integrity of the accreditation process.” (2012 Policy on Public Disclosure, p. 103) However, there is no transparency regarding the Team Recommendation.

There are many more exclamations of the Commission's public purposes.

In *Salkin*, the court explained that the discipline issued by the Association "carr[ie]d the odor of public sanctions." That is especially true here.

City College's status as a public institution that provides low cost higher education to over 80,000 students also indicates that its accreditation status is a matter of public concern and significance. ACCJC recognizes this. Indeed, the Commission's Policy on Public Disclosure and Confidentiality expressly authorizes the Commission to announce to the public and the press the action taken, the basis for that action, and "any pertinent" information whenever the Commission concludes that the college has "used the public forum to take issue with an action of the Commission relating to that institution," or "misrepresents" a Commission action, or has become a matter of "public concern." (Disclosure and Confidentiality Policy, 2012 ed., p. 102; also found in predecessor versions) And that is exactly what the District did.

Following a radio show held on July 6, 2012 on KQED FM, at which several CCSF figures spoke, within hours ACCJC had issued a rebuke to CCSF, in the form of a press release, and then posted the press release with the rebuke on its website. It remains there to this day.

The foregoing suffices to establish that the Commission is sufficiently "tinged with public stature or purpose" to be bound by California law governing fair procedure. Indeed, this is more than a tinge - this evidence shows that ACCJC emphasizes its role as the guardian of the public interest. Having assumed this role, ACCJC is also responsible for its disregard of fair procedure.

In order to satisfy fair procedure under California law, ACCJC must offer a meaningful opportunity for colleges, students and the public to respond to a proposed sanction, before the Commission decides, and to appeal a Show Cause sanction before the harm results from its imposition.

Being offered a chance to address the Commission to discuss the evidence - generally a few minutes - is not a meaningful opportunity, especially when the College, its students and the public have no clue as to how serious the evidence is. As our exhaustive review of Commission actions shows, given the vague standards and scheme for differentiating between sanction levels, the same conduct can give rise to a wide range of actions - from accreditation with or without concerns and recommendations, to Warning, Probation or even Show Cause.

When a team proposes a particular sanction, and the Commission increases it to

one more severe, there is absolutely no opportunity for the College to understand why due to the lack of sufficient findings, as demanded by *Topanga*. Nor is there an opportunity for the Commission to explain the its reasoning, to “bridge the analytic gap,” and offer a chance to appeal in case the Commission got something wrong, or overlooked or misinterpreted relevant evidence. It serves neither the interest of the students or the public to perpetuate a system with this unfairness.

CCSF, its faculty, and its students have suffered, and continue to suffer harmful effects from ACCJC’s unwarranted and unfair action. ACCJC must follow due process, must avoid conflicts of interest affecting its reviews, and it must follow its evaluation procedures which provide for an informed recommendation by the evaluation team. These did not occur.

For the reasons set forth above, and based on the cases cited, ACCJC violated California law when it failed to provide an opportunity for CCSF to appeal Show Cause status. For this reason, Show Cause status must be reversed and the *status quo* restored.

D. The Commission Denies Due Process By Providing Insufficient Opportunity for the Commission to Consider Evaluation Team Reports and Recommendations, and Background Information

ACCJC denies due process to colleges, beneficiary students, employees and the public, by affording the Commission insufficient time to review and consider applications for reaccreditation, or other actions - such as removal from Show Cause status.

The procedure followed by ACCJC is arcane. As was explained by Norval Wellsfry, an Associate Vice President, at a recent ACCJC training session, a vehicle delivers the reports, recommendations, letters, and backup materials to the Commission, usually at their hotel the night before the Commission meets to consider the colleges’ applications. During its meeting from June 6-8, 2012, the Commission considered action on 25 institutions, including 21 California community colleges. Of these, at least 14 were full evaluations, and 11 were continued actions. There were 4 non-community colleges considered.

Of the 25 considered ACCJC reaffirmed accreditation for just 8, 6 of them California community colleges. That’s just 32%. It issued Warnings to 3, imposed Probation on 2, and Show Cause on CCSF. It continued 5 colleges on Warning, and 6 on Probation. Besides deciding the fate of 25 colleges, the Commission reviewed and received 21 reports, and reviewed and decided 21 “requests” for substantive change. In the case of CCSF, the 2002 Evaluation Team Report is more than 65 pages long. The backup evidence is hundreds of pages. The backup reports - from 2006, 2007, 2009 and

2010, and the Commission letters, amount in the aggregate to at least another 100 pages

Altogether, the number of pages which had to be read and analyzed was easily over 5,000 pages, and probably closer to 10,000, if not more. The 19 Commissioners attended a public session on June 6 in which they considered revisions to 7 standards and policies, and approved 2 policies for “first” reading. How much time did they have to read, understand and prepare for deliberations on the 25 colleges, including CCSF? Not much.

There is ample evidence that the Commission overlooked serious conflicts of interest involving the review of CCSF, and may have disregarded a procedural error in regard to the team recommendation. Clearly, the Report and President Beno’s subsequent summary mischaracterized the events of 2006 to 2012. Far too often the Commission has disregarded recommendations of evaluation teams.

An obvious weakness in the Commission’s consideration of accreditation actions, apart from its failure to observe due process in regard to the rationale, is that it allots insufficient time to consider applications for accreditation or other action. In some cases, it seems clear that commissioners have less than a day - apparently just hours - to review thousands of pages of dense and complicated documents. There is no way this method of deliberation satisfies due process.

It is not just ironic, it is inconsistent, that while the Commission gets less than a day to read upwards of 25 reports and hundreds of pages of backup data, the Commission hypocritically complains when a college sent information to a visiting team, just **five days before a visit**. See Letter, Beno to Solano Community College, February 3, 2009, p. 4.

In the case of *Western State University of Southern California v. American Bar Association*, 301 F. Supp. 2d 1129 (C.D. Cal. 2004), an accrediting body allowed just one day for a college to seek to reverse an adverse decision. That was absurd, and the court correctly enjoined the policy. Here, the failure to afford adequate time for commissioners to review applications - preferably before they **arrive** for the Commission meeting would seem essential to due process. Due process requires a meaningful opportunity to be “heard.” A college is heard based upon its self-study report, the team report, and the myriad of other documents. Absent a reform of this antiquated rule, every adverse action taken by the Commission under this scheme is invariably a denial of due process.

ACCJC has no valid explanation for not providing the Commission members who decide, copies of the relevant documents a reasonable amount of time prior to the deliberations. One day is obviously sufficient. It is a denial of due process.

E. ACCJC's Claim that it Provides Due Process Is Unavailing

ACCJC claims it provides “due process” in that institutions may respond in writing to draft team reports to correct errors of fact, respond to final team reports on issues of substance and to deficiencies noted in a report, and appear before the Commission when reports are considered.¹¹² ACCJC asserts this complies with **34 CFR sections 602.18, 602.23** and **602.25** of the “Higher Education Act of 1965 as amended.” (Policy on Commission Good Practice in Relations with Member Institutions, 2011 ed., p. 44, n. 1) Of course, these are not part of the HEA, which is found at **20 USC sections 1099b et seq.** Apparently ACCJC does not realize it is referring to regulations adopted by the Secretary of Education. Those regulations do not provide that ACCJC’s policy of denying appeals of sanctions less than disaccreditation, are lawful.

First, **34 CFR section 602.18** deals with “consistency in decision-making,” and has nothing to do with sanctions or appeals of sanctions. It mandates that ACCJC consistently applies and enforces standards that respect the mission of a college, and that the training offered by accredited colleges is sufficient to achieve its stated objective during the period of accreditation.

Next, **34 CFR section 602.23** deals with substantive changes, and not due process. The citation to this section is inapposite.

Finally, **34 CFR section 602.25** states that to be accredited, ACCJC must “demonstrate that the procedures it uses throughout the accrediting process satisfy due process.” It adds that the agency meets this requirement if it provides sufficient opportunity for a written response to any deficiencies identified by the agency, *before any adverse action* is taken. (**34 CFR § 602.25 (d)**) Subsection (f) requires that the ACCJC provides for an appeal of adverse action, and specifies the requirements for an appeal. And adverse action is defined as the denial, suspension, revocation or termination of accreditation, “or any comparable accrediting action an agency may take against an institution or program.” (**34 CFR § 602.3**)

There are fair procedure problems with ACCJC’s policy. First, ACCJC does not provide “sufficient opportunity” for a written response to any deficiencies identified *by*

¹¹² See “Policy on Commission Good Practice in Relations with Member Institutions,” 2011 ed., p. 44, no. 20. The Policy also allows that if the Commission action lists any deficiency not noted in the Team Report, then ACCJC must act “through its President,” to “afford the institutional additional time to respond in writing to the perceived deficiency before finalizing its action.” (*Id.*, No. 20.1., p. 45.)

ACCJC, simply by offering an opportunity to respond to reports or appear before the Commission, where the reports are discussed. This is because *ACCJC* maintains secrecy of the team recommendation, denying the institution, its students and the public the opportunity to make an informed judgment as to what is at stake or under consideration by the Commission at that moment, and address it in a meaningful fashion. At a minimum fair procedure requires notice of what is under consideration. But *ACCJC* does not provide any information to the College, students or public as to what sanctions, if any, *ACCJC*'s is considering, or what sanctions are recommended or suggested formally or informally by the team, *ACCJC* staff or others.

Second, the due process currently provided is not enough under California law. California law demands that an adequate appeal procedure exist for *every sanction*, including sanctions less than disaccreditation. If *ACCJC* fails to provide such an appeal, a court may intervene to enforce California law and correct procedural errors.¹¹³ California's law requiring due process for the sanction of, for instance, show cause, is not inconsistent with the HEA nor its regulations, but is supplementary or congruent.

ACCJC also takes refuge in its status as a voluntary organization. However, as noted elsewhere, CCSF's membership is not voluntary - its is required by California law. (Cal. Code Regs., tit. 5, tit. 5, § 51016) And, of course, the reality is that every California community college must be accredited by an accrediting agency approved by the Department of Education, for it and its students to receive Federal funds.

Here, *ACCJC* violated CCSF's rights in failing to obtain and forward a team recommendation. It violates the rights of all California community colleges, and their students and employees, by failing to provide meaningful notice of the recommendation in time for opposition, and in failing to provide for a due process appeal of Show Cause status.

VII. In Placing CCSF on Show Cause Status, ACCJC Disregarded the Public Policy of the State of California

Federal law requires that **ACCJC's "standards ... must be reasonable, applied with an even hand, and not in conflict with the public policy of the jurisdiction."**

¹¹³ Federal law similarly guarantees that accrediting bodies must comply with their procedures. See, e.g., *Chicago School of Automatic Transmission v. Accreditation Alliance of Career Schools*, 44 F. 3d 447, 449-450 (7th Cir. 1994); *Foundation for Interior Design Educational Research v. Savannah College of Art & Design*, 244 F. 3d 521, 528 (6th Cir. 2001)

Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools, 432 F. 2d 650 , 655 (D.C. Cir. 1970), emphasis added; *Rockland Institute v. Association of Independent Colleges & Schools*, 412 F. Supp. 1015, 1016 (C.D. Cal. 1976) California law is in accord with this rule. *Salkin v. California Dental Association, supra.*, 176 Cal. App. 3d 1118 at 1122-1124. These cases explain that an association such as the Accrediting Commission, even if it is considered a private entity, is obliged to act *in accordance with California law*. This principle has also long been recognized by California law governing private associations. *Bernstein v. Alameda-Contra Costa Medical Association* (1956) 139 Cal. App. 2d 241, 253; *Smith v. Kern County Medical Association* (1942) 19 Cal. 2d 263, 265; *Pinkser v. Pacific Coast Society of Orthodontists* (1974) 12 Cal. 3d 541, 553, 558; *California State University, Hayward v. National Collegiate Athletic Association* (1975) 47 Cal. App. 3d 533, 540 [holding that a private association must apply its rules consistent with the “laws of the land”].

In *Bernstein*, a local accrediting body (a county medical association) expelled a physician for violating American medical ethics, after he disparaged another member in a civil malpractice trial. The rules of the American Medical Association forbade a doctor from disparaging, by “comment or insinuation,” any doctor who preceded him in treating a patient. The dispute arose after the original doctor, who worked for a steel mill, said a worker had died of natural causes. Dr. Bernstein concluded he had died of an industrial injury. Dr. Bernstein was alleged to have behaved unethically after the worker’s widow was awarded workers compensation benefits.

The court cited a long line of cases holding that private societies may not enforce their by-laws “against public policy.” It refused to endorse the ethical rule as contrary to public policy. As the court explained, the state, not a medical society, had the right to define the duties of witnesses in a legal proceeding. *Id.* at 247, and n. 5. *Bernstein* traced the California precedent that private associations rules cannot violate State legislation back three decades, to *Bennett v. Modern Woodmen* (1927) 52 Cal. App. 581, 584-585, 199 P. 343. The case cited precedent across the nation dating to 1909. *Id.* at 584-585, citing, *inter alia*, *Samberg v. Knights of Modern Macabees*, 158 Mich. 568, 123 N.W. 25 (1909)

ACCJC standards have not been applied with an “even hand,” and are in conflict with the public policy of California in regard to numerous subjects including wages and benefits, shared governance, retiree health benefits, the Educational Employment Relations Act, freedom of expression under the California Constitution, shared governance requirements, Governing Board authority, Title 5 regulations, and the mission of California’s community colleges. It is a formal policy of ACCJC that compliance with external law, or policies of other organizations, should not be considered. Curiously, this policy does not appear in the Eligibility Requirements or Standards, but appears only in

the Team Evaluator Handbook.¹¹⁴ This seemingly violates **34 CFR section 602.18 (a) and (c)**.

Ironically, ACCJC inconsistently dispenses with this policy when it suits them. For example, ACCJC has been enforcing its peculiar view of GASB 45 since the standard was created, becoming increasingly prescriptive and disciplinary. ACCJC demands that California community colleges maintain reserves of 5 % or much more, while in Hawaii it accedes to Hawaii law, which requires only a 3 % reserve. And in the internal dispute at Santa Barbara City College, where ACCJC came to the defense of the Chancellor and losing incumbent Board members, it cited the Board for allegedly violating the Brown Act (even though the local District Attorney had found the Board did not violate the Brown Act).¹¹⁵

In reality, ACCJC has acted antagonistically toward State law for some time, a topic we next address.

A. ACCJC Has Disregarded Public Policy In Sanctioning CCSF and Other College's for Not Pre-Funding "OPEB" "Liabilities" Through an Irrevocable Trust. In Addition, ACCJC's Demands Are the Product of a Conflict of Interest with the CCLC Retiree Health Benefits Program Joint Powers Agency

One of the primary reasons ACCJC placed CCSF on show cause status is the college's alleged failure to make progress towards "addressing" its estimated future liabilities for retiree health benefits. This lack of progress is indicated as a "deficiency" in regard to Standard III.D. in President Beno's July 2, 2012 Action Letter to CCSF. The "deficiency" was described as the college's failure to "pre-fund" its "liabilities" for Other Post-Employment Benefits ("OPEB"), by not paying the "Annual Required Contribution" into an irrevocable "trust."¹¹⁶ An abundance of evidence shows that ACCJC views pre-

¹¹⁴ As noted elsewhere, ACCJC has indicated that "Recommendations should *not try to enforce* the standards of governmental agencies, the legislature, or other organizations." (1997 Handbook for Evaluators, at p. 32). This became a clearer directive in August of 2004, in the new Team Evaluator Manual, stating that "Recommendations should *not be based on* the standards of governmental agencies, the legislature, or organizations." (2004 Team Evaluator Manual, at p. 23).

¹¹⁵ See discussion of Santa Barbara City College, *infra*.

¹¹⁶ The ARC is a term of art, which is explained in and calculated according to Government Accounting Standards Board No. 45 ("GASB 45") The Government Accounting

funding of the “ARC” as district obligations is attributable to their erroneous application and interpretation of Government Accounting Standards Board No. 45 (generally referenced as “GASB 45”).¹¹⁷

ACCJC’s directive to CCSF to pre-fund the ARC in accordance with the GASB 45 “ARC” formula, and its sanctioning of CCSF for its “failure” to do this, is beyond the scope of the Commission’s legitimate jurisdiction, is based on a “standard” which is not widely accepted, conflicts with California law and public policy, and arises out of and involves a serious conflict of interest.

A bit of history is needed to fully understand this issue. In its June 29, 2006 Reaccreditation Letter to CCSF, ACCJC *recommended* that the college “*address funding for retiree health benefit costs.*”

As of June 30, 2010, ACCJC had identified the “pre-funding of the ARC as a “concern” of the Commission, and was demanding that CCSF deposit funds into a *irrevocable trust* to pre-fund OPEB liabilities, in an amount equal to the ARC.

In 2012, the ACCJC criticized the College for failing to implement this recommendation. (July 2, 2012 Letter, p. 2-3). **Prefunding, as expected by ACCJC, would more than double the current pay-as-you-go expense of retiree health benefits, thus reducing the funds available for (1) the offering of classes and other student services, and (2) salaries and benefits for faculty.**¹¹⁸ For CCSF's Fiscal Year ending June 30, 2012, the college paid \$7,243,730 toward the current cost of retiree health benefits. Had CCSF followed the Commission directive and prefunded the ARC, the cost would have been more than twice as much - the sum of \$16,590,309. Such an expenditure would certainly have necessitated reductions in college classes and services, harming the students. In other words, by evaluating colleges over prefunding of the ARC, even demanding that colleges either directly or by coercion, ACCJC is interfering in colleges’ discretion, and harming students. In the Bay Area, while millions and millions of dollars stashed away for a rainy day based on ACCJC’s unreasonable demands, a monsoon has been obliterating college classes, putting students

Standards Board is a private accountancy organization which offers advice concerning governmental accounting principles and procedures.

¹¹⁷ See, e.g., ACCJC’s action letter to CCSF dated July 2, 2012, pp. 2, 3 and 6, its June 30, 2010 letter to CCSF, and the numerous letters and reports cited *infra*.

¹¹⁸ This directive by ACCJC came after the District had already reduced faculty pay by a significant percentage for 2011-2012 and before it reduced faculty pay for 2012-2013.

on interminable wait lists, denying them the universal access they should be receiving. No wonder many colleges will not stand up to the ACCJC, when it can accomplish this, despite the law.

The Facts Concerning ACCJC’s Sanctioning Colleges for Not “Prefunding” Their GASB 45 Liabilities

1. ACCJC’s Initial References to Pre-Funding Retiree Health Benefits Are Perfunctory in Contrast to Later Commission Demands

ACCJC teams made brief references to retiree health benefits in connection with college accreditation reviews in 2003. Funding for this “long-term” liability to provide health care benefits was mentioned in evaluation reports or action letters dealing with the four Peralta Colleges (Laney, Merritt, Alameda and Vista), where Beno was previously employed.¹¹⁹ While there was no Standard that referred to retiree health benefits, ACCJC teams or President Beno, occasionally referred to this topic in discussions of the Standard governing fiscal stability, III.d.1.b and c.¹²⁰

2. The Adoption, Meaning and Implementation of GASB 45 Show That it is Mischaracterized by ACCJC

In June 2004, the Government Accounting Standards Board, that sets generally accepted accounting principles for public sector entities, issued GASB

¹¹⁹ There perfunctory comments are in a March 18-23, 2003 Evaluation Report of College of Alameda Report, that recommended the District devise a concrete plan to “provide funding for the long-term liability posed by healthcare benefits.” (March 18-23, 2003 Evaluation Report, College of Alameda, p. 5) An identical comment appeared in a letter from Beno to Laney College in June 2003, and in Reports concerning Vista College and Merritt College in October 2004.

¹²⁰ A March 2003 Evaluation Report concerning Palomar College mentioned the college “pays retiree benefits on a pay-as-you-go basis,” and that “A funding plan for the future unfunded liability to the college has not been initiated.” (March 3, 2003 Palomar College Evaluation Report, pp. 38-39)

A March 2004 Evaluation Report recommended that Allan Hancock College begin an effort to “adequately fund its retiree-benefit obligations rather than rely on annual budget appropriations.” (March 2004 Evaluation Report, p. 48). Similar comments appears in a Marin 2004 Evaluation Report and a Ventura October 2004 Report.

No. 45, *Accrediting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions*.

GASB 45 had a narrow focus. As one commentator has explained,

“GASB 45 promulgates *financial reporting standards* for OPEB plan sponsors, namely state and local governing employers offering OPEB. The statement requires public employers to *produce actuarial valuations* for their OPEB, following GAAP principles, and to report these liabilities on their financial reports.” (Prefunding Other Post Employment Benefits (OPEB) in State and Local Governments: Options and Early Evidence,” Center for State & Local Government Excellence, Cogburn and McCall, September 2009)

GASB 45 thus establishes *guidelines* for how public employers should *report* the costs of employer-provided retiree health plans. GASB 45 *does not* require that future liabilities be pre-funded, only that they be reported. (*Id.*, p. 8)

One of the tools used to calculate this future liability is the “Annual Required Contribution.” The ARC is used in GASB 45 as a measurement tool to inform public entities what their Annual Required Contribution would be *if* they 1) were to pay off the cost of health care in a fiscal year, *and* 2) pay a projected yearly contribution need to amortize estimated future liability within the time span of 30 years. Again, the standard noticeably, *does not* require that an ARC be made, that an irrevocable trust be formed, or that future liability be planned for. In fact, except for the cost of the accounting, no new costs for benefit coverage are created by GASB 45. The intention of the standard is instead to “make the liabilities due to the promise of health care insurance to retirees more transparent and to recognize the liabilities during the years of service to employees.”¹²¹ In essence, to raise awareness and implement a check on public entities to keep them from promising too much to their employees, by requiring them to look at the reality of what is being promised. In fact, in an official response released by GASB to the question, “**What are the most common misconceptions about Statement 45?**” the Board answered,

“**That it requires governments to fund OPEB.** Statement 45 establishes standards for *accounting and financial reporting*. How a government actually finances benefits is a policy decision made by government officials. The object of Statement 45 is to more accurately reflect the financial effects of OPEB transactions, including the amounts paid or contributed by the government, whatever those amounts may be.” [Emphasis in

¹²¹Clark, Robert L.. "Will Public Sector Retiree Health Benefits Plans Survive? Economic and Policy Implications of Unfunded Liabilities." *American Economic Review: Papers & Proceedings* 99.2 (2009): 533-537. Print.

original] (Attachment 7A, p.2, emphasis added)

Prior to GASB 45, public employers were only required to report the annual amount that they actually paid for benefits for current retirees. Starting in 2007-2008,¹²² GASB 45 declared that public agencies should provide *periodic actuarial reports* that *disclose* any long term retiree healthcare liabilities. Again, GASB 45 does not require that a public employer prefund these liabilities.

The “predominant” approach to “OPEB funding” is “pay-as-you-go.” GASB requires that governmental entities calculate and report the amount that they would have to pay in order to fully fund the amount of their liability that is estimated will come due in *30 years* (the “ARC”). While some agencies have elected to fund the ARC, many have not. But prefunding in this way presents difficult financial challenges:

“... the ARC will likely be substantially higher than annual pay-as-you-go-payments.” (*Id.*)

Despite the fact that GASB 45 clearly contains no mention of a requirement to fund the ARC, numerous myths have grown about GASB. As the Center for Local and State Government Excellence has observed, it is frequently misunderstood that GASB 45 requires prefunding:

“One of the myths (Clark 2008) that has surfaced post-GASB 45 is that the statement requires OPEB providers to establish irrevocable trusts and to prefund retiree health care ... such actions are not required by GASB 45 ...”
*Id.*¹²³

As will become evident, ACCJC succumbed to this myth several years ago, and has engaged in extreme actions, including sanctions, to compel districts to unnecessarily pre-fund their estimated OPEB liabilities.

3. ACCJC Reports and Letters in 2005 Include Directives

¹²² GASB 45 was effective for 2007-2008 for employers with revenues of \$100 million or more. For those between \$10 million and less than \$100 million, the effective date was 2008-2009.

¹²³ This attribute of GASB 45 was widely publicized. For instance, the California Debt and Investment Advisory Commission issued a OPEBs & GASB 45 Question and Answer Guide in 2005 which emphasized that “GASB 45 does not require liabilities to be funded through an irrevocable contribution ...” *Id.* p. 2.

Requiring Prefunding of GASB 45 “Liabilities” Based Upon an Inaccurate Interpretation of GASB 45

In 2005, references to GASB 45 began to appear in ACCJC evaluations, and in a dramatically-presented Statement issued by President Beno, which dominated a special publication of the Community College League of California, written in part by Steven Kinsella, a Certified Public Accountant, President of tiny Gavilan College, and first Chairman of Board of Directors of the CCLC Joint Powers Agency, an investment consortium that many California community colleges joined to pre-fund their OPEB. (Attachment 7.B.) Most of these references misconstrue GASB 45, directing colleges to take dramatic steps to *finance* their OPEB liability, something that the GASB 45 standard does not actually require.

Cypress College - March 2005¹²⁴. GASB 45, though not mentioned by name, seems to have influenced a March 2005 Team Evaluation Report for Cypress College. The team, consisting of seven administrators and two faculty, wrote:

“Like many other California community colleges, the North Orange County Community College District has an unfunded liability in the form of retiree health benefits; for this district, that total is approximately \$70 million. District staff is assessing the true obligation through an actuarial study and will recommend a prudent process to **start addressing funding the liability** (Standards IIID.1.b, III.D.1.(c).” (Cypress 2005 Evaluation Report, p. 40, emphasis added)

This team included Gavilan College President **Steve Kinsella**, who was to become increasingly embroiled in the pre-funding issue. Kinsella would become Chair of the CCLC JPA Board at some point in Fall or Winter 2005-2006. The CCLC JPA maintains an “irrevocable trust” for many of the California Community Colleges. Colleges can become members of the trust and contribute their ARCs. After the Commission issued “GASB”, “irrevocable trust” and “prefunding” recommendations, many colleges joined the CCLC JPA¹²⁵

College of the Redwoods - October 2005. In an October 2005 Team Evaluation

¹²⁴ For reference of the history of Commission evaluation regarding retiree health benefit liability (OPEB), *see* Attachment 7.C.

¹²⁵ See City College of San Francisco’s Response to 2006 Recommendation 4: Financial Planning and Stability, in its 2009 Progress Report, which reveals that, “The College did join the investment consortium sponsored by the **Community College League for this issue** but has not deposited any money into the fund.” (2007 CCSF Progress Report, p. 14, emphasis added)

Report involving the College of the Redwoods, there was mention of the need for an *irrevocable trust to receive such prefunded contributions*.¹²⁶ The Report criticized the college because, while it was funding its long-term liability through an Employee Benefit Trust Fund, the fund was “**not an irrevocable trust** and would not meet the requirements for GASB 45 reporting requirements.” Despite this evaluation team observation which was obviously based on GASB 45,¹²⁷ there was no specific mention of GASB 45, prefunding of GASB 45 liabilities, or the “Annual Required Contribution” in the Eligibility Requirements or the Standards, or in any ACCJC publication.

Solano Community College - October 2005. With an October 25-27, 2005 Evaluation Report of the Solano Community College,¹²⁸ an ACCJC team first discussed GASB as **requiring that funds be “set aside”** and detailed adverse consequences to the college that would supposedly befall it if this were not done. The team, with 7 managers and 3 faculty, was clear in its demands - that Solano Community College “should develop a detailed plan ... to address the long-term financial obligations including ... **establishment of a reserve for retiree health benefits.**” (2005 Report, p. 4, emphasis added) The Report added that,

“Unfunded liability and the requirements of GASB 45 have been discussed at high levels ... reserve strategy options have been discussed but a decision has not been made and **funds have not been set aside in preparation for GASB 45 requirements.**” (Solano Evaluation Report, Oct. 25-27, 2005, p. 38, emphasis added)

The Report suggested adverse consequences if money was not set aside:

“The most recent actuarial study ... indicates a liability of \$11.8 million. **The GASB requirement for compliance will be effective** in fiscal year 2009 for SCC.

¹²⁶ Under GASB 45, as noted above, monies placed in a so-called “irrevocable trust” are deducted from the unfunded liabilities. The trust is not actually “irrevocable” - GASB 45 recognizes that entities may withdraw their contributions under certain conditions.

¹²⁷ According to ACCJC Policy, a position articulated by the Evaluation Team represents the position of the Commission. Commission Staff train evaluation team members as to what they should be evaluating, and how.

¹²⁸ The Team Report recommended that the College develop a plan to address “long term financial obligations including ... establishment of a reserve for retiree benefits.” (Solano Evaluation Report, October 24-27, 2005, p. 4). Solano was reaccredited, with this recommendation for improvement, in a letter dated January 31, 2006.

If this issue is not resolved as required by the new regulation, the financial rating for the District will be negatively impacted. This will result in a lower rating and have a negative impact on the funds ...” (2005 Solano Team Evaluation Report, p. 39, emphasis added)

The Commission reaccredited the college, but in its January 31, 2006 action letter President Beno wrote that the College “should develop a detailed plan with a timeline and fixed responsibility to address the long-term financial obligations including ... *establishment of a reserve for retiree benefits.*” (Beno to Perfumo, January 31, 2006, p. 2)

It bears emphasis that both the 2005 Solano Evaluation Team, and the Commission, were misconstruing GASB 45. GASB 45 does not require prefunding, and GASB 45 “requirements” have **never required a reserve fund** for OPEB prefunding.¹²⁹ Furthermore, there was no ACCJC policy which required adherence to any interpretation of GASB 45. Indeed, as of Fall 2005 the ACCJC Team Evaluator Manual was quite clear - as it remains - that the ACCJC does not “base” recommendations ‘on the standards of ... organizations.” We found no evidence that this contradiction was noticed by members of the ACCJC in 2005.

Solano responded to the Report and Action letter. A Special Report and a Progress Report were subsequently filed by Solano, and in November 2008 the ACCJC conducted a site visit in response. It is worthwhile to consider this, even if we get ahead of ourselves.

Solano Community College - Fall 2008. A 5-person team, made up of five managers (two superintendents, a president, a vice chancellor and a business manager) and no faculty, reviewed several variety of Standards, including ‘Fiscal integrity and Stability.” *It focused in particular on the 2005 recommendation of a retiree benefits reserve.* It’s comments confirm a continued misunderstanding by the Commission of GASB 45. First, GASB 45 was incorrectly described as a requirement of California law, and second, it was again presented as if GASB 45 required a level of “prefunding” retiree benefits. The team explained:

“The College has not made progress meeting this recommendation ... **With regard to California State Regulation, GASB 45 ..., which requires a level of funding for a college’s retiree and other benefits,** the college has done the following.

¹²⁹ Also, the assertion that failure to ‘resolve” GASB 45 would have a negative impact on the college’s financial rating was pure speculation.

The College contracted with an actuarial firm ... concluded that the College's Actuarial Accrued Liability is valued at \$16, 087, 726 and the Annual Required Contribution (ARC) is \$1, 728, 414. **To satisfy the requirements of GASB 45, the college has joined the Community College League of California's Retiree Health benefit Joint Powers Authority (JPA). To date the College has deposited \$917, 000 ... but no further transfers have been designated in the ... 2008-2009 budget.**

“Because of the significant liabilities ... the college should plan, budget and provide for the transfer of funds into the irrevocable trust to pay for future benefits in accordance with GASB 45. Additionally, the college should maintain exploring all options available to reduce its continuing health benefit costs ... The college is at impasse with these two bargaining units. The inability to negotiate a cost cap will raise the district's long term costs for health benefits.” (Solano Team Evaluation Report, Nov. 2008, emphasis added)

Concluding the College had not met this recommendation, the Team suggested that the college immediately develop a plan to establish a retiree benefits reserve and do “something” to address collective bargaining settlements to reduce these benefits. (Report p. 16-17)

There are several striking dimensions to the 2008 report. As should be evident, this Team's summary of GASB 45 was inaccurate. First, GASB 45 is not a California State Regulation, it is an accounting standard of a private organization. (As is still the case, the ability of the Commission and its staff to locate and correct misstatements in team reports is questionable.) But the salient point is that ACCJC declaims that it does not enforce the rules of private organizations, which we discuss below.

Second, GASB 45 did not require any public entity to “transfer funds into” an “irrevocable trust.” Particularly troublesome is that the 2008 team apparently saw nothing awry in connection with prefunding through the CCLC's JPA - as we discuss below, ACCJC's connection to this JPA presents serious conflict of interest issues.

Third, GASB 45 did not require a “level of funding” for retiree and other benefits. Finally, as to “negotiating” to reduce these benefits - ACCJC shows astounding ignorance. The law also clearly forbids districts from negotiating to reduce contractually vested retirement rights.¹³⁰

¹³⁰ The Federal courts have specifically held that vested pension rights cannot be bargained away by unions in negotiations with employers. "Under established contract

ACCJC continued to misconstrue GASB 45. On February 3, 2009, in an Action Letter, Beno told Solano College it had been placed on Show Cause status. Among the reasons was the College's failure to establish a *reserve for retiree benefits*. (Letter, Beno to Solano, Feb. 3, 2009, p. 2) Thus as to Standard III.D. and ER 17, Beno wrote, "In order to assure the institutions (sic) future fiscal stability, the College should immediately develop a detailed plan with a timeline and fixed responsibility *to address the establishment of a reserve for retiree benefits.*" (*Id.*, emphasis added)

Solano College Spring and Fall 2009. In a "Show Cause" Report dated March 31, 2009, Solano asserted it had satisfied the Commission by contracting with one of the Community College League of California's "approved" actuaries, Total Compensation Systems," and **transferred funds into the Community College League's "irrevocable trust" to "pay for future benefits in accordance with GASB 45."** Show Cause Report, p. 28. The College declared its resolve to thereafter make the ARC payment into the CCLC "trust." *Id.*

On April 27, 2009 ACCJC sent another evaluation team to the college - this time, four administrators led by **ACCJC Commissioner John Nixon**, who served as a Commissioner from July 1, 2008 until July 2011, when he left his position as commissioner and became Associate Vice President of the Commission - a member of its staff. This team issued a "Show Cause" Report which found as to OPEB funding, that the college was now building a reserve. The perfunctory comment appears at p. 15 of their Report.

On June 30, 2009, ACCJC changed Solano's Status to Probation. Again, multiple recommendations were made and one of them was an insistence that the college continue to build a reserve for retiree benefits. (Letter, Beno to Solano, June 30, 2009, p. 2) This letter was followed by two more Solano reports, and then more Commission reviews.

On October 29, 2009, a two person team of *administrators*, again led by Commissioner John Nixon, evaluated Solano. Presumably satisfied by Solano's joining the CCLC JPA and prefunding OPEB liabilities, there was no mention

principles, vested retirement rights may not be altered without the pensioner's consent." *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181, 92 S.Ct. 383 (1971) "If the rights were vested, the union and [the employer] were without power to bargain those benefits away." *Bokunewicz v. Purolator Products, Inc.*, 907 F.2d 1396, 1401 (3d Cir. 1990) The California Public Employment Relations Board has definitively ruled that unions do not represent retirees under the EERA. *San Leandro Unified School District* (1984) PERB Dec. No. 450, 9 PERC ¶ 16017.

whatsoever of GASB 45. Another team visit followed.

In October 2011, a 12 person team, *dominated by 9 administrators*, again reviewed Solano. Although the College was operating with a “planned deficit,” the team decided that the College was now doing just fine with regard to OPEB, by putting money into the Community College League’s irrevocable trust.¹³¹ In other words, running a deficit was okay if it was incurred in order to allow the prefunding of GASB 45 “liabilities” through the CCLC JPA. As the team recognized:

“The College has established an irrevocable trust with the **Community College League of California** to fund health care obligations for retirees. The current operating budget includes **full payment of the Annual Required Contribution (ARC) as established by GASB 45. The ARC in the current year is paid by pay-go benefits for retirees as well as an expected current contribution to the irrevocable trust.**” (2011 Solano Team Evaluation Report, p. 45)

As ACCJC began to impose requirements invoking GASB 45, the private trade association, the Community College League of California, became involved with GASB 45.

4. The CCLC Retiree Health Benefits JPA Emerges in 2005 to Accept Prefunding Contributions, With a Boost From Barbara Beno and the ACCJC

The Community College League of California is a “trade association” composed of all California community college districts.”¹³² The CCLC, led for several years by Scott Lay, engages in a variety of activities to support community college districts.

Starting on or about January 2, 2005, one of these activities was to create an

¹³¹ As discussed later, as a member of the CCLC JPA “trust,” Solano would have been required to pay the League an initial fee of more than \$5,000, an annual fee (\$3,000), and also five basis points for its contribution to the trust - understood to be \$225,000 during the 2010-2011 Fiscal Year.

¹³² The League’s website explains that it is composed of the 72 local community college districts, and includes two “major organizations” which share a common mission, staff and fiscal resources, the California Community College Trustees, and the Chief Executive Officers of the California Community Colleges. Two other organizations are affiliated with the League, the Association of California Community College Administrators, and the California Community Colleges Classified Senate. The League includes various boards of directors. (Attachment 7.D.)

irrevocable OPEB “trust” to prefund retiree health benefit liabilities as calculated by the ARC under GASB 45.¹³³ It is this JPA which is at the heart of another ACCJC conflict of interest.

Gavilan College president Steve Kinsella was extremely involved in the creation of the JPA trust.¹³⁴ Kinsella served as the JPA’s original chairperson of the trust’s board.¹³⁵ The term of office of each individual board member is “indefinite.”¹³⁶

The League has claimed credit for creating the trust. For instance, in a Special Report issued in Fall 2005, the League stated that in *February 2005*, business “officials” of several California community colleges, under the leadership of the CCLC, created the Retiree Health Benefits JPA. The new JPA began with approximately 15 “founding” or “charter” districts, one of which was Gavilan College. (Attachment 7.F.) The districts whom the CCLC indicates became members the first year are: Antelope Valley, Coast, Copper Mountain, Desert, Foothill-DeAnza, Glendale, Grossmont-Cuyamaca, Kern, Lake Tahoe, Merced, Palomar, San Diego, San Joaquin Delta, Sequoias, Shasta, Siskiyou, Solano, Southwestern, West Hills, and Yuba. *Id.*, p. 4.

The CCLC’s JPA member districts are required to pay “Start-Up” Fees,¹³⁷ an

¹³³ See Retiree Health Benefit Program Bylaws, Revised April 21, 2009, indicating that Charter Members of the JPA are those who were original signatories to the JPA Agreement on “its execution date of January 2, 2005.” The formal name of the Agency is “Retiree Health Benefits Program Joint Powers Agency.” *Id.*, p. 1 The parties to the Agreement are the League and the member districts. Each party appoints, through its governing board, an individual member who serves as a member of the JPA Board. *Id.* pp. 2-3. (Attachment 7.E.)

