

# Proposition 209 Handbook



**OFFICE OF GENERAL COUNSEL  
THE CALIFORNIA STATE UNIVERSITY**

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**Table of Contents**

I. INTRODUCTION..... 1

II. PROPOSITION 209 ..... 1

III. OUTREACH AND OTHER PRE-ADMISSION ACTIVITIES ..... 2

IV. FUNDRAISING..... 3

V. ADMISSIONS ..... 6

VI. FINANCIAL AID/SCHOLARSHIPS..... 6

VII. STUDENT SUPPORT SERVICES AND RETENTION INITIATIVES..... 9

VIII. EXCEPTIONS TO THE GENERAL PROHIBITIONS..... 10

A. Grants and Contracts..... 10

B. Federal Affirmative Action Requirements..... 11

IX. CAMPUS CLIMATE AND CULTURAL COMPETENCY EFFORTS ..... 12

## **I. INTRODUCTION**

The California State University (CSU) serves the State of California, acting in a public higher education capacity. CSU has a diverse workforce and serves a diverse group of students in a heavily populated state that is significantly more diverse than the nation as a whole. In his 2016-2017 budget, Governor Brown referenced the “achievement gap that persists between the performance of underrepresented students and their peers.” His budget summary commends the CSU’s Graduation Initiative 2025, as well as its efforts to address achievement gaps. These gaps include those between students of different races and ethnicities, as well as between first-time freshmen who receive Pell Grants and those who don’t, where the 4-year graduation rate for the former is 11% lower than the latter. It is clear that CSU’s funding is linked to the success of all of its students, and CSU faculty and staff must actively work to ensure equal access and success for all.

CSU is committed to an environment of inclusive excellence:

The California State University is committed to maintaining an inclusive community that values diversity and fosters tolerance and mutual respect. We embrace and encourage our community differences in Age, Disability, Race or Ethnicity, Gender, Gender Identity or Expression, Nationality, Religion, Sexual Orientation, Genetic Information, Veteran or Military Status, and other characteristics that make our community unique.<sup>1</sup>

The purpose of this handbook is to provide guidance on what actions the CSU may lawfully take to promote diversity and ensure equality. It is intended as a guide to CSU administrators, faculty and staff seeking to create inclusive campuses where excellence and achievement are equally shared and available to all. When in doubt about whether an activity or program that will accomplish these important University objectives is permissible under state/federal law or CSU policy, please consult with the Office of General Counsel.

## **II. PROPOSITION 209**

Proposition 209, passed by California voters in November 1996, amended the California Constitution to prohibit the granting of preferences in public employment, public education and public contracting to any individual or group on the basis of race, sex, color, ethnicity or national origin.<sup>2</sup> California courts have made clear that Proposition 209 is intended to end so-called “government-sponsored discrimination” designed to redress past discrimination in employment and education. Granting a preference to any individual or group on the basis of race, sex, color, ethnicity or national origin is illegal discrimination.<sup>3</sup>

What is meant by a preference or “preferential treatment?” The Courts that have weighed in on that question since 1996 have made clear that a policy or practice that treats all individuals or groups in exactly the same way, regardless of any of the protected characteristics (*i.e.*, race, sex, color, ethnicity or national origin), would not be considered preferential treatment. Conversely, providing a tangible benefit to an individual or group because that person or group falls within one (or more) of the protected characteristics clearly constitutes preferential treatment and is prohibited.

### **III. OUTREACH AND OTHER PRE-ADMISSION ACTIVITIES**

#### Permissible Activities

- Outreach activities to certain groups based on demographics evidencing low college attainment, *e.g.*, Super Sunday, Ferias de Educación, Asian Political International Studies Association (APISA) Days, etc.
- Participation in specific federally-funded programs such as Upward Bound, GEAR UP, CAMP, etc. (but see section VIII.A, Grants and Contracts, below).

