



## **Managing Director’s Guidance Memo**

### **Standard 208 September 2024**

#### **Standard 208. ACADEMIC FREEDOM AND FREEDOM OF EXPRESSION**

- (a) A law school shall adopt, publish, and adhere to written policies that protect academic freedom. A law school’s academic freedom policies shall:
  - (1) Apply to all full and part-time faculty, as well as to all others teaching in law school courses;
  - (2) Apply to conducting research, publishing scholarship, engaging in law school governance, participating in law related public service activities, curating library collections and providing information services, and exercising teaching responsibilities, including those related to client representation in clinical programs; and
  - (3) Afford due process, such as notice, hearing, and appeal rights, to assess any claim of a violation of the academic freedom policies.
- (b) A law school shall adopt, publish, and adhere to written policies that encourage and support the free expression of ideas. A law school’s free expression policies must:
  - (1) Protect the rights of faculty, students, and staff to communicate ideas that may be controversial or unpopular, including through robust debate, demonstrations, or protests; and
  - (2) Proscribe disruptive conduct that hinders free expression by preventing or substantially interfering with the carrying out of law school functions or approved activities, such as classes, meetings, library services, interviews, ceremonies, and public events;
- (c) Consistent with this Standard, a law school may:
  - (1) Restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, or that unjustifiably invades substantial privacy or confidentiality interests.
  - (2) Reasonably regulate the time, place, and manner of expression.

- (3) Adopt policies on academic freedom and freedom of expression that reflect the law school’s mission, including a religious mission, to the extent such policies are protected by the First Amendment of the United States Constitution and are clearly disclosed in writing to all faculty, students, and staff prior to their affiliation with the law school.

***Interpretation 208-1***

*Standard 208 applies to both public and private law schools.*

***Interpretation 208-2***

*A law school may, when appropriate, differentiate among students, faculty, and staff in its policies on freedom of expression.*

***Interpretation 208-3***

*Standard 208(a) does not preclude a law school from identifying the courses that will be taught, requiring courses to cover particular content, or requiring faculty, students, or staff to clarify in appropriate circumstances that their views are not statements by or on behalf of the law school.*

***Interpretation 208-4***

*This Standard does not prevent a law school from applying disciplinary action for conduct identified in Standard 208(b)(2).*

***Interpretation 208-5***

*Subsection (c) recognizes that law schools may restrict speech consistent with the First Amendment of the United States Constitution.*

***Interpretation 208-6***

*Effective legal education and the development of the law require the free, robust, and uninhibited sharing of ideas reflecting a wide range of viewpoints. Becoming an effective advocate or counselor requires learning how to conduct candid and civil discourse in respectful disagreement with others while advancing reasoned and evidence-based arguments. Concerns about civility and mutual respect, however, do not justify barring discussion of ideas because they are controversial or even offensive or disagreeable to some.*

**Background**

This memorandum provides guidance on the policies required by **Standard 208: Academic Freedom and Freedom of Expression**. Standard 208 is a new Standard; it went into effect in February 2024.

Standard 208 was created to strengthen academic freedom and freedom of expression protections, as Standard 405(b) required a law school only *to have* “an established and announced policy with respect to academic freedom” and did not specifically require that a law school *adhere to* its policy on academic freedom. The Council believes that the development of the law and effective legal education require free and robust inquiry, exposition, and exchange of ideas and states this conviction in Interpretation 208-6 where it also explains that “becoming an effective advocate or counselor requires learning how to conduct candid and civil discourse in respectful disagreement with others while advancing reasoned and evidence-based arguments.”

Specifically, Standard 208 requires a law school to adopt, publish, and adhere to written policies that:

- protect academic freedom; and
- encourage and support the free expression of ideas.

### **Guidance on Subsection (a) – Academic Freedom**

Subsection (a) describes the policies that a law school must adopt to protect academic freedom. It is not designed to include a comprehensive definition of academic freedom or to prescribe the exact policies a law school must adopt.

Subsection (a) describes certain elements that a law school's policies must include. Law schools have substantial discretion to shape their own policies, so long as they contain these core elements. The law school's policies can be expressed in University policies, law school policies, or a combination of both so long as they include all these core elements and the law school adopts, publishes, and adheres to those policies.