¹³⁴ Mr. Kinsella has been the Superintendent/President of Gavilan College since January 2003. (AVC Accreditation website, “The Team,” Dr. Steven Kinsella, chair. See: www.avc.edu/aboutavc/teamsitevisit.html.)

¹³⁵ See Special Report, “Funding retiree health benefits – ...” (Attachment 7.B.); *League in Action* newsletter, “19 districts joint new statewide JPA To fund retiree health benefits,” CCLC, Spring 2006, p. 1 (Attachment 7.F.); *League in Action* newsletter. “Trustees endorse League program to address retiree health benefit challenge,” CCLC, Fall 2006, pp. 1, 4. (Attachment 7.G.)

¹³⁶ See 2009 Bylaws, Section III.E., (Attachment 7.E.)

¹³⁷ The Charter Members paid \$2,500 and non-Charter Members pay \$5,500 to join the JPA (the “Start-up Fee”), subject to annual adjustment. Bylaws, *Id.*, Section VI.B., p. 9

Ongoing Fee.¹³⁸ These fees are paid to the CCLC's JPA. As of June 30, 2012, the JPA "trust" assets were valued at \$ 133, 741, 103.53.¹³⁹ According to documents from the CCLC Budget, the trust appears to generate about \$125,000 annually in revenue for the League's JPA.¹⁴⁰

The JPA is "duty bound to ensure that Trust assets are used exclusively for the purpose of providing OPEB to eligible retirees of the [member] Districts."¹⁴¹

a. Beno and ACCJC Encourage Colleges to Prefund Their GASB Liabilities Through the CCLC's JPA Trust

In its "Special Report to Trustees and Chief Executive Officers," issued by the CCLC in Fall 2005, the League wrote glowingly about its new JPA and the need for colleges to pre-fund retiree health benefits. (Attachment 7.B.)).¹⁴² The Fall 2005 CCLC Special Report was devoted exclusively to promoting the CCLC JPA for retiree health benefits.

The lead article, written by Steve Kinsella, John Rodgers and Diane Woodruff, indicated that given the new GASB 45 requirements, "the prudent time for trustees and CEOs to act is now." *Id.*, p. 1. In promoting the advantages of colleges joining its new JPA, the League emphasized the **risk to college accreditation from not prefunding OPEB liabilities** (even though as of Fall 2005, the ACCJC had only begun to mention the subject in evaluation reports or action letters). But then, CCLC had a specific reason to

¹³⁸ The annually-paid Ongoing Fee consists of a base fee of \$3,000, and "an investment fee of \$.0005 times the gross amount of Community College District funds invested in the Agency for the first \$10 million, and \$.00025 for all funds over \$10 million." Bylaws, *Id.*, Section VI.D., p. 9. This fee is also subject to ongoing adjustment as determined by the Board of the JPA. *Id.*

¹³⁹ See "CC League Consolidated Trust Statistics - As of June 30, 2012." (Attachment 7.H.)

¹⁴⁰ The Leagues FY 2012 Operating Budget shows, under "Revenue," a budgeted amount of \$ 125, 000 for the "Retiree Health Benefits JPA." (Attachment 7.I., p. 3)

¹⁴¹ Memorandum, Best, Best & Krieger LLP to CCLC Retiree Health Benefit Program JPA, July 26, 2011 (Attachment 7.J., p. 4.)

¹⁴² This Special Report is also available at:
http://www.nacubo.org/documents/prof_dev/Calif%20Comm%20College%20Solution%20to%20GASB%2045_Giles.pdf

mention the ACCJC.

The Report highlighted comments by the ACCJC - to be specific, its president, Barbara Beno - regarding the relationship between GASB 45 pre-funding and accreditation. Some of Beno's comments were emphasized in red type, boxed in red.¹⁴³ The most prominent covers a third of the second page, and is entitled "**A Statement Regarding GASB 45 From the Accrediting Commission.**" It is "signed" "Barbara A. Beno, President, August 2005."

Beno's complete statement is as follows:

"The requirements of GASB 45 concerning the reporting of retiree health benefits liabilities are in alignment with current Commission standards and practices. Current standards state specifically that governing boards are responsible for the fiscal health of the colleges they govern.

The Commission's standards IV D.1 and 2 require that an institution's financial resources be sufficient to support its mission, and that institutional financial plans identify and make provision for liabilities. These requirements include the following: - 'When making short-range financial plans, the institution considers its long-range financial priorities to assure financial stability. The institution clearly identifies and plans for payment of liabilities and future obligations.'

In the past several years, the Commission has cited unfunded liabilities associated with retirement and other benefits as a factor in evaluation of institutional financial stability and management quality, and required institutions to identify the amount of and make plans to pay unfunded liabilities. **Governing board efforts to address GASB 45 will likely bring more institutions into alignment with existing accreditation standards,** but will also challenge institutions to implement strategies to ensure long term fiscal stability.

Barbara A. Beno, President, August 2006"

The *Special Report* included this warning,

"To have the unfunded liability removed from their balance sheets, **districts are**

¹⁴³ We have been unable to locate any source for ACCJC/Beno's comments in favor of a trust, other than the CCLC promotional newsletter itself. It appears ACCJC willingly wrote a "pitch" for colleges to join the CCLC JPA, at risk of accreditation troubles.

required to commit funds irrevocably to a trust fund, the type being developed by the Community College League’s new Retiree Health Benefit JPA ...” *Id.*, p. 2., emphasis added.

We include within this complaint a complete copy of the CCLC JPA Special Report, which begins on the next page.

The message of the CCLC Special Report, combined with the statement by President Beno on page 2, could not have been clearer: districts wanting to avoid accreditation problems would be wise to prefund their GASB “liabilities.” Furthermore, the Newsletter conveys the message that ACCJC would be satisfied if colleges joined the ACCJC JPA and make irrevocable deposits into the JPA “trust.” Thus, the Newsletter added:

“Accreditation. The Accrediting Commission, in a statement on page two of this report, states that districts are required ‘to identify the amount of and *make plans to pay unfunded liabilities.*’” *Id.*, p. 4, emphasis added.

Beno’s reference to the GASB standard being “in alignment” with current ACCJC standards is unsupported. **In fact, there was no mention of GASB 45, or the ARC, anywhere within the Standards, nor was there any mention of prefunding retiree health benefit “liabilities.”**¹⁴⁴ And what Beno neglects to mention is that ACCJC’s official policy in 2005, and to this day, is that: “Recommendations should not be based on the standards of ... organizations.” See, e.g., Team Evaluator Manual, 2004 ed., p. 23) Yet over the next 7 years, ACCJC frequently cited colleges for failing to satisfy the Commission’s interpretation of GASB 45.

The new JPA was also prominently mentioned in the **Spring 2006 edition of League in Action newsletter**, which announced on the front page that, “19 districts join new statewide JPA to fund retiree health benefits.” (Attachment 7.F.) It stated,

“California community colleges are invited to join 19 charter member districts ... in a new statewide program to help community colleges address the challenge of retiree health benefits. The new joint powers agency (JPA) is a state-approved legal and financial structure that will allow community college districts to invest in a special trust designed to fund long term health benefits for current and retiree employees.” *Id.*

¹⁴⁴ As discussed *infra.*, it wasn’t until June 2012, that ACCJC added references to OPEB liabilities to its Standards, and the addition is not entirely clear.

The article, after noting that “**Steve Kinsella, president/superintendent of Gavilan CCD, is the chair of the JPA Board of Directors,**” seemingly quoted Kinsella as stating,

“California’s community colleges face a \$ 2.5 billion unfunded liability over the next 30 years for retiree health benefits. We need to ensure that our community colleges are equipped to meet the new accounting standards and to secure healthcare benefits for current and future retirees. This approach ... is the most prudent ...” *Id.*, p. 1.

On page 7, the Newsletter emphasized the advantages of joining the JPA:

“**According to Kinsella**, the League-sponsored JPA is the only higher education entity of its kind in the United States established expressly for the purpose of facilitating compliance with the new accounting standards. **The non-profit organization is led by Kinsella**, and ... They were selected by fellow community college leaders on the JPA board.

The JPA provides its members an approved list of actuaries they can work with to determine their financial liability for future retiree health benefits ...

The League has led an effort over the past year to inform trustees, chief executive officers and chief business officers about the new accounting standards, known as GASB 45 . **The Accrediting Commission has urged districts to comply with GASB 45 standards as well, stating, ‘The Commission’s standards require that an institution’s financial resources be sufficient to support its mission, and that institutional financial plans identify and make provision for liabilities.’**” (*Id.*, p. 7, emphasis added)

Ironically, the same League newsletter identified ACCJC as one of the League’s “Partners in Professional Development.” *Id.* p. 2. As the Newsletter explained, 11 statewide associations, including the ACCJC, had “joined with the League in offering outstanding professional development” at the League’s annual “Convention and Partner conference” each November. *Id.* p. 2.¹⁴⁵

The League’s **Fall 2006 Newsletter** continued the same theme of promoting the

¹⁴⁵ The Newsletter stated that “in most cases” its statewide partners are “getting a share of the proceeds.” *Id.* p. 2. We do not know if ACCJC receives a share of the CCLC “gate” but we request that ACCJC clarify this.

JPA. The Newsletter explained that the 22 districts which then belonged to the JPA “have created an irrevocable trust ...” and that Kinsella was the chair of the JPA board of directors. (*Id.* p. 4., Attachment 7.G.) Kinsella was quoted at length,

“The Retiree Health Benefit Program JPA Board of Directors is pleased that so many community college district trustees, chief executive officers, and chief business officers have embraced, through their membership in the JPA, our collective effort to address the GASB 45 challenge many of us face. The JPA Board of Directors and its Investment Committee will carefully and prudently monitor the program and its investment options to insure maximum return on your capital with minimum market risk. I invite all districts that are not now currently members to give consideration to joining this important statewide JPA.” *Id.*, p. 4

And then the Newsletter again sings the praises of the JPA in relation to accreditation:

“Participation in the program allows California community college districts to fully comply with GASB 45 **and to comply with the Accrediting Commission standards related to having financial plans that meet all long-range financial priorities, liabilities and obligations.**” *Id.*, p. 4, emphasis added.

The article included a “block” promotion for the League’s “37- page booklet explaining GASB 45 and the investment options. *Id.*

b. ACCJC Evaluation Teams Pressure Colleges to Prefund Their GASB 45-OPEB Liabilities

After Beno’s statement in the CCLC Special Report in Fall 2005, ACCJC’s criticism of colleges for not pre-funding their GASB 45 “liabilities” increased, and Mr. Kinsella began taking an active role as Team Chair on various ACCJC Site-visit Evaluations, concurrently with his college’s membership in the JPA and sometimes his service with the CCLC JPA as a designated trustee or alternate,¹⁴⁶ and later as a Commissioner, a member of the Commission’s *ad hoc* Task Force on finance, and a Vice Chair of the Commission.

¹⁴⁶ Kinsella has served on the CCLC JPA as the Chairperson, as a Trustee, and as an Alternate Trustee. The precise timeline of when he served in each of these positions is unclear because the JPA’s records are difficult to access. What is known is that he served as the Chairperson at the founding of the JPA in 2005, served on the Board of the JPA as a Trustee until at least 2008, and is continuing service to the JPA as an alternate Trustee today.

Foothill College - January 2006. A Commission “action letter” from President Beno recommended that the district “develop and implement a plan to address the unfunded postretirement liability. (Standard III.D.2.c.)” In a 2011 Report, the team “found the District to be **fully compliant with GASB 45, having helped to form a statewide retiree health benefits irrevocable trust through the Community College League of California in the 2006-2007 fiscal year.**”

Sierra College - October 2007. A reference to prefunding of OPEB liabilities through an *irrevocable trust* appeared in the October 2007 Sierra College Evaluation Report prepared by a team of 8 administrators and one faculty member, **chaired by Steven Kinsella**, the founder and apparently the Chair of the CCLC JPA at that time. The October 2007 Report stated,

“If the college does not pay \$5.5 million per year into an irrevocable trust fund, it will accumulate an unfunded liability that will be reported on the college’s financial statements. At the time of the team’s visit the college had not established a long term financial plan to address this obligation (III.D.1.(c).”

“Recommendation # 5:

Plan for Long-Term Debt Financing--The team recommends that the college **develop a long term debt financing plan to address the costs associated with implementation of GASB 45 requirements.** (Standard III.D.1.C)” (October 2007 Evaluation Report, Sierra College, p. 55, emphasis added)

When Mr. **Kinsella** was serving as Chair of the Sierra team, Gavilan College was still a member of the CCLC JPA. At some point, apparently after 2008 according to one document publicly available, Mr. **Kinsella** ceased being Gavilan’s designated “trustee” or representative on the JPA Board, and apparently became the alternate representative. How long he held this position is unknown. However, as College president he presumably retained influence, if not some persuasive authority, over Gavilan’s involvement with the JPA.

In 2012, for a Follow-Up visit of Sierra, **Kinsella** was made chair of a two-person visiting team that assessed only Sierra College’s compliance with the Commission’s “OPEB” liabilities and GASB standards. In 2012 Gavilan was still a member of the JPA trust, with a seat on the board. By then **Kinsella** was also a Commissioner of ACCJC.

Palomar College - March 2009 Another lengthy ACCJC reference to GASB 45 and an “irrevocable trust,” appears to have come a year and one-half after the Sierra College Report. It came from **another Kinsella-led team.**

In a March 2009 Evaluation Report, the team, composed of 7 administrators and 2 faculty, issued an Evaluation Report. The College had actually joined the Community College Leagues' Retiree Health Benefit JPA, but *the College had not deposited monies in the CCLC JPA trust*. The Kinsella-led team found fault with this, criticizing the College's failure to pre-fund the OPEB, and **criticizing the College for not adding funds to the League-run JPA. In other words, the ACCJC, in a report by Kinsella and his team, criticized Palomar College for not paying into the JPA trust of which Kinsella was a founding chair, and still was involved through Gavilan's participation, and presumably through service as an alternate trustee of its board. The Palomar Report stated:**

“Recommendation #11: Long-Term Health Fund Liability–In order to meet the Standards, the team recommends the college **identify and plan for the funding of the future retiree health benefits** (III.D.1.b, III.D.1.c) ... (Evaluation Report, 3/09, pg. 11, emphasis added)

The College is **not paying an amount into the fund that equals the Annual Required Contribution (ARC)** and as a consequence will be recording a liability for the portion of the obligation that is not funded on an annual basis. By drawing down the fund balance of the Retiree Benefit Fund the College is not paying the minimum annual cost of actual expenditures incurred during the year or what is referred to as the "pay-as-you-go" amount which is not a funding method but is at least an approach that pays for the yearly costs of these benefits ...

If the College does not pay \$4.5 million per year into a trust fund, it will accumulate an unfunded liability that will be reported on the College's financial statements. The 2008-09 Adopted Budget includes the in and out transfers but does not contain funding for this liability. **The District is a member of the Community College League's Retiree Health Benefit Program JPA that assists districts in responding to GASB No. 45. However, the District has not transferred any funds to the JPA** and, through its payments in FY 07/08, is starting to consume its ending fund balance. (Palomar March 2009 Team Evaluation Report, p. 82, emphasis added)

Palomar was followed by a number of reports evaluating colleges in connection with paying the GASB 45 “Annual Required Contribution.”

Napa Valley College - October 2009. The ACCJC's obsession with college's prefunding projected OPEB liabilities became epidemic. In an October 2009 Evaluation Report to Napa Valley College, a team of 9 administrators and 3 faculty wrote that while

the college had taken some steps toward funding the retiree health benefit liability, “retiree benefit funds have not been placed in an *irrevocable trust* ...” The Report predicted that this might “significantly reduce the college’s ability to support current levels of operations ...” (2009 Napa Evaluation Report, pp. 35-36) *There was no analysis to back up this prediction.*

Santa Monica - March 2010. The March 10, 2010 Evaluation Report to Santa Monica College demanded that the College do “better” than put away \$3.4 million to prefund “GASB 45” OPEB benefits. (Evaluation Report, Santa Monica College, March 9-11, 2010, p. 55) The Report offered that the College “has made efforts to allocate funds to respond to **the requirements of GASB 45** ... the amount the college contributed is a start, but is a minimal one. It is important that the college revisit this issue **revisit this issue after the current economic crisis has been surmounted.**” *Id.* Notably, in contrast to its treatment of CCSF and some other colleges, the Commission gave Santa Monica a pass - **they could defer dealing with prefunding until “after the current economic crisis has been surmounted.”** (*Id.*, emphasis added)

The Santa Monica Team Report was accepted by the Commission, which *reaffirmed accreditation*, and issued an action notable for **not** mentioning the College’s inability to continue prefunding of GASB 45 “liabilities.” In treating Santa Monica so gingerly, and coming down hard on CCSF for the same issue during the same economic crisis just a year and a half later, it is apparent why ACCJC is viewed as being inconsistent or playing favorites.

Glendale College - March 2010. In a March 2010 Report about Glendale Community College, an ACCJC team reported:

“The Team Recommends that the college develop and implement a **plan for funding its long-term employee liability under Government Accounting Standards Board (GASB) 45.** Standard III.D.1.c.” p.7

“**Identification of the liability for the Government Accounting standards Board (GASB) 45 requirements has been completed; however, there is not agreement between the college and the unions as to whether funding this liability, which is \$16 million, is a negotiable item.** The College has not implemented any funding at this point until this issue has been resolved.” p. 54

Los Angeles Trade Tech - March 2010. In March 2010, a visiting team issued an Evaluation Report on Los Angeles Trade Tech which looked at the District’s creation in 2008 of an irrevocable trust to prefund retiree benefit costs, but needed to “reconcile

the remaining net OPEB obligations.” (Los Angeles Trade-Technical College, Evaluation Report, March 23-26, 2010, p. 42) The College was then placed on probation by a letter of June 30 2009 from President Beno, which cautioned that the District’s OPEB liability needed to be carefully monitored for th “next few years.” (Letter, Beno to Rodriguez, June 30, 2009, p. 2)

On March 15, 2010 LA Trade-Tech filed a Probation Follow-Up Report which described its handling of the unfunded liability by negotiating with the District’s unions to begin pre-funding part of the unfunded liability, and that it had reconfigured its benefits to significantly reduce the projected unfunded liability by nearly \$100 million. (Follow-Up Report, p. 83) On June 30, 2010 ACCJC’s action letter reduced LA’s sanction level to Warning. The Warning letter included a “Commission concern” about how the College was addressing its OPEB liability and demanded more:

“The consequence of not funding an amount that is at least equal to the ARC is that an unfunded liability will be recorded on the financial statements of the district and the colleges and that the ending fund balance or reserves will decline. Eventually, unless this liability is funded the district and the colleges’ financial condition will deteriorate to a level that will make it difficult for colleges to meet the requirements of Standard III.D.

The Commission requests that the College provide information about how the ARC is being handled and how funds in an amount at least equal to the ARC are being paid into an irrevocable trust funding order to pay for liabilities as they become due ...” (Letter, Beno to Chapdelaine, June 30, 2010, p. 3)

This action letter reveals the ACCJC increasingly extreme and prescriptive demands, demanding compliance with the GASB 45 ARC, even though it is official Commission policy that **“Recommendations should not be based on the standards of ... organizations.** The relevant standards for the team are those of the Commission.” (Team Evaluator Manual, 2011 ed., p. 22.) The ARC, as mentioned earlier, is a GASB 45 formulation, for purposes of the GASB 45 calculation. There is no reference to the ARC in the 2011, 2012 or any of the Commission’s policies, procedures, Standards, or Eligibility Requirements. The ARC is not required to be pre-funded under GASB.

Furthermore, ACCJC’s prognostication skills do not allow it reliably predict whether the lack of payment of the estimated “ARC” will or will not have an adverse impact, whether in 10 years, 20, 30 or more.

Allan Hancock College - March 2010. ACCJC continued its mischaracterization

of GASB 45 in a March 2010 Evaluation Report of Allan Hancock College. In 2004 the ACCJC team Evaluation Report noted that the college's long-term obligation for retiree health benefits was "budgeted as part of the annual budget process. This practice is problematical [sic.]" because the obligations "should be fully reserved based on an actuarial report." It then indicated the college should begin a multi-year effort to adequately fund this obligation, rather than rely on the pay-as-you go method." (2004 Hancock Report, pp. 47-48) However, it was also noted that the College still satisfied met Standard Nine, for Financial Resources. (Id., p. 48) But in 2010, the College was told that it had to "plan for all obligations including **the new GASB 45 requirement ...**" (Evaluation Team Report, Allan Hancock, March 2-4, 2010, p. 39)

ACCJC Training - Oakland, January 2013. In January 2012, ACCJC conducted a training session for team evaluators. During a question and answer section, those attending observed a question posed to ACCJC Vice President Jack Pond. The question sought an explanation as to why, if ACCJC policy was to disregard the standards of organizations other than ACCJC, colleges were being evaluated based on their prefunding of retiree health benefits. Pond reportedly acknowledged that they shouldn't be. Yet this was a principal focus on ACCJC's critique of CCSF.

5. The State Chancellor's Office Advisory Approving Pay-As-You-Go Funding

ACCJC's focus on prepaying the ARC is confounding in view of the June 14, 2010 Memorandum¹⁴⁷ from the State Chancellors Office, an "Accounting Advisory" to the Chief Business Officers of California's community colleges concerning the effects of GASB 45. It provided that,

"GASB 45 does not require funding the ARC: districts can continue using the Pay-As-You-Go approach ..." (Attachment GASB 1, Memo, June 14, 2010, p. 1)

The Memo further advises,

"It is important to note that GASB 45 does not require changes in government fund accounting and financial reporting ... Only amounts actually funded and/or expected to be liquidated with

¹⁴⁷ Entitled "Accounting Advisory: GASB 45 - Accounting for Other Post-Employment Benefits," the memo was issued by Frederick Harris of the State Chancellor's Office (Attachment 3.B.).

expendable available resources can be recognized as OPEB expenditures for governmental fund accounting.” (*Id.*, at p. 3)

The issuance of this memo did nothing to call off ACCJC. The Commission continued to misrepresent the meaning of GASB 45, and to find colleges to act improperly if they did not fund the ARC.

6. Post-June 14, 2010 ACCJC Actions - ACCJC Disregards the Chancellor’s Office Advisory Authorizing Colleges to Follow the Pay-As-You-Go Method for OPEB Liabilities

ACCJC paid no heed to the State’s position, and continued to sanction colleges for not prefunding their “GASB 45” estimated liabilities.

Antelope Valley College - October 2010. In an October 18-21, 2010 Evaluation Report to Antelope Valley Community College District, a team led by **Steven Kinsella**, composed of 8 administrators and 3 faculty, issued a scathing report criticizing the college’s failure to pre-fund its retiree health benefit liabilities ARC by depositing them into “an irrevocable trust.” (Report, p. 5) Kinsella’s involvement with the JPA trust as of 2010 is not clear, but his college was still a member of the trust, and Kinsella is still the president of the College. Antelope Valley was also a charter member of the JPA.

The Kinsella team found the Antelope Valley College at fault for utilizing the pay-as-you-go approach authorized by the State Chancellor’s Office, and for not pre-funding the ARC as calculated under the GASB 45 formula:

“The college is using the Pay-as-You-Go approach to pay for retired employee health benefits. The cost of retired employee health benefits is about \$500,000 per year ... with the Annual Required Contribution (ARC) calculated at \$1.5 million per year ... Now that GASB 45 has been implemented as generally accepted accounting principles ... colleges are going to see how the unfunded portion of the Annual Required Contribution appear as an expense in the current year. As the unfunded liability increases, the college’s unrestricted general fund balance will decline. In the case with Antelope Valley College, it is paying approximately \$500,000 of the ARC account leaving an unfunded liability of \$800,000. The unfunded liability will be reported on the Balance Sheet as an increase in the liability with a corresponding decrease occurring in the Unrestricted General Fund balance. The college has not yet established a plan to address this obligation and therefore does not meet the requirements of the Standards (III.D.1.c.)” (Antelope Valley October 2010 Team Evaluation

Report, p. 54)

As a recommendation the Team wrote,

““Recommendation #4: **To comply** with the standards, it is recommended that the college, when making its short-range financial plan, e.g. the annual budget of the college, **consider its long-range financial obligation to pay the cost of the GASB 45 - Other Post-Employment Benefits (OPEB) as the costs are incurred instead of delaying payment to some future date.** Specifically the college is encouraged to prepare a comprehensive plan to prevent disruption of services offered to students by **paying the Annual Required Contribution (ARC) determined using generally accepted accounting principles into an irrevocable trust fund** at the amount equal to the actuarially determined Annual Required Contribution (III.D.1.(c).” (Report, p. 5)

This recommendation both misstates the law and effectively coerced the College into depositing monies into the CCLC JPA which team Chair Kinsella helped create and served as first chair.

Los Angeles Community College District - 2009 and 2010. In June 2009 ACJC placed LA City and and LA Trade Tech on Warning. In June 2010 the Commission wrote to the District itself (it has 9 colleges) and expressed concerns about the district’s prefunding of the ARC. The letter from Beno to the District stated,

“Commission Concern: The Commission found that the Los Angeles Community College District has complied with the recommendations made to it as communicated through the colleges. However in assessing compliance with Standard III D. Financial Resources, the Commission has a concern about whether the LACCD's financial resources are sufficient to support student learning programs and services and to improve institutional effectiveness. The distribution of resources supports the development, maintenance, and enhancement of programs and services. Provisions of Standard III. D requiring a level of financial resources that provide a reasonable expectation of both short-term and long-term financial solvency requires that the district begin to act in a way that will **create funding plans to ensure that adequate cash or liquid resources will be available to pay for OPEB liabilities at the time those costs become due.**

The Commission notes that districts **not making the minimum payment of ARC** are now accumulating unfunded liabilities that will require cash to be paid out when benefits are paid to retired employees. **The consequence of not funding an**

amount that is at least equal to the ARC is that an unfunded liability will be recorded on the financial statements of the district and the ending balance or reserves will decline. Eventually, unless this liability is funded the district's financial condition will deteriorate to a level that will make it difficult for colleges to meet the requirements of Standard III.D.” (*Id.*, emphasis added)

The Commission letter acknowledged it accredits colleges, not districts, hence its concern over ARC funding was expressed to the District.

Oxnard College - October 2010. In an October 2010 Team Report, Oxnard College was also criticized for an unfunded OPEB liability; ACCJC expected it to establish an “irrevocable trust account.”

Ventura College - October 2010. In an October 2010 Team Report, Ventura College was criticized for not fully funding its Annual Required Contribution (ARC) and for “utilizing [the] pay-as-you-go approach.”

San Jose City College - January 2011. San Jose City College was placed on probation in a January 31, 2011 letter from Beno, which referred to OPEB:

The Commission requires institutions to clearly identify and plan for payment of liabilities and future obligations. The Commission requests that the San Jose-Evergreen Community College District **demonstrate how it plans to fund the Annual Required Contribution for its Other Post Employment Benefits.** Should the District not now be in a position to fund the ARC payment, it should describe its plans to address this long term obligation. (Eligibility Requirement: 17, III.D.1.b, c (Letter, Beno to SJCC, January 31, 2011; See Attachment OPEB - 7, p. 1)¹⁴⁸

CCSF - June 2012. And, finally, CCSF was placed on Show Cause Status on July 2, 2012, and, as explained above, its failure to place assets in an irrevocable trust, was cited as having violated Commission Standard III.D.1.c.

As is evident from the foregoing information, ACCJC was determined to cause districts to prefund their OPEB estimated liabilities, and the ARC, with monies that could have been used for other matters. ACCJC took away colleges’ discretion, using the implicit threat of sanctions to coerce its unjustified objective. With this background in

¹⁴⁸ A similar letter was sent to the San Jose-Evergreen District’s other college, Evergreen Valley. (See Attachment OPEB - 8, p. 1)

mind, we turn to the numerous violations of law and policy which ACCJC has perpetrated, on CCSF and other colleges, in its misguided actions to enforce its inaccurate understanding of GASB 45 “requirements.”

7. ACCJC’s Requirement to Pre-fund OPEB and Its Reliance on a Faulty Interpretation of GASB 45 To Support This, Violates the Law and its Own Policy

ACCJC’s evaluation and sanctioning of California community colleges for not prefunding GASB 45’s “Annual Required Contribution” is based on the Commission’s incorrect interpretation of GASB 45.

First, it violates the Commission’s own policy that it will not enforce the standards or requirements of “other organizations.” Second, it contradicts California public policy, which allows pay-as-you-go funding. Third, the criteria itself is illegitimate, arbitrary and capricious, and reflects a serious mischaracterization of GASB 45. Fourth, it is not widely accepted, even by other accrediting bodies in California. Finally, ACCJC’s obsession with prefunding the GASB 45-defined “ARC” arises out of a serious conflict of interest involving the CCLC’s JPA and the involvement of JPA members in accrediting evaluations and decisions.

(a) ACCJC Policy Prohibits Assessment of Standards of Other Organizations Such as GASB 45 - ACCJC violated 34 CFR § 602.18(c)

ACCJC did not actually adopt a “standard” which mentioned OPEB until its June 2012 meeting, hence it should not have relied upon it to assess CCSF or the numerous colleges discussed above. Even then, the Standard contradicts ACCJC’s other policy forbidding teams to review colleges based on the standards of other organizations. How could this inconsistency have escaped ACCJC for so long? How could ACCJC continually misrepresent the meaning of GASB 45? ACCJC’s actions are derived from and have implemented ACCJC’s mistaken view of GASB 45. This derivation is evident through the consistent citation of GASB 45 and the ARC in team reports. The new Standard circa 2012 states that,

“III.D.3.c. The institution plans for and allocates appropriate resources for the payment of liabilities and future obligations, including Other Post Employment Benefits (OPEB), compensated absences, and other employee-related obligations.

III.D.3.d. The actuarial plan to determine Other Post Employment Benefits (OPEB) is prepared, as required by appropriate accounting standards.”

As is evident, the new Standard is the GASB 45 OPEB accounting standard. Adopting this new Standard in June 2012 doesn't excuse ACCJC's imposing this requirement on CCSF arising out of CCSF's 2011-2012 review - that review was months before. Nor does it justify imposing in on any other California community colleges, whether before or since June 2012.

Federal law, in **34 CFR § 602.18 (c)**, states that the agency “(c) Bases decisions regarding accreditation ... on the agency's published standards;” In basing CCSF's decision on the unpublished GASB 45 prefunding “standard,” the Commission violated this provision.

Even if the Commission asserts that the existence of a Standard requiring that, “the institution clearly identifies and plans for payment of liabilities and future obligations” (2011 Standard IIID.1.(c) is broad enough to cover the ACCJC's requirement that Colleges pre-fund their OPEB liability through an irrevocable trust, **it still violates 34 CFR § 602.18 (c)**. This is because the Standard is too vague and broad. It is overwhelmingly evident through the Evaluation Reports of ACCJC's member institutions that the evaluation teams were basing their evaluations of institutions “planning” and “payment” of future obligations on their faulty interpretation of GASB 45. As discussed above, “Failure to comply” with GASB 45 is frequently listed as a deficiency to Standard IIID.1.c, and was often coupled with a “Recommendation”, that the Commission asserted was mandatory to follow. Yet, nowhere in the Standards is it signaled to colleges that their compliance with this standard will be evaluated in this manner.

Planning to pay OPEB through “pay-as-you-go” **is still a plan**, and would conceivably meet the Standard. However, colleges have frequently been “dinged” for addressing the Standard in this way. In fact, it seems that the Commission is still violating **34 CFR § 602.18 (c)** in this manner, as the Standard still does not explicitly state that the payment of future liabilities must be prefunded in an amount equivalent to the ARC, even though that is clearly how ACCJC is enforcing it.

Moreover, the hypocrisy continues as ACCJC still provides as follows in the Team Evaluator Manual:

“7. Recommendations should not contain references that are not part of the Standards: Terms like ‘Americans with Disabilities Act (ADA),’ ‘shared governance,’ ‘matriculation,’ and ‘collegial consultation’ have specific meaning in some of the systems which govern some member institutions. While the principles included in these terms may be embodied in the Accreditation Standards, avoid creating confusion that may result from the use of these specialized terms.”

8. Recommendations should not be based on the standards of governmental agencies, the legislature, or organizations. The relevant standards for the team are those of the Commission.” (Team Evaluator Manual, 2011 ed., p. 22.)

These policies date back to before 2005, when ACCJC began to cite colleges for not prefunding OPEB under GASB 45. Evaluating colleges on GASB 45 is plainly inconsistent, actually prohibited by these provisions.¹⁴⁹ Accordingly, ACCJC acts arbitrarily when it evaluates colleges for prefunding their OPEB liabilities.

(b) ACCJC’s Evaluation of OPEB Liability Prefunding Contradicts California public policy, which allows pay-as-you-go funding

Retiree health benefits were first offered to school and community college employees in the 1960s, the result of State policy adopted by the Legislature which encouraged public entities to provide this benefit.¹⁵⁰ From the beginning, these benefits were typically funded on a pay-as-you-go basis. Most California community college and school districts offer some form of these benefits. In general, they were provided in lieu of better salaries, in order to recruit and retain excellent teachers. And, under California law, they were generally contractually “vested” when they were offered, with employees having to remain employed long enough, and retire from a district, in order to receive them.¹⁵¹

¹⁴⁹ Again, the frequent mention of GASB 45 in Evaluation Reports effectively represents the Commission’s interpretation as to what was considered to meet the requirements of Standard III.D.1.c. The Commission trains the evaluation teams, who would not cite it so frequently, nor make as many recommendations on the topic, if the Commission hadn’t communicated to them *that GASB 45 was Standard III.D.1.c.*

¹⁵⁰ See Cal. Government Code § 53205.2.

¹⁵¹ An unbroken line of California cases holds that retirement benefits are deferred compensation for public service, protected by the Contract Clause. *Olson v. Cory* (1980) 27 Cal. 3d 532, 538; *Thorning v. Hollister School District* (1992) 11 Cal. App. 4th 1598, 1605 (*rev. den.* 1993); *O’Dea v. Cook* (1917) 176 Cal. 659, 661-662. The contractual basis of the right to post-retirement health benefits is an exchange of the employee’s services for the post-retirement benefits offered by the CBAs, or by District policy. *California Teachers’ Assn. v. Cory* (1984) 155 Cal. App. 3d 494, 505-506. This entitlement can be implied (*Id.* at 504-505), or it can be explicit. *Allen v. City of Long Beach, supra.*, 45 Cal. 2d at 130. Although most California vested rights cases involve pensions, retirement health benefits were held vested rights protected by the Contract Clause in *Thorning v. Hollister School District*.

California public policy in regard to pre-funding has been set by the State Chancellor's Office for some time. Most recently, the State Chancellor's Office issued an advisory Memorandum dated June 14, 2010 confirming that GASB 45 "does not require funding of the ARC, [and] districts can continue using the Pay-As-You-Go approach."

Federal law requires ACCJC to respect California's public policy. With regard to OPEB liabilities, ACCJC has disregarded it since 2005.

(c) ACCJC's Application of GASB 45 is Arbitrary, Capricious and Illegitimate and Reflects a Serious Mischaracterization of GASB 45. It also violates 34 CFR §602.18(a).

Federal law and due process demand that the Commission's Standards, and its application of those Standards, not be arbitrary, capricious or unreasonable. While an accrediting body is afforded a wide range of discretion, it abuses that discretion when it acts in an arbitrary manner. With regard to GASB 45 and OPEB liabilities, ACCJC's history is nothing but arbitrary and illegitimate.

First, ACCJC has continually misinterpreted GASB 45 as requiring prefunding of the Annual Required Contribution. In our detailed examination of ACCJC's history of regulating GASB 45 compliance during the past 8 years, the Commission has consistently criticized districts for not meeting the standards, and sanctioned them, because they had failed to prefund to ACCJC's satisfaction of their estimated GASB liability. ACCJC simply refuses to accept that the *ARC is an accounting term of art for illustrative purposes - not a requirement to actually pay*.

ACCJC's recent Task Force on Financial Standards perpetuated this deliberate misunderstanding. ACCJC's Summer 2011 Newsletter announced that three Task Forces had been "convened to advise ACCJC in critical areas of institutional performance." One was the Financial Task Force chaired by Steve Kinsella. As the newsletter related,

"The [Financial] Task Force met on February 25 [2011] to discuss financial obligations associated with Other Post Employment Benefits (OPEB), an increasingly important issue for institutional financial planning and stability. **Regulations (GASB 45) require institutions to identify OPEB liabilities and account for this liability in annual audits and financial planning and amortize the obligation by funding it annually.**" (Newsletter, Summer 2011, p. 4)

It is beyond dispute that GASB 45 does not require annual funding. Yet the ACCJC reported otherwise.

The January 2011 Action letter from Barbara Beno to Antelope Valley College identified GASB 45 “funding requirements” as one of the main issues, and the Kinsella report dictated that the College take action “by **paying the Annual Required Contribution (ARC) determined using generally accepted accounting principles into an irrevocable trust fund** at the amount equal to the actuarially determined Annual Required Contribution.” (October 2010 Report, p. 54) It is no surprise then that College’s are knuckling under to ACCJC’s directives. Thus, Antelope Valley Fall 2012 Follow-Up Report dutifully identified the GASB 45 funding requirement as one of its main priorities despite it being a “difficult time to set aside funds with so many critical-needs areas” in a time of “multi-year budget reductions.”¹⁵² Antelope Valley also confirmed that it was looking to prefund by payment into the CCLC trust founded by Mr. Kinsella, who still is shown on AVC’s website as the chair of the October 2010 team visit.

Los Angeles community colleges have been warned that they need to pay the ARC. For instance, Beno’s June 30, 2010 letter to LA Trade Tech included this:

The Commission requests that the College provide information about **how the ARC is being handled and how funds in an amount at least equal to the ARC are being paid into an irrevocable trust** fund in order to pay for liabilities as they become due (ER 17 and Standard III.D.1.b and c.”(L.A. Trade-Tech, Beno Letter, June 30, 2010, following. Evaluation Report March 2010, pp. 2-3)

Los Angeles Community College District acknowledged comments from President Beno over its need to pay the ARC, stating:

“B. Beno reported that if a District is in violation of something, all colleges in the district may receive a recommendation to force the district to take care of it. An example of how this policy affects LACCD is the GASB violation in the warning that appears to be issued to all 9 colleges regarding the need to monitor each college’s payment to ARC (Annual Required Contribution) to ensure the District’s ability to pay benefits to retired employees.” (Attachment 7.K.)

