

C L E A
Clinical Legal Education Association
<http://cleaweb.org>

July 8, 2013

Jeffrey E. Lewis
Chair, Standards Review Committee
Dean Emeritus and Professor
Saint Louis University School of Law
3700 Lindell Blvd.
St. Louis, MO 63108
By email to lewisje@slu.edu

Dear Dean Lewis:

As the Standards Review Committee (Committee) continues its review of Accreditation Standard 405, the Clinical Legal Education Association (CLEA), on behalf of its over 1,000 members, offers this comment on the drafts posted for the July 19-20, 2013 meeting to highlight two important issues that deserve this Committee's attention.

- First, the Committee needs to fix language in Interpretation 405-6 that has created an unintended loophole that allows one-year contracts to count as “a form of security of position reasonably similar to tenure.”
- Second, the Committee needs to strengthen the language in Interpretation 405-8 defining “reasonably similar” participation in faculty governance to ensure that *at a minimum* clinical and legal writing professors have a voice in hiring and promotion decisions within their own field of study.

CLEA's January 11, 2013 letter on Accreditation Standard 405 describes some of the legislative history of the current standard, explaining how the Council has repeatedly turned back attempts to weaken the security of position of clinical faculty.¹ CLEA's June 24, 2013 statement describes the pressing need to continue to protect the security of position of clinical professors in these times. This comment focuses more narrowly on two specific areas where language in the Interpretations following Standard 405 needs clarification.

The Need to Fix the Unintended Loophole in Interpretation 405-6

To understand the present significance of the terms used in Standard 405(c) and its Interpretations, it is important to understand the reasons why the Council has decided over the past two decades to focus special attention on the status of full-time clinical faculty. Since 1984, Interpretation 405-6 had stated that the requirement in Standard 405(c) that full-time clinical faculty be afforded a form of security of position reasonably similar to tenure includes “a

¹ A full historical account can be found in Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008).

program of renewable long-term contracts.” During the Committee’s review of Standard 405 in 2004, it reviewed the practice of the Accreditation Committee to approve law schools with three-year contracts and no presumption of renewal. The Standards Review Committee determined that such contracts were “inconsistent with the plain meaning of that Standard [405(c)]” and recommended that Interpretation 405(c) be changed to specify that long-term contracts must be at least five years in length and renewable to satisfy the “reasonably similar to tenure” requirement for employment relationships with clinical faculty.

The Council adopted the recommendation of Standards Review to define “long-term contract” as at least five years in length. It also asked Standards Review to consider the meaning of “renewable” in Interpretation 405-6 because there was “no agreement about whether ‘renewable’ means ‘presumptively renewable,’ so that a person holding such a contract could rely on long-term and continuing employment so long as the person’s work performance was satisfactory, or ‘capable of being renewed,’ meaning that the contract is not subject to a term limit or cap on the length of time that the person could be in such a position.” The Standards Review Committee then considered whether a renewable long-term contract carries with it a presumption of renewal and ultimately rejected that definition. However, the Council again disagreed with the Committee and rejected its proposal, deciding that it was important that clinical faculty contracts be presumptively renewable. So, in 2005, the Council added the current language to Interpretation 405-6: “For the purposes of this Interpretation, ‘long-term contract’ means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom.”

Unfortunately, following a well-publicized showdown with one prominent school, the Accreditation Committee interpreted the new language “or other arrangement sufficient to ensure academic freedom” to permit one-year at-will contracts for clinical faculty as long as the school has some process in place to protect academic freedom. Because of the ambiguity and application of that phrase, the Accreditation Committee and Council requested Standards Review review the Interpretation. In 2007, the Committee unanimously proposed a revision of Interpretation 405-6 as follows:

For the purposes of this Interpretation, “long-term contract” means a contract for a term of at least a five-years ~~contract~~ that is presumptively renewable or includes other provisions ~~arrangement~~ sufficient to ensure academic freedom.

