



Memorandum

To: The Council

From: The Standards Committee

Date: November 4, 2021

Re: Recommendations for Approval for Notice and Comment on Standard 206 Revisions

Revisions to Standard 206 (Diversity and Inclusion) went out for Notice and Comment after the Council's May 2021 meeting. (The Standard 206 language that went out for Notice and Comment is attached as Appendix A.) In response to the comments received, the Standards Committee asked the Council at its August 2021 meeting for guidance on how to proceed with the revisions to Standard 206. We considered the Council's guidance as well as the comments received during the initial Notice and Comment period and made substantial revisions to Standard 206. The revisions to Standard 206 that we recommend for a second round of Notice and Comment are included as a redline below.

Explanation of Revisions to Standard 206

Revised Standard 206 aims to achieve the effective educational use of diversity, the compelling state interest recognized in *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas*, 570 U.S. 297 (2013) (*Fisher I*) and *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016) (*Fisher II*). Subsection (a) outlines three things a law school must provide in service of this goal, 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 but focuses particularly on underrepresented groups related to race and ethnicity. This focus acknowledges the unique historical injustices and contemporary challenges faced by those groups. Subsection (a)(2) requires a school to include members of underrepresented groups in its faculty and staff, but again requires a particular focus on underrepresented groups related to race and ethnicity. Subsection (a)(3) requires an inclusive and equitable environment for a larger list of groups.

Subsection (b) indicates that subsections (a)(1) and (2) will be enforced through analysis of data collected by the law school through the ABA Annual Questionnaire (AQ). However, the law school is required to publish the data already collected to ensure public scrutiny of its progress in meeting the Standard.

Subsection (c) focuses on the enforcement of Subsection (a)(3) by requiring an annual assessment of the inclusivity and equity of a law school's educational environment. The law school is required to provide

the results of this assessment (which could be a law school climate survey, the Law School Survey of Student Engagement (LSSSE), or similar assessment mechanism) to the faculty and to the Council upon request and is required to take concrete actions to address any deficiencies.

Several interpretations are newly added or substantially revised. In Interpretation 206-1, “underrepresented groups” and “faculty” are defined. Interpretation 206-2 further explains the concept of “effective educational use of diversity.” Interpretation 206-3 provides a non-exclusive list of concrete actions towards creating an inclusive and equitable environment. Interpretation 206-4 continues to provide that a religious school need not act inconsistently with the essential elements of its religious values and beliefs provided that its actions are protected by the United States Constitution. Interpretation 206-5 clearly states that law schools in jurisdictions prohibiting the consideration of race or ethnicity in employment and admissions are not compelled by Standard 206 to consider race and ethnicity in those decisions. Interpretation 206-6 protects academic freedom by clarifying that schools need not prohibit or censure academic discussion of ideas that may be controversial or offensive to some.

Redline of Standard 206

Standard 206. DIVERSITY, EQUITY, AND INCLUSION

~~(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.~~

(a) A law school shall ensure the effective educational use of diversity by providing:

- (1) Full access to the study of law and admission to the profession to all persons, particularly members of underrepresented groups related to race and ethnicity;
- (2) A faculty and staff that includes members of underrepresented groups, particularly those related to race and ethnicity; and
- (3) 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.

~~(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.~~

(b) A law school shall report in the Annual Questionnaire and publish in accordance with Standard 509(b) data that reflects the law school’s performance in satisfying Standard 206(a)(1)-(2).

(c) A law school shall annually assess the extent to which it has created an educational environment that is inclusive and equitable under Standard 206(a)(3). The law school shall provide the results of such annual assessment to the faculty. Upon request of the Council, a law school shall provide the results of such assessment and the concrete actions the school is taking to address any deficiencies in the educational environment as well as the actions taken to maintain an inclusive and equitable educational environment.

Interpretation 206-1

Underrepresented groups are groups related to race, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status that are underrepresented in the legal profession in the United States when compared to their representation in the general population of the United States. Faculty for purposes of Standard 206(a)(2) includes full-time and part-time tenured and tenure-track faculty, as well as contract faculty, research faculty, adjunct faculty, and any other faculty category.

Interpretation 206-1

The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 206. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 206 by means other than those prohibited by the applicable constitutional or statutory provisions.

Interpretation 206-2

To ensure the effective educational use of diversity, a law school should include among its faculty, staff, and students members of all underrepresented groups, but should be particularly focused on those groups that historically have been underrepresented in the legal profession because of race or ethnicity.

Interpretation 206-2

In addition to providing full opportunities for the study of law and the entry into the legal profession by members of underrepresented groups, the enrollment of a diverse student body promotes cross-cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different backgrounds. The forms of concrete action required by a law school to satisfy the obligations of this Standard are not specified. If consistent with applicable law, a law school may use race and ethnicity in its admissions process to promote diversity and inclusion. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students and that create a favorable environment for students from underrepresented groups.