And the July 2, 2012 Letter from ACCJC (Beno) to Sierra College focused on GASB 45:

¹⁵² See 2012 Antelope Valley Follow-Up Report, pp. 34-35.

“The College stated, and the team confirmed, that Sierra College has implemented appropriate action to comply with Accreditation Standards on the requirement for a plan to address costs associated with the implementation of GASB 45 as stated in Recommendation 5 from the 2007 comprehensive evaluation.”

What Sierra had done was prefund its “GASB 45” “liability,” by putting the money in the Retiree Health Benefit JPA operated by the CCLC.

We request given the overwhelming evidence we have presented, that the Commission indicate which Commissioners, if any, who have served on the CCLC JPA, voted on which Commission actions and when, so we can precisely determine any who voted on sanctions involving GASB 45 issues, while they served on the JPA as trustees or alternates (the JPA terms are, according to its bylaws, indefinite). We also request that the Commission provide us information on any action votes in which individuals who have served on the JPA recused themselves. We again emphasize we do not accuse any commissioners or JPA board members of any personal financial benefits arising out of this issue - we do allege that the involvement evidenced by the facts establishes a conflict of interest for the ACCJC.

GASB 45 is a means of accounting for future liabilities - not debt. And even though GASB 45 does not require payment of the so-called Annual Required Contribution, but only its calculation, prefunding became almost a religion to ACCJC, akin to the conformity and boosterism expressed by an exuberant George Babbitt.¹⁵³

(d) Evaluating a College’s Prefunding of OPEB Liabilities Is Not Widely Accepted by Other Accrediting Bodies and Thus Violates 34 CFR § 602.13

ACCJC’s policy to use a college’s pre-funding of post-retirement benefits (the “ARC”) is a criteria not “widely accepted” in California, or in the U.S.. Federal regulation requires that an accrediting agency must prove to the Department of Education that its “standards, policies, procedures and decisions to grant or deny accreditation are **widely accepted by**” educators, educational institutions, other accrediting bodies, and practitioners and employers in the fields for which the covered institutions prepare their students. (34 CFR § 602.13, emphasis added)

No other regional Accrediting Agency has as rigorous Financial Resource Requirements as ACCJC. Most other agency standards contain broad language about

¹⁵³ See *Babbitt*, Sinclair Lewis, 1922.Harcourt, Brace and World, Inc, Chapter 21

being “responsible” and “realistic,” and having procedures in place to “evaluate” the budget. No other agency points to specific actions that need to be taken to achieve these broad financial goals. But ACCJC does, adding them in June 2012 at the same meeting where it placed CCSF on Show Cause:

- c. The institution plans for and allocates appropriate resources for the payment of liabilities and future obligations, including Other Post-Employment Benefits (OPEB), compensated absences, and other employee related obligations
- d. The actuarial plan to determine **Other Post Employment Benefits (OPEB)** is prepared, as required by appropriate accounting standards.
- e. On an annual basis, the institution assess and allocates resources for the **repayment of any locally incurred debt instruments** that can affect the financial condition of the institution. (Standard III.D., 2012 ed.)

ACCJC focuses on the quality of processes and evaluation procedures, **as opposed to focusing on the quality of what those processes are actually measuring.** For instance, it demands that

“a. **Financial documents**, including the budget and independent audit, have a high degree of credibility and accuracy, and reflect appropriate allocation and use of financial resources to support student learning and programs and services.”

No other agency policy has a standard regarding financial documents, with the exception of external audits. All other agencies require an external audit. However, the subsequent requirement is that Colleges *consider, follow-up, or take appropriate action* versus ACCJC’s requirement that “Institutional Responses to external audit findings are comprehensive, timely, and communicated properly.”

ACCJC’s dictatorial approach to the GASB’s “Annual Required Contribution” therefore exists in sharp contrast to other accrediting bodies.

As of 2009, very few public entities had decided to prefund their OPEB liabilities. A study conducted by the Center for State & Local Government Excellence found that only 3% of the nation’s municipalities had adopted a “governmental trust,” and 32% were not likely to adopt a trust. In California, for example, the CSU system has not “pre-funded” its OPEB liabilities, which apparently are enormous.¹⁵⁴ Yet WASC’s senior

¹⁵⁴ CSU’s “OPEB” liabilities are included in the State of California’s OPEB actuarial study, and is presumably not even reviewed by WASC. (See San Jose State University, Financial Statements, June 30, 2011, p.38, Attachment 7.L.) The State is, for the most part, not prefunded and as of June 30, 2010, the actuarial unfunded liability was estimated at \$59.9 billion.

commission has not sanctioned CSU colleges.

ACCJC acts as though OPEB liabilities are a debt. They are not. They are part of compensation, as is salary. Like salary, the future cost is variable, turning on numerous factors. Districts and other public entities are not generally required to prefund their future salary payments, though surely they are a massive future liability.

Standards & Poors issued a paper, "U.S. States' OPEB Liabilities And Funding Strategies Vary Widely," on June 3, 2009, in which it explained that "Long-Term Liabilities Differ From Debt." *Id.* p. 3. The paper noted that postretirement liability "is subject to significant variation based on the actuarial methods and assumptions used to calculate it," and that "OPEB liabilities are likely to be more volatile than pension liabilities because they include future health care cost inflation assumptions, which vary widely. Because of this inherent variability, pension or OPEB liabilities differ significantly from debt obligations ..." *Id.* It continued, "For this reason, ... OPEB liabilities do not appear on the debt statements we use to analyze and report on debt ratios in our public finance credit reports" unless OPEB obligation bonds are issued.

In its zeal to review the ARC, ACCJC has run afoul of **34 CFR §602.18(a)**, which restricts the longitude of accreditation reviews. **Section 602.18(a)** focuses accrediting agency reviews so as to "enforce standards ... that ensure that the education or training ... is of sufficient quality to achieve its stated objective **for the duration of any accreditation period ... granted by the agency.**"

ACCJC grants accreditation for six years - **not 30 years**. It is difficult enough to prognosticate 6 years into the future. But 30 years? That's absurd. Yet that is exactly what ACCJC does by focusing on colleges' prefunding of their estimated OPEB liability that is amortized over a period of 30 years! ACCJC's attempts to measure college's efforts at prefunding this speculative liability have degenerated into crude methodology and mythology, and misstatement of GASB 45, and hence are illegitimate.

The estimated ARC is not a fair measure of institutional strength and stability," hence ACCJC's demand it be paid is a violation of **34 CFR section 602.19 (b)**.

Since GASB took effect, California community college districts continue to report on how much the medical coverage of their current retirees actually costs each year, and now also have to report on the cost of future benefits that current employees earn during

See State of California, Retiree Health Benefits Program, GASB Nos. 43 and 45 Actuarial Valuation Report as of June 30, 2010, GRS, pp. 3, 8, 12 - 13 (Attachment 7.M.).

the fiscal year as well as the estimated value of benefits earned in prior academic years. **Except for the cost of the accounting, however, no new costs for benefit coverage are created by GASB 45.** Except, that is, if a college district elects to prefund some of its estimated future OPEB liabilities. Then, new costs for benefit coverage would occur if the district put money aside in order to fund the liability in addition to their current pay-as-you-go obligations. In other words, setting aside monies to pre-fund estimated future costs does cost money; continuing to pay-as-you-go has no increased costs.

This is the great irony of ACCJC's misguided mission, At a time when colleges challenged to maintain their programs and mission, the Commission is actually pressuring them to reduce their mission and student services, and put the money away for a future rainy day. Given ACCJC's strong support for the Student Success Task Force, one may well ask whether ACCJC's determined coercion of prefunding has an ulterior motive?

ACCJC's application of its Financial Standard to find fault with colleges that have not prefunded the ARC violates the provisions of **34 CFR section 602.13** which provides that,

“The agency must demonstrate that its **standards, policies, procedures and decisions to grant or deny accreditation are widely accepted in the United States by—(A) Educators and education institutions; and (B) Licensing bodies, practitioners, and employers in the professional or vocational fields for which the educational institutions or programs within the agency's jurisdiction prepare their students.**” (emphasis added)

(e) ACCJC Has a Serious Conflict of Interest in its Actions to Enforce the ARC and GASB 45

We have already emphasized ACCJC's responsibility to act as an impartial accreditor. It should be impartial in its assessment of fiscal stability. But given the extensive involvement and influence of Steve Kinsella, and other representatives of the CCLC JPA for retiree health benefits, impartiality disappeared 8 years ago, when Barbara Beno wrote the statement which appeared in CCLC “prospectus” or Special Report for satisfying supposed GASB 45 obligations.

The CCLC “JPA trust” benefits financially from deposits made to “pre-fund” OPEB liabilities, charging an initial fee of \$ 5, 500, an annual fee of \$ 3,000, and .05 basis points per million dollars invested. As of June 30, 2012 the trust had invested over \$130 million, from among its about 20- member districts. (Attachment 7.H.) Obviously

the more invested, the more the financial benefit to the CCLC.¹⁵⁵

Furthermore, as with the Student Success Task Force and SB 1456, prefunding of the ARC is another highly controversial and partisan issue. For those entangled on one side of that issue, to then judge and vote to sanction allegedly non-compliant colleges is the height of conflict of interest. No amount of argument can dispel the message of the CCLC's red-alert Special Report, which relied upon Beno to convince colleges to join and pay into the CCLC JPA trust. Its trustees, such as Kinsella, have a fiduciary duty to maximize its return, to build up its assets. Didn't this raise a red flag for president Beno? Obviously not - her staff - and therefore her - have placed Mr. Kinsella on team after team, where he judges prefunding. ACCJC put him on its financial task force, to write policies and guidelines which surely included prefunding the ARC.

Mr. Kinsella is not the only member of ACCJC active within the trust.

Frank Gornick. Besides Mr. Kinsella, another active member of the ACCJC, Dr. Frank Gornick, has at some point been a board member of the CCLC Retiree Health Benefits JPA. Dr. Gornick appears of become a board member of the JPA by at least 2008, although we as yet do not know his period of service on the board or as an alternate. (Again, this information was requested of the JPA, but has not been provided at this point.) Dr. Gornick is Chancellor of the West Hills Community College District, which consists of West Hills College in Coalinga and Lemoore . Gornick began his service for West Hills nearly two decades ago.

Gornick served as Team Chair for the evaluation of the Peralta Community College District in April 2012, and thus was a chair in the same cycle in which he presumably voted on CCSF's accreditation. The Follow-Up Visit Report issued by his 2012 team assesses the District's methods of dealing with the "GASB 45 related OPEB liabilities." Report, pp. 3-6. The 2010 team also discussed OPEB extensively at pp. 3-4, 6-7. Gornick also was chair of the October 2009 Sacramento City College Comprehensive Evaluation Team, which also issued a report assessing the extent to which the Los Rios District is funding its OPEB liability in accordance with the Annually Required Contribution under GASB 45. (See Sacramento City College Evaluation Team Report, p. 41)

As a commissioner, Gornick is obliged to vote on accreditation action matters, and surely has voted to issue sanctions to some colleges. Knowing that some of the evaluation reports, as cited above, made specific reference to GASB 45, and the GASB

¹⁵⁵ We have no information that individual trustees benefit financially.

45-computed “annual required contribution,” we want to know if he recused himself from any votes.

The first action that Mr. Gornick and Mr. Kinsella presumably were scheduled to take in respect to CCSF would have been the decision to place CCSF on Show Cause sanction at the June 2012 meeting, thus directing them to follow the recommendation of the team and the command of Beno’s July 2, 2012 letter, to prefund their retiree health benefits. In effect this requirement seemingly encourages CCSF to deposit CCSF funds into the CCLC Trust. We ask ACCJC to divulge if they voted on this action matter.

In 2010 CCSF submitted a Follow-Up Report to the Commission. In this report City College stated, “The College did join the investment consortium sponsored by the Community College League for this issue but has not deposited any money into the fund.” (2010 CCSF Follow-Up Report, p.20) The response to this report from CCSF was the first-ever Commission mention to the College, of a “concern regarding OPEB” and request for information about, “how the Annual Required Contribution is being handled and how funds in an amount at least equal to the ARC will be paid into an irrevocable trust fund.” (Beno June 30, 2010 Letter to Griffin)

Again, this letter was in response to a Report from CCSF that declared the College was a member of the CCLC JPA, but they had not yet deposited any money. Commissioners, including presumptively Gornick and Kinsella, were expected to read the various reports of CCSF and Commission responses, and are presumptively aware that the recommendation that CCSF fully fund the ARC by paying into an “irrevocable trust fund,” was effectively a recommendation that CCSF deposit money into the JPA where they both had served as board members, and whose employers still belonged to it.

Numerous community college administrators who served on the CCLC JPA in 2011, for example, have served on ACCJC evaluation teams. These include Joe Wyse, Steve Crow, Ken Stoppenbrink, James Austin, Mazie Brewington, Tom Burke, Bonnie Dowd, Sue Rearic, and Kimberly Allen. It is obvious that ACCJC takes no action to address this conflict of interest. In particular, it does not restrict administrators who serve on the CCLC JPA, or any of its competitors, from being active within ACCJC, where they are required to assess OPEB issues and can make decisions which benefit the CCLC JPA.

ACCJC has utterly failed to recognize this apparent and actual conflict of interest, with the result that in several ACCJC reports, the Commission-appointed representatives - some of them members of the JPA board - have criticized and thus may have contributed to sanctioning of districts for failing to pay into the JPA trust.

And Commissioners have voted, in judging these colleges, to sanction them.

These serious faults utterly undermine ACCJC's assessment of CCSF and require that Show Cause be rescinded.

(f) Anomalies in San Francisco Disregarded by ACCJC

Unlike most California community colleges, CCSF is intertwined with the City and County of San Francisco, through its Charter. This historical situation results in the College employees retiree health benefits being provided through the San Francisco Health System. Thus, unlike most colleges, CCSF can't just "prepay" monies to the System for future liabilities. The City system has its own trustees, and its own set of rules. The full implications of this are shrouded in confusion, and have periodically resulted in litigation. The impact of this related entity remains uncertain. In its evaluation of CCSF, ACCJC totally ignored this problem. In demanding that CCSF prefund a benefit to a fund it does not control, ACCJC acted arbitrarily, and in disregard of California law.

8. The ACCJC Lacks Jurisdiction to Review OPEB Because Community Colleges Are Backed by the Full Faith and Credit of the State

There is another, entirely independent reason to call into doubt ACCJC's actions in inquiring into a college's prefunding of estimated OPEB liabilities. Federal law provides that the Department of Education "shall determine an institution to be financially responsible ... if ... such institution has its liabilities backed by the full faith and credit of a State, or its equivalent." 20 USC § 1099c.

In California, community college district are legally obliged to fulfill their obligation to their students. Thus, Article IX, section 14 of the California Constitution clearly establishes that it is the California Legislature which bears the ultimate responsibility for establishing and maintaining school districts. Furthermore, California law provides that public education, including community college education, is collectively financed out of general taxes. *Serrano v. Priest* (1971) 5 Cal. 3d 584, 603 n. 19. California law further provides that the State recognizes a duty, under the California Constitution, to prevent budgetary problems of a particular school district from depriving students of basic educational equality. *Butt v. State of California* (1992) 4 Cal. 4th 668, 674.¹⁵⁶

¹⁵⁶ In *Butt*, the State suggested that "once revenues are fairly apportioned at the beginning of each school year ... it cannot be constitutionally liable for how local officials handle those funds." The Court rejected this argument. *Id.* at 688-689. As the court emphasized, "Nor does

Several subsections of section 70902 emphasize that local college districts are part of a larger system regulated by law.¹⁵⁷ As such, the State publishes controlling authority governing the funding and expenditures of community college districts, such as the Budget and Accounting Manual, and a uniform system of accounting. Education Code section 84362, the Fifty Percent Law, was enacted over 150 years ago to restrict funding on administration, to focus on instruction. ACCJC “evaluates” local colleges as if they were independent of the State, but they are not - they are inextricably intertwined with it. For the most part, college income comes from the State, through a college’s district. Colleges cannot charge whatever they want - the Legislature determines tuition per Education Code section 76300. And the State determines the maximum amount of fees a district may charge for any service.¹⁵⁸

disagreement with the fiscal practices of a local district outweigh the rights of its blameless students to basic educational quality.” *Id.* at 689. The court spent considerable effort reciting the various State programs affording institutions loans and other financial relief, during an actual crisis, hoding that the State is constitutionally required to intervene when a district’s fiscal problems “would otherwise deny its students basic educational quality.” *Id.* at 692.

¹⁵⁷ Education Code §70902 (a)(1) states that “The governing board of each community college district shall ... operate ... one or more community colleges **in accordance with law ...**”

* (b) The governing board ... shall establish rules and regulations **not inconsistent with the regulations of the board of governors and the laws of this state** for the government and operation of one or more community colleges ...”

* (5) **To the extent authorized by law**, determine and control the district’s operational budget ...”

* (6) ... **contract for ... services as authorized by law.**

* (7) **Establish student fees as it is required to establish by law and, in its discretion, fees as it is authorized to establish by law ...**”

* (c) In carrying out the powers and duties specified in (b) or other provisions of statute, ... **adopt rules and regulations, not inconsistent with the regulations of the board of governors and the laws of this state**, that are necessary, and proper, to executing these prescribed functions.” (Section 70902, emphasis added)

¹⁵⁸ Thus, the Education Code sets an upper limit on **all** fees that a district must or may charge students. Even when the decision on whether or not to assess such a fee is discretionary, the amount that a district may charge for each fee has a clear and mandatory upper limit. For example, under section 76355, “health fees,” a community college district “*may* require community college students to pay a fee in the total amount of *not more* than ten dollars (\$10) for each semester . . . ,” and “*may* increase this fee by the same percentage increase as the Implicit Price Deflator for State and Local Government Purchase of Goods and Services.” A district may also decide to set a lower fee for part-time students, and make the fee optional or mandatory for such students. Even though the health fee is optional, however, the Code sets clear upper limits

Furthermore, Education Code section 66030 leaves no doubt of the Legislature's intent that students have an *equal economic opportunity* to attend and graduate from California's public community colleges:

"66030 (a). *It is the intent of the Legislature that public higher education in California strive to provide educationally equitable environments that give each Californian, regardless of ... economic circumstances, ... a reasonable opportunity to develop fully his or her potential.*" (Emphasis added)

Section 66201 expands on this legislative commitment to equal opportunity:

"... The Legislature hereby reaffirms the commitment of the State of California to provide an appropriate place in California higher education for *every student who is willing and able to benefit from attendance.*"

Article IX, Section 6 of the California Constitution expressly provides that California's public community colleges are part of California's public school system.¹⁵⁹ Education remains a matter of statewide concern. *Hall v. City of Taft* (1956) 47 Cal. 2d 177, 179; *Whisman v. San Francisco Unified School District* (1978) 86 Cal. App. 3d 782, 789. Thus, a college district is not "free and independent" of legislative control. *Hayes, supra.*, 5 Cal. App. 4th at 1524.

on the *maximum* amount a district may charge full- or part-time students for the fee.

Similarly, for other optional fees, the Code also sets forth a *maximum* amount a district may charge. [See, § 76360 **parking fees**, where a district "may require students in attendance and employees of the district to pay a fee, in an amount, *not to exceed* fifty dollars (\$50) per semester and twenty-five dollars (\$25) per intersession;" § 76361 **transportation fees**: "[t]he sum of the fee authorized . . . *shall not exceed* seventy dollars (\$70) per semester or thirty-five dollars (\$35) per intersession;" § 76060.5 **student representation fee** of "one dollar per semester;" § 76375 **student body center building fee** that "*shall not exceed* one dollar (\$1) per credit hour, up to a maximum of ten dollars (\$10) per student per fiscal year;" and § 76370 **fees for course auditing**, "[i]f a fee for auditing is charged, it *shall not exceed* fifteen dollars (\$15) per unit per semester."] Nowhere in the Code is a district allowed to charge any unlimited fees for resident students, nor are there any fees without a set, statutory maximum, such as what the District is suggesting for its tiered student enrollment fee.

¹⁵⁹ The University of California is not part of the public school system, as it is a public trust born in the Constitution of 1849. See Cal. Const., Art. IX, § 9.

As was explained in *Serrano II*,¹⁶⁰ as summarized in *Hayes*, “education is uniquely important and cannot be left totally under local monetary control.” *Hayes, supra.*, 5 Cal. App. 4th at 1524. Thus, “... regulation of the Education system by the legislature will be held to be controlling over any inconsistent local attempts at regulation or administration of the schools.” *Hayes, supra.*, 5 Cal. App. 4th at 1524-1525. Thus, the State is the “beneficial owner of school property, and local districts hold title as trustee for the State.” *Hall v. City of Taft, supra.*, 47 Cal. 2d at 181-182.

We emphasize the holding of *Hayes*, that:

“... an educational system that produces disparities of opportunity based on district wealth would fail to meet constitutional requirements ...” 5 Cal. App. 4th at 708.

As the Supreme Court and the Legislature recognized in *Butt*, the State is effectively a guarantor of each community college or school district. The scope of this guaranty has never been fully fleshed out - when Compton was disaccredited several years ago by ACCJC, the State arranged to transfer operations of the college to a neighboring district, to preserve educational opportunities for its students. This is, by the way, the arrangement which President Beno presumptively decried at the Redwoods meeting she held on March 26, 2012, even though it is the prerogative of the State and the courts, and not ACCJC, to determine such matters.

With the power of state funding behind them, ACCJC’s oppressive efforts at attempting to dictate prefunding of speculative OPEB liabilities rests on shaky ground, and its efforts at assessing fiscal capacity are questionable.

9. ACCJC’s Treatment of GASB 45 Exemplifies Its Disregard of Law and Unreliability

We have emphasized ACCJC’s demand that colleges prefund the ARC on account of GASB 45 because it is a microcosm of the problems inherent in the Commission’s schizophrenic approach to accreditation.

ACCJC assesses GASB 45 “prefunding” even though this so-called Standard is not widely accepted across the country. ACCJC demands district’s plan to and prefund, to

¹⁶⁰ *Serrano v. Priest* (1976) 18 Cal. 3d 728, *reh. den.*, as modified Feb. 1, 1977 (*Serrano II*). *Serrano II* reaffirmed the Supreme Court’s earlier decision in *Serrano v. Priest* (1971) 5 Cal. 3d 584 (*Serrano I*), which held that a constitutional challenge could be made to California’s mechanism for funding public schools.

comply with GASB 45, even though GASB 45 is a reporting requirement, not a prescription for prefunding.

ACCJC insists on prefunding the ARC per the GASB 45 formula even though its consistent policy, and directive to teams, is that they not assess compliance with either law or the standards of other organizations.

ACCJC's obsession with this prefunding persists despite unequivocal statements by the State Chancellor's Office, which are part of California's law under the Title 5 regulations and the Budget and Accounting Manual, that the pay-as-you-go approach is permitted.

ACCJC insists on colleges prefunding this liability to attain fiscal stability over 30 years, when it accredits for 6 years. ACCJC demands prefunding even though it will cost most districts more than twice as much in the short run, as paying-as-you-go, thus further stressing colleges during the Great Recession. This is madness.

And ACCJC demands for prefunding arise in the context of a conflict of interest, one so transparent as to be almost unbelievable. Steven Kinsella helps create the CCLC Retiree Health Benefits JPA trust in 2005. The CCLC and its JPA, relying on statements by Beno in the 2005 League's Special Report, attempted to convince districts to join the trust. Numerous members of the JPA board have served as team chairs, where they their teams would have been called upon to evaluate colleges' "success" at prefunding the "ARC." Mr. Kinsella himself has served on teams which stressed the necessity or advantages of prefunding. Hence, the team he chaired that reviewed Palomar College in 2009 said that the College, which belonged to the JPA, should look at prefunding, in these words:

“If the College does not pay \$4.5 million per year into a trust fund, it will accumulate an unfunded liability that will be reported on the College's financial statements. The 2008-09 Adopted Budget includes the in and out transfers but does not contain funding for this liability. **The District is a member of the Community College League's Retiree Health Benefit Program JPA that assists districts in responding to GASB No. 45. However, the District has not transferred any funds to the JPA** and, through its payments in FY 07/08, is starting to consume its ending fund balance.” (Palomar March 2009 Team Evaluation Report, p. 82, emphasis added)

At the time, numerous board members of the JPA served on teams, Mr. Kinsella would be appointed to the Commission just months later. This relationship between the JPA, the CCLC and the Commission should have raised red flags for Beno and the

Commission - but they not only ignored these signs, they embraced the notion of prefunding the ARC and approving prefunding into the CCLC JPA trust. And this misguided view that prefunding should be required was directly responsible for the Commission's decision to sanction CCSF with Show Cause. Not only must that sanction be rescinded, but the Department of Education needs to revoke ACCJC's accreditation or not renew it. This episode alone establishes the Commission's lack of reliability.

B. ACCJC is Antagonistic Toward Union and Employee Rights under the EERA

ACCJC has a reputation as being antagonistic towards Unions, and the rights of Unions and employees as provided for in California's collective bargaining law, the Educational Employment Relations Act ("EERA," Government Code § 3540 *et seq.*). This antagonism is evidenced in official policies of the ACCJC as well as individual assessments, actions and statements.

1. ACCJC's Official Policy Is to Disregard The Rights and Duties Which Arise Under State Law, When Assessing an Institution

The ACCJC insists that it is not bound to observe state laws in creating and applying Standards during the accreditation process. Thus, it declares:

"As a voluntary, nongovernmental agency, the Commission is not obligated to exercise the regulatory control of state and federal governments, **nor to apply their mandates regarding collective bargaining, affirmative action, health and safety regulations, and the like.** Furthermore, the Commission does not enforce the standards of specialized accrediting agencies or other nongovernmental organizations, **nor the laws and regulations of state agencies,** ... The Commission has its own standards and expects that institutions and teams will apply them ..." (Team Evaluator Manual, 2011 ed., p. 8)

While it is true that ACCJC does not and cannot "enforce" laws or regulations, it is still required to respect the public policy of the State. *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools*, 432 F. 2d 650, 655 (D.C. Cir. 1970); *Rockland Institute v. Association of Independent Colleges & Schools*, 412 F. Supp. 1015, 1016 (C.D. Cal. 1976); *Bernstein v. Alameda-Contra Costa Medical Association* (1956) 139 Cal. App. 2d 241, 253. And that rule means that the Commission and its staff cannot encourage or condone violation of the laws. It also should not ignore final judicial decisions which determine a college has violated relevant State laws.

Facially, ACCJC's policies conflicts with State law by declaring it will not apply

the requirements of collective bargaining, health and safety laws, and the “like. ACCJC’s policy plays out in several ways. First, ACCJC demands immediate action by districts to adopt policies, even though State law requires they be collectively negotiated. Second, ACCJC - in matters far beyond the required Federal standards - insists that certain items be done exactly as the Commission dictates, even though they are subject to bargaining. Third, ACCJC acts to restrict union activities - as it did in Palomar, discussed infra. Fourth, ACCJC has acted to reduce faculty compensation, or the funds available for negotiations, when the Commission decides what it should be. Finally, the Commission gets the message across to trustees that they should not communicate with labor organizations or not “give in” to their demands - to not act like a “city council.” This narrow, prejudiced and adversarial approach does not appear to be widely shared. by accreditors generally.¹⁶¹

ACCJC’s disregard of its public responsibility to respect State and Federal laws also leads to the Commission sanctioning colleges for obeying the law. In its evaluation of CCSF, ACCJC’s evaluation in 2012 criticized CCSF for actions it took, or which its trustees took which are consistent with California law and public policy:

* Despite the State Chancellor’s Advisory, and State law, allowing colleges to pay for their retiree health benefits on a pay-as-you-go basis, ACCJC sanctioned CCSF over it’s failure to prefund its OPEB-GASB 45 liabilities. In this way, the Commission behaved inconsistently. State law demands that a district, if it wants to prefund benefits of bargaining unit employees, must negotiate over the subject. In the name of GASB 45, CCSF indicated the District should not follow State law, but should adhere to ACCJC’s misinterpretation of an external rule, GASB 45. In giving in to anti-unionism, ACCJC thus violated Federal law, which requires an accreditor to have policies in place to avoid inconsistent application of its standards. It also violated the proviso that restricts the Commission to basing its determinations on the next 6 years of accreditation, not a 30 year, highly unpredictable guesstimate.

* Despite State law which recommends colleges maintain a reserve of 5%, ACCJC

¹⁶¹ For example, the Middle States Association of Colleges & Schools affirmatively acknowledges the place of labor organizations: “The existence of collective bargaining agreements is an institutional matter or, as in the case of some public institutions, a matter of public policy. Although the Middle States Commission on Higher Education takes no position with respect to a decision to bargain collectively, all affected constituents should be sensitive to the impact of bargaining on students and their needs, on professional relationships and responsibilities, and on educational effectiveness.” “Characteristics of Excellence in Higher Education, Eligibility Requirements and Standards for Accreditation,” 12th ed., 2006, Middle States Commission on Higher Education.

indicated that CCSF's maintenance of a 5 % reserve was "well below a minimum prudent level," and demanded that they raise their reserves to an amount in excess of the State requirement, a "prudent level" to be determined by ACCJC, or to be guessed at and then "approved or disapproved later" by ACCJC. And, again, ACCJC acted inconsistently - agreeing that it follows Hawaiian law setting a 3% reserve. Inconsistently, ACCJC respects Hawaii law which sets reserves at 3%, when evaluating colleges in Hawaii.

* .Despite state law, A.B. 1725, which mandates a "shared governance" system, and a CCSF shared governance system which is identical to that of other colleges, ACCJC has criticized the system, and the College proposed to either dismantle or modify the system, based on the Commission's demands.

* Despite their Constitutional rights to speak out and to the public on matters of public concern, and to satisfy the listening rights of the public and labor union members, ACCJC criticized CCSF because some trustees spoke individually with the public, or with the media.

Of the 14 recommendations made by ACCJC, four of them (nos. 10, 12, 13 and 14) directly involve ACCJC's disregarding of public policy. And of the cited Eligibility Requirements, 2 of them (17 and 18) also involve public policy issues.

In the sections which follow, we illustrate that the ACCJC's adversarial approach to union-related matters is not appropriate for a regional accreditor, and disregards legal requirements. While examples are not exhaustive, they are illustrative of the problem.

ACCJC Treats Unions As Not Being a Partner in Operation of the College or Fulfilling its Mission and Accreditation Standards

It is settled law that the ACCJC cannot adopt or interpret accreditation standards which impinge on the fundamental rights of faculty. *Nova University v. Educational Institution Licensing Commission*, 483 A. 2d 1172 (D.C. 1996), citing *Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583, 593-599 (1926) Faculty have a fundamental right in California to join, and be represented in their employment relations, with a labor union. ACCJC either ignores or is hostile to this principle. (See EERA, Cal. Gov't. Code § 3540 *et seq.*) Yet ACCJC persists in refusing to adhere to this principle.

On January 26, 2013, ACCJC President Beno and Associate Vice President John Nixon spoke at the CCLC's 3-hour long "Effective Trusteeship Workshop" at the Community College League's meeting in Sacramento. In her presentation she said that,

“we have had more sanctions because of governing board policies.” Then she added, “**Frankly, the unions come in**” and words to the effect that ‘the boards become *more politically driven.*’ (Attachment 7.N., p.12, emphasis added) Beno said “some boards are so politically weak,” that “they cave to contracts they cannot afford.” She said they “are elected by some folks, [but] once they take office, they need to stay focused on institutional effectiveness.” “Institutional effectiveness” and satisfying the duty to bargain are not mutually exclusive.

This mindset, in which unions of faculty and staff are viewed as causing board members to become more cognizant of politics and disregard the goals of accreditation is not born out in reality. The statistics we cite, and the excellence of CCSF, confirm that with a strong union contract and a strong union, a major metropolitan college can excel. No matter how much ACCJC argues to the contrary, the results of the evaluation did not identify a college failing at education - to the contrary, it is and remains a leader.

But ACCJC’s attitude, which has gotten more extreme over the years, has spread. For instance, in Cuesta College’s accreditation review held in 2010, College president Dr. Gil Stork responded to requests for inclusion of the CCFT president in the interview ACCJC schedule by stating, “that he contacted the Chair of the team, Dr. Serban, who stated that ACCJC teams typically do not interview bargaining unit representatives because it is the Senate who represents faculty in participatory governance and that the ACCJC standards do not deal with contractual/negotiated issues.” (Attachment 7.O., p.7) Faculty contracts cover a wide range of faculty employment conditions, yet ACCJC would exclude them from involvement.

Or consider this comment made in the Show Cause letter from President Beno to Solano, in Feb 3, 2009, which addressed negotiations over Student Learning Objectives. This topic has led to controversy, because the Commission indicates faculty should be evaluated based on their implementation of SLOs, and evaluation is an enumerated subject of bargaining under the EERA. Hence, employers cannot act unilaterally to impose evaluation requirements. The letter from President Beno states:

“It is the responsibility of every constituent group ... to participate in productive dialogue, ... and every constituent group must commit to action that improves educational quality and student learning. **The college must proceed immediately to take this action and should not allow operational or collective bargaining issues to distract them ...**” (Action Letter, p. 2.)

Beno’s message was clear - colleges need to ignore collective bargaining issues, and they will be held accountable if they do not do so. In other words, ACCJC encourages colleges to refuse to accommodate negotiations issues and act unilaterally,

even when it is illegal to do so.

California adopted its collective bargaining law for community colleges (and school districts) in 1976 with the express purpose of improving employer-employee relations, and recognizing the right of community college employees to join unions, be represented by them, and “afford” faculty “a voice in the formulation of educational policy.” Though both unions and senates, faculty exercise this voice. (See Cal. Government Code section 3540 et seq.) This statute has fulfilled its purpose, but ACCJC still wars against it, and exacerbates problems.

Throughout California, and in San Francisco in particular, colleges demand changes in bargained for contracts in the name of accreditation, frequently saying that ACCJC had told them they needed to do this or that. During negotiations at CCSF, the subjects linked to ACCJC demands include OPEB funding, greater reserves, cuts in faculty pay, elimination of faculty benefits, and hiring more administrators, among other issues. Not long after the AFT was instrumental in persuading the citizens of San Francisco to pass a parcel tax to increase funding for CCSF, the District indicated in negotiations that it wanted to divert the entire \$14 million Parcel Tax revenues, for the first year, into a reserve, it said this was for “accreditation purposes.” (Attachment 7.P.) They argued this even though the tax had appealed to voters because it was intended to fund education programs. ACCJC’s indications to CCSF about the tax seems to go hand in hand with their view that a 5% reserve is not good enough - despite that being California policy - that the Commission can insist on a higher, “prudent” reserve, which appears to be not what the State says, but whatever ACCJC says it is on any given day.

ACCJC is required to respect California’s chosen processes for deciding wages, hours and terms and conditions of employment, and there is no Federal law contradicting this.

2. Redwoods: March 26, 2012 - President Beno Declares at a Public Meeting that the Commission Will Never Allow Another “Compton” - Tells Faculty They Can Get Unemployment Insurance and Apply for Jobs With a New College and Without a Union contract if ACCJC Disaccredits

Redwoods is an example of ACCJC disrespect for faculty and union rights, and its adversarial approach to labor and employees. In October 2011, the College of the Redwoods underwent a re-accreditation evaluation by a team of educators appointed by ACCJC, and in January 2012, the College was placed on Show Cause sanction.

ACCJC President Barbara Beno visited the College’s main campus on March 30,

2012 and “discussed CR’s Show Cause sanction at a **public meeting** in the CR Forum Theater and at College Council.” (Attachment 7.Q.)¹⁶²

Around a hundred faculty and community members attended Beno’s March 30th presentation in the Forum. Everyone understood it was a public meeting. At the start, Beno announced “that she did not want her comments documented or directly quoted for broadcast or publication.”¹⁶³ However, her presentation was streamed to the entire college community, meaning the College of the Redwoods and the college’s other sites. In order to stream it, it was recorded. Ms. Beno also asked if any members of the press were present, indicating what she had to say was “not pretty for the college to have in the press.” (No one was identified as a member of the press.) While the Brown Act, California’s open meeting law, may not have applied - it depends on who attended - the Act forbids efforts to determine who is attending a public meeting. There is also no legal basis upon which Ms. Beno could forbid those present, which included faculty, staff and members of the public, from documenting or quoting her remarks for broadcast or publication.

During her talk, Beno critically discussed the College’s accreditation history and asserted that the college had not done what was required of it, that its promises were “no good”, and that the Commission had been too generous with the College. She said that “show cause,” was “legally impregnable.” She said the Commission felt CR’s “failure” to do what was expected of it could “harm the Commission in being a reliable authority,” so that the college had to “do it or get out of the club.”

And then she challenged the rights of the faculty and staff Unions, and the employees’ rights, should the Commission disaccredit the College. This is the gist of what she said,

Close out plan - you must plan. If the college loses accreditation, it cannot continue to operate; it no longer will it be a college. You have to prepare to teach out all programs, dispose of assets, terminate contracts with vendors, severance and **layoff of all staff ...**

‘There is a hypothesis that the State would not let you close ... that if you re taken

¹⁶² These notes were taken by someone who watched Beno over the college’s network.

¹⁶³ This was heard by those in attendance, and was later documented in Newsletter # 7. The Newsletter states, “Dr. Beno emphasized that she did not want her comments documented or directly quoted for broadcast or publication.” (Attachment 7.Q., p. 3)

over by another college, all employees would keep their jobs and, of course, **the Commission, once, in Compton, let Compton keep its unions and employees. That has not worked well for El Camino. The Commission will not do that again. If you close, you can become an employee under their own processes, but the Commission will not allow bargaining units to keep their collective bargaining contracts - you get unemployment and a chance to apply for jobs with the new college.**' (Attachment 4.F.1., emphasis added)

Many of those attending were shocked at Beno's remarks. How could the Commission dictate they would all be fired, and lose their Union contracts?

At this point Beno turned on a recording of Bob Dylan's song, "The Times They Are a Changin'". "Can you sing it," she said, as she began to sing along with Dylan's lyrics - "Better start swimming or you'll sink like a stone for the times they are a changing." Many of those attending were dumbfounded.

