

January 21, 2022

Leo Martinez, Council Chair
William Adams, Managing Director of Accreditation and Legal Education
321 N. Clark Street
Chicago, IL 60654

Via email: Fernando Mariduená (Fernando.Mariduená@americanbar.org)

Re: Comment on Proposed Revision of ABA Standard 206

Dear Chair Martinez,

On behalf of the Chairs of the ABA Coalition on Racial and Ethnic Justice, Commission on Disability Rights, Commission on Hispanic Legal Rights and Responsibilities, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, and Council for Diversity in the Educational Pipeline, we welcome the opportunity to provide our comments on the proposed revisions to Standard 206 (Diversity, Equity, and Inclusion). We acknowledge and appreciate the Council's continuing efforts to broaden the coverage of the Standard to include disability, sexual orientation, and gender identity or expression, among other groups. However, we are concerned that the proposed language fails to recognize adequately the barriers that underrepresented groups other than those related to race and ethnicity continue to face and creates a two-tier ranking among members of underrepresented groups by assigning priority status to groups related to race and ethnicity. Not only does this confer "less than" or inferior status to other underrepresented groups, but it significantly impedes law schools' ability to provide a truly inclusive and equitable environment for all.

The Standard outlines three things a law school must provide to ensure the "effective educational use of diversity," related respectively to the student body, faculty and staff, and an inclusive and equitable environment. Subsection (a)(1) requires a school to provide full access to the study of law and membership in the profession to all persons, with a particular focus on members of underrepresented groups related to race and ethnicity. Subsection (a)(2) requires a school to include members of underrepresented groups in its faculty and staff but calls for particular attention to be paid to members of groups related to race and ethnicity. Interpretation 206-2 underscores that law schools should be particularly focused on those groups that historically have been underrepresented in the legal profession because of race or ethnicity. It is not until one gets to Subsection (a)(3)—requiring law schools to provide an inclusive and equitable environment for students, faculty, and staff with respect to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status—that those members of underrepresented groups in addition to race and ethnicity are explicitly named.

The Council's explanatory statement accompanying the proposed revisions to Standard 206 and Interpretation 206-2 states that the particular focus for members of underrepresented groups

related to race and ethnicity “acknowledges the unique historical injustices and contemporary challenges faced by those groups.” (Memorandum to Interested Persons and Entities from Leo Martinez, Council Chair, and William Adams, Managing Director of Accreditation and Legal Education, December 16, 2021, at 3). We recognize and appreciate the concern of historically underrepresented racial and ethnic groups in law schools and the legal profession (and in society more generally) and have no intention of minimizing those. However, we think it important to build on that recognition and expand the focus of Subsections (a)(1) and (a)(2) to include other historically marginalized groups, whose level of representation in law schools and the profession remains highly concerning as well.

The other underrepresented groups referenced in Subsection (a)(3) have also faced unique historical injustices and contemporary challenges, but members of these groups are still not seen as important enough to warrant equal recognition. For example, Congress, the courts, and government agencies have long recognized that disabled individuals have been subjected to a history of unequal treatment and marginalization based on myths, fears, and stereotypes. Over 30 years after passage of the Americans with Disabilities Act, it is unacceptable not to view disabled people as a significantly underrepresented group. In addition, the LGBTQ+ community has endured decades of unequal treatment, including many people subjected to literal criminal prosecution simply for being a perceived member of the LGBTQ+ community. Up until the 21st century, it was a crime to engage in homosexual conduct nationally, and we have yet to pass national antidiscrimination laws like the Equality Act. We are concerned that the message being conveyed by the proposed revised Standard is that the Council does not recognize this reality. Quite simply, we do not count.

In our view, Subsections (a)(1) and (2) are insufficiently inclusive. Subsection (a)(1) makes no reference to members of underrepresented groups at all except those related to race and ethnicity. By contrast, Subsection (a)(2) references underrepresented groups, requiring schools to include members of underrepresented groups in its faculty and staff. However, it qualifies this requirement with the language “particularly those related to race and ethnicity.” We argue that this language sends a clear message to law schools that race and ethnicity should be given primary focus when it comes to their diversity efforts with respect to the student body, faculty and staff. It also sends a clear message to students, faculty and staff from underrepresented groups “other than” race and ethnicity that the schools’ commitment to diversity does not apply equally to them.

Subsections (a)(1) and (2)’s particular focus on race and ethnicity significantly impedes schools’ ability to create a truly inclusive and equitable environment for members of the other underrepresented groups referenced in Subsection (a)(3). How is such an environment attainable if a law school’s diversity efforts are focused only on certain marginalized persons to the exclusion of others? Such a focus perpetuates the continued underrepresentation of other marginalized individuals such as disabled and LGBTQ+ students, faculty, and staff, as well as failing to recognize the unique challenges faced by multiple marginalized students, faculty, and staff. It is far easier for schools to simply not admit or recruit as many people from other marginalized backgrounds (or from intersectional backgrounds)—and therefore not need to make efforts to include them—than to make meaningful change toward fully including them from the beginning in admissions, recruitment, and hiring.

Further, it is important to highlight that the changes proposed here take a momentous step backwards from the proposed revisions to Standard 206 that the Council approved for Notice and Comment at its May 13-15, 2021, meeting. In its May 25 notice and comment memorandum, the Council noted: “Based on discussions during the Fall 2020 Roundtables, *as well as recurring feedback from diversity groups at the ABA*, the proposed revisions add the groups listed in Standard 205 to Standard 206.” (emphasis added). The proposed language stated:

(a) A law school shall provide:

- (1) Full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly those related to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status; and
- (2) An environment that is inclusive and equitable with respect to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status.

Particularly noteworthy, members of all of the underrepresented groups are explicitly named in both Subsections (a)(1) and (2) in calling on law schools to provide full opportunities for the study of law and entry into the profession and an inclusive and equitable environment. Of the comments received on this proposed language, not one expressed support for the existing Standard’s emphasis on racial and ethnic groups to the exclusion of other underrepresented groups. Nor did any comment express concern about including a commitment to enhance diversity of other underrepresented groups, including disabled people and LGBTQ+ people. We find it problematic that, notwithstanding the absence of any objection to the changes in the May 25, 2021, proposal regarding expanding the reference to underrepresented groups and removing the preference for racial and ethnic group members, the Council did an about-face and decided to ignore the very feedback from the Fall Roundtables and the ABA diversity groups to which it originally sought to respond.

In conclusion all of the underrepresented groups explicitly named in Subsection (a)(3) deserve to be explicitly included in Subsections (a)(1) and (2) alongside race and ethnicity; otherwise, it undermines the fundamental fabric of DEI, which is giving *all* individuals a voice and seat at the table. Focusing primarily on race and ethnicity not only creates more division among marginalized groups, but also further entrenches institutional biases and discrimination against members of the “other” underrepresented groups, as well as multiple marginalized members.

Sincerely,

Twanda Turner-Hawkins, Chair, Coalition on Racial and Ethnic Justice

Denise R. Avant, Chair, Commission on Disability Rights

Betty Torres, Chair, Commission on Hispanic Legal Rights and Responsibilities

Michelle Behnke, Chair, Commission on Racial and Ethnic Diversity in the Profession

Hon. Benes Aldana, Chair, Commission on Sexual Orientation and Gender Identity

Hon. Maureen Mulligan, Chair, Commission on Women in the Profession

Cal Gonzales, Chair, Council for Diversity in the Educational Pipeline