The required elements include:

- The policies must apply to all individuals teaching in law school courses, regardless of faculty status. This means that the academic freedom policy must apply to adjunct as well as full-time faculty teaching in all areas of the law school (e.g., doctrinal, clinical, skills, legal writing, academic success). They also must apply to anyone, including a person who does not have faculty status, who engages in a covered activity while they are engaging in that covered activity (e.g., librarians involved in collections activity or providing information services to faculty or students, guest lecturers or speakers who teach a single class session or portion of a class session).
- The policies must cover all activities described in Subsection (a)(2). As provided in Subsection (c) and discussed in Interpretation 208-3, the law school can still impose appropriate restrictions on protected activities, such as a requirement that the individuals engaging in those actions clarify that they are not speaking or acting on behalf of the law school, that a particular course must cover certain content or develop particular skills, or that speech unrelated to the course is not protected. For example, a law school may prescribe that a clinical course designed to teach litigation skills should not take clients whose matters do not involve litigation. Also, the law school administration can determine the time and location of courses and exams, and the requirements of syllabi and learning outcomes, as well as the modality of the course (e.g., in-person, on-line, or hybrid).
- The policies must afford due process to adjudicate any claimed violation. The process that is due may vary with respect to the severity of the alleged violation and the discipline imposed, the status of the speaker, and other factors reflected in the policies. With respect to significant adverse employment decisions (such as termination of employment or denial of tenure) imposed as a sanction on a full-time faculty member for conduct that the faculty member alleges is protected by academic freedom, the Council will likely conclude that the process shall include, at a minimum, appropriate notice affording the faculty member the opportunity and adequate time to prepare a defense, a hearing, and the right to appeal the decision to an appropriate body (or authority such as a University administrator). Lesser sanctions or adverse actions against non-faculty members (such as guest speakers or teaching assistants) will likely involve significantly less process (e.g., appeal to a law school or University administrator with final authority).

In drafting this Standard, the Council considered traditional statements on the scope of academic freedom, such as the American Association of University Professors' 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments (the "1940 Statement"), *available at* <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>. This Statement (or a similar statement) may guide law schools in building their own policies but is not necessary for compliance with the Standard.

### **Guidance on Subsection (b) – Freedom of Expression**

Subsection (b) describes the policies that the law school must adopt to encourage and support the free expression of ideas. Subsection (b) is not designed to include a comprehensive definition of free expression or to prescribe the exact policies a law school must adopt. In determining whether a law school's policies are in compliance with Standard 208(b) and (c), the Council may consider traditional statements on the scope of freedom of expression in the 1974 Report of the Committee on Freedom of Expression at Yale (the "Woodward Report"), *available at* <https://yalecollege.yale.edu/get-know-yale-college/office-dean/reports/report-committee-freedom-expression-yale>, or the 2015 Report of the Committee on Freedom of Expression at the University of Chicago (the "Chicago Statement"), *available at* <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>. These documents may guide law schools in building their own policies, but are not necessary for compliance with the Standard.

Subsection (b) describes elements that a law school's policies on freedom of expression must include. Law schools have substantial discretion to shape their policies, so long as they comply with these elements. The required elements include:

- The policies must ensure that faculty, students, and staff are able to communicate ideas that may be controversial or unpopular. Such policies may include programs to educate the community about the importance and contours of free speech, designation of appropriate channels and means to engage in protest activities, and other measures to ensure that the administration is actively protecting free expression on campus. *See Woodward, supra.*
- The policies must proscribe conduct that interferes with or disrupts law school functions or approved activities. The policies can be stated generally or specifically. For example, the policies may prohibit physical coercion or intimidation, threats of violence, and other disruptive conduct as a means of communicating ideas that would prevent reasoned debate. *See Woodward, supra.* As clarified in Interpretation 208-5, a law school's policies to prevent disruptive conduct may include appropriate disciplinary action against those who disrupt the speech of others in violation of the limits established by the law school for protests of such speech. Those policies may be contained in documents, including employee disciplinary policies/procedures, faculty handbooks or bylaws, or student conduct or disciplinary codes applicable to the law school or university community; and the academic freedom policies can reference these sources. Consistent with the requirements of Subsection (b)(1), the law school's policies to prevent disruptive conduct likely should include policies that designate appropriate channels and means to protest offensive ideas and speakers, in place of disruptive conduct.

The policies prescribed in Subsection (b) also must protect the right to free expression of speakers invited by the law school or by student groups, even if the invited speaker's ideas are controversial, offensive, or objectionable. At the same time, the law school may impose appropriate non-content-based requirements

as a prerequisite for the presentation of any such speaker. For example, the law school may provide that only registered student organizations may extend invitations to outside speakers, and that these student organizations may host such a speaker only after taking appropriate administrative steps, including advance notice of the invitation to the law school administration, limiting access to law school community members, or other actions to protect the safety and security of the law school community. Through implementation of its policies, the law school need not grant a platform for speech to any individual from outside the law school community who desires one, nor is it required to allow any individual or ad hoc group of students or staff to invite a speaker to campus. The law school also remains free to attempt to persuade any member(s) of the law school community not to invite a speaker to campus where the speaker would likely cause disruption or pose a safety or security risk.