Beno continued speaking, adding that the college had seen "president after president come in" and "be forced out because **you didn't like them.**" (Emphasis added)¹⁶⁴

Notwithstanding her extreme views, the ACCJC cannot abrogate a Union contract. Federal common law and California law requires ACCJC to observe State law, meaning it must accept Union representation of employees, the negotiability of matters within the scope of collective bargaining, and California laws governing recognition of Unions and layoff or discharge of faculty. Furthermore, as noted under the OPEB section of this Comment/Complaint, the State has responsibility for the education of students in any college which is discredited, and the Commission cannot just shut down a college and dictate to the State what becomes of it.¹⁶⁵ Despite her desire, President Beno's public remarks quickly became common knowledge throughout the California community college community.

3. ACCJC Encourages Districts to Adopt Policies Drafted by the

¹⁶⁴ In reality, prior presidents had violated faculty rights, resulting in the filing of unfair labor practice charges, and the issuance of complaints by the California Public Employment Relations Board, which determined the complaints alleged *prima facie* violations of California's collective bargaining law.

¹⁶⁵ As was discussed in *Butt v. State of California*, supra., if a community college were forced to close for any reason, the State is responsible for making necessary arrangements to continue the education of the affected students.

Community College League of California, Despite Their Illegality

Another example of ACCJC demanding action regardless of a duty to bargain, is that the Commission has in recent years hounded colleges over their alleged failure to update their policies, or adopt particular ones. These include numerous policies which implicate the rights of employees, students and the public.

At the CCLC's Board Member training conference on January 26, 2013, one of the speakers on the same panel as Ms. Beno reminded those attending that the CCLC "provides model policies." (Attachment 7.N.) In accreditation decisions, these "model" policies are repeatedly cited by ACCJC's teams as satisfying accreditation standards. The trouble is, that in endorsing a particular trade association, ACCJC is again fomenting discord. The CCLC "model" policies are controversial because they involve rights guaranteed by the California Education Code, the Educational Employment Relations Act, or the State or Federal constitutions, and they sometimes violate those rights. Moreover, some of these model policies involve issues subject to collective bargaining negotiations. A couple of examples illustrate the problem.

a. Free Speech Policies and Procedures.

In recent years, free speech policies distributed by the CCLC as "models" have resulted in controversy throughout the State, because they are actually designed to restrict free speech by students, the public, and labor and other organizations.

The CCLC "model policy" which one employer attached as its "defense" to an unfair labor practice charge for unilaterally restricting faculty speech, is a classic example of the problem. The policy, attached in the Appendix, declares the following:

* "The college(s) of the District is/are non-public forums, except for the following areas which are reserved for expressive activities ... [include a list of areas] ... These areas are designated public forums. The District reserves the right to revoke that designation and apply a non-public forum designation."

* "Non-student community groups wishing to engage in speech or expressive activities on campus, in the areas designated as public forums, must provide notification to the district through [the CEO or designee] [insert number - not more than three business days in advance of the activities and must describe the nature of the planned activities ..."

* "All persons using the areas that are designated public forums shall be allowed to

distribute petitions, circulars, leaflets, newspapers, and other printed matter. Such distribution shall take place only within those areas.” (Attachment 7.R.).

In an article published in the California *Public Employee Reporter* (“CPER”) entitled “Zoned Out – The Peculiar Assault on Free Speech by California Community Colleges”,¹⁶⁶ the illegal provisions of these employer policies are dissected, from designating historical public forums as non-public forums, and restricting handbilling and newspaper distribution. (Attachment 7.S.)¹⁶⁷

As the article points out, from time immemorial, the streets, sidewalks, plazas and similar open areas of colleges have been considered to be public forums. And yet the CCLC promoted its speech-restrictive policy on speech which declares the colleges are not public forums, and then adds that “This policy is legally required.” (Attachment 7.S., p. 6.)

Free speech issues have now been arising with some frequency. While not every dispute can be traced directly to CCLC or ACCJC, their actions fanned the flames. In Fall 2009, a protest occurred L.A. Southwest College over various college actions. Protesters - which included students and faculty - assembled in the college’s “free speech zone,” but then left it to protest in a courtyard where the president’s office is located. They were prevented from entering by the police, and that night campus police showed up at their homes to deliver letters summarily banning them from campus, placing them on administrative leave, and advising them they were under investigation. A letter from the Foundation for Individual Rights in Education dated November 3, 2009, relates some of

¹⁶⁶ *CPER Journal* No. 207,

¹⁶⁷ The University of Arkansas’ declaration that campus was a non-public forum was held unconstitutional in *Bowman v. White*, 444 F. 3d 967, 976, 978 (8th Cir. 2008) The Court recognized this amounted to a prior-restraint on free expression. *City College of San Francisco* was enjoined after it arrested religious speakers attempting to proselytize, and admitted its campus is a public forum. See *Jews for Jesus, Inc. v. San Francisco Community College District*, 2009 WL 86703 (N.D. Cal. 2009) The University of Nevada’s effort to create a non-public forum, and confine speech to four *limited public forums* was stopped by the intervention of the Foundation for Individual Rights in Education. (<http://www.thefire.org/article/7118.html>) West Virginia University abandoned its “free speech zones” after FIRE’s challenge, and declared the entire campus is a free speech zone.<http://www.thefire.org/index.php/case/30.html> *Citrus Community College’s* failed attempt in 2003 to declare the college a non-public forum led to suit by the ACLU, and the forced rescission of its free speech policy. See http://www.thefire.org/public/pdfs/4704_2818.pdf

these events, and explains why they were an unconstitutional restriction on speech (Attachment 7.T.). ACCJC had placed Southwest College on Probation in April 2008, then removed it from Probation in June 2009. **The events which gave rise to the College's notoriety for its treatment of faculty and students were ignored by ACCJC.** Yet ACCJC promotes policies from the CCLC which involve restrictions on speech.

The Commission should not be endorsing nor approving college districts for adopting policies promoted and essentially "sold" to districts by the League through its Policy Service. The Commission has, by encouraging or approving of colleges use of ACCJC's Policy services, effectively participated in the widespread attack on freedom of speech in California public colleges.

b. Ethics Policies Demanded by ACCJC Are Negotiable

This is another example of the Commission demanding policies be adopted "immediately," despite a duty to bargain. Ethics polices, like any performance standards or work rules whose violations may result in disciplinary action, are negotiable. *Peerless Publications*, 283 NLRB 334 (1987); *Tenneco Chemicals* 249 NLRB 1176, 1180 (1980); *Transportation Enterprises, Inc.* (1979) 240 NLRB 551, *modified* in other respects 630 F.2d 421 (5th Cir. 1980); *Concord-DocuPrep, Inc.* (1973) 207 NLRB 981; *NLRB v. Miller Brewing Co.*, 408 F. 2d 12 (9th Cir. 1969). The PERB agrees. See *San Bernardino City Unified School District* (1982) PERB Dec. No. 255, 6 PERC ¶ 13249; *Trustees of the California State University* (2003) PERB Dec. No. 1507-H, 27 PERC 26 (2003), and *San Bernardino City Unified School District* (1998) PERB Dec. No. 1270, 22 PERC ¶ 29113, p. 480.

ACCJC demands that districts just act to adopt ethics policies, regardless of the bargaining obligation. Colleges should not be sanctioned for performing their statutory duty to bargain, nor should ACCJC insist that one size fits all - with negotiations, each employer becomes a distinct learning laboratory, were diverse strategies and models are tried out. But ACCJC prefers a dictatorial approach.

4. ACCJC Threatens Union President Michael Mills. Peralta Board Member and a Local Newspaper With Defamation For Criticizing ACCJC and President Beno

On May 9, 2006 the Berkeley *Daily Planet*, a local newspaper with a circulation of perhaps 15,000, published an article critical of ACCJC. (Attachment 7.U.) The article quoted Michael Mills, the president of the Peralta Federation of Teachers, as stating: "... the leading administrators of the [ACCJC] have a vendetta against the Peralta college

district, and that the ACCJC ‘is operating like a star chamber’ with a ‘process that is out of control.’” Mills was also quoted as saying that the four Peralta colleges were put on warning because of unfunded medical liabilities, micromanaging by the district board, and for not having a strategic plan, and that “None of these were accreditation standards.” (See attachment to Letter, ACCJC to O’Malley, May 22, 2006)

In the same article, the President of the Peralta Board of Trustees was quoted as saying words to the effect that ACCJC operates without a “lot of oversight.”

On May 22, 2006, Joseph Richey, the Chair of ACCJC, wrote Mr. Mills as a representative of ACCJC. Richey accused Mills of making “false and defamatory comments about ACCJC and about ... Barbara Beno and Deborah Blue.”¹⁶⁸ Mr. Richey demanded that Mills provide him with “copies of your communications to the Berkeley *Daily Planet*,” and that “the statements attributed to you have serious legal implications.” Richey demanded that Mills “personally apologize for his *defamatory remarks*” to Ms. Beno and Ms. Blue. (See Attachment 7.V., emphasis added)

Richey sent a similar letter to the President of the Peralta Board of Trustees, Linda Handy, accusing her of making false statements about ACCJC, including that ACCJC “operates without a lot of oversight ...,” Richey also sent an 8 page letter to the *Daily Planet*, complaining of numerous comments in the story, including text about ACCJC President Beno and former ACCJC Vice President Blue’s employment at the Peralta Community College District, a matter of no proper concern to ACCJC.

Richey’s letters implicitly threatened legal action against Mills, Hardy and the *Daily Planet*, in violation of California law which protects freedom of speech. PFT notified the Commission of this in a letter from its lawyer dated June 7, 2026, that ACCJC had no cause to threaten action against Mills. (See Attachment 7.W.). The PFT’s letter pointed out that ACCJC, Beno and Blue were “public figures,” and that ACCJC’s action was contrary to law because for several reasons. Among these were that ACCJC, because of its public accrediting function, was foreclosed from bringing defamation claims, and its demands violated California’s anti-SLAPP law, California Code of Civil Procedure section 425.16(e)(2).

The Commission never replied to Bezemek’s letter, and nothing further was heard from ACCJC regarding the matter.

¹⁶⁸ Ms. Blue, after leaving Peralta, had become a vice president of ACCJC.

5. Beno at Mira Costa in 2008 Praises Employees Who Do Not Form Unions

ACCJC's reputation for being anti-union is reaffirmed by ACCJC. For instance, the Interim president of Mira Costa College, Susan Cota, invited Beno to visit the school. Beno did, and met with Academic Senate leaders, and others. At the meeting, Beno demonstrated the Commission's pro-administrator slant, and her dislike of unions:

The meeting with Beno revealed that her concerns centered on the linking of faculty and administrator salaries to the same pay scale, the size, scope, and organization of the Senate and district committee structure, and a perceived lack of clarity regarding planning processes. **She stated that the college has in the past enjoyed a very good reputation across the state based upon its lack of a union among full-time faculty and staff and that its good reputation created a "halo effect" that may have caused prior visiting teams to overlook governance problems.**" (Attachment 4.F., emphasis added)

Subsequent to the meeting, the District unlinked faculty and administrator salaries.

6. Beno at Palomar Attempts to Prevent Employees From Criticizing Administrators By Advising Board to Adopt a Policy Preventing Faculty From Speaking With the Board of Trustees

This example illustrates how ACCJC violates the rights of employees to act collectively under the EERA. Academic and classified college employees enjoy the legitimate right to complain about their working conditions. This means they may complain about their supervisors, especially when those supervisors adversely affect their wages, hours or working conditions or other legitimate interests. This right, recognized under the EERA, has long been acknowledged under the National Labor Relations Act. *California Teachers Association v. Public Employment Relations Board* (Journey Charter School) (2009) 169 Cal. App. 4th 1076, 1085-1087. In the case of Palomar, the ACCJC criticized employee complaints and decided that this criticism violated the Governance Standard.

The problem appears to have resulted because a group of employees, acting under the umbrella of the local Senate, expressed their criticisms of their supervisors, and then shared them with the administration. The visiting team took offense at one comment by one employee, and on that basis the Commission eventually demanded that the process

stop, unless the employees ceased making derogatory remarks about administrators.¹⁶⁹ The extent of this effort is discussed *infra.*, in the section about ACCJC's efforts to advance the interests of administrators.

7. Negotiations Over Compensation

ACCJC's Action Letter of July 2, 2012 to CCSF states that the "primary reason" issues such as OPEB liabilities and "underfunding of the district's workers compensation self-insurance fund" cannot be resolved because "unrestricted general fund salaries and benefits exceed 92% of the total expenditures ..." (Action letter, p. 3) This is not a legitimate criteria of fiscal stability, and conflicts with California public policy.

As noted, California law provides for collective bargaining negotiations over the compensation of nearly every community college employee, except managers. The average percentage expenditure for unrestricted general fund salaries and benefits is 86 percent. Other district's expend as much, or a greater percentage, than CCSF. For instance, Kern was 93 percent in 2011-2012, Pasadena was 90 percent in 2011-2012¹⁷⁰ Modesto Junior College was at 97% of the college budget.¹⁷¹

The salaries of AFT 2121 members are negotiated in accordance with California law. In demanding that one outcome of those negotiations - the percentage of salary and benefits as a factor of the District's general fund - be reduced, ACCJC intruded into the collective bargaining relationship between CCSF and its unions, including AFT 2121. During negotiations since July 2, 2012, the District has demanded that AFT 2121 agree to salary reductions, citing ACCJC. Yet District faculty have had no pay increase since

¹⁶⁹ As discussed below, the offensive comment, described as racist, may or may not have been; whether it was is immaterial to a Commission directive to cease all employee communications until a process was developed to prevent such comments. This was, again, not the purview of the Commission - such employer-employee relations matters are for the employer and the employees, acting through their representatives, to resolve.

¹⁷⁰ www.pasadena.edu/Files/News/4600_File.pdf

¹⁷¹ Modesto was placed on Probation January 2012. The Evaluation Report stated that, "With so little flexibility and with the small probability for significant new money from the state over the next several years, the college has begun discussion of the possibility of reallocating current base budgets. The reallocation of base budgets would allow the college to effectively address the challenges that lie ahead by shifting monies from low priority needs to high priority institutional needs. This would be a significant departure from the incremental approach that has characterized budget decision making at the college. (III.D.1.b.)" (2011 Evaluation Report, Modesto Junior College, p.52)

2007-2008. In fact, in every year since, faculty pay has been reduced: 1% in 2010-2011, .45 % in 2011-2012, 7.125 % in 2012-2013.¹⁷² And apparently ACCJC is demanding more.

In focusing on the percentage of overall compensation as a part of the college's total expenditures, ACCJC disregarded the fact that general fund revenue is only one measure of district expenditures. A more appropriate measure of *faculty* compensation is a comparison to other California, or Bay 10, community colleges, or California's Fifty Percent law, Education Code section 84362.¹⁷³ ACCJC, however, ignores both of these criteria, and focuses on a criteria which is not widely accepted and, given the various funding sources for California community colleges, is sufficiently incomplete that it is misleading.

Since 2004, ACCJC has indicated in its Team Evaluator manuals that it is improper for teams to refer to external law. In this way, ACCJC attempts to divorce District obligations under external law or regulations, from assessment. Yet, when it sues ACCJC, it refers to violations of external law and regulations, or other external policies. For instance, ACCJC has relied extensively on districts "failure" to prefund retiree benefits as a violation of the Standards, relying explicitly on the actual or supposed terms of GASB 45, such as the "Annual Required Contribution," and an "irrevocable trust." As mentioned earlier, ACCJC claimed SBCC's trustees did not respect the Brown Act, an exceptional sanction as no such criteria had ever before been evaluated, strongly suggesting it was another example of ACCJC advancing administrative interests at the expense of the board of a district.

C. ACCJC Inconsistently and Wrongfully Found CCSF Deficient Due to its Receipt of Grants Funding

¹⁷² CCSF is atypical in having instituted pay cuts - most Bay Area community college districts have just had no pay increases in recent years: Chabot (none since 2007-2008); Foothill-DeAnza (none since 2008-2009); Marin (none since 2008-2009), Ohlone (none since 2010-2011), San Mateo (none since 2007-2008), West Valley-Mission (none since 2007-2008); Peralta (none since 2008-2009); Contra Costa (none since 2008-2009) and San Jose-Evergreen (none since 2007-2008).

¹⁷³ The Fifty Percent law measures compensation provided to classroom teachers (including instructional aides) as a percent of the "Current Expense of Education." The standard is aimed at reducing the amount of district resources expended for administrative salaries. However, ACCJC shows no specific interest in reducing administrative salaries. To the contrary, its policies tend to increase the compensation paid for administration. (See discussion as to Mira Costa College and ACCJC herein)

It is contrary to California public policy for ACCJC to determine that CCSF is not in compliance with a Standard or Eligibility Requirement because of its success in obtaining of grant funding. Yet ACCJC concluded that CCSF was should not have relied so much on grant funding. This notion is repeated in several areas of the 2012 Team Evaluation Report, stating:

“A review of the 2009-2011 Technology Plan and the 2009-2011 Technology Plan Update along with the 2011-2012 college budgets confirms the institution **continues to rely almost exclusively on bond and grant funding for the acquisition and replacement of hardware. This does not achieve the stability that is equivalent to an ongoing source of college general funds.** (III.C.1.c)” (CCSF Evaluation Report p. 53, emphasis added)

"Planning and assessment processes, however, need to be fully integrated to include planning for human resources, technology resources and physical resources that inform the process for budget development and **do not rely on** unrealistic revenue projections and **one-time funds.** (Eligibility Requirement 19)" (CCSF Evaluation Report p. 19, emphasis added)

"Financial constraints and issues related to financial planning have weakened the connection between the planning processes and fiscal resources. For example, **fiscal resources are often one-time or restricted-use revenue supplied by grants, bond funds, Perkins IV funds, and donations, which are currently allocated outside of the regular college planning process.** The ability of programs and individuals to find resources and develop programs from funding sources outside of the regular planning process **results in circumventing rather than following appropriate processes**" (CCSF March 11, 2012 Evaluation Report p.20, emphasis added)

One would think from so much criticism that CCSF had collected a huge amount of its funding from grants. But that is **not** the case. In fact, its total grant funds during 2010-2011 is appears to constitute about 1 % of its total budget.

Over the past 6 years, as State funding has declined due to fiscal shortfalls at the State level, colleges have aggressively sought to replace lost State funding with grants. ACCJC has complimented colleges for this initiative. For example, in a review of **Cañada College**, the ACCJC *commended* it for obtaining grant funding:

“Because the college does not currently have a position dedicated to resource

development, the fact that the administrative staff has been **so successful in the acquisition of federal grants and local funds is to be applauded**, particularly given the extensive workloads that each administrator currently carries. While the importance of these support programs have been evidenced through various cohort studies, the college ..” (2007 Canada College Evaluation Team Report, p. 30)

ACCJC’s 2010 evaluation of **Santa Monica College** was extremely complimentary of the College’s success in attracting grants:

“The college has put considerable effort into pursuing external funding. They have had success and have accrued more than \$6 million in grants and partnership funding over the last several years ... (III.D.2.d., III.D.2.e., and II.D.2.1.)” (Santa Monica Evaluation Team Report, March 9-11, 2010, p. 56)

Once again, the action letter from President Beno date June 30, 2010 reaffirmed accreditation, and made **no** mention of grant funding. (Letter, Beno to Chui Tsang, June 30, 2010)

An Evaluation Report of **Los Angeles Harbor College**, which was conducted in the same cycle as CCSF in March 2012, similarly looks *favorably* on the college’s success in obtaining grants,

“Most individual technology resources are purchased by departments with their own funds. Those purchases made with block grant and Title V funds are discussed and evaluated in the groups which oversee those funds. With the passage of Prop A/AA/J, the **college has been able to** allocate sufficient bond funding to upgrade its IT infrastructure and ensure that it will be reliable in the future.” (Los Angeles Harbor College Evaluation Report, March 2012, p. 42, emphasis added)

But the **most contradictory** of all is the **April 16, 2012 Follow Up Visit Report involving the Peralta Community College District**. The Follow-Up Visit resulted from the four Peralta Colleges being placed on Warning Status. A team chaired by **Frank Gornick** - a Commissioner of the ACCJC - and four others visited and reviewed, inter alia, a 2010 finding that the District/Colleges “have not achieved compliance with Standard III.D. and Eligibility Requirements # 5 and # 17 ... [they] do not demonstrate fiscal capacity to meet Standards and Eligibility Requirements ...” (Report, p. 11)

In this Report, issued in the same cycle as that of CCSF, the Visiting Team - including **Commissioner Gornick** - emphasized that the colleges had “excelled at securing external grant funding,” and thus met the Standard! The Team Report states,

“In addition to state funding, the District/colleges have excelled at securing external grant funding to augment and expand current educational programs and to respond to emerging career technical and/or community needs. According to documentation ... the District/colleges had more than \$28 million in grant funding (including categorical funding and financial aid). The general breakdown ... is as follows.” (Peralta April 16, 2012 Follow Up Visit Report, p. 12)

The team reported that COA had gotten 22 grants worth more than \$6 million, Berkeley City got 17 grants worth almost \$ 3 million, Merritt got 33 grants worth \$7.7 million, and Laney received 31 grants worth \$ 9.5 million. In addition, the Report recognized that the District itself had 10 grants worth over \$ 1.8 million.

Within a few weeks of issuing this Report (stamped as received by Peralta’s Chancellor on May 21, 2013, the Commission - which includes Commissioner Gornick, the team chair for the Peralta Visit and Report - would vote upon, and sanction, CCSF for depending too much on Grants Funding. The contrast in how Peralta, Santa Monica, Candada, and Harbor were treated versus CCSF is unexplainable. Moreover, on the CCSF team was a Dean from Laney College who has had some responsibility for acquiring grants - Peter Crabtree. Mr. Crabtree is listed as the Principal Investigator (“PI”) on several of these grants.¹⁷⁴

Ironically, Peter Crabtree had been involved in helping to write proposals at his own college for some of the very *same grants* that CCSF successfully applied for - and that evaluator is Peter Crabtree, a Dean of Technical Education at Laney College, and President Beno’s husband. The first of these grants was the National Science Foundation’s Advanced Technological Education Grant. Peter Crabtree was involved in writing or submitting the grant proposal for Laney College and the Peralta Community College District, in September 2012. The grant awarded the Peralta District with \$3.5 million dollars (Attachment 7.X.). CCSF also reported receiving the same National Science Foundation’s Advanced Technological Grant in September 2012 (Attachment 7.Y.).

Grant funding in technology was one of the specific areas pointed to in the CCSF Evaluation Report as an example of “not achieving stability,” and Mr. Crabtree was assigned to interview “Kristin Charles, Grants,” on the visiting team’s interview

¹⁷⁴ Mr. Crabtree was the PI of a successful NSF Advanced Technology Education Grant and a Renewal Grant.

schedule.¹⁷⁵ (Given Mr. Crabtree's presence on the team, his conflict of interest, and the strikingly different team view of CCSF's success at obtaining grants, one must again question the effect of Crabtree's appointment to the CCSF evaluation team.)

Both CCSF and Peralta were recipients of federal grants awarded from the Trade Adjustment Assistance Community College and Career Training initiative. These grants were awarded to consortiums of colleges in September 2012; Peralta's consortium was awarded \$14.9 dollars, and CCSF Consortium was also awarded \$14.9 million dollars (Attachment 7.Z.).

The language in the L.A. Harbor College Report noticeably departs from the frequent citations of concern in CCSF's Report that Grant funding was detrimental to CCSF's fiscal stability. The technology grants acquired by Canada College and Los Angeles Harbor College represent a similarly small percentage of the unrestricted budget, however, these colleges were lauded for the acquisition of such funding. Yet the evaluation report of CCSF indicated concern over the utilization of so-called unreliable funding sources to make technology infrastructure improvements. Such disparate applications of principles of evaluation are unintelligible and arbitrary.

Apart from the inconsistency of the Commission, ACCJC once again disregards the public policy of California by treating CCSF's use of grants to fund programs as a deficiency. In fact, given the Great Recession, the worst economic catastrophe since the Great Depression, the Chancellor's Office of the California Community colleges encouraged districts to secure funding through grants to help them address the fiscal crisis. In summary, ACCJC's reliance on CCSF's successful obtaining of Grant Funds contravenes California public policy, is inconsistent with its treatment of other colleges, and is patently arbitrary.

D. ACCJC Disregards California Public Policy on Reserves While Inconsistently Respecting Hawaii's Public Policy on Reserves

The Commission has identified CCSF's alleged insufficient reserves as a justification for concluding it did not meet its Standard III.D. governing fiscal stability. In finding fault with CCSF's reserves, ACCJC has disregarded California public policy which uses a 5% reserve guideline. It has also applied its Standards inconsistently, treating CCSF and other California community colleges more harshly than Hawaiian colleges, where the Commission respects Hawaii state law, with its 3% reserve guideline.

¹⁷⁵ Schedules obtained for the CCSF visit denote only Crabtree meeting with Kristin Charles.

Standard III assesses whether a college “effectively uses its ... financial resources to achieve” “educational purposes”, “student learning outcomes”, and “improve institutional effectiveness.” Subpart D adds, *inter alia*, that the “level of financial resources provides a reasonable expectation of” “short-term” and “long-term financial solvency.” Section 2.c. makes one reference to reserves: that the institution has “sufficient cash flow and reserves to maintain stability, strategies for appropriate risk management, and realistic plans to meet financial emergencies and unforeseen occurrences.” As we explain, a California community college has “sufficient reserves” by meeting the State standard of five percent. ACCJC cannot interpose a higher percentage requirement.

The background to ACCJC’s focus on CCSF’s reserves is as follows. In 2006, the Evaluation Team that visited CCSF made the following recommendation:

“Recommendation 4: Financial Planning and Stability- The team recommends that the college develop a financial strategy that will: match ongoing expenditures with ongoing revenue; *maintain the minimum prudent reserve level*; reduce the percentage of its annual budget that is utilized for salaries and benefits; and address funding for retiree health benefits costs (III.D.1.b, III.D.2.c, III.D.2.d).” (Evaluation Team Report, p. 5, emphasis added)

The 2012 Site-Visit Team observed that CCSF met the State standard, but it asserted, without explaining why, that this was below the “minimum prudent” reserve level:

“The team confirmed that City College of San Francisco has not addressed this recommendation. The current projections for the 2011-12 year indicate ongoing expenditures will exceed revenues by approximately 5.9 million dollars. Salaries and benefits remain above 92% of the unrestricted general fund expenditures. Furthermore, unfunded liabilities, such as Other Post-Employment Benefits (OPEB) and Workmen's Compensation, continue to negatively impact cash flow, and no plan has been developed to address payment of these liabilities. ***While the reserve meets the minimum California community college requirement, it is well below a minimum prudent level, as demonstrated by an increase in short-term borrowing to meet cash flow needs.***” (2012 Evaluation Report, p. 14, emphasis added)

As a result of its assertion that a 5% reserve is “below a minimum prudent level,”

the Team found that CCSF had not addressed the 2006 recommendation, even partially.¹⁷⁶

In finding CCSF's 5% reserve inadequate to meet Commission Standard III.D., ACCJC disregarded California's statewide public policy that a 5% reserve is prudent. (Memo, Assistant Vice Chancellor Frederick E. Harris to Chief Business Officers, October 25, 2005, FS 05-05, Attachment 7.A.A.) California law requires that the recording of district income and expenditures shall be in accordance with the uniform system of accounting as prescribed by the California Community Colleges "Budget and Accounting Manual." (Cal. Code Regs., tit. 5, § 59010 [incorporating the BAM into State law]; see also Cal. Code Regs., tit. 5, § 58307) The Community Colleges Budget and Accounting Manual (or "BAM") "has the authority of regulation in accordance with title 5, Section 59011, of the California Code of Regulations ..." (BAM, 7.A.B., p. 1-2)

The Community Colleges Systems Office now and for many years, has been required to "adopt criteria and standards" for the fiscal condition of California's community college districts. (See Cal. Education Code § 84040(c)). In addition, the Board is required to, and does, adopt standards for "district maintenance of sound fiscal conditions." (§ 84040(c)(2))

Also for many years, the System Office of the State Chancellor's Office has, in accordance with these Legislative directives, defined a "**prudent reserve**" as being "not less than **five** percent of expenditures." (See, Attachment 7.A.A, emphasis added)¹⁷⁷

In other words, a general fund unrestricted reserve of five percent satisfies the State Chancellor's Office requirement of a "prudent reserve." Ironically, the purposes for such "reserves" and the measures of financial integrity set forth in ACCJC Standard III.D. and the BAM, are set forth in identical language. (See Attachment 7.A.B, p.1-15) The Commission has acted arbitrarily when it picks and choose which BAM policies it will respect and which it will disregard.

In fact, this five percent requirement has been followed by colleges throughout the

¹⁷⁶ This was the evidence at the time of the site-visit, and the information on which the Commission relied to make their decision as to CCSF's sanction. In September of 2012, three months after the Commission voted to take action on City College, the FCMAT report on the college indicated the reserve was closer to 1%. AFT 2121 disputes this conclusion. Nonetheless, this is irrelevant as neither the Evaluation Team nor the Commission relied on, or could have relied upon, this information to reach their earlier decisions in March and June, 2012.

¹⁷⁷ The BAM defines a "reserve" as "An amount set aside to provide for future expenditures or losses, for working capital, or for other specified purposes." (BAM p. A-28)

California community college system, except when districts are coerced by ACCJC into maintaining a larger reserve, generally at the expense of education and contrary to California law, discussed further below. Ironically, ACCJC chooses to accept the 5% reserve figure when it suits the Commission. For instance, in the same cycle as CCSF, one Team Evaluation Report declared,

“The district maintains the required reserve of 5 percent or \$25 million.” (Los Angeles Harbor College Evaluation Team Report, March 13-15, 2012, p. 45)

The Commission claims that CCSF’s “short-term borrowing” evidenced that the reserve was not “prudent.” However, the BAM makes it clear that the general reserve is **designed to be used for just this short-term borrowing purpose**, as a general reserve is supposed to be “used to record the reserve budgeted to providing operating cash in the succeeding fiscal year until local property taxes and State funds become available.” (Attachment 7.A.B, p. 4-21) The “reserve” funds of districts are defined in the BAM to mean appropriations “not designated for any specific purpose, and held available for transfer for specific appropriations as needed during the fiscal year.” (Attachment 7.A.B., p. 4-40)

The Commission’s broader application of its Standards puts severe pressure on institutions to maintain excessive reserves, much greater than the State’s five percent standard. Reserves are necessary to offset adverse impacts in the event of a financial emergency. To not use them when such a situation arise would defeat the purpose of the BAM. Choosing to allocate excessive monies to reserves inhibits institutions from otherwise spending that money to retain instructors and maintain class sections for students. If class sections are cut, a college may experience a downward spiral, adversely affecting future enrollment.

In fact, many colleges with high levels of reserves have also implemented layoffs, and thereby cut class sections at their institutions, adversely affecting availability of classes for students. The 2011 Evaluation Report of Shasta College reveals that despite having a 22 % *reserve*-- that is, more than 400% higher than what was required of it¹⁷⁸-- the district continued to implement a “hiring freeze” which is responsible for keeping over 40 full-time positions open. (Shasta College, 2011 Evaluation Report, p. 46).

Napa Valley College, which historically maintained reserves between 6% and 10%, came under Commission scrutiny for its own self-reported concern that it might not be able to keep reserves *above* 5% given the ongoing fiscal crisis (Napa College, Oct.

¹⁷⁸The college maintained reserve levels at 22%, the State required reserve amount is 5%.

2009 Team Evaluation Report, p.35-37).¹⁷⁹

This trend is the result of colleges' desire to escape the Commission's punishment of institutions that are perceived not to meet ACCJC's excessive Financial Standards. Accumulating reserves above the State-declared satisfactory amount of five percent, instead of keeping classrooms open, contradicts the public policy of the State as expressed in the Budget and Accounting Manual, the Chancellor's Office's requirements, and the mission of California's Community Colleges to provide educational opportunity to qualified students. (See, *A Master Plan For Higher Education*, 1960, p. xii)

The effect of this Commission pressure is no more readily apparent than in the case of CCSF's Proposition A funds. In November 2012 San Francisco residents voted to implement a parcel tax in order:

“To provide City College of San Francisco with funds the State cannot take away; offset budget cuts; **prevent layoffs**; provide an affordable, quality education for students; **maintain essential courses including**, but not limited to, writing, math, science, and other general education; prepare students for four-year universities; provide workforce training including, but not limited to, nursing, engineering, technology, and business; and keep college libraries, student support services, and other instructional support open and up to date.” (Attachment 7.A.C., emphasis added.)

Yet, once the Initiative passed, and it was known that these new funds would soon be received by the District, CCSF's Board refused to allocate these funds to realize the goals for which they were approved. Instead, they resolved to use the Prop A funds to build an excessive reserve. AFT 2121 announced that during collective bargaining negotiations the District at one point admitted that they were allocating the \$14 million dollars in Parcel Tax revenues “*solely for 'accreditation purposes.'*” (Attachment 7.D.) The District was more willing to betray the trust of the voters who approved sacrifices in order to enable City College to continue to carry out its historic mission, than run the risk of disaccreditation by a Commission bent on bending the College to will, notwithstanding California public policy.

The March 15, 2013 CCSF Show Cause Report confirms the effectiveness of ACCJC's coercion, with this statement explaining,

¹⁷⁹ Modesto Junior College and Columbia College are colleges within the Yosemite Community College District. The District implemented layoffs in March 2011, closing entire programs, despite maintaining reserves in excess of the required amount.

“The College’s reserves are currently inadequate... The College can address this need [to build up the reserve] with the adoption of the 2013-14 budget by making prudent allocations of the new parcel tax revenues the College will begin to receive... the Board of Trustees adopted a long-term plan for fiscal stability for the next eight fiscal years... funds will be allocated to the reserve until it grows to \$17.66 million or 8 percent.”
(CCSF Show Cause Report, p. 203)

CCSF’s misguided, new intention to increase its reserves to 8% reflects the recent pattern of the California community college’s to increase their reserves higher than the state mandate in order to avoid sanction by the Commission (at the expense of their students, employees, the public and sound fiscal policy). In coercing this result, ACCJC has undermined California’s public policy.

As usual, however, ACCJC operates inconsistently. And that is apparent from its treatment of the Hawaii community colleges in regard to reserves.

Presumably, the Commission’s justification for requiring some California community colleges to maintain reserves in excess of the state-mandated 5%, is the explanation for disregarding other aspects of California law - the claim that Commission decisions and Standards are not obligated to “exercise” or “apply” governmental or regulatory mandates:

“As a voluntary, nongovernmental agency, the Commission is not obligated to exercise the regulatory control of state and federal governments, **nor to apply their mandates regarding collective bargaining, affirmative action, health and safety regulations, and the like.** Furthermore, the Commission does not enforce the standards of specialized accrediting agencies or other nongovernmental organizations, **nor the laws and regulations of state agencies,** ... The Commission has its own standards and expects that institutions and teams will apply them ...” (Team Evaluator Manual, 2011 ed., p. 8)

Yet, the Commission **chooses to defer to state law in the case of the Hawaii community colleges.**

Like California, Hawaii state law delegates a specific minimum level of reserves that is considered prudent. **However, in Hawaii this state-mandated level is 3%.** The Commission defers to Hawaii state law on reserves in evaluating Hawaii Community Colleges’ fiscal stability. This is evidenced by numerous evaluation reports and ACCJC action letters.

The 2006 Evaluation Report of Leeward College, located in Pearl City, Hawaii states:

“An ending fund balance of 3% of expenditures has been used by the community college system as a guideline for a desired ending fund balance. The college met that requirement for the year ended June 30, 2006. The unrestricted ending fund balance was \$1.15 million which exceeds the 3% requirement. This reserve level is adequate to meet likely contingencies.” (October 2006 Evaluation Report, p. 37, emphasis added)

The 2006 Evaluation Report of Kapi’olani College, located in Honolulu, Hawaii states;

“A review of three years of financial trends and analysis data revealed the college has met the three percent reserve requirement with the exception of fiscal year 2004-05, when the college fell short of the target by maintaining only a 2.63 percent reserve.” (October 2006 Evaluation Report, p. 53, emphasis added)

No recommendations were made regarding Financial Resources for Kapi’olani College, acknowledging the State’s policy that a 3% reserve is adequate.¹⁸⁰

The Commission’s acceptance of Hawaii’s 3% reserve is no anomaly. Not only has the Commission repeatedly accepted it in their accreditation decisions, but the Commission staff and Commissioners have for some reason given the Hawaiian colleges extensive personal attention during Beno’s time as President. In 2006 ACCJC sent seven evaluation teams to Hawaii. **Commission Chair Jan Kehoe** headed up the October 2006 Hawaii Community College team. In addition, **Commissioner Joseph Richey** was one of two members of the Leeward Community College “Mid-Term Visit” team in 2003 – the other was president **Beno**; **Richey** was also a member of a 4 person team led by

¹⁸⁰ ACCJC indicated in 2006 that “As a component of the community college system and the larger University of Hawai’i system, Leeward Community College is insulated from many of the contingencies that could create a financial shortfall that would disrupt services and programs provided to students. An unrestricted ending fund balance of 3% is adequate to meet emergency cash and funding needs.” (October 2006 Evaluation Report, p. 37) If this is offered as a justification for treating Hawaii more leniently, it does not suffice. Each California community college is part of a larger system - one which is at least 50 times the size of Hawaii, and, like Hawaii, is backed by the full faith and credit of the State.

Barabara Beno, which visited Leeward Community College in April 2005, and the University of Hawaii office in Honolulu. This team also included **Commissioners Joseph Richey, Commissioner Sherrill Amador and future Commissioner Dr. Marie Smith. Peter Crabtree**, Beno's husband, was on the team which visited Kapiolani College in Hawaii in 2006. All told there have been about a dozen commissioners or staff who have evaluated Hawaiian colleges in the last 10 years.

The difference in application and deference to state law between Hawaii and California is an inconsistency, violating ACCJC policy and establishing a violation of **34 CFR §602.18(b)**, which requires that accrediting agencies have effective controls against the *inconsistent* application standards, and that an accrediting agency must base its decisions regarding accreditation on the agency's published standards.

Here, ACCJC defers to state law to evaluate financial stability in Hawaii, but it stubbornly refuses to abide by State law in California, thereby violating the requirement that the Commission have effective controls against inconsistently applying standards. Furthermore, the policy of deference to state law regarding reserves in one state, but not in another, is conspicuously absent from the Commission's published Standards, which state:

“The institution has sufficient cash flow and reserves to maintain stability, strategies for appropriate risk management, and develops contingency plans to meet financial emergencies and unforeseen occurrences.”

