



UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425

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March 8, 2006

VIA FACSIMILE AND U.S. MAIL

The Honorable Sally Stroup
Assistant Secretary for Postsecondary Education
c/o Ms. Robin Greathouse
Accreditation and State Liaison
United States Department of Education
Room 7105, MS 8509
Washington, D.C. 20006

Re: Recognition of Accrediting Agencies, State Agencies for the Approval of Public Postsecondary Vocational Education, and State Agencies for the Approval of Nurse Education; American Bar Association, Council of the Section of Legal Education and Admissions of the Bar

Dear Assistant Secretary Stroup:

As Vice Chair of the U.S. Commission on Civil Rights, writing on my own behalf, I would like to express my concern regarding the petition for renewal of recognition (the "Petition") filed by the American Bar Association (the "ABA"), Council of the Section of Legal Education and Admissions of the Bar (the "Council"), with the U.S. Department of Education (the "Department") with respect to accreditation throughout the United States of programs in legal education that lead to the first professional degree in law, as well as freestanding law schools offering such programs. For the reasons set forth below, I urge you either to deny the Petition or to grant it only upon the condition that the Council disavow its new Standard 211 (Equal Opportunity and Diversity) and its accompanying interpretations.

The U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an agency of the federal government authorized to investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices; to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; to appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; to serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin; to submit reports, findings, and recommendations to the President and Congress; and to issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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ABA Standard 211

On February 11, 2006, the Council voted in favor of Standard 211, and its accompanying Interpretation 211-1, which will be reviewed by the ABA House of Delegates at its August 3-8, 2006, meeting. These provisions, when read together, appear to require that any law school that seeks ABA accreditation engage in racial preferences in hiring or admissions, regardless of any contrary federal, state, or law prohibiting such policies. Specifically, Standard 211 provides in full as follows:

Standard 211. Equal Opportunity and Diversity.

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

Although equal opportunity for members of underrepresented groups is a laudable goal, I am concerned that Standard 211's requirement of "concrete action" to achieve gender, racial and ethnic diversity may be tantamount to a requirement of unlawful quotas and preferences when read together with Interpretation 211-1, which provides as follows:

Interpretation 211-1:

The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211.

Standard 211, read in conjunction with this interpretation, is problematic for several reasons:

First, Standard 211 appears to require candidates for accreditation or re-accreditation to disregard federal constitutional requirements that are inconsistent with Standard 211. This could, for example, require institutions to disregard the protections that post-secondary school students have under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The U.S. Department of Education lacks the authority to require its grantees, either directly or indirectly, to undertake actions that would violate federal constitutional requirements. Moreover, any action by the U.S. Department of Education, directly or indirectly, that has the foreseeable affect of causing its grantees to violate students' constitutional protections, would be tantamount to a constitutional violation on the part of the Department and its officers.

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Second, Standard 211, appears to require candidates for accreditation or re-accreditation to disregard any federal, state, or local civil rights law or policy that conflicts with the institution's efforts to comply with Standard 211, including the regulations and guidance of the U.S. Department of Education and its Office for Civil Rights. Among the ramifications of this provision is the following. Under this standard, the ABA could force Department grantees to choose between, on the one hand, compliance with Standard 211 (necessary for accreditation) or, on the other hand, compliance with OCR regulations (necessary for the receipt of federal funds). I would urge the Department to give serious thought before accepting a petition which may be inconsistent with the Department's own civil rights regulations and which could undermine compliance with the Department's civil rights laws and policies.

Third, Interpretation 211-1 tacitly suggests that Standard 211 may conflict with existing non-discrimination law in at least some states, if not also the federal government, such as prohibitions on the use of racial or ethnic preferences in post-secondary admissions in California or Florida. In other words, Standard 211 implicitly requires the use of racial or ethnic preferences in admissions, without explicitly admitting it. The ramifications of this point include the following. If the Department should grant the ABA's Petition, it will force public law schools in some states, such as California and Florida, to choose between compliance with state constitutional requirements and ABA accreditation for their law schools. Since public institutions in these states are legally required to comply with their states' constitutions, this requirement could lead to loss of accreditation for all public law schools in these states.

I am also concerned that Standard 211 may also represent an effort to pressure institutions to adopt unlawful policies with respect to financial aid. The basis for this concern is a change in language between the Council's prior Standard 211 and the new Standard 211. The prior Standard 211 provides in full as follows:

Standard 211. Equal Opportunity Effort.

Consistent with sound legal education policy and the Standards, a law school shall demonstrate or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms. This commitment typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and a program that assists in meeting the unusual financial needs of many of these students, but a law school is not obligated to apply standards for the award of financial assistance different from those applied to other students.

One critical deviation from the prior standard is the Council's decision, as shown by comparing the language above the new Standard 211, to delete the following phrase: "a law school is not obligated to apply standards for the award of financial assistance different from those applied

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to other students.” The most obvious inference from this change is that the Council’s new standards will in fact obligate law schools to apply different standards for the award of financial assistance to students on the basis of race or ethnicity – and to do so regardless of whether this might violate state or federal constitutional or statutory antidiscrimination law. I would also observe that this change is accompanied by a change in the title of the standard – from “Equal Opportunity Effort” to “Equal Opportunity and Diversity” – which suggests that the Council now is placing its focus squarely on “results” rather than “effort.” This is confirmed by Interpretation 2113, which provides that 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.” In other words, the new standard would appear to require, not just efforts such increased recruitment and outreach, but actual results, such as the achievement of quotas both in financial aid and in admissions, and to explicitly require institutions to disregard constitutional and civil rights protections that may be violated by their approach.

In sum, the new ABA Standard 211, read in conjunction with ABA Interpretation 211-1, appears to represent an effort to pressure law schools to adopt racial and ethnic quotas and set-asides that may violate federal or state constitutions and civil rights laws. It would be inappropriate for the Department to grant the ABA Petition, to the extent that such action could implicate the Department in the violation of federal and state law. As a matter of policy, it would also be inappropriate for the Department to participate in conduct that would have the affect of undermining students’ civil rights protections. For these reasons, we would urge you either to deny the Petition or to grant it only upon the condition that the Council disavow Standard 211 and its accompanying interpretations.

This letter is sent on my own behalf and may not represent the views of all members of the U.S. Commission on Civil Rights.

Sincerely,



ABIGAIL THERNSTROM
Vice Chair