In an effort to increase the diversity of its student body, CSU engages in efforts to reach K-12 grade students who are not being immersed in a college-going environment and therefore may not apply. Students targeted by these efforts are those whose parents have not attended college or youth from demographic groups in which college attainment is lower than for other groups (*e.g.*, by race or socioeconomic status). In this effort, the CSU as a system and individual CSU campuses have developed and coordinated multiple outreach activities that provide comprehensive information about (i) CSU admission requirements, (ii) financial aid, and (iii) early college readiness/ preparedness to communities where the lack of access to this information functions as a barrier that may impede college preparation and attendance.

These efforts do not create “set-asides” or different admissions standards, nor are they targeted solely by any individual applicant’s race, sex, color, ethnicity or national origin. Rather, they target all potential students in particular communities where demographics evidence low college application submission, admissions, year to year persistence, and graduation. As long as these efforts do not consider any individual student’s race, sex, color, ethnicity or national origin to grant a preference, use of any one or more of those characteristics as one demographic factor amongst others has withstood Proposition 209 challenges in other lawsuits.<sup>4</sup> For example, “Super Sunday” presentations at particular churches in targeted neighborhoods may reach a largely African American community, but all attendees at the church, of whatever race or ethnicity, receive the information.

Other federally-funded outreach programs such as the TRIO programs (Upward Bound, Upward Bound Math Science, Veteran’s Upward Bound, Educational Talent Search), are similarly permissible, because participation is not limited by any protected characteristics, including race. They are open to all students who “have a need for academic support in order to pursue a program of postsecondary education,” because they are from low-income families, are potential first-generation college students, or otherwise at high risk of academic failure.

Similarly, the CSU Mentor website discusses the EOP program and makes clear that to be eligible, students must demonstrate academic potential, be low-income, and come from disadvantaged economic and educational backgrounds. These programs use characteristics other than those proscribed by Proposition 209 to select promising students from communities that are not achieving proportional college attainment rates.

#### **IV. FUNDRAISING**

The following definitions apply through this handbook:

- “Financial aid” includes scholarships, fellowships, grants-in-aid, loans and other payments to students to assist them financially while enrolled at the University;
- “Preferential financial aid” means aid for which a student’s race, color, ethnicity, national origin or sex is a factor in determining whether he or she receives aid, the amount or terms of the aid, or the type of aid;
- “Gift” includes grants, donations, contributions, distributions from trusts or other entities, bequests and all other charitable transfers;
- “Donor” includes private, external, non-University organizations and individuals which may provide gifts for financial aid or other educational benefits targeted to students based on race, color, ethnicity, national origin or sex; and
- “University” includes CSU auxiliaries, alumni associations, and centers and institutes.

#### Permissible Activities

- University employees may not solicit or accept gifts *to the University* that are directed toward students of a particular race, sex, color, ethnicity or national origin, whether to establish programs, provide scholarships, or otherwise. [See the Financial Aid/Scholarships section below regarding permissible University activities in connection with donor-designated, preferential financial aid and scholarships *to be paid to*

*students.]* However, a donor may give such a gift to the University in recognition of the fact that conditions could change in the future making it legally permissible to grant such a preference, **so long as the terms of the gift permit such aid to be administered without any preference and the donor is informed and understands that the gift will not be administered in a preferential manner unless the law changes.**

The following methods may be employed to administer such funds:

- Gender specific athletic scholarships and program support may be distributed in compliance with Title IX regulations.
- Students who have been identified for a scholarship or other support without consideration of race, sex, color, ethnicity or national origin may be matched to available funding. For example, a President's Scholars program selects a pool of recipients based solely on academic merit. A selected student who is Latina could be matched to funding from a scholarship with a designated preference for Latinas. The value of the scholarship can be no more or less than scholarships provided to other President's Scholars.
- Other criteria are used to distribute the funds until such time as a preference based on race, sex, color, ethnicity or national origin becomes legally permissible.
- Where no preference is granted to any group or individual based on any of the protected characteristics (*i.e.*, race, sex, color, ethnicity or national origin), the University may solicit or accept gifts supporting or providing:
  - Lectures, town halls, guest speakers or other discussions about topics of race, sex, color, ethnicity, or national origin;
  - Academic programs such as Gender and Women's Studies, LGBTQ Studies, Ethnic Studies, African-American Studies, Chicano Studies, and Asian-American Studies;
  - Institutional or academic research about topics of race, sex, color, ethnicity, or national origin;
  - Outreach and student recruiting activities which may target underrepresented communities, as discussed above (*e.g.*, Feria de Educación, Journey to Success, and Super Sunday);