This Standard noticeably does not say “sufficient cash flow is equal to the state mandated reserve requirement,” or, “sufficient cash flow is equal to the state mandated reserve requirement in Hawaii, but not in California.” Thus, this Commission practice constitutes an “underground standard” in violation of §602.18(c)

Likewise, if the Commission is right in their belief that they do not have to defer to state laws to formulate standards, maintaining that different levels of reserves constitute the same level of “sufficiency” to “maintain stability” is arbitrary and capricious, and also constitutes a violation of **34 CFR §602.18(b)** [effective controls against inconsistent application of standards].

However, the law is clear, both under Federal common law due process, the Higher Education Act, and California's common law fair procedure doctrine, that an accreditor's failure to respect state law is illegal.

ACCJC's determination that CCSF failed to meet the fiscal stability Standard by

not having a general unrestricted reserve greater than the 5 % reserve set by California law, results from the Commission's (1) disregard of California public policy and (2) its inconsistent treatment of CCSF compared to Hawaiian community colleges. For these reasons the Commission has violated **34 CFR CFR §602.18(b) and 602.17 (c)**, and acted arbitrarily. Hence the Show Cause sanction was improperly imposed, and it should be reversed.

VII. A Stacked Deck: Evaluation Teams and the Commission Are Not Composed of Peers. Instead, They Are Dominated by Administrators, And Seek to Advance Administrative Interests at the Expense of Faculty, Students and the Public. ACCJC Thereby Violates 20 USC §1099b, 34 CFR § 602.15 (a)(6), 34 CFR § 602.21, 34 CFR §602.23(a), and ACCJC Policies and the Law on Conflict of Interest and Due Process.

Faculty should play a **central role** in the assessment of institutions. But they do not. This is the result of policy and practices of the ACCJC. Even though administrators represent only about 3 % of the workforce of the community colleges, they represent a domineering 75 % of the so-called "peer evaluation teams," bringing their perspective and interests to the forefront of accreditation review. Many of these interests are philosophical and accreditation is increasingly used a tool to advance those interests, which focus less on academic and student-oriented outcomes, and more on discretionary procedures. As a result, there is a huge disconnect between the colleges which ACCJC sanctions, and the actual outcomes in terms of student performance, as measured by the Chancellor's Office (see extensive discussion in Section XI, *infra*.)

The ACCJC has, as discussed in this Complaint and Comment, committed numerous violations of law and policy in its evaluation of CCSF, and in evaluating most California community colleges. It has shown contempt for the public policy of California and the mission of community colleges, disregarded conflicts of interest of its own making, ignored due process requirements, misapplied its policies, and acted inconsistently. These actions are too numerous to result from simple negligence - they reveal an agency which is *dominated* by managers and administrators of California community colleges, and attempts to advance their interests at the expense of the students, faculty, staff and the public.

A. ACCJC Policy Is To Appoint Independent Evaluation Teams of Peers

At the root of accreditation is the principle that evaluation shall be carried out by independent evaluation teams composed of peer evaluators. ACCJC's Bylaws declare that the purpose of the Commission is to assure "the educational community, the general public, and other ... agencies" that the college merits accreditation, through, *inter alia*,

“period evaluation of institutional quality by qualified peer professionals.”¹⁸¹

This principle is so important that ACCJC policies constantly refer to it. The Commission’s “Statement on the Benefits of Accreditation” identifies peer evaluation as a critical element: “The Commissions accreditation process is a **collegial process of peer review.**”¹⁸² This Statement mentions that “**voluntary participation in peer review**” offers a guard against “external encroachment harmful to institutional quality,” and provides schools with “an enhanced reputation.”¹⁸³

ACCJC’s Policy on Institutional Integrity and Ethics announces that a college “maintains an commitment to external evaluation and **assists peer evaluators** in performing their duties.”¹⁸⁴

The Commission’s “Policy on Interregional Polices etc.” asserts that when the Commission operates within the territory of another regional accrediting commission, it engages the participation of the “host” commission so as to “**preserve the values and practices of peer review ...**”¹⁸⁵ Likewise, ACCJC’s Policy on Joint Accreditation Processes with the Association of Senior Colleges of WASC provides that the ACCJC will “**appoint a team ... comprised of peer evaluators ...** [and] will provide primary staff assistance for **peer evaluator training ...**”¹⁸⁶ And the same Policy indicates that ASCSU staff, in cooperation with ACCJC staff, “will provide primary staff assistance for peer evaluator training ...”¹⁸⁷

ACCJC’s Policy on Professional and Ethical Responsibilities of Commission Members similarly indicates that the Commission “encourages and supports institutional

¹⁸¹ ACCJC Bylaws, Article I (Purpose), Section 2 (Purpose), p. 1, emphasis added.

¹⁸² *Statement of the Benefits of Accreditation*, Statement Elements, adopted June 20-04, Revised January 2011, Edited June and August, 2012, emphasis added.

¹⁸³ Id. p. 2; 2012 Handbook, p. 32, emphasis added.

¹⁸⁴ Policy on Institutional Integrity and Ethics, 2012 Handbook, p. 76, emphasis added.

¹⁸⁵ Policy on Statement on the Evaluation of Institutions Operating Interregionally, 2012 Handbook, p. 82, emphasis added.

¹⁸⁶ Policies and Procedures for Joint Accreditation etc., 2012 Handbook, p. 88, emphasis added.

¹⁸⁷ Id., p. 91, emphasis added.

development and improvement through self evaluation **and periodic evaluation by qualified peer professionals.**¹⁸⁸

In addition to these above policies, ACCJC’s Team Evaluator Manuals state that the evaluation teams are supposed to consist of the “**peers** of those working in the colleges.” (Team Evaluator Manual, 2001 ed., p.2, 2011; 2012 ed., p. 2) This has long been ACCJC policy - the 1997 ACCJC “Handbook for Evaluators,” states that “**The evaluation team, all professional peers** ... offer independent insights based on careful analysis ...” (1997 Handbook for Evaluators, p. i.)

The current and predecessor Team Evaluator Manuals similarly confirm that:

“The External Evaluation team, made up of *professional peers* who volunteer their services, offers *independent insights* based on careful analysis ...” (Team Evaluator Manual, p.2, 2011 and 2012 ed.)

The Team Evaluator Manual also describes the importance of peer assessment:

“The accreditation paradigm includes ... Assessment of the self-evaluation and the institution against the Accreditation Standards by **external, peer reviewers** with recommendations to the institution and the Commission.” (*Id.*, emphasis added.)

The ACCJC claims that it selects teams of *peers*:

“**The ACCJC staff develops the peer evaluation teams from a roster of experienced educators** who have exhibited leadership and balanced judgment. Typically a team has several faculty members, academic and student services administrators, a chief executive officer, a trustee, a business officer, and individuals with expertise and/or experience in learning resources, distance/correspondence education, planning, research, and evaluation.” (Team Evaluator Manual, p. 3, section 2.3. emphasis added)

In short, ACCJC’s commitment to operate a peer evaluation system is readily

¹⁸⁸ See Policy on Professional and Ethical Responsibilities of Commission Members , p. 137. The Commissions “Statement on Diversity” also references that the Commission evaluates institutional effectiveness in addressing diversity issues through “peer evaluation processes.”

apparent. The trouble is, ACCJC violates this principle with every evaluation team it appoints.

B. Administrators Dominated the CCSF Evaluation Team, As They Dominate All of ACCJC’s “Peer” Evaluation Teams – 75% of Those Appointed

The CCSF Evaluation team, appointed by the “staff” of the ACCJC for the March 2012 evaluation, consisted of 17 members. Of these, 12 were administrators, 1 was a board member, and **just 4 were faculty**. In other words, although CCSF has nearly 1,500 faculty (close to 80% of its workforce), it represented **just 23.5 % of the team**. And the team’s leaders - the chair, the assistant chair, and those assigned to lead the standards reviews, were all managers.¹⁸⁹

Over the last 6 years, **75 percent of the membership of evaluation teams for the California community colleges have been composed of managers, administrators and board members**. (See Attachment 8.A.) Many have been presidents, vice presidents, chancellors and vice chancellors. Like ACCJC’s president Beno, some of these have never worked for a California community college as tenured instructors. (See Attachment 8.A.) The statistics showing that administrators are over-represented within California community college evaluation teams are comparable to all the teams created by the ACCJC. (Attachment 8.A.)¹⁹⁰

ACCJC evaluation teams are not representative of the workforce in the California community colleges - in the case of CCSF, if there had been relative representation, then there would have been 13 faculty peers, 3 or fewer administrators, and perhaps one board member, if any. See Table CIET 1-1, which follows and appears in the Appendix. CCSF’s experience is typical.

The community colleges employ around 100,000 employees, and statistical information for the last 20 years confirm that the percentage of educational administrators

¹⁸⁹ Standard I was led by Dean Buechner; Standard II by Vice President Blanchard. Standard III by Vice Chancellor James and Vice President Elam, and Standard IV by Superintendent/President Lacy (Attachment 4.E.)

¹⁹⁰ While ACCJC might argue that a district could “challenge” a team filled with administrators, this is not at all possible. Challenging one or more members will not change ACCJC’s practice of stacking the teams with managers. Furthermore, the evaluation process is for the benefit of the public and the students, who cannot challenge team members. Only through enforcement of the law will the membership of teams be reformed.

has remained constant at about 2 % of all employees, and classified administrators have also remained constant at 2%.¹⁹¹ In other words, a group which represents 4% of the employees, represents 75% of the evaluators. This huge disparity is the result of deliberate decisions by the ACCJC.

Having reviewed accreditation review teams for the period of January 2006 through October 2012 it appears that every team chair has been a manager, and most assistant chairs are either administrator or assistants to the team chair at the college. (8.B.) Not one faculty member has ever been appointed a team chair. unjustifiable.

ACCJC likely would assert that a single faculty member would lack the needed administrative support provided by a second-tier administrator from his or her district, who serves as the “assistant.” Again, the excuse is overblown. There are thousands of faculty who run programs as coordinators, who serve as officers of their local Senate, who are Union leaders, who take charge of program reviews. And cooperating with an assistant chair is hardly the unique province of chancellors.

The ACCJC openly acknowledges that it will not appoint faculty to chair visiting teams. What it doesn't openly acknowledge is another unwritten, underground rule - it generally will not assign a faculty chair to any of the four “Standards teams” within a visiting team. Each Standard (there are four), has a subgroup team leader. In San Francisco this was a Dean for Standard I (Institutional Mission and Effectiveness), a Vice President for Standard II (Student Learning Programs and Services), a Vice President and Vice Chancellor for Standard III (Resources), and Superintendent/President for Standard IV (Leadership and Governance).

It would require an exhaustive review of every team agenda, but given the number of administrators, and ACCJC's partiality for assigning administrators to important team roles, it is reasonable to assume that ACCJC assigns each “subgroup” within the Standards to a team leader who is a manager or administrator.

Even when a team includes a faculty member with extensive experience on evaluation teams, or for instance in a particular issue (e.g. Student Learning) or role (e.g. a Senate or Union president) it appears ACCJC always appoints an administrator, even a novice administrator.

¹⁹¹ See, e.g., “The Composition of Staff in California's Community Colleges, 1994 to 2002, California Research Bureau, Jan. 2004, Elias S. Lopez, Ph.D.; California Community College Chancellor's Office, Fall 2006, Employee Category Salary Distribution by District.

In doing this, ACCJC improves the chances that the team will enforce policies which benefit managerial interests at the expense of faculty, student or public interests.

C. ACCJC's Failure to Appoint Peer Evaluation Teams Violates Its Policy and the Law

We have shown that managers and administrators dominate the evaluation process at the team level, with representation at 40 times their numbers. In some cases, especially Follow-Up visits, every team member is a manager or administrator.

ACCJC's numerous manuals, bylaws and policies do not define peers, but the Team Evaluator Manual states as to "Team Selection," that:

"Each team is selected to provide experienced, impartial professionals appropriate for the institution being evaluated ... **Teams are reflective of the diversity of the college and the region.**" (Team Evaluator Manual, p. 4, emphasis added)

Diversity should certainly include the faculty.

The most common source of a definition for peer would be *Webster's*, which defines a peer as "one that is of the same or equal standing."¹⁹² But the peer evaluators appointed by ACCJC are not, by any means, anywhere proportionate to the various ranks of employees serving in the colleges.

Peer review is, however, a concept well-known in academia, and in the community colleges. In the California community colleges, evaluation of tenure candidates, and other faculty means evaluation teams which are predominately composed of peers.¹⁹³ When it adopted A.B. 1725, the Legislature decreed that faculty would "play a central role" in the evaluation process.¹⁹⁴ In expressing its intent, the Legislature explained that,

*"This bill, in addition, would require that the evaluation include a peer review process, as specified, ... (1) Emphasis is placed on the responsibility of the faculty to ensure the quality of their **faculty peers** ... (5) A faculty member's students, **administrators, and peers** should all contribute to his or her evaluation, but the faculty should, in the usual case, play a central role in the evaluation process and,*

¹⁹² *Websters* Unabridged Dictionary.

¹⁹³ See California Education Code section 87663.

¹⁹⁴ See Stats. 1988, , note to Education Code section 87350, Section 4.

together with appropriate administrators, assume principal responsibility for the effectiveness of the process ... (w) ... The faculty's inherent professional responsibility to ensure the quality of their **faculty peers** requires faculty review to be at the heart of the evaluation process leading to tenure decisions ... Whenever an evaluation is required of a [academic] employee of a community college district ... the evaluation shall include, but not be limited to, a peer review process ...” Stats. 1988, Chap. 973.

When it comes to peer review of medical personnel, peer evaluators are frequently fellow physicians or nurses.¹⁹⁵

Faculty are professional educators. Many college administrators never had much experience as professional educators, or lack the recent experience and faculty perspective. They are not faculty peers.

ACCJC likely contends that peers has a broader meaning, that it must include not just faculty, but administrators, as accreditation requires professional experts. However, while most teams include a few peers from the ranks of faculty and administration, and occasionally board members, managers and administrators are disproportionately represented. Our examination shows, as we emphasize, that 75 percent of the “peer evaluators” are managers. Managers have no claim to exclusivity of expertise. It is statistically impossible for 75% of the peer evaluators to have been selected by chance.

ACCJC also states that “Each evaluator is chosen to bring perspective to the task, but not as a ‘representative’ of an organizational constituency. Teams represent the Commission.” Presumably ACCJC argues that given this policy, it can appoint just 20% faculty, since each evaluator does not “represent” a constituency such as faculty service. This argument is nonsense. If this definition is applied to “representative,” then how is it that 75% of the appointees do come from a particular constituency - the managers and administrators of the community colleges. No amount of argument can undermine the fact that this is a “constituency,” and that the Commission deliberately appoints most of the teams from this group.

Furthermore, under **34 CFR section 602.21**, ACCJC’s review of an institution is required to involve “all of the agency’s relevant constituencies in the review and affords them a *meaningful opportunity to provide input into the review.*” However, by facilitating managerial domination of the evaluation process, ACCJC appears to violate **34 CFR**

¹⁹⁵ The California Board of Registered Nursing has 5 registered nurses and 4 public members.

section 602.21(b)(4). If faculty evaluators remain steady at less than 20% and administrators remain at 75%, there is no way academic employees are able to provide meaningful input into the review.

ACCJC's failure to appoint peers has not gone unnoticed. Faculty organizations, individual employees, and commentators have criticized ACCJC for this failure. ACCJC has offered several defenses. They are specious.

ACCJC has claimed that it has difficulty getting faculty to commit to participate in the process, because they will be away from their colleges and students for four days in March.¹⁹⁵ Given the stranglehold resulting from the mandatory requirement of a recommendation, whether a letter or signature on a form, and ACCJC's policies and practices, this excuse lacks credibility.¹⁹⁶ After all, according to ACCJC's unwritten policy, colleges are required to release faculty to participate in the accreditation process.¹⁹⁷ This policy should be written, and enforced so that faculty are automatically released from their regular duties to participate on teams. Administrators are already afforded this opportunity, largely without the need for a written policy.

One might imagine ACCJC will contend faculty just are not sufficiently qualified to evaluate standards such as "Resources." However, many faculty have exceptional experience when it comes to district budgets. Many serve as officers in state or local associations (e.g. EOPS, DSPS, Counselors). Moreover, the Board of Governors adopted a regulation specifically defining "academic and professional matters" as including

¹⁹⁵"Behind the Green Curtain: The Accreditation Visit Unveiled etc.", Fulks and Mahon, The Senate Rostrum, Dec. 2009, available at: <http://www.asccc.org/content/behind-green-curtain-accreditation-visit-unveiled-or-where-do-those-accreditation-recommendations>

¹⁹⁶ ACCJC has no cause to challenge faculty's understanding of the assessment process. The Commission conducts team training each year. The training lasts one day, and is given at various times during the year, in Northern and Southern California. All team members - whether administrators, board members or faculty, receive the same training. ACCJC also provides an annual orientation session - one day - for team chairs. In the case of CCSF the team chair orientations were on December 2 and 6, 2011.

¹⁹⁷ See Hillman, "The ACCJC Visiting Team: Details, Details, Details, Sept. 2012, the Academic Senate of California Community Colleges, "The district or college must allow potential team members to commit to the required timelines and to the time to prepare for a visit to another college, as well as allow the required time away from their campus." (Found at: <http://www.asccc.org/content/accjc-visiting-team-details-details-details>)

“processes for institutional planning and budget development.” (Cal. Code Regs. § 53200 (c)(10)) Districts are required to consult with academic senates on budget development.

Moreover, faculty unions have considerable expertise in budget analysis, as this is essential for collective bargaining. The California Fifty Percent Law, Education Code section 84362, also requires faculty and their unions to engage in detailed budget analysis to assure districts are satisfying their obligations. And most districts have created councils for budget consultation, generally with the approval and involvement of faculty unions and senates. And, of course, every community college district employs faculty to teach accounting, business and economics. Expertise is not a valid justification for excluding faculty peers.

The real culprit is the Commission, which has traditionally insisted on an underground regulation, that faculty who desire to serve must obtain the approval of a college president or CEO of the district. This restriction discriminates against faculty participation and thus adversely impacts ACCJC’s compliance with the peer review obligation. Hence, ACCJC should immediately (1) cease giving effect to it and (2) consult with faculty representatives and other constituencies and Commission members generally, to agree upon a scheme in which interested faculty may apply without requiring “approval” from presidents or CEOs.

Administrators are no longer peers of teachers and other professional educators. Barbara Beno, herself, was a researcher, not a tenured, or probationary faculty member, before becoming a college president and reportedly taught but a few classes in Peralta as a part-time teacher after becoming an administrator. In assigning “peer evaluation” to non-peer administrators, ACCJC has stacked the deck and created a system in which, rather than playing a “central role,” faculty play bit parts.

1. This Disproportionate Appointment Scheme Creates a Conflict of Interest and Favoritism

This administrative bias continually informs the adoption and implementation of Standards and Requirements, and adversely affected CCSF and other colleges. By causing and perpetuating this administrative domination, ACCJC has a conflict of interest or the appearance of a conflict of interest. This conflict results from the fact that the evaluation teams are the captive of management, which acts to further its own interests at the expense of the students, employees and public. This conflict of interest or appearance of a conflict, violates **34 CFR section 602.15 (a)(6)**, which requires that ACCJC to have “[c]lear and effective controls against conflicts of interest, or the appearance of conflicts of interest, by the agency’s - (ii) Commissioners; (iii) Evaluation team members ... (v)

Administrative staff.” There do not appear to be any effective controls.¹⁹⁸

2. **Secrecy and Exclusivity in the Appointment Process Violate 34 CFR Section 602.23(a)**

For many decades women and minorities were shut out of academia. To be sure, this resulted from discrimination, but among the discriminatory practices which allowed this to occur was the secrecy which accompanied faculty appointments and tenure. If the current process of appointment isn't akin to an “old boy network,” then nothing is.

The administrative and managerial bias which infects the ACCJC exists in part because ACCJC selects the team members by exercising total discretion in an atmosphere of secrecy. And, it has adopted policies which severely restrict the pool of available faculty. Foremost are the rules which require faculty to be **nominated or approved by managers**.

ACCJC's detailed Accreditation Reference Handbook, and its Team Evaluator Manual, make no mention of ACCJC's process for selecting teams. Rather, *team selection is the result of underground policies*. These policies virtually assure perpetual management domination of evaluation. And as underground policies, they violate Federal requirements that these procedures be published for the benefit of the public. Thus, **34 CFR section 602.23(a)** requires that, “written materials describing” the “standards and procedures it uses” must be available to the public. But there has never been a description of the process actually used and faculty who have inquired, have often been stymied.

The selection process is arranged by the staff ACCJC, all of whom formerly worked as community college managers. Because the selection process results from underground regulations, which are not set forth in the hundreds of pages of ACCJC policies and manuals, it is far easier for discriminatory practices to perpetuate themselves.

Prior to September 2012, ACCJC required a signed, letter of recommendation from the college president where the faculty member works, to qualify a faculty member as eligible for participation on an evaluation team. (“The ACCJC Visiting Team: Details, Details, Details,” *ASCCC Rostrum*, September 2012, by Michelle Hillman.)¹⁹⁹

¹⁹⁸ It would be no less legal if it were the result of de facto discrimination.

¹⁹⁹ available at:
<http://www.asccc.org/content/accjc-visiting-team-details-details-details>)

In **34 CFR section 602.23(a)** the Department of Education requires that ACCJC must “maintain and make available to the public written materials describing – ... [t]he standards and *procedures* it uses to determine” the accreditation decisions it makes. This requirement is violated by ACCJC’s underground regulations: (1) appointing mostly administrators to teams; (2) appointing only administrators to special teams such as Follow-Up teams; (3) appointing only administrators as team chairs; and, (4) appointing only administrators to lead specialized teams for Standards and Eligibility Requirements, or parts of Standards.

After apparently years of complaints, ACCJC barely opened the door a crack by eliminating in Fall 2012, the need for a *signed letter of recommendation*, and replacing it with a chancellor or resident’s required *signature on a form to nominate a faculty member*. *Id.* That is, college managers remain the gatekeepers to faculty participation. Sort of like how integration of colleges and universities was stalled for many decades, for women and minority faculty, not to mention students.

Through these restrictive rules, the ACCJC assures that teams remain dominated by management and administrators, and that union members or representatives are virtually never appointed to teams.

What is clear is that every evaluation of a California community college in the past 12 years has been by a team of educators which is not actually composed of the college’s peers, nor representative of the diversity of the college. And that will continue unless ACCJC is required to open the process to transparency and eliminate the managerial control.

ACCJC must “maintain a systematic program of review that demonstrates that its standards are adequate to evaluate the quality of the education ... and relevant to the educational needs of students.” **34 CFR section 602.21**. Also, ACCJC must demonstrate its program of review is “comprehensive,” “regular,” examines “each of the agency’s standards and the standards as a whole,” and “Involves all of the [ACCJC’s] relevant constituencies in the review and affords them a meaningful opportunity to provide input into the review.” **34 CFR 602.21** In maintaining a practice of administrator domination of the Commission and its evaluation teams, ACCJC violates this regulation.

Management domination is largely to blame for many of the criticisms, and sanctions, received by California community colleges. This is because the Commission staff - *dominated by managers* - and the Commission itself - *dominated by managers* - have used the assessment process to select teams *dominated by managers*, who have advanced *managerial objectives* which are not accurate indicators of academic quality or the Federal standards. Nor, as we show below, do they actually satisfy ACCJC’s

additional Policies. Or, they involve so-called Standards which are not widely accepted as required by law,²⁰⁰ are not consistently applied by ACCJC,²⁰¹ or are not clearly and published.²⁰²

This bias and obvious conflict result in a loss of confidence in the Commission. After all, unlike the other regional accrediting agencies recognized by the Department of Education, the subset of colleges and hence available administrative evaluators is comparably small. Given the interconnectedness of the ACCJC with a number of administrative and management trade associations - the Community College League of California, the CEO's Association, the Association of California Community College Administrators, etc. - the same administrators keep showing up on teams. As a result, it is natural to suspect that teams are stacked and reviews are sandbagged by the staff of the Commission, to generate predetermined results. This will not change until the Commission ceases the illegal stacking of the deck, and establishes a means of fostering true peer evaluation.

By assuring managements domination of the evaluation process, ACCJC has grown more extreme in its actions, thus acting contrary to the interests of students, faculty, staff and the public.

D. Harm to CCSF Due to the Dominance of Administrators in the Evaluation Process

The disparity between faculty and administrator service on teams and the

²⁰⁰ See **34 C.F.R. §602.13** mandating that “standards, policies, procedures and decisions to grant or deny accreditation are widely accepted by” educators, educational institutions, and other accrediting bodies.

²⁰¹ See **34 CFR §602.18**, which demands that ACCJC and similar bodies have “effective controls against the ‘inconsistent application of the agency’s standards,’ and that it ‘must consistently apply and enforce standards that respect the stated mission of the institution.’”

²⁰² See **34 CFR § 602.18 (c)**, which requires that reviews must be based on published standards; **34 CFR § 602.23 (a)** requires that ACCJC must “maintain and make available to the public, written materials describing...the standards and *procedures* it uses to determine” the accreditation decisions it makes. (Emphasis added). **34 CFR § 602.13** requires that accreditation procedures must be widely accepted. And **34 CFR § 602.15(a)(6)** requires ACCJC have “Clear and effective controls against conflicts of interest, or the appearance of conflicts of interest, by the agency’s—(i) Board members, (ii) Commissioners, (iii) Evaluation team members ... (v) Administrative Staff ...”

Commission explains much of what has caused the excesses in ACCJC's actions over the last several years. In the case of CCSF, these adverse impacts work to the disadvantage of faculty, are anti-competitive in violation of antitrust laws, and benefit administrators at the expense of faculty and students.

First, ACCJC has insisted that CCSF's long-standing organizational arrangement under which division chairs administer the college's departments and divisions, be eliminated and replaced by highly-compensated administrators.

Second, ACCJC has, based on what the District has said in labor negotiations, demanded reductions in faculty and staff wages and benefits. ACCJC has demanded other salary restrictions, to the point that funds would unnecessarily be no longer available for personnel costs, but instead would be reserved, thus flouting the purpose behind Proposition A on the November 2012 election ballot.

Third, ACCJC has strongly criticized CCSF's Board, and college governing boards in general, for supposedly "micro-managing" colleges, insisting that Boards limit themselves to vague policies, allowing administrators free rein over most operational decisions. In doing so, ACCJC is disregarding California public policy and laws which require Board review and action, especially in areas where they serve as fiduciaries. As part of this effort, ACCJC has attempted to reduce communications between faculty and their union representatives and the Senates, again in an effort to increase the power of administration at the expense of public policy.

Fourth, having accreditation evaluation teams dominated by management creates a conflict with the accreditation objective of an independent review.

Fifth, **20 USC section 1099b** requires that an accrediting agency, to be reliable, must be independent, both administratively and financially, of related, associated or affiliated trade association. The managers who dominate ACCJC's teams belong to, and are active in, the Community College League of California (CCLC). Hence, ACCJC happens to encourage colleges, to satisfy accreditation standards, to adopt CCLC policies. Many of policies have been (1) contrary to the EERA and (2) of questionable constitutionality or plainly unconstitutional. For example, ACCJC has encouraged the unilateral adoption of policies on ethics and civility, although these are negotiable under the EERA. And it has encouraged the adoption of policies restricting freedom of speech, such as SBCC's policy on tiny "free speech zones." Hence, ACCJC appears to fail the mandate of **20 USC section 1099b(3)C**.

Sixth, ACCJC has acted throughout the State to (a) support legislation which increases administrator salaries, (b) criticized and implicitly threatened sanctions for

colleges which tie administrator salaries to faculty pay.

Overall, ACCJC's actions to perpetuate and implement managerial domination of accreditation, and which allow management to effectively determine which faculty, and the number, may be eligible to serve on evaluation teams, makes ACCJC an unreliable agency within the meaning of **20 USC section 1099b**, and it is not entitled to continued recognition by the Department of Education.

Likewise, ACCJC's persistent practice of allowing disproportionate representation by management, and insufficient participation by faculty, also makes ACCJC an unreliable agency within the meaning of **20 USC section 1099b**, and it is not entitled to continued recognition by the Department of Education.

In concealing the process under which it assembles evaluation teams, "qualifies" faculty participants, and allows management to dictate which faculty are "approved" to be on teams, ACCJC violates **34 CFR section 602.23(a)** which requires that ACCJC "maintains and makes available to the public written materials describing – (3) The standards and procedures it uses to determine whether to grant, reaffirm, .. Or take any other action related to each type of accreditation ..."

E. Harm To the Community Colleges Resulting from Administrative Dominance of ACCJC

The harm which results from the administrative domination of accreditation teams and the accreditation process, and the disproportionately small number of peer faculty, affects all ACCJC's member institutions and the accreditation process. As stated above, one of the driving forces behind the Commission's management bias is its practice of overloading evaluation teams with Administrators.

Evaluation teams are supposed to be "impartial", "peer evaluation teams", "reflective of the diversity of the college." (Team Evaluator Manual, 2.3 Team Selection, pg. 4). Commission documents declare that Evaluation Teams are **not** supposed to be "**representative of an organizational constituency**", which certainly applies to administrators. (Team Evaluator Manual, 2.3 Team Selection, pg. 4, Emphasis Added.) Certainly there is a tension between the concepts of peer evaluation teams reflective of a college, and members representative of an organizational constituency. And admittedly the ACCJC dictum is vague. However, the reality is that evaluation teams are overwhelmingly composed of administrators, which is an *organized constituency*. The administrators are typically represented by the Association of California Community College Administrators ("ACCCA"), although their interests are often advanced by the

Community College League of California and sometimes by even the ACCJC.²⁰³

The practical consequences of this are enormous. The harm to colleges includes the following:

1. ACCJC insistence that colleges hire more administrators.
2. ACCJC insistence that administrator salaries not be proportional to faculty salaries.
3. Other ACCJC efforts to increase administrator salaries, as in actively supporting legislation to exempt administrators from normal rules on “double-dipping” of pensions and salaries.
4. ACCJC’s action to encourage colleges to hire administrators whose primary focus is on accreditation.
5. ACCJC’s actions to encourage colleges to adopt Board policies drafted by the Community College League of California. These policies have included restrictions on the rights of faculty and the public, such as insistence on designating colleges as “non-public forums” and establishing “free speech zones” to limit freedom of speech.²⁰⁴
6. ACCJC’s action to require colleges to prefund OPEB liabilities under GASB 45, which has been encouraged by administrators such as Steve Kinsella, who has served as an ACCJC team member, task force member, and Commissioner, and served as the CCLC founder, Board member or alternate member, of the CCLC Retiree Health Benefits JPA.

ACCJC repeatedly informs colleges they must hire more Administrators. Such directives appear in numerous letters from Barbara Beno to colleges, containing these statements:

"San Jose City College has experienced very significant administrative turnover and periods of inadequate administrative staffing. The College needs to fully staff an administrative structure that is designed to provide stable leadership and oversight necessary to support the institution's mission and purposes." (Letter, Beno to Treadway, San Jose City College, January 31, 2011, pg. 2)

"The Commission notes that Cuesta College does not have sufficient staff, with appropriate preparation and experience, to provide stable administrative services

²⁰³ When CCSF’s Interim President Pamila Fisher wanted help in obtaining higher compensation for her temporary service, she contacted President Beno for assistance in lobbying the Legislature. (See discussion, *infra*.)

²⁰⁴

necessary to support its mission and purpose. The college needs to move expeditiously to fill vacancies and interim/acting positions.” (Letter, Beno to Stork, Cuesta College, January 31, 2011, pg. 2)

“The visiting team did not confirm that City College of San Francisco has a sufficient administrative staff with appropriate experience to support the necessary services for an institution of its size, mission, and purpose. The organizational structure and staffing is fluid, and administrative oversight is unsettled.” (2012 CCSF Evaluation Report, p. 16)

Recently, CCSF announced that it would replace the many department chairs with deans. So, on March 14, 2013, it formally announced its plan to hire nearly 30 new deans, in order to satisfy the ACCJC. It set a short deadlines of 6 days for applications, also so as to satisfy the ACCJC.

Again, ACCJC’s affinity for Administrators is observably linked to the the composition of the Commission itself as well as the make-up of Site-Visit Teams. The call for greater administrative hiring is no coincidence, as 14 of the 19 Commissioners are themselves administrators, or former administrators, and 75% of site-visit evaluators are administrators--all of whom invariably protect the interest of administrators.

Despite the continual citation to colleges that they hire more administrative support, the equivalent recommendation in terms of faculty is seldom, if ever, made. In fact, ACCJC reports have been known to suggest that institution’s cut the amount they are expending on faculty or union contracts (in other words, salary cuts or layoffs). This bias toward administrative positions is also seen in other accreditation documents that the ACCJC distributes. In the “Annual Fiscal Questionnaire”, the Commission asks each institution questions such as, “During the reporting period, did the institution settle any contracts with employee bargaining units?”, and “Did any contract settlements exceed the institutional COLA for the year?”, in regard to the salaries and benefits of the classified staff and faculty. See Attachment 8.C.

One thing the questionnaire does not concern itself with, however, is the salary or pay raises of *Administrators*. This is especially revealing since, being the most well paid employees of each community college, administrative increases in salary, even in small percentages, tend to be dramatic. Similarly, the Commission views “turnover” and “interim positions” in Administrative Positions as a negative, and has frequently cited institutions as deficient for having these sorts of situations (2004 Evergreen Valley College Evaluation Report, progress noted on p.14 of October, 2010 Evaluation Report, 2012 CCSF Evaluation Report p. 16 Examples). In the case of Palomar College the Commission even went as far as to forbid a certain type of Administrative Evaluation

(2009 Palomar College Evaluation Report pp.67-68).

The Commission's obstinate focus on increasing the number of administrative positions, and their compensation, has created a new, larger market for them. Since the "crack down" on accreditation that started in the early 2000s, at least **196** administrative positions that deal exclusively with accreditation matters have been created at ACCJC member institutions. These newly created positions often even bear the name of particular Standards (Dean of Institutional Effectiveness, Vice President of Student Learning Outcomes, etc.; See Attachment 8.D). The supposed necessity for these additional administrators emanates from the demands that the ACCJC place on colleges in order to comply with their Standards.

As more focus by the ACCJC is directed towards colleges' institutional evaluations, reviews of program implementation, research for growth projections, etc. an (artificial) need is created for increased administrative capacity to meet the accreditation standards-- or alternatively face sanction. Considering the Commission is made up by a majority of Administrators or Former Administrators, and that 75% of all Evaluation Team Members are similarly in Administrative positions, this comes as no surprise. Nonetheless, the paradigm pushed by the Commission, enforced through their standards/sanctioning, mandates that all colleges 1) need a lot of administrators 2) the jobs for those administrators must be stable and 3) despite the frequent citation of institutions for not meeting the "Financial Resources" standard, paying Administrators high salaries will in no way be penalized.

F. ACCJC Creates, and Disregards, Conflicts of Interest in Appointing Site Visit Evaluation Teams, Particularly Those Which Are Chaired by or Include ACCJC Commissioners and Staff

As we have mentioned, Federal law requires that accrediting bodies have "[c]lear and effective controls against conflicts of interest or the appearance of conflicts of interest by the agency's ... (iii) Evaluation team members ... (v) Administrative staff, and (vi) Other agency representatives." **34 C.F.R. § 602.15(a)(6)**

One Federal regulation requires that the Commission conduct an *independent review* of each institution on which it takes action. This is **34 CFR §602.17 e)**, which provides that the agency "**conducts its own analysis** of the self-study and supporting documentation furnished by the institution or program, [and] **the report of the on-site review...**"[Emphasis Added.]

In addition, ACCJC policy provides that,

“The evaluation team provides an **independent peer review** of an institution ...” (Team Evaluator Manual, July 2011, p. 6, emphasis added)

Having an independent analysis requires that members or staff of the Commission not serve as part of the on-site evaluation team. Yet the Commission intentionally assigns Commissioners, and occasionally staff, to serve on evaluation teams. We submit that this practice violates the ACCJC’s “Conflict of Interest Policy,” which provides, in part, that:

“The Commission will *not knowingly invite or assign participation in the evaluation of an institution anyone who has a conflict of interest or the appearance thereof.*” *Id.*, p. 125, emphasis added.

Despite these rules, ACCJC assigns Commissioners to site visit evaluation teams, and generally to serve as chairs.

1. ACCJC Assignments of Commissioners

At least 10 commissioners have been appointed to serve as chairs of evaluation teams, and their subsequent evaluation reports have then been reviewed, discussed and voted upon by the Commission of which they are members. These commissioners are: Frank Gornick, Steven Kinsella, John Nixon, Holly Beernink, Steve Maradian, Michael Rota, Eileene Tejada, Sherrill Amador, Steve Smith, Joseph Richey, and Jan Kehoe.

Dr. Frank Gornick. The Chancellor of the West Hills Community College District, where he has worked for more than 16 years, Gornick served on several evaluation teams for many years before becoming a commissioner.²⁰⁵ But since being appointed a Commissioner effective July 1, 2009, he served as chair of the visiting team for Sacramento City College for October 12-15, 2009. Gornick also served simultaneously as a Commissioner and the chair of a visiting team which did a Follow-Up Visit and Report for the four Peralta colleges in April 2012, and a Special Visit in 2010.

Steve Kinsella was appointed to the Commission for an unexpired term of a Commissioner who died, effective October, 2009.²⁰⁶ He subsequently was appointed to a

²⁰⁵ According to Jack Pond of ACCJC, Gornick chaired three teams, and had served on several others. He was team chair for San Bernardino Valley College in October 2008; Sacramento City College in 2003, and two Peralta teams, 2010 and 2012.

²⁰⁶ Kinsella replaced a commissioner who had died. Under ACCJC’s policy, vacancies are filled by appointments made by the Commissioner Selection Committee. (2009 Accreditation Reference Handbook, p. 144.)

three year term as an Administrator-Commissioner, effective July 1, 2010. He became vice-chair of the Commission in January 2013. Mr. Kinsella has been appointed as chair of four teams since becoming a Commissioner.²⁰⁷ In each of these cases, Mr. Kinsella was a Commissioner when he served on the team, and on the Commission when it voted to approve or reject his team's recommendations. As discussed earlier, in each case, the team evaluated the District's pre-funding of OPEB liabilities, by applying the accounting principles of GASB 45.²⁰⁸ Kinsella was on one non-California team, which ignored OPEB and GASB.²⁰⁹ In the case of the 2012 Sierra Follow-Up Visit Evaluation Team, a two-person team composed of Kinsella and Ed Maduli (a retired administrator), the *sole issue* was prefunding OPEB liabilities and "compliance" with GASB 45. This issue, as discussed below, creates a conflict of interest involving Mr. Kinsella.