### **Guidance on Subsection (c) – The Law School’s Authority to Regulate Speech**

The Council recognizes that the Standards it has prescribed for academic freedom and freedom of expression may involve discretion and interpretation of unresolved areas of the law. Subsection (c) seeks to address certain of these areas and to confirm the law school’s substantial discretion to regulate or restrict academic freedom or expression within them. As provided in Interpretation 208-5, Subsection (c) will be interpreted consistent with the First Amendment of the U.S. Constitution. In areas where First Amendment law is unclear or debatable, the Council will likely find any policy arguably consistent with First Amendment doctrine to be compliant, unless and until the law school’s policy (or one substantially similar to it) has been found inconsistent with the First Amendment in a judicial proceeding following the exhaustion of any available appeals. To the extent that this occurs, the law school will be expected to change its policy to be consistent with the First Amendment. This approach gives schools the maximum flexibility to adopt and adhere to policies that they find appropriate, whether articulated in a general or more detailed manner, so long as they comply with applicable constitutional law.

In particular, consistent with the First Amendment, the law school may:

- Restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise not legally protected. The Council is aware that many of the categories of expression that may be regulated under this provision are vague, and that situations may arise where it is unclear whether particular speech falls into one of these categories. In such a situation, the Council will not second-guess the reasonable determination of the law school, so long as the law school has adopted and is applying its policies in compliance with Standard 208.
- Reasonably regulate the time, place, and manner of expression. Consistent with First Amendment doctrine, such restrictions must be content neutral.
- Adopt policies on academic freedom and freedom of expression that reflect the law school’s mission, including a religious mission, to the extent such policies are protected by the First Amendment of the U.S. Constitution and are clearly disclosed in writing to all faculty, students, and staff prior to their affiliation with the law school. This provision tracks the U.S. Department of Education’s requirement that an accrediting agency “must consistently apply and enforce standards that respect the stated mission of the institution, including religious mission.” 34 C.F.R. § 602.18(a).

The law school also may need to apply these policies consistent with other legal obligations and will be given considerable deference by the Council in exercising this discretion.

### **Enforcement**

When reviewing a law school's policies adopted under Standard 208, usually after a law school's Site Visit, the Council will review whether the law school has adopted and published the required policies and whether it adheres to them (or has a method of ensuring adherence). If the facts in the law school's Site Report do not indicate adherence or adherence is questionable, the Council requires the law school to submit additional information under Rule 11(a)(2)-(4) so that it can conduct further review and take action as appropriate after that review.

The Council also expects that the Managing Director's Office might receive complaints or other information about a law school's alleged non-compliance with Standard 208 related to a particular incident or set of incidents. Such complaints usually allege facts involving actions by a law school that are alleged to violate these policies. Consistent with its practice related to enforcement of other Standards, the Managing Director's Office notes the facts that led to the allegation of non-compliance, reviews the law school's policies, and shares the complaint and this information with the Council; the Council can then request additional information from the law school and determine whether there is a compliance issue.

In these enforcement actions, the Council's role as an accreditor is to ensure that the law school has adhered to and continues to adhere to its published policies. It will not generally second-guess a law school's handling of a particular situation under its policy, so long as the law school is in fact adhering to its policies. The electronic form for filing complaints makes clear the roles of the Council and Managing Director's Office in the complaint process:

This process is not available to serve as a mediating or dispute-resolving process for a person with complaints about the policies or actions of an approved law school. The Council or Managing Director will not intervene with an approved law school on behalf of an individual with a complaint against or concern regarding action taken by a law school that adversely affects that individual. The outcome of this process will not be the ordering of any individual relief for any person or requiring specific action by a law school with respect to any individual. *The most likely outcome for a complaint that raises issues under the Standards would be a finding of non-compliance and a requirement that the law school update its policy to come into compliance* (emphasis added).

In short, the Council will not make judgments on specific actions taken by a law school, nor will it intervene or provide any individual relief from such actions. The Council's role is to determine whether these actions implicate its adherence to its published policies required by Standard 208 when the Council is notified of these actions via a law school's Site Report, complaint, or other manner. Assessment of adherence will consider the school's overall enforcement of its policies.

**The Managing Director's Office will issue Guidance Memoranda from time-to-time when new Standards or Interpretations have been adopted or when, in the course of the Office's dealings with schools about compliance with the Standards, a number of schools are asking for clarification or direction regarding a particular Standard, Interpretation, or reporting requirement. The Office does its best to provide helpful guidance, but we remind schools that we do not have the authority to bind the Council. That said, the Council understands the necessity of providing guidance and will take that guidance into account in any determination about a school's operating in compliance with the Standards.**