THE EQUAL PROTECTION PROJECT
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September 30, 2024

Via Email (NoticeandComment@americanbar.org)

The American Bar Association
Attn. David A. Brennen, Council Chair

Re: Response to ABA Standards – Matters for Notice and Comment – Standard 206

Dear Chair Brennen:

I am a Clinical Professor of Law at Cornell Law School and Director of the Cornell Securities Law Clinic, which I founded in 2008.[1] I am also the founder of The Equal Protection Project (EqualProtect.org) of the Legal Insurrection Foundation, a non-profit entity that, among other things, seeks to ensure equal protection under the law and non-discrimination by the government, and that opposes racial discrimination in any form.

I submit this comment in opposition to certain aspects of the ABA proposed modification to law school accreditation Standard 206 (the "proposed revision").

I commend the Council for taking a fresh look at Standard 206 following the United States Supreme Court's landmark *Students for Fair Admissions*[2] (*SFFA*) decision and deciding

[1] For identification only, this comment is submitted in my individual capacity.
[2] *Students for Fair Admissions v. Pres. & Fellows of Harvard College*, 600 U.S. 181 (2023).

that "revisions to Standard 206 were needed."[3] In addition, the Council's decision to propose the Standards Committee's second proposal to Standard 206, rather than the now-discarded first proposal, is well taken, given the first proposal's suggested emphasis on racial "diversity" and its suggestion that law schools make "use [of] race and ethnicity in its admissions process to promote diversity and inclusion."[4]

I do still object, however, to the proposed revision to Standard 206. The proposed new standard – now renamed "Access to Legal Education and the Profession" – purports to eliminate any race-based quotas or other means of unlawfully discriminating against students of any race or national origin, but it contains qualifiers to otherwise unobjectionable policy statements that undermine its stated intention to emphasize "access" for all students to law school and the justice system.

Objections to the Proposed Revision to Standard 206

Under the proposed revision, revised Standard 206, now entitled "Access to Legal Education and the Profession," states:

> (a) For purposes of ensuring the legitimacy of the justice system, a law school shall demonstrate by concrete actions a commitment to access to the study of law and entry into the legal profession for all persons including those with identities that historically have been disadvantaged or excluded from the legal profession.
>
> (b) A law school shall demonstrate by concrete actions a commitment to creating and maintaining a supportive learning environment for all students, in part by providing access to faculty and staff positions for all persons, including those with identities that historically have been disadvantaged or excluded from the legal profession.

Revised Interpretation 206-1 states:

> The commitment to providing access to the study of law and entry into the profession typically includes:
>
> 1) admissions policies, processes, and practices aimed at evaluating each applicants' potential holistically, including consideration of the applicant's individual experiences and challenges and the contribution that the applicant is likely to make to the legal profession such as making affordable legal services available to all people;
> 2) recruitment efforts targeted at groups that have been disadvantaged in or excluded from the legal profession,

[3] American Bar Association, Council of the Section of Legal Education and Admissions to the Bar (the "Council"), Matters for Notice and Comment: Standard 206, Aug. 28, 2024.
[4] *Id.* (First Proposal).

> 3) programs aimed at meeting the academic and financial needs of all students; and
> 4) efforts aimed at creating a supportive learning environment for all students in the law school.

Revised Interpretation 206-2 states:

> Compliance with Standard 206(b) does not require a law school to take race or any other identity characteristic into account in making an individual employment decision.

Revised Interpretation 206-3 states:

> A supportive learning environment is one that promotes professionalism, mutual respect, and belonging for everyone in the law school community.

The proposed revisions are not wholly objectionable. The change in Standard 206's proposed name from "Diversity and Inclusion" to "Access to Legal Education and the Profession" is a step in the right direction. And the elimination of the use of "diversity" in the text of the Standard and its Interpretations, and of any requirement to ensure racially diverse law school student populations is in congruence with *SFFA*, which held that "[e]liminating racial discrimination means eliminating all of it."[5] Best of all, Interpretation 206-1, sections three and four state that "[t]he commitment to providing access to the study of law and entry into the profession typically includes (3) programs aimed at meeting the academic and financial needs of all students; and (4) efforts aimed at creating a supportive learning environment for all students in the law school." These interpretations are entirely appropriate, emphasizing as they do the needs of ***all*** law students. Furthermore, Interpretation 206-2 properly states, again emphasizing the needs of all law students, that "[c]ompliance with Standard 206(b) does not require a law school to take race or any other identity characteristic into account in making an individual employment decision," and Interpretation 206-3 properly states that "[a] supportive learning environment is one that promotes professionalism, mutual respect, and belonging for everyone in the law school community."

I have no objections to these portions of the proposed revision addressed above.

My objections center on the qualifying language present in Standard 206 Sections (a) and (b). For example, Section (a) states: "For purposes of ensuring the legitimacy of the justice system, a law school shall demonstrate by concrete actions a commitment to access to the study of law and entry into the legal profession for all persons ***including those with identities that historically have been disadvantaged or excluded from the legal profession***." (qualifying language emphasized here). Had the Standard 206 Section (a) simply required law schools to "demonstrate by concrete actions a commitment to access to the study of law and entry into the

[5] 600 U.S. at 206.

legal profession for all persons," full stop, I would have no objection and would support that statement. But by adding the "***including those with identities that historically have been disadvantaged or excluded from the legal profession"*** language, the ABA seems to be using a "dog whistle" to signal to law schools that race and other identities ***should still be used*** to differentiate among law students and discriminate against those whose racial and other identities ***have not*** historically been disadvantaged or excluded from the legal profession. Such an intention would not be congruent with *SFFA* because it would involve discrimination by subterfuge rather than faithfully hewing to the text and purpose of the *SFFA* holding.

Standard 206 Section (b) fares no better. Again, had Section (b) simply stated that "[a] law school shall demonstrate by concrete actions a commitment to creating and maintaining a supportive learning environment for all students, in part by providing access to faculty and staff positions for all persons," full stop, I would have no objections. But by adding the "***including those with identities that historically have been disadvantaged or excluded from the legal profession***" language, the ABA undermines its stated intentions by way of, as explained above, an objectionable "dog whistle."

Standard 206 Interpretation 206-1(2) is most objectionable, stating as it does that "[t]he commitment to providing access to the study of law and entry into the profession typically includes recruitment efforts targeted at groups that have been disadvantaged in or excluded from the legal profession." This interpretation seems to suggest that law schools ***should not*** target recruiting efforts at the general law school candidate population and encourages law schools to target recruiting efforts at racial and other identities, a suggestion contrary to *SFFA.*

The language addressed above seriously undermines the attempt by the Council to comply with the requirements of *SFFA*.

A Simple Solution to the Proposed Revision to Standard 206

The solution to the Proposed Revision is simple: Strike the qualifying language addressed above, e.g. reference to "those with identities that historically have been disadvantaged or excluded from the legal profession" in Standard 206 Sections (a) and (b), and strike entirely Interpretation 206-1 Section (2), which states that a law school's commitment to providing access to the study of law and entry into the profession typically includes "recruitment efforts targeted at groups that have been disadvantaged in or excluded from the legal profession."

Such a solution, if effected, would result in a change to Standard 206 that would fulfill the goal of racial neutrality embodied in *SFFA*, and would have my full support. I strongly encourage the Council to make these changes before implementation of revised Standard 206.

Conclusion

For the reasons set forth above, I urge the Council to modify its proposal as suggested above and make no attempt to conjure racial diversity in a manner that undermines this largely positive effort, or that fails to be faithful to *SFFA*.

Respectfully submitted,

/William A. Jacobson/

William A. Jacobson, Esq.