²⁰⁷ Antelope Valley College Evaluation Team in October, 2010; Sierra College Follow-Up Visit Team on April 16, 2012; College of Micronesia Follow-Up Team for April 23-25, 2012; and Bakersfield College Evaluation Team in October 2012.

²⁰⁸ **Antelope Valley** was reaccredited and given a team recommendation that it should comply with GASB 45 by paying the "ARC" into an irrevocable trust fund, among others. The Commission's January 31, 2011 letter reaffirmed accreditation, with 4 outstanding recommendations to be addressed, **including GASB 45**.

Sierra's Follow-Up Report dated April 16, 2012 was focused solely on Recommendation 5 from 2007: "The team recommends that the college develop a long term debt financing plan to address the costs associated with the implementation of GASB 45 requirements." The Sierra Follow-Up Report noted that "The College has taken a number of steps to develop and implement a plan to address the OPEB obligation." The ACCJC's July 2, 2012 action letter states that the "team confirmed, that Sierra College has implemented appropriate action to comply with Accreditation Standards on the requirement for a plan to address costs associated with the implementation of GASB 45 as stated in Recommendation 5 from the 2007 comprehensive evaluation."

Bakersfield: The Report from Fall 2012 commented that the institution must address several long-term obligations when conducting financial planning, but that it has fully funded its OPEB fund. The ACCJC's Feb 11, 2013 action letter reaffirmed accreditation.

²⁰⁹ The team's May 18, 2012 Follow-Up Evaluation Report directed to Micronesia did not discuss GASB 45 or OPEB whatsoever.

John Nixon was appointed a Commissioner as of July 1, 2008. (ACCJC *News*, Summer 2008 ed., p. 5) Nixon remained a commissioner until July 2011. Nixon served on at least one team while a Commissioner: Santa Barbara City College October 2009 Site-Visit team. Nixon was a Commissioner both at the time of the site-visit and a Staff member when he served as chair of a 3-person team investigating SBCC in 2011-2012.

Michael Rota was appointed a Commissioner on July 1, 2004, to represent the seven community colleges of the University of Hawaii. He served on the October 2005 Mt. San Jacinto Site-Visit Team. Mr. Rota was a Commissioner both at the time of the site-visit and when the Commission voted to take action on Mt. San Jacinto.

Eileen Tejada was appointed a Commissioner effective July 1, 2006, and served until July 2012. She served on the 2011 Modesto Junior College Site-Visit Team. Ms. Tejada was a Commissioner both at the time of the site-visit and when the Commission voted to take action on Modesto Junior College.

Holly Beernink was appointed a Commissioner as of July 2005. She served on the March 2009 Butte Site-Visit Team. Ms. Beernink was a Commissioner both at the time of the site-visit and when the Commission voted to take action on Butte.

Sherrill Amador was appointed a commissioner as of July 1, 2004. She remains a Commissioner, and served beginning in July of 2010 as a vice chair of the Commission until becoming Chair of the Commission in July 2012. Amador served on the four-person team that visited Honolulu as part of the Leeward College evaluation in April, 2005, and the March 2008 Evaluation Team for Cerritos College, while simultaneously serving as a Commissioner. Amador was a Commissioner both at the time of these Site-Visits and when the Commission voted to take action on Leeward College and Cerritos College.

Marie Smith, was appointed to the Commission July 1, 2007.²¹⁰ She served on the October 22-25, 2007 College of San Mateo Site-Visit team while concurrently serving as a Commissioner. Smith was a Commissioner both at the time of the site-visit and when the Commission voted to take action on College of San Mateo. Smith also served as Chair of the College of the Redwoods Evaluation Team for October 21, 2009, and was a commissioner when the Commission accepted the report in January 2010.

Joseph Richey, commissioner from June 1988 to July 2007 and the Commission

²¹⁰ Prior to her Commission appointment, Smith had served as chair in several evaluation teams: Hawaii Community College system (October 22-28, 2006), Kapi'olani Community College (Oct. 23-26, 2006),

vice chair from April 2003 until becoming Commission chair from March 2005 until July 2006, was in 2003 a member of a two-person team visiting Leeward Community College in Hawaii, a “Midterm” Visit. Also on this two-person team was ACCJC Executive Director Barbara Beno, who served as team chair. Richey was also a member of a 4 person team which visited Leeward Community College in April 2005, to the University of Hawaii office in Honolulu. Again, Executive Director Barbara Beno was chair of the team, which also included Commissioner Sherrill Amador and Dr. Marie Smith.²¹¹

Jan Kehoe served on the October 2006 Hawaii Community College Site-Visit Team while concurrently serving as the chair of the Commission. Jan Kehoe was the Chair of the Commission both at the time of the site-visit and when the Commission voted to take action on Hawaii Community College.

ACCJC has adopted a provision that Commissioners who recently served on a team must recuse themselves from deliberation relating to the decision on the matter. This is not enough to eliminate the actual or apparent conflict.²¹² The Commission makes a judgment on whether to issue sanctions, and whether to follow or reject the recommendation of evaluation teams. When a Commissioner serves on a team, it means his or her colleagues are judging a fellow Commissioner’s assessment. This is especially true when the Commissioner is the team chair, or has special expertise in the subject matter.

2. ACCJC’s Assignment of Commission Staff

ACCJC occasionally has assigned commission staff to serve on teams. For example, President Beno served as chair of the University of Hawaii evaluation from April 4 to 8, 2005, chair of the University of Hawaii Community Colleges team from November 15 - 18, 2004, and chair of the Leeward College (Hawaii) team on November 14, 2003. Ms. Beno also served as chair of a 3-person team which visited Compton College in 2006. And for CCSF’s Show Cause visit this April, 2012, ACCJC assigned Dr. John Nixon, a Vice President of ACCJC, to serve on that team. In October 2012, Vice President Norval Wellsfry was assigned to a 3 person Special Visit Team at Palo

²¹¹ Dr. Marie Smith was a retired community college administrator, who was named to the Commission effective July 1, 2007.

²¹² ACCJC policy once provided that Commissioners who participated on reviews could not “vote” on the actions taken as to those institutions, although they were allowed to 1) be in the room when the institution is being discussed and voted on and 2) participate in the discussion of how the Commission should act. This rule effectively precluded the possibility that the Commission could independently “conduct its own analysis.”

Verde College. In October 2008, ACCJC Vice President Dr. Steve Maradian served on the El Camino Site-Visit Team. Other staff have been assigned to teams.

This occasional practice disturbs the independence which by policy is supposed to characterize the evaluation teams.

3. The Assignment of Commissioners and Staff Creates an Appearance or Actual Conflict of Interest by Interfering in the Independence of Teams from the Commission

Under ACCJC policy, evaluations teams are supposed to be independent of the Commission. But if the team includes a Commission staff member, that independence is compromised. An evaluation team is like a jury (or, in some cases, a judge), because it determines the facts. To ascertain the facts, it visits the college; interviews numerous members of the college community; receives, assembles and reviews evidence submitted by the college or requested by the team; makes a team recommendation to the ACCJC; and, writes a report detailing its conclusions and the evidence relied upon. This function does not require the appointment of a Commissioner or staff member. Rather, it is a function for peers - educators.

A team chair ordinarily has some responsibility for communicating the team's recommendation, and for overseeing preparation of the team's report. When a member of the commission serves as a juror, and his/her fellow judges then consider whether to accept his/her judgment, the review process is skewed. The views of a Commissioner serving as team member may be given more weight than truly independent team members would be afforded. In addition, because of one's experience as a Commissioner, a Commissioner serving on a team may have insights into obtaining approval of the team recommendation, or a greater penalty, that an independent reviewer would not have. Thus, by breaching a bright-line boundary between the team and the Commission, the ACCJC puts at risk a fair, impartial analysis of the evidence by the Commission itself.

It is logical, and hence must be presumed that some colleagues of a Commissioner-evaluator would inevitably feel some pressure to agree with the conclusions of their fellow Commissioner serving as an evaluator, particularly a team chair. After all, these commissioners generally spend years working together. The ACCJC has routinely placed members of the Commission on evaluation teams despite the inherent conflicts of interest that arise.

The question is whether the risk of influence resulting from a Commissioner or staff member serving as a team chair, is sufficiently substantial to interfere in the Commission's expected impartial assessment of the team's recommendation. The answer

to this question is found within ACCJC's policy itself. ACCJC's conflicts policy specifies that the Commission should, "Make all of its decisions in an atmosphere which avoids even the appearance of conflict of interest ..."

4. ACCJC's Appointment of Several Members From One College Also is a Conflict of Interest

The ACCJC has appointed teams which are heavily weighted towards evaluators from a particular college. For example, in the October 2008 review of San Bernardino College, *five* members of the 11 member visiting team were from West Hills Community College District - President Gornick and four others.²¹³

In the case of CCSF, three members of the site visit team from March 2012 were from Bakersfield. In the Show Cause team visit of April 2013, three of 10 team members were from Bakersfield.

Having a visiting team so heavily weighted toward one district, particularly where one is the President or Chancellor, also runs contrary to the ACCJC's supposed goal of preventing conflicts and assuring independent review. Instead of having a team of its "peers" evaluate their institution, Sacramento City College had a site-visit team that was nearly half comprised of Mr. Gornick *and his subordinates*, not to mention a subsequent decision made by Gornick's colleagues on the Commission. A similar review occurred in CCSF.

Placing ACCJC commissioners and staff on evaluation teams violates the ACCJC's Conflict of Interest Policy, Federal law, and the common law understanding of conflicts of interest.

G. ACCJC Consistently Acts to Advance the Interests of Administrators, At the Expense of Students, the Public, Faculty and Staff, College Trustees. This Activity Is Inconsistent With ACCJC's Role as an Accreditor, Applies Standards Not Widely Accepted, Involves a Conflict of Interest, and Hence Violates the Law

Barbara Beno and the ACCJC consistently wields the power of the Commission to advance the interests of administrators, both generally and individuals, at the expense of faculty, staff, Board members, students, and the public. These are not isolated instances,

²¹³ Mr. Gornick also seems to be the one of the few team chairs that was afforded a "Second Assistant"

but occur over and over again, throughout the community colleges.

While Ms. Beno or the Commission would likely insist these actions are taken only to “improve” the community colleges, the facts suggest an abuse of authority. Exercising the power of the Commission to improve compensation for administrators, to avoid administrators being criticized by faculty, to restrict faculty speech, to compel “harmony” at the expense of free speech, is a misuse of the accreditation process and violates 20 USC section 1099b, which demands that accreditors be reliable. Below are examples which typify the Commission’s excessive activities.

1. ACCJC Attempted to End a System in Which Administrator Pay Was Tied to Faculty Pay at Mira Costa College

In 2008, Susan Cota, the Interim Superintendent/President of Mira Costa College in San Diego County, contacted Beno to invite her to visit the College to meet with its Board concerning their “role at MCC.”²¹⁴ Beno came to the college and met with, among others, three Senate leaders. As the Senate explained it, “Some issues raised by Beno were enough to cause alarm.” The Senate later called a special meeting to discuss these matters. (Mira Costa College Senate Progress Report 741, October 17, 2008, p. 1)

The Senate’s Report relates the following:

“The meeting with Beno revealed that her concerns centered on the linking of faculty and administrator salaries to the same pay scale, the size, scope, and organization of the Senate and district committee structure, and a perceived lack of clarity regarding planning processes. She stated that the college has in the past enjoyed a very good reputation across the state based upon its lack of a union among full-time faculty and staff and that its good reputation created a “halo effect” that may have caused prior visiting teams to overlook governance problems.” (Id.)

The only way to interpret this is that Beno is suggesting the College may have trouble with the ACCJC if it does not unlink administrator salaries from faculty salaries.

While many administrators may perceive that their pay should be increased at rates

²¹⁴ See Mira Costa College, Academic Senate Progress Report 741, October 17, 2008. The Report states, “Beno’s visit was the result of conversations between Beno and Interim Superintendent/President Susan Cota. Cota contacted Beno to invite her to visit Mira Costa College (MCC) to meet with the Board concerning their role at MCC.” *Id.*

exceeding that of their subordinates in the faculty or staff, and enjoy various rights to collectively approach their employer to discuss increases in their wages, it is really no business of ACCJC whether administrators are paid based on a formula which is related to faculty pay. Again, Beno intervened to use the power of the Commission to advance the interests of administrators: to financially benefit administrators at the expense of the faculty.

As a result of Beno's indicating her "concern," Mira Costa unlinked the administrator salaries. (See Attachment 8.E.)

2. In 2012, Beno Intervened to Lobby the Legislature to Allow Retired Administrators to Earn More Money as Interim Administrators

In spring 2012, while CCSF was under review by ACCJC, the Commission worked with CCSF's lobbying arm, CCSF's Office of Governmental Relations, to support legislation benefitting administrators in the community colleges. The Commission was brought into the matter through CCSF's Interim Chancellor Pamila Fisher deciding to seek assistance from Barbara Beno. This situation indicates how easy the Commission involves itself in political issues of concern to colleges, administrators and employees. However, such lobbying is not a proper matter for the Commission.

On May 1, 2012, Pamila Fisher was appointed by CCSF as its Interim Chancellor, following the sudden departure of its Chancellor, due to illness.²¹⁵ She served until October 2012. When she was appointed, Fisher was working for the Association of California Community College Trustees, and retired from serving as the Chancellor of the Yosemite Community College District. At the time she accepted employment with CCSF, Fisher was receiving a pension from the California State Teachers Retirement System (CalSTRS). CalSTRS then had a series of rules, mostly memorialized by statute, restricting the earnings and period of employment of retired annuitants such as Fisher.

On May 14, 2012 Beno phoned CCSF's Governmental Relations Office indicating that Pamila Fisher had contacted her, and that Fisher recommended that Beno contact the Office to get more information on proposed State legislation to extend or change the STRS regulations which regulated the conditions under which retired administrators could work as interim administrators in California's community colleges. At the time

²¹⁵ She was to be paid a pro-rated monthly salary based on a total yearly salary of \$276,000, along with housing and auto allowances, and a plane flight home each month. See http://theguardian.com/newchancellor/?wmp_switcher=mobile)

there were a two bills, AB 2275 and AB 178, under consideration. Beno asked for information on who she should write to in support of legislation benefitting interim administrators, and indicated she would write to the Legislature on behalf of the ACCJC and WASC. Beno also indicated that this legislation was critical to the survival of community colleges, particularly those needing special trustees.

Over the following several weeks, Beno and CCSF's Governmental Relations Office communicated periodically about the status and terms of the proposed legislation, and what Beno could do to assist in its passage. On May 20, 2012, CCSF's Board president John Rizzo wrote to Assembly Member Jeff Gorrell urging support for AB 2275. Rizzo's letter was cc'd to Beno, among others.

On June 7, ironically the likely date that the Commission would have voted in a closed session to sanction CCSF, CCSF provided Beno with a draft letter which CCSF intended to send to the Senate Committee on Public Employment and Retirement, in support of AB 178. AB 178 would have extended the sunset date for a post-retirement earnings limit affecting Fisher, to June 30, 2014 from June 2012. The letter outlined why CCSF desired extending the limit - that with 13 senior administrators who had retired largely due to the budget situation, and four new, interim vice chancellors, the District wanted to hire an experienced retired Chancellor. The College felt that extending the earning limits would improve their chances of recruiting someone fitting their preferences. The letter was eventually signed by CCSF Board President John Rizzo, and was sent to the appropriate Senate Committee.

At Fisher's request, CCSF kept President Beno informed about the prospects of the legislation. On June 12, 2012 the Governmental Relations Office notified Beno that AB 178 would increase the amount of post-retirement earnings to \$44,000, from its then limit of \$32,000. CCSF indicated it would be lobbying to increase it further, to around \$66,000, but that there was opposition in the Legislature and Governor's office.

Beno responded to CCSF that same day, stating that an increase to a \$44,000 limit was not much help. On June 12, 2012, Beno advised CCSF that she was sending ACCJC's letters of support for AB 178 to the Assembly and Senate that day. She thanked CCSF for its assistance. Beno's signed letters were actually submitted to the Legislature on June 12, 2012, on behalf of the ACCJC. In her letter to Assembly Member Gorell, Beno wrote about how important it was for California community colleges to:

“... hire high quality interim administrators and consultants from the ranks of retirees to fill in positions while they are being advertised, or to spend a longer period of time helping an institution correct problems or to develop capacity to maintain quality as new administrators are trained ... Retirees serve a critical role

in maintaining or rebuilding the quality of California community colleges during this period of significant demographic change.

It is ACCJC's view that the availability of experienced, highly qualified temporary administrators is critically important to institutions success in maintaining compliance with Accreditation Standards and in providing experienced leadership to help institutions found out of compliance to return to compliance and retain their accreditation. Unless the STRS exemption is extended, the California community colleges will experience significant hardship in finding the necessary leadership. The ACCJC supports your legislation AB 178." (Attachment 8.F.)

It is ironic that ACCJC "dinged" CCSF for having too many interim administrators, given the above letter which extolls the idea of using highly-qualified retired administrators. In any event, after sending in her supporting letters, Beno contacted CCSF's Governmental Relations Office, and inquired as to whether there was anything else she should do to help get the legislation passed.

The June 22, 2012 Analysis of AB 178 by the Senate Committee on Public Employment & Retirement listed the supporters as a number of management and labor organizations, including Association of California School Administrators (ACSA), California Association of School Business Officials (CASBO), California Charter Schools Association Advocates, California County Superintendents Educational Services Association (CCSESA), California Teachers Association (CTA), Los Angeles County Superintendents of Schools, Riverside County School Superintendents' Association (RCSSA). It also listed one entity which is ostensibly not a trade association - the **Accrediting Commission for Community and Junior Colleges**.

The next analysis, June 25, 2012, also listed CCSF as well as WASC as supporters. Subsequent analysis also listed WASC. We understand this reference to WASC to be the ACCJC letters, which also list WASC.

To summarize these events, when confronted with an issue affecting the future compensation and length of service of interim administrators, even though the State was then experiencing the worst budget crisis in its history, the Interim Chancellor of the District contacted Beno (hence ACCJC) seeking assistance in support of legislation allowing interim managers to receive higher compensation - their full retirement allowances, and wages for service as "retired" administrators. In turn, President Beno willingly assisted this effort, by writing supporting letters to the Legislature on behalf of the ACCJC. Beno's intervention illustrates the extent to which the Commission sees itself as taking sides in partisan legislative disputes, and advancing the interests of management. This is the activity of a partisan advocate like the CCLC or ACCA - not an

accreditor.

3. At Palomar, ACCJC Wielded its Power to Prevent Constitutionally and Statutorily Protected Faculty Speech Which Disparaged Administrators, and by Demanding the College Restrict Faculty Communications About Administrators With the Board of Trustees

In an evaluation and action letter to Palomar College in 2009, ACCJC wielded its power by using the accreditation process to suppress speech protected by the Constitution, academic freedom, and laws protecting employees rights to engage in collective bargaining and mutual aid and protection. To put it bluntly, the Commission threatened the College's accreditation if it failed to suppress employee speech.

It all arose because faculty, working concertedly with their Academic Senate, had a practice of "evaluating" their administrators. These are not formal, personnel evaluations - they aren't personnel evaluations at all.

A team of evaluators led by Steve Kinsella concluded that Palomar College did not meet the Standard on Human Resources, because the Academic Senate had a practice of facilitating faculty in "evaluating" administrators, without affording "due process" to the affected administrators. (See Palomar Evaluation Report, March 9-12, 2009, pp. 11, 65, 68-69, 71. As the Report explained,

"The team was alarmed to learn ... the Faculty Senate was conducting its own performance evaluations of administrative personnel. Surveys were conducted, summarized and then made available to the Faculty Senate ... The results ... were discussed between the Faculty Senate and members of the ... Board of Trustees. (III.A.3.a, b)."

"The surveys were anonymous .. This practice provided members of the Faculty Senate with a forum to make harassing and disparaging comments. One of the most alarming aspects of this process was that the unprofessional conduct of one or two individuals was allowed to go forward to the Board of Trustees uncensored.(III.A.4., III.A.4.a, b, c)."

"Even though the survey was anonymous, the team was disappointed by the fact that when unprofessional comments were made, instead of censuring out the comments, they were codified in a typewritten report and published for many to see ... The individuals being evaluated play no role in the process and have no due process rights. The practice is out of compliance with Standard III.A.1.b., iii.A.3., III.A.3.b., III.A.4, III.A.4.b, III.A.4.c." (Id. pp. 67-68)

“The Report went on to then state that it was “the team’s opinion that the Faculty Senate’s practice of evaluating administrators is discriminatory and has allowed inflammatory statements to be introduced to the College. (III.A.4.c.)”

The Evaluation Report said that for the College to meet Standard III, it had to “Develop a policy to discourage the use of discriminatory, racial, harassing and unprofessional comments when participating in any evaluation process. (III.A.4)”

The subsequent Action Letter from Barbara Beno, placing Palomar on Warning, put the full power of the Commission behind this suppression of speech:

“Establish a policy that denies access to the Board of Trustees by members of the Faculty Senate unless due process rights of any employee subject to a discussion about their performance are provided. (IV.B.1.e.)” (Beno to Deegan, June 30, 2009, p. 3)

It should go without saying that faculty are entitled to make disparaging remarks about their administrators, and that for the most part, such disparaging rights are protected by the Constitution and by the EERA.²¹⁶ Moreover, when faculty express their views, they are not responsible for affording due process rights to those they criticize, and due process, such as the board wants to provide, is for the board to decide - it cannot condition employees’ expressive and statutory rights on its diligence in affording administrators an opportunity to respond. But what is stunning is that ACCJC would demand a policy denying faculty their “access” to the Board for someone’s alleged transgression.

Perhaps the most instructive case, given the failure of either Kinsella’s team, the Commission, or Beno to appreciate the importance of the right to criticize, is the case of *Bauer v. Sampson*, 261 F.3d 775 (9th Cir. 2001). The Commission should be informed about *Bauer*, as the case arose when the Commission took note, as the court explained, in a four-three split on the College’s Board and administrative turmoil.

Bauer involved the disciplining of a faculty member who taught ethics and politics, who had distributed on campus his tract complaining about the college’s new president, in particularly disparaging terms, in his handbill he titled “Dissent.” Professor Bauer not only referred to the President in derogatory terms, he parodied the President and other administrators in cartoons in which he was “exterminated” by various gruesome

²¹⁶ The primary exception is true threats, in certain contexts, defamatory remarks or those meeting a narrow definition of obscenity.

means. For instance, he wrote:

“I, for one, have etched the name of Sherry ‘Realpolitik’ Miller-White and others of her ilk on my permanent shit list, a two-ton slate of polished granite which I hope to someday drop on Raghu Mathur's head.”

Only the case itself can do justice to describing Bauer’s withering hyperbole, which surely owes credit to Jack London’s famous description of a scab. The court found Bauer’s speech to be on a matter of public concern, and protected by the First Amendment. These interests outweighed the employer’s claimed interests in “harmony.” The court explained what the college should have understood, that “the vigorous exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams.” *Id.* at 785.

Bauer is but one of many similar California and Ninth Circuit cases.²¹⁷ In *Adcock*, a teacher spoke out in criticism at a forum held for the purpose of commenting on school affairs. Similarly, in *California Teachers Association v. PERB (Journey Charter School)* (2009) 169 Cal. App. 4th 1076, criticism of a school board was protected by the EERA, as it involved concerted activity.

In the case of determining whether particular faculty expression is protected by law, ACCJC is out of its league. Instead, it pushes forward based upon its prejudices - to prevent criticism of administrators. And that is what transpired in Palomar. The faculty have a right to criticize administrators, whether they do so in their own concerted “evaluations,” or not. There is no law requiring that such criticism be conveyed to the criticized administrator, nor is there a requirement of “due process.” These were excuses used by ACCJC to try to curtail and chill the exercise of faculty speech, and, as in other cases, ACCJC uses colleges as its surrogate, imposing or threatening sanctions to achieve its ends of advancing the interests of administrators.

Here, that the Commission would deny access by citizens who are faculty to the Board, unless the faculty surrendered its constitutional and statutory rights to criticize, is outrageous. It matters not what one or two of the faculty critics said - which, by the way,

²¹⁷ See, e.g., *Ofsevit v. Trustees* (1978) 21 Cal. 3d 763; *Adcock v. Board of Education* (1973) 10 Cal. App. 3d 60; *Kirchman v. Lake Elsinore Unified School District* (1997) 57 Cal. App. 4th 595, 603; *California Teachers Association v. Public Employment Relations Board (Journey Charter School)* (2009) 169 Cal. App. 4th 1076, 1085-1087.

is not explained²¹⁸ - what matters is the ACCJC has no right to judge the comments of faculty, nor to demand limits in the name of accreditation. Nor can it restrict all the faculty because it believes one or two crossed an ill-defined, and unconstitutional line.

The ACCJC cannot interpret or adopt accreditation standards which impinge on the fundamental rights of faculty. *Nova University v. Educational Institution Licensing Commission*, 483 A. 2d 1172, (D.C. 1996), citing *Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583, 593-599 (1926) During a time when loyalty oaths were still imposed upon teachers, the Supreme Court recognized that “the essentiality of freedom in the community of American universities is almost self-evident ... To impose any straight-jacket upon the intellectual leaders of our colleges and universities would imperil the future of our Nation.” *Keyishian v. Board of Regents* (1967) 385 U.S. 589, 598-599. This goes not just for public entities, but for accrediting bodies, which must respect the law of a State.²¹⁹

In the case of Palomar, the Commission directed a district to adopt policies prohibiting communication between the faculty and the District’s Board of Trustees, until it was assured that faculty would no longer complain about or “evaluate” their supervisors. Employees enjoy the right in this country to make derogatory comments about their bosses, who may not like it, but cannot punish it absent rare and compelling circumstances.

Here, based on the asserted concern that an anonymous employee had made a racist comment in a complaint about an administrator, ACCJC sanctioned Palomar, and directed that it adopt policies prohibiting communication between the faculty and the District’s Board of Trustees, until it was assured that faculty would no longer complain about or “evaluate” their supervisors.

This evaluation and instruction to Palomar impinged on the fundamental rights of

²¹⁸ A review of the self-study report indicates that one critic claimed an administrator had gotten their job through affirmative action. Regardless of whether some may interpret this as a racially-based comment, a stray remark does not allow a district, or the ACCJC, to punish the faculty as a whole, nor to adopt policies forbidding communications from the faculty, on matters they desire to present.

²¹⁹ Ironically, ACCJC has totally never deplored the statewide effort by the Community College League, through a proposal that college’s adopt new policies declaring campuses to be non-public forums, and attempting to cabin freedom of speech within tiny “free speech zones.” To the contrary, ACCJC has encouraged colleges to adopt the League’s unconstitutional policies. See Attachment 7.S.

faculty, under both the California Constitution and the EERA. Accordingly, ACCJC again went too far, got involved in matters beyond the scope of its legitimate authority, its management-heavy team and Commission intent on “protecting” management at the expense of fundamental employee rights.

4. Beno Orders Investigation of Santa Barbara In Violation of its Complaint Policy, and Then Issues Findings In Violation of its Policy on Not Enforcing State Law

Santa Barbara City College (“SBCC”) is recognized as one of the “top ten” community colleges in the U.S.²²⁰ In fact, on March 19, 2013, it was named as the top community college.²²¹ However, on March 26, 2012 it was placed on Warning sanctions by ACCJC, due to the Commission’s findings that SBCC had deviated from Eligibility Requirements, Accreditation Standards or policies.²²² (Attachment.7.W.1.) ACCJC’s Warning letter advised that the College had to file a Special Report and would be visited by Commission representatives.²²³ SBCC was given Warning not due to a regular reaccreditation review, but based on a complaint filed against the college by citizens who supported a group of three former trustees, and the college Superintendent/President. The events require some background and appear to be hotly disputed.

a. The Events Leading to ACCJC’s Investigation and Sanction of SBCC

In October 2009, SBCC underwent a re-accreditation review by a team appointed

²²⁰ See Aspen Institute list of on or about September 2012, the second straight year SBCC was named to the top 10 list.

²²¹ Along with Walla-Walla Community College. They were jointly awarded the Aspen Prize.

²²² Warning status, as discussed herein, arose out of a complaint made against SBCC in June 2011, alleging the college was in violation of various Board policies and Accreditation Standards. The complaint alleged that the 1) trustees interfered with college governance processes; 2) the Board interfered with curriculum processes; 3) the Board interfered in college operations; 4) the Board failed to follow Board policies and procedures, and other allegations. (Letter, January 31, 2012, Beno to President Friedlander)

²²³ ACCJC also required the Board to, *inter alia*, obtain training from outside experts on the role of trustees and the Superintendent, and that **the training should occur at a public meeting**. The Board was ordered to “revise its code of ethics,” and that the Board should revise its methods of operation.

by ACCJC. The team was chaired by Dr. John S. Nixon, the President/CEO of Mt. San Antonio College, a former commissioner, and a staff member of ACCJC at the time. Chancellor Serban happily announced his appointment at a public meeting of the District's board of trustees;

“We have learned that Dr. John Nixon, Superintendent/President at Mt. San Antonio College has been appointed as team chair for our accreditation visit in October. *I have had the opportunity to talk with John at various times over the past 10- years. He has a long experience in the California Community Colleges in various roles and is very well regarded and respected. He will be an excellent team chair.*” (Attachment 7.W.2, Minutes, the Report of the Superintendent, July 30, 2009 Board of Trustees Meeting,.., p. 4)

The College was reaccredited. The action letter from President Beno does not include *any recommendations or concerns.* (Attachment 7.W.3)²²⁴

During the period of 2010 to 2012, political controversy roiled Santa Barbara City College over whether certain services would be eliminated or changed. Four challengers ran for the District's Governing Board against the incumbents in 2010, and were elected in November 2010. After they took office, more controversy arose, this time arising out of things they did. The “new” Board majority set about evaluating Dr. Serban. On July 28, 2011 the “new” board, by a vote of 5-0, put Serban on paid administrative leave.²²⁵ This, and other activities, energized those loyal to the “old” Board majority. A group called “Take Back SBCC,” composed of supporters of the “old Board” and Superintendent Serban, was formed and in July 2011.

b. The ACCJC Investigation of SBCC

“Take Back” SBCC filed a complaint with the District Attorney of Santa Barbara County, alleging the new board had violated the Brown Act in evaluating Serban.²²⁶ It

²²⁴ While serving as a Commissioner, Nixon would have reviewed reports and recommendations made by teams Serban chaired or served on. Serban was a member of various evaluation teams, including the Mira Costa College evaluation team in March 2010 (she was team chair), a Cuesta College Follow-Up team on October 17, 2009, and Chair of a two-person Cuesta Follow-Up team on November 5, 2010 Serban was also a member of the College of San Mateo team in October 2007, and Solano in October 2005.

²²⁵ http://www.noozhawk.com/article/072911_sbcc_president_serban_put_on_paid_leave/

²²⁶

<http://www.independent.com/news/2011/jul/15/sbcc-trustees-accused-brown-act-violation/>

also served notice they would begin a recall of the four recently-elected trustees.²²⁷

By a letter dated July 1, 2011, addressed to Barbara Beno, Take Back filed a 16-page complaint with ACCJC, alleging the SBCC Board had violated the Education Code, Title 5 regulations, various ACCJC Standards and policies, as well as the Brown Act.

At this point, the Commission moved fast. By letter dated July 14, 2011 Beno wrote to Serban, explaining that the staff's review of the complaint and supporting evidence "indicates that if accurate, the behaviors described would [besides Standard IV-likely also place the institution out of compliance with parts of Standard I.B., Standard II, and Standard III.D.]" Beno announced the Commission would investigate by conducting a "Special Visit" in fall 2011. Serban notified all employees of the Commission's action.

At this point, ACCJC had violated its policies. ACCJC's written Policy on Student and Public Complaints Against Institutions provided that:

"Within ten days of the receipt of a complaint it will be acknowledged in writing and initially reviewed by the staff of the Commission."

The Policy also provides that if the Complaint "appears to be within the scope of the Commission's policies and jurisdiction, and is substantially documented, a copy of the complaint will be forwarded to the institution's chief executive, who will be asked to respond to the President [Beno] within 30 days." (Complaint Policy, p. 2, #3.) Only after the College has responded will the complaint and response be reviewed to determine whether "the complaint has sufficient substance to warrant further investigation." (*Id.*, #4)

Beno and staff had reviewed the Complaint and without affording SBCC a chance to respond, had ordered an investigation and Visit without informing the college and allowing it 30 days to respond. The College objected.

On July 28, 2011 news reports indicated that Serban agreed to resign as president of SBCC. On August 25, 2011 Jack Pond gave SBCC 30 days to respond to the letter. The college responded, and Beno issued the same order - an investigation and Commission Visit. ACCJC appointed announced in October, the appointment of an

²²⁷ <http://dissenttheblog.blogspot.com/2011/08/serban-gets-axe.html>

“investigative team” consisting of Dr. Armine Hacopian,²²⁸ Brian Thieboux,²²⁹ and Dr. John Nixon, who was by now a Commission staff member.

In a letter dated September 18, 2011, an ad hoc group of senior SBCC faculty wrote to Beno stating that the accusations against SBCC “do not have sufficient support or significance to create a credible case requiring action by the ACCJC.” The detailed letter alleged that “soon into Dr. Serban’s tenure, the atmosphere at [SBCC] showed signs of change,” and alleged that concerns were raised about her “leadership style.” That members of the college community “worried that it was autocratic, top down, and that long-standing traditions of shared governance were at risk.” It added that at the end of Dr. Serban’s first year, she had “decided, without consultation, to make extensive cuts to the classes offered at Continuing Education, specifically ... for active older adults and those provided by the Parent Child Workshops ... The result was uproar from the students and faculty in Continuing Education.” The letter alleged that Dr. Serban “attempted to impose a pay reduction on faculty and staff,” that the Faculty Association “politely refused” although the staff union and managers’ group agreed, and that at the end of the 2008-2009 fiscal year, the College ended up with a large budget surplus. The letter continued with many more allegations against Dr. Serban, even noting that after she had arrived, “in an unprecedented action, [the college deans] filed for union rights ...” The letter included a lengthy rebuttal to the Take Back allegations. But the investigation went forward.

On January 31, 2012 ACCJC sent SBCC a 16 page, detailed letter from Beno. (Attachment 7.W.4.) It announced that the Commission itself had made findings based on its review of “all the evidence.” The College was given 30 days to respond before the Commission reached a decision. Among the Commission’s numerous findings were these:

1. Board members “interfered” with “established college governance processes” and did not understand their duties and “limits” by a variety of actions, including requesting that class sessions be added, some trustees attending a meeting to look into a complaint about the college president “dominating” the meeting, asserting which courses should be considered by the Board for approval, trustees at a Board study session directing staff to submit course outlines for approval, Board members questioning employees about their job descriptions, and Board behavior which “forced several

²²⁸ He was the President of the Board of Trustees of Glendale Community College District.

²²⁹ He was a faculty member at Palo Verde College.

individuals, including other Board members, to seek assistance from ACCJC... which suggests that inappropriate conduct may arise at any meeting ..." (Letter, pp. 2-6)

2. Board members, at a public meeting-Board study session, "interrogating" a supervisor about her department's operations, trustee comments about a fifth employee position in the Office of Continuing Education, which "indisputably reflects efforts by one or more Trustees to micro-manage the operations of the college ..." Id. pp. 3-10

3. Considered allegations that the Board had "developed and imposed a new process" to evaluate the president, and thereby had not followed its own processes, thereby violating Accreditation standards. Further, the Commission directed that the Board include the president in developing the evaluation process. Id. pp. 11-12

4. "Some of the new trustees take a dismissive view of the complaints filed against them, claiming they did nothing wrong ... The Board must demonstrate that it operates as a whole, recognizes bases for the complaint to the ACCJC that have been found accurate by the Investigative Team and endorsed by the Commission's action ..." Id. pp. 13-15.

5. "While allegations of violations of the Brown Act focused on the evaluation and termination of the President were refuted by the County Counsel, the Investigative Team found evidence in documents that the Board and individual Trustees either do not understand the Brown Act, or they choose to ignore it. In fact, during an interview, the current Board President claimed that following the Brown Act is problematic at times and limits the actions Board members (sic). And that, if he could, he would give Ralph Brown his opinion ... given the appearance that the Brown Act is a barrier to him and some of the other board members. The Brown Act is not directly tied to ACCJC Standards; however, ignoring or violating laws does constitute a violation of the Standards." *Id.*, p. 15 The Commission adopted this letter as its Final decision on the complaint, and imposed Warning on the District. (Letter, March 26, 2012, Beno to SBCC, Attachment 7.W.1.)

On April 5, 2012 an article appeared in the on-line newspaper, the Santa Barbara Independent. In it SBCC president Jack Friedlander was referenced as saying the commission lacks both checks and balances and proper due process, but he harbors no interest in fighting the system. (Friedlander comments did not appear in quotes, unlike in the article) On April 10, 2012, ACCJC issued a "Public Disclosure Notice of Commission Concern for Santa Barbara City College," in order to "provide accurate information about the" Commission's actions toward SBCC. (Attachment 7.W.5.) Thus, it strongly implied that the information presented by Friedlander was inaccurate. The three-page long Notice included this:

“The ... Independent ... has published the alleged statements of Friedlander, to the effect that ‘the commission lacks both checks and balances and due process.’ Regardless of whether the news service has accurately represented Dr. Friedlander’s words, the news article raises Commission concerns about accuracy of reporting on the accreditation of Santa Barbara City College ... [SBCC] was issued Warning ... Only Commission actions to terminate or deny accreditation or candidacy may be appealed under Commission policy. Therefore, the College cannot appeal the Commission’s action. [SBCC] was afforded the due process outlined ... [by] ...”

The Notice then listed the “due process” which it assertedly provided, including 1) an opportunity to respond to the complaint, 2) an opportunity to meet with the Commission’s investigative team, 3) an opportunity to respond to the “preliminary findings” of the Commission, 4) the Commission’s action in weighing the evidence for and against the complaint. The Commission then attached, and released, the March 26, 2012 Warning letter to ACCJC, and presumably, although it is not entirely clear, the January 31, 2012 letter as well.