The Committee explained that the proposed amendment was drafted to clarify that “a one year contract plus a policy on academic freedom is not sufficient under this Standard.”²

The Council postponed acting on the Committee’s recommendation pending its receipt of a report from a specially appointed ABA task force, which it received back in 2008. Yet, the task force took no position on this question and the Council has not been again presented with the Standards Review’s proposal to fix the Interpretation. As a result, the Accreditation Committee continues to adhere to its position that at-will contracts can be “a form of security of position reasonably similar to tenure.”

² ABA Standards Review Comm., *Draft Revisions to Standards for Approval of Law Schools and Explanation of Amended Interpretation 405-6* (2007).

To finally fix this twisted application of the phrase “long-term contract,” CLEA requests that the Committee again adopt its unanimous language from 2007 and propose that Interpretation 405-6 be amended to define a “long-term contract” as “a contract for a term of at least five-years that is presumptively renewable or includes other provisions sufficient to ensure academic freedom.”

The Need to Strengthen Interpretation 405-8 to Ensure that Full-Time Clinical Faculty Are Allowed to Participate in Law School Governance

The present language in Interpretation 405-8, as applied by law schools and interpreted by the Accreditation Committee, fails to provide clinical faculty with meaningful participation in law school governance that is reasonably similar to that provided doctrinal faculty. Although the current interpretation says that a school “shall afford full-time clinical faculty participation in law school governance “in a manner reasonably similar to other full-time [doctrinal] faculty members,” as CLEA’s June 24, 2013 Comment documents, participation in governance is sharply restricted for most full-time clinical faculty.

Interpretation 405-8 was originally adopted by the Council in 1988 after receiving reports that law school were denying professional skills faculty opportunities to participate in governance. The Council explained that the interpretation—which, when originally implemented in 1988, required only “an opportunity to participate”—was adopted to make it clear that the “perquisites” language in Standard 405(c) included participation in governance. Because of continuing concerns about the level of participation afforded clinical faculty, in 2005 the Council clarified the phrase “an opportunity to participate in law school governance” to read “participation in faculty meetings, committees, and other aspects of law school governance.”

As CLEA’s June 24, 2013 Comment shows, in spite of this change, clinical faculty at many schools are not permitted to participate in governance in a manner reasonably similar to that afforded doctrinal faculty. According to a 2010-11 study of over 300 clinical faculty by the Center for the Study of Applied Legal Education (CSALE), only 37% of full-time clinical faculty are allowed to vote on all faculty matters (compared to universal participation for doctrinal faculty) and 32% cannot vote on any matter.³ Disturbingly, 12% of full-time clinical faculty are not permitted to attend faculty meetings. And, perhaps most distressing of all, some clinical faculty are not even allowed to serve on committees that address the hiring and promotion of other clinical faculty.⁴

There clearly is a need for more precise language when such large numbers of clinical faculty are denied basic governance rights, including participation in the hiring and promotion of fellow clinical faculty. Given the current discussion of the need to integrate theory and practice in legal education, it is so important to ensure that full-time clinical faculty have a real voice in the conversation. They must be provided participation rights in all matters of curriculum, academic policy, and personnel that are substantially similar to that provided doctrinal faculty.

³ CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION: THE 2010-11 SURVEY OF APPLIED LEGAL EDUCATION 27 (2011).

⁴ *Id.* at 28-29.

CLEA, therefore, proposes that Interpretation 405-8, as well as any alternatives to current Standard 405 proposed by the Committee, be amended to read as follows:

A law school shall afford to full-time clinical faculty members participation in faculty meetings, committees, and other aspects of law school governance involving academic matters such as mission, curriculum, academic standards, methods of instruction, and faculty appointments and promotions of other clinical faculty in a manner ~~reasonably~~ substantially similar to other full-time faculty members. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).

By substituting the word “substantially” for the current word “reasonably” and specifying the aspects of governance that clinic faculty must be allowed to participate in, this change will make clear that, unlike the present situation at many schools, clinical faculty cannot be excluded from faculty decisions dealing with the curriculum and academic standards and must be provided a voice in faculty appointments and promotions of clinical faculty.

Thank you,

A handwritten signature in cursive script that reads "Katherine Kruse".

Katherine Kruse
CLEA President