- Student services and cultural activities such as cultural centers, heritage events, clubs promoting cultural awareness, and awards programs for cultural leadership;
- Intercollegiate athletics, for the Athletic Department to provide financial assistance to athletes, equipment, uniforms, training facilities, and competitive opportunities; however, note that all such funds must be used in accordance with Title IX requirements for gender equity and be considered as part of a pool of resources which is then distributed in compliance with Title IX;
- Student financial assistance where the donor has a designated preference for students who are first generation, AB540 eligible<sup>5</sup>, or educationally disadvantaged;
- Student financial aid so as to promote academic values such as diversity and inclusion: *e.g.*, awarded to those students who have demonstrated potential for leadership in promoting cross-cultural understanding; those who have an outstanding record of service dedicated toward helping educationally disadvantaged students; or those with a demonstrated academic interest in topics such as race, gender, and multiculturalism as they intersect with traditional academic fields;
- Financial assistance to offset the costs of study abroad for students with financial need. Having international experiences is recognized as a high-impact practice for student learning, but cost is often a barrier for low-income, first generation college students.

University employees may:

- Use personal non-work time, while acting in their capacity as a private citizen rather than as a CSU employee and representative, to raise and assist in the administration of aid funds on behalf of an outside organization whether or not the aid is preferential. Personal time may include the *incidental* use of University resources as permitted for other personal purposes; and
- Since University officials routinely use University resources to attend a variety of outside fundraising events of benefit to the University, its students, faculty and staff, University officials may also attend events where preferential financial aid funds are raised. However, University officials shall not use official time or resources to initiate or plan such an event.

## **V. ADMISSIONS**

### Permissible Activities

- Hosting ‘yield events’ to admitted students from specific groups. These students have already been through the normal, rigorous admission process by which all students are admitted. These programs are designed to encourage students to attend/select a particular campus to meet their academic goals.

### Impermissible Activities

- Creating set-asides or quotas and thereby admitting students using a different standard because of their race, sex, color, ethnicity or national origin;
- Allowing students to attend at a different cost based upon their race, sex, color, ethnicity or national origin;
- Granting enrollment or registration priority to any students based on race, sex, color, ethnicity or national origin; and
- Considering race, sex, color, ethnicity or national origin as a selection criterion for programs such as EOP.

## **VI. FINANCIAL AID/SCHOLARSHIPS**

### Permissible Activities

The University may make financial aid decisions and awards, including using state and/or private gift funds, that are not based on any of the protected characteristics (race, ethnicity, color, national origin or sex). Examples of non-preferential financial aid include scholarships targeted to:

- Students from high schools with certain demographic profiles, which may open access to a more diverse pool of prospective students;
- Students with potential for leadership in diversity; and
- First generation, disadvantaged or low-income students.

Non-preferential aid may include aid designated to promote academic values such as diversity and inclusivity to those who have demonstrated, for example:

- A potential for leadership in promoting cross-cultural understanding;
- An outstanding record of service dedicated toward helping educationally disadvantaged students; or
- An academic interest in topics such as race, gender, and multiculturalism as they intersect with traditional academic fields.

Since Proposition 209's prohibitions do not apply to private, non-University organizations and individuals and their funds, private donor-designated financial aid funds may be used for financial aid or other educational benefits targeted to individual students on the basis of one or more of the protected characteristics, as set forth below.

- **Routine assistance** (see below) may be provided by the University to such donors facilitating the implementation of such awards. However, similar assistance must be made available and provided to *all* donors on a non-preferential basis. That is, all donors must be eligible for similar routine assistance, regardless of the characteristics of the group(s) the donor organization or individual serves. No donor should receive different or special assistance just because it facilitates financial aid based on race, sex, color, ethnicity, or national origin (see below for examples of permissible routine assistance);
- The University must not control the donor or administer the gift, fund or endowment; and
- The University must not be directly involved in selecting recipients of the financial aid.