Interpretation 206-3

Concrete actions towards creating an inclusive and equitable environment under Standard 206(a)(3) may include, but are not limited to:

- (1) Support of student affinity groups and the provision of student mentoring opportunities;
- (2) Diversity, equity, and inclusion education for faculty, staff, and students;
- (3) Provision of mentoring opportunities for junior faculty members with particular focus on promotion, tenure, and retention of faculty members from groups underrepresented in legal education;
- (4) Support of pro bono and externship opportunities that reflect a commitment to an inclusive and equitable environment; and
- (5) Continuing education for faculty members regarding the effective use of diversity in the classroom.

The determination of a law school's satisfaction of its obligations under Standard 206(c) is based on the totality of the law school's actions as well as the results achieved.

Interpretation 206-4

To the extent that Standard 206 requires a religiously affiliated law school to provide an environment that is inclusive and equitable with respect to sexual orientation and gender identity or expression, the school is not required to act inconsistently with the essential elements of its religious values and beliefs provided that its actions are protected by the United States Constitution.

Interpretation 206-5

For law schools in jurisdictions that prohibit the consideration of race and ethnicity in employment and admissions decisions, Standard 206 does not compel the consideration of race and ethnicity in such decisions.

Interpretation 206-6

Consistent with academic freedom, the requirement of creating an inclusive and equitable environment does not require law schools to censure or prohibit academic discussion of ideas that may be controversial or offensive to some students, faculty, or staff.

Redline of Standard 206

Standard 206: Diversity, ~~and~~ Inclusion, and Equity

~~(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.~~

(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.

~~(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.~~

(b) A law school shall take effective actions that, in their totality, demonstrate progress in

- (1) Diversifying the student body, faculty, and staff; and
- (2) Creating an inclusive and equitable environment for students, faculty, and staff.

Interpretation 206-1

The requirement of a constitutional provision or statute that purports to prohibit consideration of ~~gender, race, ethnicity, or national origin~~ race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status in admissions or employment decisions is not a justification for a school's non-compliance with Standard 206. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the ~~commitment~~ effective actions and progress required by Standard 206 by means other than those prohibited by the applicable constitutional or statutory provisions.

Interpretation 206-2

In addition to providing full opportunities for the study of law and the entry into the legal profession by members of underrepresented groups, the enrollment of a diverse student body has been proven to improve the quality of the educational environment of all students, and further prepares law students for competent practice by providing opportunities for cross-cultural understanding; dispelling stereotypes; and enabling students to better understand persons of different backgrounds. ~~promotes cross-cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different backgrounds.~~ The forms of concrete action required by a law school to satisfy the obligations of this Standard are not specified. If consistent with applicable law, a law school may use race and ethnicity in its admissions process to promote diversity and inclusion. The determination of a law

school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admissions process, special recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students and that create a favorable environment for students from underrepresented groups.

Interpretation 206-3

Effective actions and progress towards diversifying the student body may include, but are not limited to, the following activities:

- (1) Setting and publishing goals related to diversity and inclusion including threshold data disaggregated by race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status and tracking and reporting progress in meeting those goals over a period of years (i.e., three years);
- (2) Adopting and using pipeline programs to facilitate the recruitment, preparation, and enrollment of students from underrepresented groups;
- (3) Designing recruitment outreach for prospective students from underrepresented groups;
- (4) Initiatives designed to attract and matriculate students from underrepresented groups; and
- (5) Providing need-based or diversity scholarships to students.

The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and results achieved.

Interpretation 206-4

Effective actions and progress towards diversifying the faculty (full-time and adjunct) and staff may include, but are not limited to:

- (1) Setting and publishing goals related to diversity and inclusion including threshold data disaggregated by race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status and tracking and reporting progress in meeting those goals over a period of years (i.e., three years);
- (2) Adopting and applying criteria for selection among candidates, using rubrics, targeting pool-building efforts designed to attract diverse pools, keeping pools open until they include a diverse group of qualified candidates, using standard questions to all candidates, and providing the same information to all candidates, including a full description of the hiring process.

The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and results achieved.

Interpretation 206-5

Effective actions and progress towards creating an inclusive and equitable environment under this Standard may include, but are not limited to:

- (1) Periodic assessment of progress towards having an inclusive environment through quantitative and qualitative measures of campus climate and academic outcomes disaggregated by race, color,

ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status and reporting progress towards those goals;

- (2) The description of efforts towards inclusion and equity in outreach to potential students, faculty, and staff;
- (3) Support of affinity groups;
- (4) Diversity, equity, and inclusion training;
- (5) Provision of mentoring opportunities; and
- (6) Support of pro bono and externship opportunities that reflect a commitment to an inclusive and equitable environment.

The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and results achieved.

Interpretation 206-6

To the extent that this Standard requires a religiously affiliated law school to provide an environment that is inclusive and equitable with respect to sexual orientation and gender identity or expression, the school is not required to act inconsistently with the essential elements of its religious values and beliefs provided that its actions are protected by the United States Constitution.