We take no position on whether the Commission’s recitation of the facts was accurate. Rather, this sorry episode underscores the ACCJC’s proclivity to take up matters beyond its purview, to direct how Board’s shall function based on its philosophy, and how it behaves hypocritically whenever it feels like intervening in a matter.

Here, the ACCJC acknowledges that the Brown Act is “not directly tied to ACCJC Standards.” In fact, ACCJC standards say that the Commission will **not** consider violations of external law.

Second, despite the caveat, it the Beno letter hypocritically asserts that if it finds a Board of trustee has “ignored or violated” the Act, it does constitute a violation. It finds the Board violated the Act by some members either “not understanding,” “choosing to ignore it,” or expressing their frustration it is “problematic.” In declaring that the Commission’s finding that a Board violated or ignored the law “constitutes a violation” of Standards IV.A.1., IV.A.3. and IV.B.1.c., the Commission makes every law violation a violation of the Standards. Once again, it overreaches to advance the interest of the administration, and try to limit the prerogatives of boards under California law.

The notion that ACCJC can determine whether the Brown Act was violated, after the local District Attorney ruled it had not been violated, is bizarre. And if the ACCJC really believes it can find any law violation to violate the Standards, well many colleges and schools were found during the last 6 years to violate the EERA, in final decisions of the Public Employment Relations Board - but ACCJC pays no heed at all. And as for

court decisions, several final decisions were issued, some judicially confirmed, establishing violations. But ACCJC pays no heed. And how can it - its policy says,

Recommendations should not be based on the standards of governmental agencies, the legislature, or organizations. The relevant standards for the team are those of the Commission.” (Team Evaluator Manual, 2011 ed., p. 22, emphasis added.)

When it is convenient to its goals of advancing administrative interests at the expense of trustees or Unions or employees, ACCJC does not hesitate to disregard its policies and intercede in the sort of typical political dispute which constantly occur within college districts and education in general. Moreover, the ACCJC’s interjecting itself into such disputes raises questions about the Commission’s partiality. The appointment of Nixon to the team raises similar questions, given his previous involvement with SBCC, and his roles in reviewing matters involving former president Serban, who clearly was supported by one faction and opposed by the other at SBCC. These disputes are just not ACCJC’s business, as discussed *infra*, once again demonstrating why the ACCJC is not a reliable accreditor.

5. ACCJC’s Demands that Colleges Restrict Dissent by Board Members or Face Being Dinged, and that Trustees Confine Their Actions to Policy, Are Contrary to Law and Public Policy

The ACCJC is supposed to be concerned with educational quality. However, it’s longest standard - IV. Governance - one it fiercely enforces and publicizes, deals with governance. The standard includes this prescriptive statement:

“Once the board reaches a decision, *it acts as a whole*. It advocates for and defends the institution and protects it from undue influence or pressure.”
(Standard IV.B.1.a.)

In addition, ACCJC has been demanding that trustees limit their actions to policy decisions, leaving all operational decisions to administrators. This is another example of ACCJC’s skewed view of itself as a mouthpiece for administration. ACCJC violates the law with both of these proscriptions.

5. ACCJC’s “Standard” on Board Members Speaking as a Whole Is Inconsistent With California Public Policy and the Law

In recent years, ACCJC and its president have interpreted the Standard that a board “acts as a whole,” even more strictly to include “speaking” as a whole. When President

Barbara Beno addressed the CCLC “Effective Trusteeship Workshop” on January 26, 2013 she stated that once a board acts, the board members must **“support” the action publicly**, or **“risk an accreditation ding.”** She added that if the Board votes one way, and a trustee disagrees, **“you have to give up** that fight; maybe this board ... is not the right place for you.” Beno said that ‘if a trustee is on the losing side of a vote once the vote occurs, the trustee must *‘publicly support’* the vote.’ She ascribed this to the need for “harmony.”

ACCJC’s policy of “dinging” governing boards where one or more members dissent after a vote is taken, is shocking. It demonstrates the ACCJC again acting in excess of its jurisdiction, to bully institutions into following ACCJC’s non-expert, partisan views.

Board members in California are **elected public officials** who are called upon at nearly every meeting to deal with matters of public concern. There are certainly occasions where Board members disagree on controversial issues, and express this disagreement before, during and after voting. The law allows them this Constitutional right. There are numerous examples of such activities. For instance, during 2011 and 2012, California community college districts took varying, and sometimes opposed positions, on the “Student Success Task Force,” and resulting proposed legislation that advocated opposite views of the mission of the community colleges. In ACCJC’s current view, if a Board decided, by majority vote, to oppose S.B. 1456, and a minority of the board supported it, then the minority would have to shut up or the college could be “dinged.”

There are innumerable matters of public concern which come before local college district boards for review and decision. There is no provision of California law which allows their views to be subject to “gag orders” from their fellow board members. The suggestion is unprecedented. Of course, the rights of faculty include the right, as listeners, to hear the views of their trustees, especially when they disagree with other trustees on an issue.²³⁰ In other words, faculty, staff, students and the public have a right

²³⁰ The Supreme Court has long recognized that freedom of speech includes not only the rights of speakers, but the **rights of listeners** to hear what others have to say. See, e.g., *Lamont v. Postmaster General of the U.S.* (1965) 381 U.S. 301, 308, Brennan concurring. Justice Brennan’s specific reference to the rights of listeners recognized it as essential to the marketplace of ideas: “I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.” Soon after the Court’s majority saw things the same way. *Red Lion Broadcasting v. FCC* (1969) 395 US 367, 390.

to listen to what trustees want to say, including those who are on the short end of an issue, and not just the views of the majority, which gets its say through a “harmony” imposed by ACCJC.

In CCSF’s review, the College was found to only partially meet Standard IV, Governance, because of Standard IV.B., Board and Administrative Organization. The Board was criticized because, “individual board members contacted the press regarding board and college issues prior to consulting with the chancellor [and] ... individual board members pursuing personal agendas to advance personal interests. These behaviors raise questions about the governing board’s bias and independence. (IV.B .1.a)” (Team Evaluation Report, p. 63)

A review of the evidence submitted to the visiting team indicates that the above comments were references to activities by trustee Ngo, who allegedly contacted the press directly about several matters of public concern.

While having Board members first disclose their dissenting views to other trustees or administrators might be polite or congenial, Board members are elected officials and hence must be entrusted with the judgment as to when, and for what issues, they will contact the media. Similarly, they are afforded a wide range of discretion in what matters of public concern they may raise. While the Report alleges that a trustee pursued “personal agendas to advance personal concern,” the evidence reveals the matters were issues of public and student concern.

To be specific, the Commission was critical of actions by Board members on the educational issue that was under debate throughout the State - the mission of the community colleges and the Student Success Task Force. And it is on this issue that the Commission has a clear conflict of interest, for the ACCJC was itself a participant in this debate, on the opposite side of CCSF’s Board, faculty and students.

It turns out that ACCJC president Beno has personal experience with this sort of public debate, one which illustrates the need to protect the free speech rights of minority trustees, as much as any, for they may eventually prevail. Had such rights not been respected in 1996, Ms. Beno might have been the chancellor of the Berkeley City Community College District, instead of the president of ACCJC.

In 1995, when current ACCJC President Beno was president of Vista Community College in Alameda County, the governing board of the Peralta Community College District voted 4-3 to support a citizen’s petition to deannex Vista College from the Peralta District. Then Vista President Beno was reportedly a supporter of the deannexation effort. Had it been successful, the Berkeley City Community College District would have

been created. But it was not to be, thanks particularly to outspoken, dissenting board members.

Although the public school boards within the jurisdiction of the Peralta district which would have been affected by deannexation, approved the deannexation petition, the Peralta trustees flip-flopped on support for it. At one point they approved it, but as public debate swirled, eventually the trustees voted 4-3 to oppose deannexation. When those supporting the petition obtained approval from the State Board of Governors, the new Peralta majority decided to file a lawsuit to enjoin the deannexation.²³¹ Other trustees opposed this action, and eventually the Alameda County Superior Court found that the State Board of Governors had wrongfully approved the deannexation petition, because it would “significantly affect the racial or ethnic composition of the districts affected” and thus violate State law against discriminatory school districts. (Order Granting Petition for Writ of Mandate, ¶ 4, Clerk’s Transcript on Appeal, p. 1283)

Had ACCJC’s and Ms. Beno’s current views about Board unit, as expressed by the CCLC and in the ACCJC Powerpoint, been asserted by ACCJC in 1998-1999, then Peralta theoretically would have been subject to sanction by ACCJC because the Peralta Board, following the first vote, and then a subsequent vote, did not speak with one voice. At one point, every trustee was taking a public position. Alternatively, had ACCJC enforced its current view on dissent in 1998-1999, then the opposition of some Peralta trustees may have been chilled, and they may not have spoken publicly, or by filing suit. As a result, the illegal deannexation might have occurred.

This example illustrates the danger to the First Amendment of ACCJC’s sanctioning the public expression of viewpoints by trustees of California community colleges. Numerous laws affirm the right of Board members to speak out on matters of public concern. These include:

1. Govt. Code section 54950 encourages communication between the members of a governing board and their constituents, declaring that:

“[T]he Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of

²³¹ See *Peralta Community College District v. Board of Governors of the California Community Colleges et al.*, Alameda County Superior Court No. 793053-3. The Peralta Federation of Teachers, AFT Local 1603, intervened in the lawsuit and argued that the proposed deannexation violated State laws against racial segregation, and thus the Board of Governors should not have approved deannexation.

the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, **do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.**" (Emphasis added)

Civil statutes designed to protect the public, such as this one, are to be "broadly construed in favor of that protective purpose" *People ex rel. Lungren v. Superior Court* (1996) 14 Cal. 4th 294, 313.

2. California Education Code section 70902 sets forth the broad power available to members of the governing board of a college. Among other things the Board of a district is under a duty to "establish, maintain, operate and govern" the district's colleges, and is authorized to "act, in any manner that is not in conflict with ... any law [or] the purposes for which community colleges are established." 70902(a)(1)

If the Commission could gag trustees on the losing side of an issue - this would violate section 70902(a). It would lead to constant squabble over how broad any given vote happened to be, since various issues have many facets. The ACCJC has indicated that Boards should adopt policies allowing them to sanction or censure their Board colleagues for publicly dissenting. One can hardly imagine a policy which would be more disruptive to "harmonious" relations, yet Beno has offered her panacea as arising out of the need for "harmony."

Beno's comments that colleges can be "dinged" by ACCJC demonstrates how far the Commission has strayed from the purposes envisioned by Congress and the Department of Education. If the Commission has its way, a college could be sanctioned if a trustee spoke out against even an illegal decision! Incredibly, at the CCLC conference in February 2013, when asked what a trustee should do if s/he believed a decision was illegal, Beno did not suggest speaking out - no, she said to call the FBI! Beno's suggestion that a Board member who believes the majority acted unlawfully should "call the FBI" is laughable. Decisions on whether districts violate layoff laws, or the Constitution, the Education Code or a union contract, are not crimes, and the FBI has no jurisdiction.

6. ACCJC's Demand that Board Members Are Confined to Making Policy Decisions As Opposed to Actions to Implement Policy Is Contrary to Law and Public Policy

A corollary of ACCJC's insistence that Board members "act" and "speak" as one, is the "doctrine" that Board members are confined to broad policy decisions, and are not permitted to exercise "operational" authority. This is another ill-conceived notion, which disregards common sense and the law.

ACCJC is ill-equipped to evaluate a district board's exercise of its authority to make decisions on operational matters. Every board has a role in numerous operational decisions, including hiring and firing, increasing or decreasing particular kinds of services, approving contracts, directing negotiations, settling unfair labor practice charges, selecting contractors, and approving expenditure of the public's money.

Is a college subject to ACCJC sanction for allowing the Board to make operational decisions instead of a chancellor? Presumably according to ACCJC, but not according to California law. Trustees have a fiduciary duty to the public and their students, and as such must make a variety of operational decisions.

IX. ACCJC Actions Efforts Aimed at Discouraging Criticism of ACCJC

ACCJC has repeatedly acted to discourage and sanction criticism of the Commission by colleges, trustees, union representatives, even individual faculty members. It does this through policies which restrict "institutional" comments and a policy which attempts to prevent knowledgeable individuals from blowing the whistle on ACCJC's transgressions.

A. ACCJC Rules Aimed at Discouraging Criticism

ACCJC's underlying rule which discourages colleges from speaking out, is its "Policy on Public Disclosure." This policy has been used by the Commission and its staff, to rebuke colleges who criticize its actions. The Policy includes the following restrictions on speech:

"If an institution so conducts its affairs that it becomes a matter of public concern, misrepresents a Commission action, *or uses the public forum to take issue with an action of the Commission relating to that institution*, the Commission may announce, through the President, the action taken and the basis for that action, making public any pertinent information available to it." (Policy on Public Disclosure, 2012, Handbook p. 90, Section I.E., emphasis added)

"... Should the institution *or others* issue selective and biased releases or use the public forum to take issue with Commission actions, the Commission and its staff will be free to make all the documents public. *In the event of such*

misrepresentation, or failure to disclose, the Commission is free to disclose the reports and provide accurate statements about the institution's accredited status. (Policy on Public Disclosure, 2012, Handbook p. 90, Section II.C., emphasis added.)

This policy was invoked against CCSF on July 6, 2012, just hours after four individuals spoke on a local public radio program, about CCSF's recent placement on Show Cause status. What happened was this:

On July 6, 2012 KQED, a local public broadcasting station scheduled a discussion of CCSF's problems during its Forum show from 9:00 a.m. to 10:00 a.m.. Those attending included Nanette Asimov (San Francisco Chronicle reporter), Interim Chancellor Pamela Fisher, John Rizzo (Chair of the CCSF Governing Board), Karen Saginor (President of the CCSF Academic Senate) and Alicia Messer (President of AFT 2121).

The show was recorded. Only Fisher and Rizzo were representatives of CCSF.

Just three hours after the show ended, ACCJC issued a Press Release which publicly accused CCSF's representatives of making "comments" which "may cause public misunderstanding about the accredited status of CCSF and "conditions found there." That press release remains posted on the ACCJC web page.

The ACCJC Statement included this:

"In this program, comments by CCSF representatives were made which may cause public misunderstanding about the accredited status of [CCSF] and conditions found there. This press release is issued to provide members of the public with correct information concerning these matters.

Specifically, the ACCJC Press Release identified these "statements" which the Commission viewed as possibly causing "public misunderstanding":

... In their remarks, ... guests in their official capacity as representatives of CCSF stated incorrectly the ACCJC in its recent comprehensive evaluation of CCSF found there were no issues with instruction and services ..."

"... ACCJC noted favorably that CCSF had directed all of its focus on serving students."

"... the level of sanction was not unlike sanctions given to a large number of other colleges in the region ..." (July 6, 2012 ACCJC Press Release, p. 1)

The Press Release then describes in considerable detail the findings of the evaluation team, although it adds pejorative comments such as:

* Some of the evaluation teams findings were identified as long as ten years ago. [But this comment appears nowhere in the Team’s findings.]

* CCSF failed to implement the eight recommendations of the 2006 evaluation team, three being completely unaddressed.

* The report and letter [from ACCJC] detail deficiencies in instructional practices, student services practices, administrative capacity and resource management.”

The ACCJC press release noted that the Commission’s Show Cause letter was “permitting a final period of time for resolution of recommendations and to fully meet the [Requirements] and [Standards].” Id. pp. 1-2.

The Release asserted (1) there had been “deficiencies in instructional practices, student services” identified in the Report and Commission Letter, that (2) the Commission took action on 45 institutions in June 2012, and CCSF was the only one receiving a “Show Cause” status.

The Press release was prominently placed on the ACCJC website and assuredly chilled the exercise of free speech by anyone associated with the college, in any capacity.

B. ACCJC Has Adopted Rules Designed to Coerce Non-Disclosure of ACCJC;s Violations of Law and Policy

The Commission’s Policy on Public Disclosure which was in effect at the time of CCSF’s evaluation was adopted in January 2010, and applied to the evaluation of CCSF. It had a confidentiality rule which forbid team evaluators from discussing “institutional information” heard or read before, during or after the team visit. The Policy said it was aimed at assuring the “accuracy” of institutional information made public, and that information which should remain confidential included interviews, reports and written communications with the college. The Policy was stated in these words:

“In order to assure the accuracy and appropriateness of institutional information which is made public, the Commission expects members to keep confidential all institutional information read or heard before, during, and after the team visit. Except in the context of Commission work, team members are limited in their discussion to information contained in the public reports. Sources of information that should remain confidential include previous college

and team reports; the current self study report; interviews and written communication with campus personnel, students, trustees, and community members; and team discussions.” Accreditation Reference Handbook, Policy on Public Disclosure, Revised January 2010., Section II.F., p. 100)

This scope of the policy was limited and would not, for instance, forbid disclosure of the assignment to the team of someone with a conflict of interest. Even then, some of that information cited, such as the self study report, was routinely released by the colleges. This Policy was revised and edited in June and August of 2012, to enlarge its scope, by adding this sentence;

Except in the context of Commission work, evaluation team members are expected to refrain from discussing information obtained in the course of service as an evaluation team member. (June or August 2012 revision)²³²

The new policy, had its first reading on January 10, 2012,²³³ and took effect after it was adopted on June 8, 2012. In plain language, the Policy seeks to coerce team members to do what it says - refrain from discussing information obtained in the course of team service. Of course, since the Policy was not in effect during the March 2012 review, it should not have been applied to the March 2012 review of CCSF, and whether procedures were not followed in that review.

Nonetheless, on June 21, 2012, ACCJC’s Vice President Jack Pond wrote a letter to the CCSF “External Evaluation Team Members” to emphasize their requirement that they maintain confidentiality regarding the visit:

“... remind you that the Commission requires that team members continue

²³² The complete revised policy paragraph states, “In order to assure the accuracy and appropriateness of institutional information which is made public, the Commission expects all evaluation team members to keep confidential all institutional information read or heard before, during and after the evaluating visit. **Except in the context of Commission work, evaluation team members are expected to refrain from discussing information obtained in the course of service as an evaluation team member.** Sources of information (2012 Accreditation Reference Handbook, Policy on Public Disclosure and Confidentiality, “The Commission’s Responsibility for Confidentiality,” Section VI, p. 106, Amended June 2012, Edited August 2012, emphasis added)

²³³ The ACCJC Spring 2012 *News* described the first reading of a “substantial revision” to the Policy, although it offered no specific details. (See ACCJC *News*, Spring 2012, p. 9

to maintain confidentiality regarding the visit. The Commission's Policy on Commission Good Practice in Relations with Member Institutions requires that team members keep confidential 'all institutional information examined or heard before, during, and after the team visit and after the Commission acts.' (Letter, Pond to Team, June 21, 2012, Attachment 9.A.)

Pond's letter was based on the June 2012 Revision, although it used slightly different language. The letter added that the Confidentiality Policy also required confidentiality of the "current Institutional Self Evaluation Report, previous External Evaluation Reports, interviews and written communications with campus personnel ... evidentiary documents, and evaluation team discussions." *Id.* And, Pond cautioned that,

"Following evaluation visits, team members may be contacted to divulge information or discuss the visit. Team members should not discuss details of the institution to anyone at their institutions, the press, ... the public, or others. *Id.*

On February 26, 2013, ACCJC Vice President Krista Johns sent a follow-up email to the CCSF Team Members, again cautioning them not to release information:

"We have been alerted that activists and members of the press are attempting to reach individual members of your team to obtain individual members' comments and observations related to the visit. **You are reminded of your obligation as team members to hold in confidence all information related to the visit ... team members may not serve as a source of information related to those posted items.** The intent of the Commission is to assure those who engage in accreditation activities protect the integrity of the accrediting processes and outcomes, and act in a manner that maintains confidence in its decisions." (Email, Johns to Team Members, Feb. 28, 2013, Attachment 9.B.)

This email is ironic, as information possessed by team members would have proven that the Commission's integrity was suspect, due to the assignment of Peter Crabtree as a team member, and the possibility of a procedural error in regard to a team recommendation. Further, the new Policy enlarges the proscription on discussing "information obtained in the course of service" as a team member, to "all information related to the visit."

ACCJC should be required to withdraw the revised policy and cease and desist in attempting to muzzle disclosure of ACCJC's violations of law or policy. Information "obtained in the course of service as an evaluation team member" may bear directly on matters affecting the employment of district employees. Hence, fellow members of labor organizations who acquire information during a team visit suggesting violation of the

rights of employees, have the right to confer with employees for their “mutual aid and protection.” If a team member learns the Commission is violating law or policy, they have Constitutional and statutory right to report that information to their colleagues, union, or an agency or entity which oversees the employer or the Commission. Numerous labor law cases hold that confidentiality rules are not allowed to interfere in employees discussing such matters.²³⁴ Likewise, an accrediting body cannot suppress freedom of expression protected by the California or Federal Constitution.

X. ACCJC Disregarded California Public Policy and Statutes and Federal Regulations in Finding Governance of CCSF to be Deficient. The Commission’s Interpretation of its Governance Standard Violates Federal Law and Common Law Due Process, in addition to the Constitutional Rights of Trustees, Students, Employees and the Public

In sanctioning ACCJC for being deficient in regard to Standard IV - Leadership and Governance, the ACCJC violates **34 CFR § 602.18**, which requires that decisions must respect the mission of the community colleges - in this case, the rights of democratically-elected trustees in a public institution; **34 CFR § 602.18 (a)**, which requires that standards must be clear, and adequate to evaluate the quality of the education offered; **34 CFR § 602.13**, which requires that standards be widely accepted; and, **34 CFR § 602.18 (c)**, requiring decisions to be based on published standards.

ACCJC’s drive to enforce Standard IV is really an attempt to enforce a philosophy of governance which, in this instance, is contrary to public policy, and the normal checks and balances which are essential in government, for the benefit of the public. While it *may* be appropriate in a private company or non-profit for the restriction on a board of directors, it is not warranted in the public sector because it disregards fundamental principles of democratically-elected school boards. Regardless, the decision of any given board to incorporate any of these policy ideas should be for the board itself and the people it represents, not for the ACCJC. ACCJC, as an impartial accreditor, has no right to demand obedience to its ideological viewpoints when, as here, they are at odds with public policy, fair procedure, due process and Federal regulations. In other words, ACCJC’s application of its Standard IV is an abuse of its authority.

There are countless examples of ACCJC’s “dinging” colleges for actions by trustees which are consistent with their obligations to students and the public. Here are a

²³⁴ See, e.g., *Phoenix Transit Systems*, 337 NLRB 510 (2002); *Ellison Media Co.*, 344 NLRB 1112 (2005); *Mobil Oil Exploration and Producing, U.S., Inc.*, 325 NLRB 176 (1997)

few:

- * For several years, 1 or 2 Peralta trustees and the Chancellor jointly held “Board” or “campus listening sessions,” at which students, faculty, members of the public were encouraged to meet them to discuss any problems they had. Topics varied, but occasionally included health and safety concerns, student learning outcomes, construction, progress on accreditation reports, master planning, and various student programs. The sessions were advertised and possible topics included. (See Attachment 10.A, the notices for “Special Listening Session Meeting, March 6, 2007, Berkeley City College; “Special Listening Session Meeting, March 8, 2007, College of Alameda; Attachment 10.A.1., Laney College Open Letter to the Students, April 29, 2010)

After the April 2010 ACCJC Special Visit, a 5-person team led by Commissioner Frank Gornick, the District was told that “while they served the purpose of connecting district trustees and administration with the colleges, they are not a systematic way of monitoring institutional effectiveness” and interfered in administration, and had to be discontinued. Ding. They were stopped. (See Attachment 10.A.2., Letter, Beno to Chancellor Elihu Harris, June 30, 2010, and attached Special Visit Report, Peralta Community College District, April 19, 2010, pp. 15-16.)

- * Ventura, Moorpark, and Oxnard Colleges were placed on Probation by the ACCJC at its meeting of January 10-12, 2012. The Commission was primarily upset with 12 year veteran Board of Trustee member Arturo Hernandez who the Commission described as “disruptive” and displayed “inappropriate behavior.”

Trustee Hernandez responded to these accusations in a July 10, 2012 Memorandum to the Faculty Senates, AFT, SEIU, Student Associations and other stakeholders of his District (Attachment 10.A.). He first noted the precipitous and flimsy nature of the “accreditation violations” cited in the report,

“Now that the ACCJC report has been presented to the public and the inaccurate and libelous accusations against me have appeared in the press, I believe that I have been defamed by false accusations and that it is now time to respond... **I was not interviewed by the Accreditation Team regarding the comments and perceptions that were presented to them...** Previous to the April 2012 report... **I was never provided a single written item, written advisory, email, memorandum, or other forms of documentation or evidence advising me of anything resembling the noted concerns.**” [Emphasis added.]

Next Trustee Hernandez addressed the situation he believed the Evaluation Team was referring to when it found that he was “disruptive and “inappropriate.”

“It is public knowledge that during the recent round of cuts for the colleges, I publicly **requested at Board meetings that the college administration share with the Board the analysis used to validate the proposed elimination of certain instructional programs at one of the colleges...** I was... informed by one college administrator... that selection of the programs for elimination was based on the perception that ‘cutting those programs would draw the least flak from the community.’ Based on this feedback, **the decision was seemingly arbitrary and guided by what would avert repercussions rather than what was good for students and the college district...** I take my vote on behalf of all communities very seriously. When we are impacting our student’s future or our employees positions, **it is my duty and responsibility to gain clarification before voting** on the abolishment of programs, jobs or other services... In effect, my opposition as a Board member to eliminating instructional programs without a valid analysis to back up that decision was apparently viewed as inappropriate conduct... **I believe as an elected Trustee that it is my fiduciary duty to seek clarification and logical answers.**” [Emphasis Added.]

Trustee Hernandez was trying to be accountable to the people that elected him. He tried to procure simple information about the methodology behind selecting certain classes for elimination in order to ensure that the students of his District were being best served. This type of action— requesting simple follow-up information from Administration-- is what voters hope for from their elective representatives. Yet this type of action is forbidden by the ACCJC. Ultimately, Trustee Hernandez’s concerns were shared by other members of the Board, and the staff recommendations were not approved. Ding.

- * At Santa Barbara City College new 4 new trustees were elected in Fall 2011. One trustee held meetings on campus where students could meet her. The ACCJC decreed this was improper. (See discussion of SBCC, *supra*.)

Over time, and more so in recent years, and thanks in part to the influence of the CCLC, activities which have long been considered normal trustee activities such as visiting a campus to talk to employees and students as in the Peralta listening sessions or informal chats by SBCC trustess, visiting classrooms with permission of teachers, and meeting informally with managers with approval of the chancellor, have been subject to criticism and “dings” by ACCJC. In other words, ACCJC has informed colleges that they

are not meeting Standard IV because these activities are a “burden to management,” or “micro-management,” or inappropriate for trustee’s “roles.”

However, going on campus to talk to employees and students is Constitutionally protected, and fulfills a trustee’s responsibilities as an elected public servant. While such actions might be considered inappropriate for members of the board of a private company, or might be enforceable against appointed trustees of a private college, they violate California public policy.

And trustee post-decision dissent has recently become a special target of the ACCJC. No published ACCJC Standard offers the extreme interpretations which dominates the thinking and actions of president Beno and the Commission in regard to this Standard. Prohibiting a trustee from meeting students on campus, forbidding a trustee and the Chancellor to hold “listening sessions,” urging that a trustee be censured or somehow disciplined because he either was confrontational, disruptive or *inquisitive*, or continued to speak out publicly on an issue of public concern where the board majority took a different view, account for an explosion in sanctioning of colleges for Board misbehavior. When did ACCJC get the power to forbid speech on the flimsiest of claim, that it is inconsistent with the Standards? In reality, ACCJC is foisting its philosophical views of leadership on colleges, again eschewing its narrower role as an accreditor which should be evaluating outcomes. The micro-manager is President Beno and her still mostly hand-picked Commission.

Furthermore, in once again acting in concert with the CCLC, to implement the philosophical objectives of the CCLC in regard to governance, ACCJC has another conflict of interest - it is supposed to be independent of trade associations, not their partner in advocating philosophical policies which are contrary to the public interest.

In addition, ACCJC violates Federal common law due process and California common law fair procedure, in that the Commission’s action disrespects the public policy of California, and deprives colleges and their students, employees and the public of *fundamental Constitutional rights*. As we prove, the ACCJC’s interpretations of this Standard are contrary to the public interest, and are an abuse of ACCJC’s authority.

Before proceeding further it should be emphasized that a standard to evaluate Leadership and Governance is **not** required by Federal law. Hence ACCJC may adopt its Standard IV, and apply it, only if it **widely accepted**, and is **adequate to evaluate** colleges consistent with the purposes of accreditation and Federal law, and not contrary to California public policy.

The alleged deficiencies of CCSF in regard to Standard IV fall into two familiar

areas, both of which have become a particular obsession of ACCJC:

1. That Board members (trustees) should act **“act” and “speak” as a whole**.

2. That Board members (trustees) have a **limited role**, in that they **only deal with policy**, leaving day-to-day decisions, administration, and implementation to the administrators.

As to the first area - acting and speaking as a whole - Beno recently explained as clear as can be, that what this means to ACCJC is that:

“... once the board acts, board members **must support the action publicly or risk an accreditation ding**. (Attachment 7.N., p.18)

“... if the board is making a bad decision, you have to give up that fight – maybe this institution is not the right place for you ... don’t go to the press. It’s not a great idea to talk to the press. **If a trustee is on the losing side of a vote, once the vote is made, [the trustee] must publicly support the vote. Teamwork is essential.**”(Id.)

The Commission’s sanctioning of CCSF relied greatly on its so-called leadership and governance failures, and central were the activities of a few trustees, who fulfilled their obligations as elected officials, and got dinged for it. One trustee held “hearings” in which he inquired into student concerns and allowed them to inform him of what those were. He did not meet on behalf of the Board - he met on his own, to obtain information from his constituents. And for this, the college was “dinged.” Dinged along with the college were the college, its students, its employees, the public, and the Constitution. Of course, the “ding” was more like a blast, given the shock and harm from Show Cause.

A. ACCJC’s Leadership and Governance Criteria is Not A Federal Standard - it is the Creation of ACCJC, and is Not Widely Accepted.

The Federal government has set forth those Standards it requires be considered by reliable accrediting agencies such as ACCJC, which are delineated in Federal regulations, in particular **34 CFR 602.16**. Within this list there is **no category for leadership and governance**.²³⁵ However, Federal regulations do not restrict an accrediting body from

²³⁵ The DOE requires that accrediting agencies (i.e. ACCJC) demonstrate they have standards for accreditation that are “sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the institutions or

developing standards “with the involvement of its members.” **34 CFR 602.16 (f) (1)**. It is unclear precisely what²³⁶ “involvement,” if any, the California community colleges have had in developing the standards developed by ACCJC, such as Standard IV. The Standard was But there is no doubt some trustees do not approve, as by practice ACCJC has gotten increasingly proscriptive of trustee speech. STOP

Governance is also not among ACCJC’s eligibility requirements. In fact, of ACCJC’s 21 eligibility requirements, only one expressly refers to governance, Requirement 3 - Governing Board.²³⁷ This requirement requires “a functioning governing board” which is “an independent policy-making body” which meets certain standards, such as having a conflict of interest policy, restricts board ownership interests in the institution, and is an independent policy-making body capable of rationale decision making.²³⁸ CCSF met this eligibility requirement - community colleges meet this simply by functioning as they are expected - holding meetings, voting, and fulfilling the simplest and most basic requirements of a board.

programs it accredits.” The agency meets this requirement if these accreditation standards effectively address the quality of the institution or program in the following areas:

- (i) Success with respect to student achievement in relation to the institution's mission ...
- (ii) Curricula.
- (iii) Faculty.
- (iv) Facilities, equipment, and supplies.
- (v) Fiscal and administrative capacity as appropriate to the specified scale of operations.
- (vi) Student support services.
- (vii) Recruiting and admissions practices, academic calendars, catalogs, publications, grading, and advertising.
- (viii) Measures of program length and the objectives of the degrees or credentials offered.
- (ix) Record of student complaints ...
- (x) Record of compliance with the institution's program responsibilities under Title IV of the Act, [dealing with loans to students]

²³⁶ The current governance standard, like all of the standards, neglects to indicate when it was written, amended or “edited.” In contrast, the ACCJC policies contain this information, but do not indicate if “member institutions” were involved in the creation, amendment or editing, and how.

²³⁷ The other eligibility requirements are discussed above.

²³⁸ The eligibility requirement refers, *inter alia*, to the board is responsible for the institutions quality, integrity and financial stability, and ensuring its mission is being carried out.

A few of the eligibility requirements, while not directly mention governance, might involve it given the lengthy, broad generalities which ACCJC includes within such requirements as Eligibility Requirement No. 18, “Institutional Planning and Evaluation.”

However, leadership and governance is an enumerated subject of the Standards, “Standard IV: Leadership and Governance.” The three and one-half page long standard is has some basic principles which can be distilled from the text:

1. Governance should be effective.
2. Through established governance structures and a written policy, the board, administrators, faculty, staff and students work together to govern
3. The college relies on the faculty, its senate or other faculty “structures,” to govern.
4. Faculty and administrators roles in governance are “substantive” and “clearly defined.
5. The processes are regularly evaluated for integrity and effectiveness.
6. The roles and responsibility of various participants are clear. (See Standard IV, pp. 16-19)
7. The Board “acts as a whole.”

It is the last one which is causing much of the trouble.

ACCJC’s interpretation of “acting as a whole” has, over the last few years, morphed into something illegal - demanding that trustees **speak as a whole**. The notion appears to have been influenced, as much ACCJC policy is, by the Community College League of California, which espouses the same harmony and teamwork theme. A team of rivals is apparently okay for the president of the United States, or the State of California’s legislature, but not for the president of the City College of San Francisco board of trustees and his colleagues.

The theory behind the Commissions peculiar approach to leadership and governance derives from the private sector, especially for non-profits like the ACCJC or the CCLC. These organizations have historically been riven by internal conflicts. Over the last four decades a governance “model” developed in which the Board sets policy at the loftiest levels, and the executive branch handles all operational and administrative decisions.²³⁹ This model might work for ACCJC and the CCLC, or for Enron, Wells Fargo, J.P. Morgan Chase, or any private corporation with stockholders to satisfy, and a

²³⁹ The so-called *Policy Governance© Model* by John and Miriam Carver, two consultants who publish incessantly in tracts by government consultants such as Jossey Bass.

CEO perhaps like Meg Whitman, who reports to a board of directors. It is not an appropriate precedent for the public sector, especially for popularly-elected officials such as trustees of a community college district, who have particular fiduciary duties thrust upon them by the Legislature and their normal responsibilities as elected trustees of *state* resources and public servants of students and the people.

Unlike members of a private association or company's board, trustees have a fundamental obligation to represent their constituents. At the recent CCLC joint training of trustees - the so-called Effective Trusteeship Workshop - Beno and others spoke with the enthusiasm of a George Babbitt, extolling their principles of good governance - especially that a **board that acts together speaks together**.

Beno and others candidly explain the fundamental principles of their leadership/governance philosophy, the ones which ACCJC has fiercely enforced, and at its core is their view of leadership and governance, that:

If a trustee is on the losing side of a vote, once the vote is made, [the trustee] must publicly support the vote. Teamwork is essential."

"Once a board acts, the board members must 'support' the action publicly, or 'risk an accreditation ding.'" (Attachment 7.N., p.18.)

Sanctions of community colleges arising out of this Standard are out of control. ACCJC has cited Board members for talking with students on campus, holding meetings to hear what is on the minds of students, and for not "giving up" the fight, after a losing vote, by continuing to speak out. ACCJC has indicated that Board's need to censure or take other "effective" action to silence the disruptiveness which accompanies dissent after a vote has occurred, or before. For example, in the Moorpark case, the Commission noted the "entire Board's responsibility to address and curtail" the member's "disruptive and inappropriate behavior."²⁴⁰ ACCJC demanded that:

"The individual members of the Board must demonstrate their ability to operate impartially on all matters relative to the District business to secure and enforce the academic and fiscal integrity of the District."²⁴¹

²⁴⁰ See Accreditation Follow-Up Report, Oct. 15 2012, by Moorpark College, p. 40.

²⁴¹ ACCJC Follow-Up Visit Evaluation Report dated April 16, 2012, cited in Accreditation Follow-Up Report, Oct. 15, 2012, p. 40.

This reference to impartiality appears to be reflected in the comments made at the Effective Trusteeship Workshop - that trustees “get pressure from organizations that get you elected. Watch the political pressure you are getting,” that constituents have “political agendas,” and that “this is my warning to you, the accreditation commission is looking over your shoulder.” These threats are chill the exercise of free speech, and are unbecoming to a reliable accreditor. ACCJC is required to recognize freedom of speech, and cannot legally attempt to dissuade it by issuing “dings.”

In addition, as was also explained at the Trusteeship Workshop and in other Commission presentations, dealing with a “rogue” board member may take “censorship.” Since when did censoring trustees become a Standard? It seems to have begun with ACCJC.

In fact, the other regional bodies do not enforce any Standard which says that a board must “act as a whole.” WASC Senior has no such rule for California’s higher education institutions such as UC and CSU; neither does the Southern Association, North Central, Northwest, New England, or Middle States.²⁴² In other words, ACCJC is once again alone in attempting to coerce and police Board speech and actions to get their messages across. Standard IV, as written, and its application by ACCJC, are **not widely accepted**, thus violating **34 CFR § 602.13**.

In addition, the vagueness of “acting as a whole” means that the Commission does not base its decisions in this area on **published standards**, thus violating **34 CFR §602.18©**. And this vagueness leads to **inconsistent application** of Standard IV, thereby

²⁴² The Southern Association simply notes there is a clear and appropriate distinction between the policy-making functions of the governing board and the responsibility of the administration and faculty to administer and implement policy; North Central says “The governing board delegates day-to-day management of the institution to the administration and expects the faculty to oversee academic matters;” Northwest says the Board “delegates authority and responsibility to the CEO to implement and administer board-approved policies related to the operation of the institution”; New England says ““3.7 The board delegates to the chief executive officer and, as appropriate, to others the requisite authority and autonomy to manage the institution compatible with the board’s intentions and the institutional mission. In exercising its fiduciary responsibility, the governing board assures that senior officers identify, assess, and manage risks and ensure regulatory compliance”. The Middle States has the only rule that is arguably close: “Members of the governing body **act** with authority only as a collective entity” and “the governing body is expected to support the chief executive officer in the conduct of the duties necessary to fulfill the mission of the institution through the executive officer’s oversight of faculty, administration, and staff.”

violating **34 CFR §602.18(b)** which requires that an accrediting agency “has effective controls against the inconsistent application of the agency’s standards.”