The following examples of **routine assistance** may be given to all donors, while remaining compliant with Proposition 209:

- Providing students with information regarding privately-funded financial aid, such as posting announcements, advertising competitions in brochures, providing applications in financial aid or other administrative offices, or sending informational materials to students meeting the donor's scholarship program requirements.
- Receiving and distributing external aid funds designated for a specific student, such as receiving funds made payable to the University on behalf of an identified student and/or directly to a student, and crediting a student's account with the amount specified by the

donor, or disbursing a check or payment made out to the student after certifying that the student is enrolled.

- Assisting with processing applications, including developing application materials, distributing and mailing applications to students meeting the scholarship program requirements, or collecting and/or processing applications from students.
- Providing a prospective donor the names of eligible students, as well as other donor-designated information about the students (*e.g.*, race, color, ethnicity, national origin or sex), for the purpose of enabling the prospective donor to select recipients of scholarships/financial aid, **but only if the campus has first obtained the student's express written consent.**
- Providing de-identified (anonymous) information to a prospective donor about eligible pools of students meeting specific criteria, from which the donor will select financial aid recipients, including information about the students' race, color, ethnicity, national origin or sex, **as long as there are at least 10 students who are a match for all of the requested criteria** (*e.g.*, same gender, same race, same color, same ethnicity and/or same national origin) so that no confidential information may be tied to any particular student. "De-identified information" means more than just removing the student's name, address and phone number, etc. – information may **not** be provided if it could potentially reveal a student's identity or enable someone to tie otherwise confidential information to any particular student or students. In that instance, the student's express written consent is required before the information can be released to the prospective donor.
  - Example: Donor requests a "de-identified" list of all African-American female freshmen at CSUX with a GPA of at least 3.0 who are pursuing engineering degrees. There are only 3 students who meet all of these criteria. CSUX may not disclose any information about these 3 students unless they each have first provided express written consent. If only one provides written consent, only that student's information may be shared.
- Accepting donor-designated gifts for financial aid to gender specific athletics teams. As long as the University is providing athletics financial aid to all male and female athletes on a proportionate basis (total financial aid dollars are to be divided in proportion to the total number of men and women participating in the campus intercollegiate athletics program), then acceptance of gifts for financial aid for a particular team will be appropriate. Athletics financial aid gifts for specific teams may also help free up University funds to ensure that all athletic teams – both male and female – receive proportionate benefits and financial aid to achieve and maintain Title IX compliance.<sup>6</sup>

### Impermissible Activities

- Using state (public) funds for financial aid awards based on race, sex, color, ethnicity or national origin.<sup>7</sup>

- The following are examples of **non**-routine assistance *prohibited* by Proposition 209 when dealing with donor restricted, preferential aid:
  - Selection of individual recipients by University employees, including members of the Board of Trustees and auxiliary boards, even if based on criteria designated by the donor. Selection of students who will receive preferential aid must be made by the donor, or the donor’s designee, based on the donor’s designated preferential aid criteria.
  - Selection or determination of preferential aid criteria by University employees, including members of the Board of Trustees and auxiliary boards. Preferential aid criteria must be specified by the donor alone.
  - The University may not receive and hold preferential aid funds or gifts from donors that have yet to be awarded to specific students.

## **VII. STUDENT SUPPORT SERVICES AND RETENTION INITIATIVES**

### Permissible Activities

- Instituting retention programs targeted to students from disadvantaged backgrounds and/or financial need, as long as participation is not limited on the basis of race, sex, color, ethnicity or national origin.
- Instituting retention programs focused on the experience of students of a particular race, sex, color, ethnicity or national origin, as long as the programs are open to all students.
- Providing routine assistance to targeted retention programs run by external entities (*see* section VI, above, for what constitutes “routine assistance”).
- Establishing targeted cultural and pride centers for, *e.g.*, Chicanos/Latinos, African Americans, Asian-Pacific Islanders, and LGBTQs, as long as the centers and the programs/services they provide are open and available to all. These centers may coordinate and sponsor programs (such as “heritage month” events, discussion/support groups, residential theme floors, and graduation celebrations) that focus on specific groups, and may also provide such services as tables, copiers, advice/support, connection to mentors and clubs, etc.
- Allowing student activities to promote and host social justice activities focused on specific groups (*e.g.*, cultural competency workshops, programs on privilege, racial

bias, gender bias, etc.), as long as the programs are open to the entire campus community.

