C L E A

Clinical Legal Education Association

http://cleaweb.org

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Donald J. Polden, Chair
Standards Review Committee
Dean, Santa Clara Law School
Santa Clara University
500 El Camino Real
Santa Clara, CA 95053

by email and U.S. mail

Re: Standards Review Committee's January Draft of Accreditation Standard 405

Dear Dean Polden:

As the ABA Standards Review Committee continues its review of Accreditation Standard 405, the Clinical Legal Education Association (CLEA) offers the following comment on the draft recently posted for the January 8-9, 2011 meeting in San Francisco. The latest draft signals a retreat from even the flawed November draft, explicitly condoning discrimination against categories of faculty members and failing to provide true academic freedom.

During the Committee's last meeting, many members expressed concerns about proposed provisions that would sanction discrimination against faculty members based on their courses or method of instruction. The January draft not only fails to address these concerns but actually encourages unequal faculty status with the insertion of the "according to their faculty position" clause in Standard 405(d). This insertion and the addition of new Interpretation 405-4, if adopted, would tell law schools they may draw "distinctions" based solely on a faculty member's method of instruction or field of study. Thus, what has been a history of de facto discrimination against professional skills faculty would, through the actions of the ABA, become de jure discrimination. It is particularly troubling that the latest draft takes this discriminatory approach after so many Committee members expressed their opposition to such a result.

This invitation to discriminate is exacerbated by the draft's proposal to replace existing Interpretation 405-8's requirement of "reasonably similar" participation in faculty governance with the broadly defined phrase "effective

(CLEA is the nation's largest association of law teachers, representing approximately 800 dues-paying faculty at over 160 U.S. law schools. CLEA is committed to legal education that trains law students to be competent, ethical practitioners and to promoting access to legal representation. Its membership consists of law professors who teach students in role as lawyers and who devote their energy and attention to identifying, teaching, and assessing proficiency in the skills and values essential to lawyering.)

participation." "Effective participation" is defined in proposed Interpretation 405-5 as simply requiring "decision making responsibility in a faculty member's area of academic responsibility for law school curriculum planning, strategic or institutional planning and hiring and retention." Clinical faculty may thus be restricted to participation in matters of curriculum, mission, or planning that affect only law clinics, rather than the law school as a whole. While some university policies may preclude non-tenure track or non-tenured faculty from some hiring or promotion decisions, there is no similar justification for limiting their participation in decisions about the law school's curriculum and mission.

The January draft's marginalization of some full-time law faculty is further demonstrated by the insertion of the phrase "protects academic freedom involving the faculty or a subset thereof" at the end of proposed Interpretation 405-2. This apparently would permit a school to meet the standard for protecting the faculty's academic freedom by applying the AAUP principles on freedom and tenure to only a "subset" of the faculty. As the May 2008 report of the ABA's Special Committee on Security of Position noted, nothing in the AAUP's principles on academic freedom and tenure "says or implies that it might be permissible to discriminate among fields of study by allocating more academic freedom to some and less to others."

Finally, while the title of this draft asserts that it provides "security of position," it in fact does not. Proposed Interpretation 405-1, by use of the term "should" rather than the "shall" in present Interpretation 405-6, and by no longer requiring that termination during a contract period be "for cause," allows a school to rely primarily, or even exclusively, on "at-will" contracts for full-time faculty. As pointed out by then chair of the Council of the Section of Legal Education and Admission to the Bar at this Committee's July meeting, merely providing factors that "should" be considered in assessing whether a school has shown compliance creates unenforceable standards.

In conclusion, the latest draft of Standard 405 is a step backward as it countenances discrimination against faculty members based on their subjects and teaching methods and fails to provide the academic freedom that is only effectively achieved by true security of position. The Committee should respect the Council's longstanding commitment to strengthening legal education by insisting that law schools provide professional skills faculty with a meaningful role in law school governance and real academic freedom through a form of job security at least "reasonably similar" to that held by tenured "doctrinal" faculty.

We ask that a copy of this letter be promptly distributed to all other members of the Committee and included in the materials provided to them for the January meeting.

Sincerely,

Robert R. Kuehn, President

cc: Hulett H. Askew, Consultant on Legal Education (by email)
Charlotte Stretch, Assistant Consultant (by email)