The Summer 2012 *News* indicated that sanctions for Board issues have increased from 46% to 71%, for the colleges on sanction over the last four years; the lead article in the issue was devoted to the trouble with school boards. The Spring 2012 *ACCJC News* indicated that this “board” category tied for first place (with “planning and using assessment results) as a cause for sanction during the prior year. ACCJC acknowledges its heavy focus on the activities of boards and trustees, claiming this is needed because “*governing board dysfunctions are increasing.*” (*ACCJC News*, Summer 2012, p. 1) The dysfunction is actually with ACCJC.

Evidence shows that ACCJC has sanctioned colleges because board members have gone onto campus, individually or perhaps with one other member and a CEO, to meet with students; have held “hearings” at which students could express their views of hotly debated educational issues of public concern - this one is part of the reason CCSF was found not to meet the Governance Standard.

President Beno reported at the NORCAL CEO meeting at Yosemite this March, that she “shames” boards into compliance. One should ask - if ACCJC has become so focused on shaming colleges into obedience, why is it that dysfunctional behavior is increasing? Could it be that the reason is ACCJC is condemning more and more legitimate speech and activities, finding them prohibited? It seems so. Given ACCJC’s dysfunctional recharacterization of sanctionable conduct to sanctionable expression, it is no surprise ACCJC is finding more and more fault. The trouble is, the Commission is citing behavior which the law, the public policy of California, demands of its elected officials.

At the CCLC workshop in January 2013, President Beno said that a governing board is not like a city council. Of course it is in many ways. While a city is not subject to accreditation, both are governed by elected trustees, who oversee enormous public resources; and are accountable to the public; both city council members and college trustees represent the public. In the name of harmony, it is improper for ACCJC to punish colleges whose boards display their disagreement, before, during or after a vote. The notion that a board member must stuff it and join the majority is anathema for elected officials. Imagine if politicians in Congress or the statehouse were told that once a vote was taken, they could no longer disagree but had to support it. We’d still have slavery, and loyalty oaths for teachers.

The fact is, both law and policy protect the right of trustees to hold and express their views on matters of public concern. Of course such expression is not without limits

- there are normal time, place and manner rules - that's part of why Robert's Rules exist. At the same time, there is no standard or law which prevents a board member from holding firm in his or her beliefs, from communicating that, from trying to use the public forum to try to persuade others to his or her point of view. This is a fundamental right. And ACCJC, in disrespecting this right, violates the law. As we have had to emphasize repeatedly, "standards ... must be reasonable, applied with an even hand, and **not in conflict with the public policy of the jurisdiction.**" *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools*, 432 F. 2d 650 , 655 (D.C. Cir. 1970) Moreover, the Commission cannot interpret or adopt accreditation standards which impinge on the fundamental rights of faculty. *Nova University v. Educational Institution Licensing Commission*, 483 A. 2d 1172, (D.C. 1984)

In Nova University, the D.C. court declared that an accrediting body "can not place conditions on the receipt of these [accreditation] privileges that themselves violate the Constitution or require the [recipient] to forego the exercise of fundamental rights. [citations] ... nor regulate its businesses in ways that impinge on fundamental rights. [citations]" *Id.* at 1181-1182. ACCJC, no less than governmental regulators, must obey the Constitution. See *Bernstein v. Alameda-Contra Costa Medical Association* (1956) 139 Cal. App. 2d 241, 253, and cases cited above in Section VII of this document.

B. Acting as a Whole Does Not Mean Thinking or Speaking as a Whole, or Fulfilling A Trustee's Role as an Elected Public Official

The central ideas behind ACCJC's recent crusade against elected trustees, something which again coincides with the interests of administrators, are a distortion of Standard IV.B.1.a., which states,

"The governing board is an independent policy-making body that reflects the public interest in board activities and decisions. **Once the board reaches a decision, it acts as a whole.** It advocates for and defends the institution and protects it from undue influence or pressure."

It is hard to disagree with the notion that the board *acts* as a whole. After all, Boards' act by majority vote in the name of the Board. Regardless of how many board members vote to approve a union contract, if a majority does so - then the board has reached an agreement. No individual trustee, absent authorization from the board, can issue commands. Hence, this Standard causes no concerns as written. The problem is in how the Commission and its President apply the Standard.

Every American should disagree that "acting as a whole" means **speaking** as a

whole. Boards are not composed of unthinking automatons, who get in line and mouth the words in unison to a tune they don't agree with. That idea was long ago rejected in this country.

As we discuss below, this unauthorized extension of a narrower rule about acting "as a whole" violates the public policy of California. This interpretation by the Commission and its staff disregards the legal rights and duties of board members, as well as their broader role as publicly-elected and accountable representatives of the people. It disregards provisions of the Education and Government Codes, and defies common sense. Any well run government recognizes and does not seek to censor or censure dissenting views, even when expressed after a vote. Moreover, the people (students, employees, the public) have as much right to learn the dissenting thoughts of board members on the losing side, as the board members have a right do to express themselves.

Unfortunately, the improper sanctioning of CCSF for one board member's exercising his Constitutional and statutory rights to meet with, and speak and listen to his constituents - mostly students - has been replayed throughout the state during the last four years, adding more evidence that ACCJC is not a reliable accreditor. And the basic problem is that ACCJC has gone beyond ascertaining whether a board "acts as a whole." Instead, it now insists that board's *speak as a whole*, with *one* voice, like an army of George Babbitts. It is obvious that ACCJC sees this as necessary for harmony.²⁴³ And it apparently hopes to shame boards into ACCJC's form of imposed harmony.²⁴⁴

The trouble is, ACCJC's obsession with dissident speech is hurting colleges, students, employees and the public. CCSF picked up Show Cause partly due to this. It is not alone in suffering from ACCJC's overzealousness and refusal to accept that the Legislature and the Constitution also determine the scope of permissible trustee behavior, not just the ACCJC, which we will discuss later.

1. The Sanctioned Behavior of CCSF Trustees Indicates That the Words or Actions are Protected Speech, and that No Substantial Evidence Supports the Sanctions

By itself, the Action Letter is none to clear about governance or leadership "failures." However, the Evaluation Report offers details.

²⁴³ Imposed harmony is not exactly harmonious, given what Beno describes as increasing problems from the boards she and the Commission police.

²⁴⁴ Beno acknowledged at the Northern California CEO's Conference that the Commission sanctions boards to "shame them" into compliance.

1. Interviews with a chair, faculty and the Senate leadership reveal concerns with the *Board's manner in dealing with some academic matters*, including a Board resolution to eliminate student placement exams and a trustee resolution to modify the Police Academy curriculum. (City College of San Francisco, Evaluation Report, p.61)

2. In the Section entitled Board and Administrative Organization, Findings and Evidence, the Report states as follows:

“... The appearance of certain news stories in the local paper revealed that individual board members contacted the press regarding board and college issues prior to consulting with the chancellor. (City College of San Francisco, Evaluation Report, p. 63)

3. Finally, “ ... *individual board members pursuing personal agendas to advance personal interests. These behaviors raise questions about the governing board's bias and independence.* (IV.B.1.a.) (*Id.*)

None of this conduct is sanctionable.

1. A Board resolution to eliminate student placement exams and a trustee resolution to modify the Police Academy curriculum is part and parcel of the everyday activities of a board of education. No matter how much one may differ with the resolution to eliminate certain placement exams, or to modify curriculum at the Police Academy, board members are elected officials who enjoy the right to advocate and propose eliminating or modifying placement exams, or modifying curriculum. There is nothing inherently wrong with such conduct under Standard IV, and even if one could interpret the proposals, the ACCJC's sanction would be based on the viewpoint of the trustee(s).

2. Individual board members contacted the press regarding board and college issues prior to consulting with the chancellor. As elected representatives of the public, trustees enjoy the right of free speech and association. Hence, they are free to contact the press. Nothing within the Standard restricts, or could legally prevent, a trustee from contacting the press. And while it may be customary or polite in some situations to alert a CEO, again, there is no legal requirement of such disclosure. The ‘act as a whole’ proviso refers to the organization of a governing board - that a single trustee, or a minority of the trustees, cannot act on behalf of the board. But when it comes to communications - as in contracting the press - board members, like ordinary employees or citizens, enjoy this constitutional right. Hence, this expressive activity is protected by the Constitution.

3. ACCJC wrote, “individual board members pursuing personal agendas to advance personal interests. These behaviors raise questions about the governing board’s bias and independence.” Rather than identify Board members improperly pursuing “personal agendas,” and “personal interests,” the evidence confirms that the Board members were ineffectually “pursuing’ the educational interests of their constituents, as well as CCSF’s students, matters that were the legitimate interests of the trustees. Even if the Board members activities were upsetting to some, holding hearings, meeting with constituents, speaking with the media are part of their job. Whether they perform these tasks well or poorly, whether some agree or vehemently disagree, is not the business of ACCJC where the subject is not a legitimate criteria for college quality, as is indisputably the case here.

To emphasize the obvious, Board members are elected officials. They represent the *public* and communities served by the college district. No law, regulation or District policy requires that they refrain from communications with the press prior to consulting with the Chancellor, or after doing so. The Community College League of California, in its Trustee Handbook states that their primary allegiance should be to the “external community and the public good.” (Attachment 10.C.) And while it may be “good practice” to alert high-level administrative officials of their planned activities, this “custom” is no indicative of institutional quality. Two Board members, Ngo and Rizzo, have come in for the harshest criticism.

Here, much of the ACCJC report’s criticism of the Board appears to have focused on the activities of Board member Ngo in connection with two issues: whether the College should continue to require placement examinations for new students and the nature, scope and length of remedial English and Math programs.

No matter how one feels on these topics, or about member Ngo’s policies or approach, it is undeniable that these are issues of intense public concern. To be clear, AFT 2121 is disagrees with several of trustee Ngo’s methods, but we do not believe they are open to consideration as accreditation criteria. Since when can an accrediting agency sanction the speech activities of Board members on matter of public concern.

In the Handbook the League attempts to address many of the issues which are embedded in the Evaluation’s critique. The multiple interests assure conflict. Thus, the Handbook avers that “boards should expect their members to uphold the welfare and success of students as a primary concern.” (Attachment 10.C.) Yet the ACCJC’s criticism of trustee Ngo by the Evaluation Report resulted from his efforts to do just that. One can disagree with whether the means he chose in regard to these two hot topics was advisable. But whomever disagrees cannot be the accreditor.

2. Freedom of Speech Protects the Board Members Right to Speak Publicly After a Vote Has “Settled” an Issue

No vote is final - in the short term, Roberts Rules of Order permit trustees to change their minds. Robert Rules govern most college board meetings. How could trustees change their minds if their members are gagged? And how could the constituents - the students, employees, the public, even the administrators, exchange ideas if the trustees were gagged?

The Supreme Court has long recognized that freedom of speech includes not only the rights of speakers, but the rights of listeners to hear what others have to say. See, e.g., *Lamont v. Postmaster General of the U.S.* (1965) 381 U.S. 301, 308, Brennan concurring. Justice Brennan’s specific reference to the rights of listeners recognized it as essential to the marketplace of ideas: “I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.” Soon after the Court’s majority saw things the same way. *Red Lion Broadcasting v. FCC* (1969) 395 US 367, 390.

Democracy is messy.²⁴⁵ Harmony often connotes totalitarianism. There is a long tradition of disagreement and dissent within American institutions which include groups of elected or appointed officials, including school boards. The grandest board we have is the Supreme Court. Important aspects of our current First Amendment jurisprudence was shaped by the post-decision expressions about the right of free speech, offered by Justices Louis Brandeis and Oliver Wendell Holmes, Jr., at a time when Americans were jailed for expressing dissent.²⁴⁶ While school board members may not decide such momentous matters of law, they do decide a multitude of controversial, divisive and mundane issues, from school construction, to compensation, budget priorities, tenure of faculty, services provided, and appointments of administrators.

²⁴⁵ “Democracy is a charming form of government, full of variety and disorder.” Plato, *The Republic*, Book 8, 557B - 558C (360 BC)

²⁴⁶ Brandeis’ opinion about limiting suppression of certain speech to when there was a “clear and present danger” expressed in dissent with Holmes in *Abrams v. United States* (1919) 250 U.S. 616, and in concurrence with Holmes in *Whitney v. California* (1927) 274 U.S. 357, but he persisted in expressing his views both on and off the court, in public. See *Freedom of Speech in War Times*, 32 Harvard Law Review, 932 (1920), Z. Chaffee, He did not “speak as a whole’ with the justices who supported suppression of controversial speech which dissented from majority views. And finally in *Thornhill v. Alabama* (1940) 310 U.S. 88 Brandeis’ test carried the day and, despite a bumpy reception over the next influenced the more refined test issued in *Brandenburg v. Ohio* (1969) 395 U.S. 444 (imminent lawless action test).

In California, dissenting board members on the short end of a vote have historically been free to continue to express their views based on their principles and beliefs. ACCJC president Beno may recall her personal experience with this sort of public debate, one which illustrates the need to protect the free speech rights of minority trustees, as much as any, for they may eventually prevail. Had such rights not been respected in 1996, Ms. Beno or her perhaps one of the prominent community members who supported deannexation, such as one of the local State representatives, or her putative successor, might have become the first chancellor of the Berkeley City Community College District, instead of the president of ACCJC. It was not to be, thanks to continuing dissent from other trustees of Peralta. The story was fairly simple:

In 1995, when current ACCJC President Beno was president of Vista Community College in Alameda County, 4 members of the governing board of the Peralta Community College District decided to support a citizen's petition to deannex Vista College from the Peralta District. This action caused an uproar. Faculty, students and residents were divided. Had it been successful, the Berkeley City Community College District would have been created. But it was not to be, thanks especially to outspoken, dissenting board members - and, a new majority was formed, with 4 members now opposing deannexation.

Were those dissenters required to shut up and publicly support an unconstitutional decision, once the original four decided to support the petition to deannex? No one contemplated there was anything improper about efforts to persuade the board to oppose, or support, deannexation. And, because the majority opposed the petition, a lawsuit was filed,²⁴⁷ and a Superior Court judge enjoined the deannexation, finding it was racially discriminatory under California law.²⁴⁸

²⁴⁷ See *Peralta Community College District v. Board of Governors of the California Community Colleges et al.*, Alameda County Superior Court No. 793053-3. The Peralta Federation of Teachers, AFT Local 1603, CFT/AFT, AFL-CIO, intervened in the lawsuit and successfully argued that the proposed deannexation violated State laws against racial segregation, and thus the Board of Governors should not have approved deannexation. The District's argument was focused instead on procedural issues. A copy of the court's decision will be provided, upon request.

²⁴⁸ To be specific, the Court "finds, that with respect to the [State Board of Governors of the Community Colleges] finding that the Vista formation would not significantly affect the racial or ethnic composition of the affected districts, the Board acted arbitrarily and capriciously in approving the petition and the Board's finding was entirely lacking in evidentiary support. In reaching this result, the court has reviewed ... and finds that ... the Board made an erroneous legal interpretation of the statute [Cal. Education Code § 74157(b)(5)], [and that the evidence] was *uncontroverted* by any contrary evidence." Decision of Judge Needham, at pp. 2-3.

3. Numerous Laws Allow the Speech Which ACCJC Sanctions

Numerous laws affirm the right of Board members to speak out on matters of public concern. These include:

1. Govt. Code section 54950 encourages communication between the members of a governing board and their constituents, declaring that:

“[T]he Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, **do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.**” (Emphasis added)

Civil statutes designed to protect the public, such as this one, are to be “broadly construed in favor of that protective purpose” *People ex rel. Lungren v. Superior Court* (1996) 14 Cal. 4th 294, 313.

2. California Education Code section 70902 sets forth the broad power available to members of the governing board of a college. Among other things the Board of a district is under a duty to “establish, maintain, operate and govern” the district’s colleges, and is authorized to “act, in any manner that is not in conflict with ... any law [or] the purposes for which community colleges are established.” 70902(a)(1)

If the Commission could gag trustees on the losing side of an issue - this would violate section 70902(a). It would lead to constant squabble over how broad any given vote happened was, or what it meant, since various issues have many facets. The ACCJC has indicated that boards should adopt policies allowing them to sanction or censure their board colleagues, for publicly dissenting. One can hardly imagine a policy which would be more disruptive to “harmonious” relations, yet ACCJC promotes this as a panacea for leadership and governance, arising out of the need for “harmony” or “teamwork.”

C. ACCJC’s Demand that Board Members Are Confined to Making Policy Decisions As Opposed to Actions to Implement Policy Is Contrary to Law and Public Policy

A corollary of ACCJC’s insistence that Board members “act” and “speak” as one,

is the “doctrine” that Board members are confined to broad policy decisions, and are not permitted to exercise “operational” authority. This is another ill-conceived notion, which disregards common sense and crucial requirements of California law.

ACCJCs philosophy is to prefer a system in which boards delegate all operational authority to the CEO, the chief executive, who in turn delegates authority to subordinates, and then assures that this authority is carried out to her or his satisfaction. Fine for Enron, not a public institution with elected trustees.

In the leading case on this issue, *California Sch. Employees Assn. v. Personnel Commission*, (1970) 3 Cal.3d 139, 143, the California Supreme Court held that “as a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization.”

Although the law may allow delegation of “an entirely ministerial act,” it is clear that a governing board of a district may not delegate any action which requires the Board to exercise discretion, absent statutory authority to do so. In *American Federation of Teachers v. Board of Education*, (1980) 107 Cal. App. 3d 829, the court found a board could delegate its authority only if it had no discretion whatsoever in how to carry out its duties. In that case, a statute mandated that a school board must accept employee resignations when offered, and must do so in one specific, proscribed manner. The court held that the governing board could delegate this authority because it involved no independent decision making on the part of the governing board.

This ruling, that a board cannot delegate discretionary duties, was affirmed in *United Ellerbroek v. Saddleback Valley Unified School District* (1981), 125 Cal. App. 3d 348. The court in that case also held that a board cannot make an improper delegation proper after the fact, by a *post-hoc* ratification of an action taken by a superintendent. *Id.* at 375.

It is true that California Education Code section 70902, which specifies the numerous obligations of the board to decide, also authorizes the board, **in its discretion**, to delegate to its chief executive officer, or any other employee or committee it chooses to delegate to, its power, but it shall not delegate “any power that is expressly made nondelegable by statute,” and all the limits of any delegation must be specified. This statutory authority thus provides three rules:

First and foremost, and the only one which matters on this point, is that the decision to delegate operational authority to a is and must remain within the **Board’s discretion**. This means that ACCJC flouts California public policy in demanding that Board’s delegate their operational authority to their CEOs. No amount of argument can

detract from the Legislature's carefully considered rule that Board's must retain this discretion, and may withdraw such delegation whenever, in their discretion, it seems appropriate to them - not to ACCJC. ACCJC violates California law when it coerces delegation through accreditation "dings."

Section 70902 is incredibly detailed, and authorizes boards to engage in a wide range of operational decisions:

1. To operate the district.
2. Establish long and short range academic and facilities plans.
3. Employ and assign all personnel.
4. Establish academic standards.
5. Determine and control the budgets.
6. Establish rules and regulations governing student conduct.
7. Establish governance structures.

The above is a short list. The Commission would be well advised to review anew section 70902. The Legislature has placed other limits on this power. For instance, many aspects are subject to mandatory collective bargaining, or to consultation with the academic senates as to academic and curriculum matters.

ACCJC's assertion that Board's should stick to policies, not operations, thus flatly contradicts California public policy, which assures that the boards retain the jurisdiction to decide what powers to delegate to their CEOs. While there are philosophical arguments in favor of broad delegation, these remain philosophies, one the Legislature has not accepted.

ACCJC's philosophy founders when specific issues are considered. In the context of free speech, as with many subjects, the dividing line is blurry. In general, ACCJC seems to prefer brief, general policy statements such as - "we support free speech - and detailed "procedures" or regulations, where the real policy choices are actually laid out. In ACCJC's view, the Board probably should stick to the "we believe in speech" policy, while allowing administrators to create free speech zones, stifle distribution of political material, and establish restrictions.

A few years ago, administrators in the Peralta Community College District tried to propose a new "procedure" which would have created "free speech zones," declared all of the campuses to be non-public forums, and restricted speech by employees, students and the public. The vehement opposition of students and the faculty Union brought this to the attention of the Board, which stopped the administration's effort to redefine the college's space as a non-public forum. The Commission would apparently view the definition of a

free speech zone to be the purview of the administration, but Trustees swear an oath to defend the Constitution - they cannot be forced by an accreditor to stand aside and allow administrators to violate the law.

Every board has a role in numerous operational decisions, including hiring and firing, increasing or decreasing particular kinds of services, approving contracts, directing negotiations, settling unfair labor practice charges, selecting contractors, and approving expenditure of the public's money. These decisions are not merely authorized by section 70901, most of them are required by law. Decisions to layoff and reduce services must be decided by the Board under section 87740 and 87743. Decisions to discipline tenured faculty are for the Board, as is the penalty proposed, under section 87734 *et seq.* Setting the parameters of a collective bargaining offer, and the ultimate agreement, must be approved by Boards under Government Code section 3540 *et seq.*

Is a college subject to ACCJC sanction for making operational decisions instead of a chancellor? Presumably according to ACCJC, but not according to California law. Trustees have a fiduciary duty to the public and their students, and as such must make a variety of operational decisions. ACCJC warned in the Effective Trusteeship conference this year that Board's needed to stick to policy - their role as public trustees governed by the Education Code dictates they make a wide variety of operational decisions.

As we have shown, ACCJC is wrongly "dinging" trustees for fulfilling their responsibilities as trustees of a public institution. Top level managers are known to complain about "interference" from trustees - such may have occurred in the day when Beno was a college president - it surely occurred in the decades before. And it continues to this day. But the issues and their complexity are such that Board's are constantly called to decide, as dictated by the law, their role as overseers and fiduciaries, and their role as public servants. The private-sector model which governed Enron and thousands of public and non-profit companies is not a model for the public sector. In trying to impose this model on the community colleges, and use "dings" or sanctions to coerce compliance, the Commission has violated the laws noted above, and shown it is not a reliable authority.

The ACCJC's philosophy is not "widely accepted" as a sanction; it is not a Federal requirement; it is vague and subject to interpretation based on fact-specific events, hence it is neither published nor clear. And, it is not adequate to the task at hand. As such, ACCJC's conclusion that CCSF did not fully meet Standard IV is not supported by the evidence, and is arbitrary, capricious and unreasonable. Ultimately, the application of the standard - how it is defined in practice - conflicts with California public policy. For these reasons, Show Cause was improperly imposed and should be rescinded.

XI. STATISTICS ARGUMENT/INSERT HERE XXX - 8 pages long

XII. In Issuing City College of San Francisco a Show Cause Sanction, ACCJC Disregarded Its Primary Mission to CCSF's Students and Violated Federal Law

ACCJC recognizes that the primary purpose of the colleges it accredits “is to foster learning” in students. ACCJC’s mission, like each of the regional college accreditation bodies, is to assure that a quality education is delivered to the students. (See Bylaws Section 2)

ACCJC disregarded this mission with its peremptory Show Cause sanction issued to CCSF. As such, it not only violated the rights of CCSF, it disregarded its mission to protect the interest of the current and future students of CCSF, who are the beneficiaries of the contract between CCSF. This action demonstrated why it is not worthy of continued recognition by the Department of Education, and Show Cause must be rescinded.

ACCJC reaccredited CCSF in 2006, meaning that no deficiencies had been identified in regard to satisfying ACCJC’s Eligibility Requirements and Standards. In 2012, ACCJC was aware that while it had identified areas to strengthen in 2006, which it had reiterated to a limited extent in 2007, 2009 and 2010, it had not identified deficiencies. Had it done so, it was required to take action to sanction CCSF, but it did no such thing.

The Commissioners and ACCJC’s staff surely were aware that a sanction of Show Cause would be both unexpected and unprecedented. We have found no evidence that an accredited college has ever been placed on Show Cause sanction, let alone for reasons as questionable as those listed in Beno’s July 6, 2012 letter, as a first sanction, except for the minuscule and inapposite Hawaii Pacific College. The Commission also should have known that the evaluation team had apparently not been allowed to make an action recommendation, a serious violation of ACCJC procedure. And it should have known that the team discussed a sanction of Warning. Furthermore, ACCJC was aware of CCSF’s status as one of California’s premier colleges, and the expectation of the school’s nearly 100,000 students, that this status was secure.

The Show Cause sanction is rare. As of June 2012, over the preceding 6 years, ACCJC has issued a Show Cause sanction only a few times, out of hundreds of Commission actions. In just the last three years, the Commission issued Show Cause to Diablo Valley, Cuesta, Siskiyou and Redwoods. Still, regardless of whether those sanctions were warranted, each of these colleges had been placed on lesser sanctions first,

and routinely more than once.

Further, the Commission was aware that with the Show Cause sanction, the College would be required to prepare “teach out” plans and prepare for closure, and that these actions would likely cause enormous distress and anxiety for the college’s nearly 90,000 students. The Commission also was aware that there was no way local Bay Area colleges could “take up the slack” for CCSF’s thousands of students, due to insufficient capacity in the programs and courses of study which would be impacted, and for a variety of other reasons.

ACCJC has claimed that the Commission itself is well situated to impose or even increase recommended sanctions beyond what a team recommends, because the Commission can take a long view of an institution’s accreditation history. But here, the evidence is that the evaluation team did not sign a team recommendation, in violation of Commission policy. Moreover, this argument for increasing sanctions is unconvincing because the evaluation team reviews the prior reports and Commission actions, and hence knows the history. It is also easy for the history of a college’s accreditation to be mischaracterized by the Commission. And there is no public decision in which the Commission itself explains why it has increased a sanction beyond that recommended by an evaluation team. At bottom the lack of transparency and the absence of findings make the increases in penalties to be arbitrary.

ACCJC may only use widely accepted standards, policies and procedures standards. But in addition, its decisions also must be “**widely accepted**” by educational institutions, educators, other accrediting bodies, and practitioners and employers in the fields for which the covered institutions prepare their students. (**34 CFR § 602.13**) The decision to place CCSF on Show Cause sanction cannot be considered “widely accepted” in light of ACCJC’s mischaracterization of the events of 2006 to 2012, its conflicts of interest, its reliance on underground, non-published standards in violation of **34 CFR § 602.18(a), (c)**, its domination by administrator interests and failure to rely on the judgment of peers, its procedural errors, its inconsistency and its failure to respect the mission of the community colleges and public policy in violation of **34 CFR § 602.18**.

In its domination by administrators, its entanglement with CCLC and other trade associations, and its legislative actions, ACCJC has shown that it is at times less interested in measuring outcomes for the benefit of students, than dictating policies and procedures which are discretionary with the colleges under California law, or even contrary to California public policy. The evidence is too strong to ignore that ACCJC is mired in mandating philosophical policies, hence its repeated inconsistent imposition of its view of vague policies. This regime of self-interest is hard for ACCJC to obscure.

As the number of sanctions issued by ACCJC has exploded over the last several years, so has the ACCJC. In 2005 ACCJC's staff consisted of its Executive Director Barbara Beno, 2 assistant executive directors, and 3 staff. As of Fall 2012, the Commission had doubled in size - President Beno, 5 vice presidents, and 5 staff. From 6 to 11.

With this increase in size, and more sanctions and other actions, has come a huge increase in ACCJC's budget and payroll, and a huge increase in its income from fees due to the higher number of sanctions, recommendations or concerns issued, because every sanction and many "concerns" requires a range of post-evaluation visits and reports, most of which result in a fee charged to the sanctioned or reviewed college.

The tax returns of ACCJC/WASC, which by law must be filed with the Secretary of State, reveal that the Commission income, which was XXX during 2006-2007, had risen to XXX by 2010-2011 (the last year that is available on line).

While ACCJC has become increasingly proscriptive in demanding that faculty pay be limited due to budget problems, tax return data suggests that ACCJC itself has not had serious concerns about holding down the wages or compensation of its executives. For instance, these returns reveal that from 2006-2007 until 2009-2010, Beno's salary increased by nearly 25%, from \$ 204, 686 to \$ 257, 438. Each of the five Vice Presidents currently earn more than \$200,000 per years. (See the Tax Returns)²⁴⁹

To fund its operations, ACCJC relies on annual membership fees which are based on the size of a college, and on assessments (fees) for such things as follow-up visits, special visits, and its review of college reports. It also charges expenses for campus visits and associated travel costs. The current fees indicate that a college such as CCSF will pay XXX in a year. (see attachment XXX)

The increase in sanctions occurs at the Commission constantly expands the scope of its Standards, either in their terms or application. In 2006 the Accreditation Reference Handbook contained XXX pages devoted to Requirements, Standards and Policies. By 2012, that had increased to XXX.

With the increases noted above, its no wonder that ACCJC needs more money. In her Report to the Commission for the January 2012 meeting, President Beno wrote that

²⁴⁹ For instance, during 2010-2011, ACCJC reported that XXX [insert salary info here]. Besides salaries, ACCJC appears to offer generous benefits - president Beno was afforded benefits of \$41, 145 in 2005-2006, which was up to \$ 59, 993 by 2009-2010. (See Tax Returns)

the Commission was running a deficit, and needed to increase fees charged to colleges. (See Attachment XXX)

Certainly the Commission would never admit that financial self-interest plays a role in the increase in sanctions, but there surely is evidence that philosophical self-interest has a huge part - witness the Commission's efforts to change the universal access standard of the Master Plan, to sanction college trustees for speaking out or seeking to connect with their constituents, students and employees, to force prefunding of GASB 45's "Annual Required Contribution," its application of standards not widely accepted, and similar initiatives. To be sure, ACCJC's excesses in these areas, and its use of accreditation as a tool to compel obedience to its philosophical views, has a significant financial impact. And, without doubt given our evidence, it reveals an abuse of authority which permeates the ACCJC.

In short, ACCJC does not comply with 20 USC section 1099b, which requires that an accrediting agency, to be reliable, must be independent, both administratively and financially, of related, associated or affiliated trade association. When managers upset with their own district boards or the laws go to the Association for assistance, and the ACCJC provides assistance - whether lobbying, investigations or sanctions - something is terribly wrong.

The ACCJC must "demonstrate it has, and effectively applies, a set of monitoring and evaluation approaches that enables [it] to identify problems with an institution's ... continued compliance with agency standards and that takes into account institutional ... strengths and stability. **34 CFR § 602.19 (b)**. It has failed in that mission. The Commission's Show Cause decision was not supported by substantial evidence and was not reasonably related to the legitimate professional purposes of the Association.

As a consequence of the foregoing, the Commissioners violated **34 CFR § 602.13** and breached their fiduciary duty to the public and students of City College, by placing CCSF on Show Cause sanction. This drastic action was both unnecessary and unthinkable. ACCJC's cavalier disregard of student welfare constitutes a prejudicial abuse of its discretion.

XIII. Conclusion

For more than a decade colleges, faculty, students and the public have been short-changed by ACCJC. As this complaint shows, ACCJC has violated nearly every Federal regulation that applies to it. These violations are serious, given the power the ACCJC wields. Although ACCJC issues policy after policy to assure everyone that it is impartial, has integrity, and has the students' best interests at heart, this is untrue.

As the evidence shows ACCJC is ACCJC is forbidden to engage in **apparent or actual conflicts of interest** by **34 CFR section 602.15(a)(6), 20 USC section 1099b, 34 CFR § 602.15(a)(6)**, and its own policies. Yet it presides over an accreditation business which is haunted by actual or apparent conflicts: the staff, under president Beno's direction, or Beno herself, placing Beno's husband Peter Crabtree on the Evaluation Team tops the list; the Commission interjecting itself in legislation opposed by CCSF, designed to change the mission of CCSF and the colleges generally; the Commission engaging in a conflict for more than 8 years involving the Community College League of California JPA, demanding that college's prefund an estimate of liabilities along with CCLC personnel who have served as commissioners, team chairs, and task force members. The Commission is required to have "[c]lear and effective controls against conflicts of interest or the appearance of conflicts of interest by the agency's ... (iii) Evaluation team members ... (v) Administrative staff, and (vi) Other agency representatives." (34 C.F.R. § 602.15(a)(6)) The evidence dispels the notion that ACCJC has ever taken conflicts of interest seriously.

ACCJC is supposed to only apply standards which are **widely accepted** by educators, educational institutions, other accrediting bodies, and practitioners and employers in the fields for which the covered institutions prepare their students. (34 CFR § 602.13) If ACCJC took this criteria seriously, it would not have spent the last 7 to 8 years demanding that colleges prefund their speculative OPEB liabilities, using the GASB 45-generated accounting formula for the ARC. Didn't ACCJC notice how alone it was on this criteria, an underground standard which socked away hundreds of millions of dollars, thanks to ACCJC's coercion, when those funds could have been used to avoid the catastrophic impact on California's students of having their classes cut to the bone. ACCJC's obsession with this so-called standard caused real and continuing harm. And who does ACCJC have to blame for this fiasco? The pied-pipers of the CCLC, or itself?

ACCJC is supposed to apply only **published standards** - that is what 34 CFR §602.18© says. Yet until June 2012, ACCJC had never adopted a "standard" dealing with OPEB - why then did it evaluate and sanction colleges for 8 years for this unpublished "standard?" ACCJC standards are supposed to be adequate, and can be reviewed over the 6 years of accreditation - but GASB 45 and the ARC are artificial, hypothetical, estimates, which can fluctuate wildly due to changes in the variables. The GASB 45 rules - unpublished for years - are not adequate - they are a deliberate misstatement of GASB 45.

ACCJC is supposed to respect the **public policy of California** - but ACCJC's official position, set forth in writing, it that it will ignore mandates of State law or other organizations - unless, of course, it suits ACCJC's philosophy of advancing the interests

of administrators - and then, well, the violation of any law - as perceived by a less than expert ACCJC - is cause of sanction. As we have shown ACCJC routinely disregards public policies it dislikes, whether the State's Master Plan and its Mission of universal, open access, the Advisory telling colleges they can continue to pay their retiree health benefits based on the pay-as-you-go-method - the most popular across the country, or the reserve guideline.

ACCJC is required by Federal law, and its own policy, to **clearly identify any deficiencies**. It did this for CCSF in 2006 - there were none. And then, to impose Show Cause, ACCJC recharacterized CCSF as having failed to correct deficiencies, thus violating 34 C.F.R. § 602.18(e). Having told CCSF in 2006 to "address" some recommendations, ACCJC morphed these recommendations into rigid demands - 6 years after the fact, then announced publicly that CCSF had failed to address them - even though CCSF filed three reports, accepted by ACCJC, which detail addressing them.

Federal law is quite clear - **respect the declared mission of California's community colleges**, a duty which is imposed by 20 USC section 20 USC § 1099b(a)(4)(A) and 34 CFR § 602.18. How can ACCJC claim any integrity when it supports legislation changing the mission of the colleges? CCSF, the Campaign for College Opportunity, CFT, the CCLC - they have every right to compete on the political field of battle - they are made for it. But not ACCJC - who would want their judge to be their opponent at almost the very moment when that judge is going to rule on a severe sanction, one which will have devastating effects for the college's students? What could ACCJC have been thinking, to go against a college which is a member of ACCJC, whose mission ACCJC had reviewed for years, and was about to review again?

ACCJC is required to have "effective controls against the inconsistent application of the agency's standards" - that's what **34 CFR §602.18(b)** requires. But does it? Not a chance. From respecting Hawaii's 3% reserve requirement, to disregarding - most of the time - California's 5% requirement, to ignoring pay-as-you-go plans but sanctifying prefunding plans, ACCJC violates this requirement. As for the sanction levels, where is the consistency - there is no way to reconcile the crazy-quilt patterns of sanctions. As for trying to judge the college's considered most effective in the areas of students success - best check the state's figures - there is no correlation between those and ACCJC, which neglects measuring outcomes, and focuses on measuring how successful colleges are at acceding to ACCJC's philosophy.

ACCJC is required to provide due process - both Federal common law due process and California common law fair procedure demand this. But ACCJC only gives lip service to this requirement. Colleges, and their students, employees and the Public are

denied knowledge of what the team of educators recommends, or any rationale when ACCJC increases the sanction.

Returning to San Francisco, it may be the largest victim of ACCJC's misconduct and abuse of authority, but the misery of ACCJC's malfeasance has touched many California colleges. And will continue to do so unless ACCJC corrects these errors.

To remedy these violations, we reiterate our remedy requests:

1. Rescind its order of Show Cause as to CCSF, restore CCSF's accreditation status to the level of Reaffirmed, which it maintained before the March 2012 review, withdraw all actions and reports arising out of the Show Cause sanction issued July 2, 2012, and institute a new review of CCSF.
2. Recuse from participation in any discussion, actions or decisions concerning CCSF, ACCJC President Barbara Beno, Commissioners Frank Gornick and Steve Kinsella, Vice Presidents John Nixon and Jack Pond, and such other commissioners, staff and evaluators as have the appearance of, or an actual, conflict of interest.
3. Recuse from any participation in ACCJC teams or on the Commission, or in any ACCJC matter concerned with financial resources, any and all trustees or alternate trustees of the CCLC Retiree Health Benefits program JPA.
4. Cease and desist misstating the 2006 review of CCSF and correct the misimpressions of CCSF's actions to "address" suggestions made by ACCJC in 2006.
5. Take affirmative action to correct misstatements concerning the CCSF 2006 Reaffirmation of Accreditation and its aftermath.
6. Modify its Policies and Procedures, as requested herein to remedy the violations of due process under Federal and State law, and ACCJC policies.
7. Cease and desist from requiring reserves beyond that suggested as acceptable by the Chancellor's Office of the Community Colleges.
8. Cease and desist evaluating a college's success at prefunding estimated OPEB liabilities.
9. Adopt fair procedures for the appeal of Show Cause sanctions.
10. Provide greater time for the Commission to consider recommendations for

action on accreditation matters.

11. Provide sufficient reasons to satisfy fair procedure when the Commission increases a sanction to something more severe than recommended by an evaluation team.

12. Provide copies of team action recommendations to the college, students and the public.

13. Adopt effective procedures to identify all potential conflicts of interest.

14. Cease and desist from lobbying on legislation which do not directly affect the operations of the ACCJC.

15. For such other and further relief as is just and proper.

Dated: April 30, 2013

By: _____

Robert J. Bezemek,
Counsel for the Complainants and
Third Party Commentators the California
Federation of Teachers, AFT, AFL-CIO, AFT
Local 2121, et al..

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