- Establishing programs like EOP to develop initiatives and/or differential retention strategies targeting specific groups based on socio-economic background.

## VIII. EXCEPTIONS TO THE GENERAL PROHIBITIONS

### A. Grants and Contracts

#### Permissible Activities

- The CSU may grant preferences to members of certain racial and/or ethnic groups under the terms of a **federally**-funded grant or contract, but only where the terms of the grant/contract **require** that we do so.
  - Subsection (e) of Proposition 209 provides:

“Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where eligibility would result in a loss of federal funds to the state.”
  - The critical question is whether the federal grant, program or contract *requires* (versus merely permits, or even encourages) preferential treatment on the basis of race, sex, color, ethnicity or national origin.
    - If it is not **required**, the CSU is prohibited from engaging in any kind of preferential treatment.
  - This includes the development of grant proposals that contemplate some form of otherwise prohibited preferential treatment. The mere fact that a federal agency accepts and funds such a proposal does **not** mean that the activity passes muster under Proposition 209.
  - This narrow exception covers only **federal** programs, not state programs or those involving other external entities.
  - Even if the above hurdles are met, the CSU must still take all reasonable steps to ensure that the preferential treatment is limited to only that preferential treatment

required under the terms of the federal program. To go farther would constitute illegal discrimination and violate Proposition 209.

Example: The Louis Stokes Alliances for Minority Participation (LSAMP) program:

“assists universities and colleges in their efforts to significantly increase the numbers of students matriculating into and successfully completing high quality degree programs in science, technology, engineering and mathematics (STEM) disciplines in order to diversify the STEM workforce. Particular emphasis is placed on transforming undergraduate STEM education through innovative, evidence-based recruitment and retention strategies, and relevant educational experiences in support of racial and ethnic groups historically underrepresented in STEM disciplines: African Americans, Hispanic Americans, American Indians, Alaska Natives, Native Hawaiians, and Native Pacific Islanders.”

[https://www.nsf.gov/funding/pgm\\_summ.jsp?pims\\_id=13646](https://www.nsf.gov/funding/pgm_summ.jsp?pims_id=13646)

At first blush, the LSAMP program appears to require that program benefits go exclusively to certain racial and ethnic groups. However, delving further into the actual program requirements makes clear that such is not the case. While participating institutions are encouraged to target these racial and ethnic groups, they are not required to do so. Indeed, at least as of several years ago, program documents contained the following language: "NSF **strongly encourages** potential awardees to permit participation by all students in LSAMP activities (emphasis added)."

As such, the LSAMP program does not fall within this narrow exception to Proposition 209, and no preferences may be granted to prospective or participating program participants on the basis of their race, sex, color, ethnicity or national origin.

### Impermissible Activities

- Once a federal grant program that requires the CSU to engage in preferential treatment ends, we may not continue to engage in any such preferential treatment, even where alternative resources are available to fund the continuation of the grant program, including private gifts.

### **B. Federal Affirmative Action Requirements**

It is important to keep in mind that federal affirmative action requirements do not obligate the CSU to take any actions that would violate Proposition 209. At the time these federal requirements were established, “affirmative action” meant taking affirmative steps to ensure non-

discrimination; it did not mean granting preferences to only certain individuals and groups on the basis of race, ethnicity or gender.

Federal Executive Order 11246, issued by President Johnson in the mid-1960s, prohibits discrimination “because of race, color, religion, sex or national origin.”<sup>8</sup> Generally speaking, Executive Order 11246 requires federal contractors, including the CSU, to employ certain procedures to analyze its workforce and evaluate its employment practices for the purpose of identifying and correcting any unlawful race-based and sex-based obstacles to equal employment opportunity. Executive Order 11246 does not require quotas or preferences, and Proposition 209 prohibits us from establishing quotas or granting preferences.<sup>9</sup>

## **IX. CAMPUS CLIMATE AND CULTURAL COMPETENCY EFFORTS**

### Permissible Activities

- Offering voluntary cultural competency training and activities to senior leadership, other MPP employees, faculty, student leaders, student group advisors, and/or other Student Affairs staff in order to increase and enhance the level of cultural competencies across the campus.
- Forming diverse search committees and ensuring they are advertising broadly to attract a diverse applicant pool. CSU may not grant preferences in employment based on race, sex, color, ethnicity or national origin, but advertising in various forums that may attract a diverse pool is legal, appropriate and a ‘best-practice’, as is ensuring a diverse search committee.
- Conducting objective student and employee climate surveys and assessing how well the campus is doing in terms of climate. Climate surveys are widely recognized as important tools for allowing community members to voice their concerns and share their experiences.
- Discussing racial, gender and sexuality issues in standing committees or diversity commissions, or in topical forums with panelists (often coordinated by faculty with academic focus on relevant areas, *e.g.*, criminal justice, etc.).
- Having Career Services assist in contacting specific groups, such as first generation, low income students. However, it would not be appropriate to offer services to or contact only particular students based on race, sex, color, ethnicity or national origin. Programs should be open to all students, and may include industry nights and employer networking, workshops and career panels, on-campus interviewing, candidate lists, etc.

<sup>1</sup> CSU Executive Order 1097, Revised June 23, 2015.

<sup>2</sup> Text of Proposition 209:

“Section 31 is added to Article I of the California Constitution as follows:

SEC. 31. (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.”

<sup>3</sup> Under proposition 209, the CSU may not grant preferential treatment to racial minorities or women even where the U.S. Constitution would permit, but not require, such preferences. As such, court decisions from other states that allow for certain forms of preferential treatment have no impact on the CSU.

<sup>4</sup> See, e.g., American Civil Rights Foundation v. Berkeley Unified School District (2009) 172 Cal.App.4<sup>th</sup> 207. Berkeley Unified School District's use of "planning areas" for school admissions was found permissible under Proposition 209, despite race being a part of the school district's analysis and despite its professed goal of promoting diversity. The school district reviewed census and other data to create "a diversity category... that measures that area's composite diversity, which is based on three factors: (1) the average household income of those living in the planning area; (2) the average education level attained by adults living in the planning area; and (3) the percentage of 'students of color' living in the planning area." The court found that since no actual attribute of any individual student was used, "any preference that is given ... is on the basis of several factors relating to the collective composition of the student's neighborhood (household income, education level and race), not the student's race." The court was clear that Proposition 209 "does not state that the state shall not consider race for any and all purposes... It does not prohibit the collection and consideration of community-wide demographic factors."

<sup>5</sup> AB540 creates an exemption from payment of non-resident tuition for certain non-resident students who have attended high school in California for three or more years and received a high school diploma or its equivalent. **This includes U.S. citizens, as well as undocumented immigrants.**

<sup>6</sup> No more than a one percent variance between men and women from actual participation numbers is acceptable.

<sup>7</sup> State/University funds may not be used for preferential aid, unless the use of such funds is necessary to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the University. *See* section VIII.A, Grants and Contracts. State/University funds includes both funds received from the state treasury **and** student tuition/fees.

<sup>8</sup> (30 Fed. Reg. 12319; 3 C.F.R. § 341), as amended by Executive Order 11375 (Fed. Reg. 14303). The OFCCP (Office of Federal Contract Compliance) has jurisdiction to oversee and ensure compliance with Executive Order 11246 and its implementing regulations. The OFCCP regulations promulgated under Section 503 of the Rehabilitation Act of 1973 (29 U.S.C. § 793; 41 CFR Part 60-741) and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (38 U.S.C. § 4212; 41 CFR Part 60-250) require similar written affirmative action programs and procedures for individuals with disabilities and Vietnam veterans. Because Proposition 209 does not prohibit the granting of preferences to individuals with disabilities or to veterans, these statutes and regulations are not implicated by Proposition 209.

<sup>9</sup> Indeed, the regulations at 41 CFR 60-2.12(e), 60-2.15 and 60-2.30 specifically prohibit discrimination and the use of goals as quotas.