

Best Practices for Protecting Security of Position for 405(c) Faculty

I. Introduction

In developing ABA Accreditation Standard 405(c), the American Bar Association (ABA) sought to protect the status of clinical faculty members. While Standard 405(c) applies explicitly to clinical faculty, many law schools have chosen to place legal writing faculty on 405(c) status and have benefitted from doing so.¹ Because safeguarding the academic freedom and security of position of clinical faculty members was the intent of the regulations, law schools must affirmatively demonstrate that they are meeting the requirements set forth in the Standard. Faculty who have 405(c) status must typically meet standards for promotion and retention similar to those applied to tenure-line faculty.² For faculty members who have met those standards, 405(c) obligates law schools to provide 405(c) faculty members substantive and procedural protections similar to those afforded tenured faculty.

This essay begins with a brief explanation of the development of ABA Accreditation Standard 405(c). It then explores what “reasonably similar to tenure” means in terms of security of position, relying in part on the American Association of University Professors (AAUP) guidance on tenure. The essay suggests Best Practices for protecting security of position for law faculty employed under ABA Accreditation Standard 405(c).³

¹ Under a prior version of the ABA Accreditation Standards, law schools were subject to a minimum ratio between students and full-time faculty, and full-time faculty were those holding 405(c) or higher status. So, placing legal writing faculty on 405(c) status improved the student/faculty ratios and, for that and other reasons, many law schools placed legal writing faculty on 405(c) status. See Melissa H. Weresh, *Form and Substance: Standards for Promotion and Retention of Legal Writing Faculty on Clinical Tenure Track*, 37 Golden Gate U. L. Rev. 281, 291 (2007); ALWD/LWI Annual Survey of Legal Writing Programs, Question 65 (noting number of schools providing 405(c) status to writing faculty) available at <http://lwionline.org/uploads/FileUpload/2014SurveyReportFinal.pdf>. Thus, once a law school has placed faculty on 405(c) status and has communicated that status to the ABA in site accreditation reports, the school is obligated to comply with both the spirit of 405(c) and the corresponding contractual terms regardless of whether the faculty member teaches clinical or legal writing courses.

² ABA Accreditation Standard 405(c) provides: “A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members.”

³ As noted herein, the focus of this essay is on *security of position* and what “reasonably similar to tenure” means in terms of security of position. It does not explore additional issues that arise from the hierarchy of employment conditions codified in ABA Accreditation Standard 405. For an extensive discussion of these related issues, see Bryan L. Adamson, Bradford Colbert, Kathy Hessler, Katherine Kruse, Robert & Kuehn, Mary Helen

II. The Development of ABA Accreditation Standard 405(c)

In *The Evolution of ABA Standards for Clinical Faculty*,⁴ Peter A. Joy and Robert R. Kuehn explore the tortuous development of the ABA standard of security of position for clinical law faculty. The authors explain that, despite the developing importance of clinical education in the United States,⁵ “in the late 1970s, ABA site inspection teams began ‘reporting to the accreditation committee that many schools were not providing their clinicians an opportunity to achieve tenure or any other form of job security.’”⁶ This observation initiated a lengthy process as the Council of the ABA Section of Legal Education and Admissions to the Bar, the ABA’s Accreditation Committee, and the Clinical Legal Education Committee sought to draft a new standard and interpretations that would recognize the value of clinical legal educators and better protect their security of position. This process, beginning in 1980,⁷ was characterized by significant efforts on behalf of the

McNeal, Calvin Pang, David Santacroce, *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 J. LEGAL PROF. 353, 392 (2012) (hereinafter Task Force Report); Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008); Kristen K. Tiscione, Amy Vorenberg, *Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty*, 31 COLUM. J. GENDER & L. 47, 48 (2015); Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467 (2004); Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181 (2014); Deborah Maranville, Ruth Anne Robbins, & Kristen K. Tiscione, *Faculty Status and Effectiveness*, in BUILDING ON BEST PRACTICES & CARNEGIE’S EDUCATING LAWYERS: LEGAL EDUCATION IN A CHANGING WORLD (Maranville, Sedillo Lopez, Bliss, & Kaas, eds., 2015); Melissa H. Weresh, *Stars Upon Thars: Evaluating the Discriminatory Impact of ABA Standard 405(c), “Tenure-Like” Security of Position*, 34 LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 137 (forthcoming 2016).

⁴ Joy & Kuehn, *supra* note __.

⁵ *Id.* at 184-90.

⁶ *Id.* at 194 (citing Roy Stuckey, *A Short History of Standard 405(e)*, at 1 (Apr. 1994) (unpublished manuscript)).

⁷ *Id.* at 195. The authors explain that

In July 1980, the Council of the ABA Section of Legal Education and Admissions to the Bar (Council) acted on these reports that schools were not providing tenure opportunities for clinical faculty and adopted Interpretation 2 of [then] Standard 405(d):

Individuals in the “academic personnel” category whose full time is devoted to clinical instruction and related activities in the J.D. program constitute members of the “faculty” for purposes of Standard 405, and denial to them of the opportunity to allow tenure appears to be in violation of Standard 405(d).

This Interpretation was suspended shortly thereafter “following a negative reaction from some law schools, and [the Council] created a subcommittee of the

ABA Accreditation Committee to enhance protections for clinical faculty⁸ competing with arguments advanced by the American Association of Law Schools, among others, to resist intrusion by the ABA on governance issues believed to be the province of law school regulation.⁹

In 1984, the ABA considered a proposed ABA Accreditation Standard 405(e), which provided that law schools “afford to full-time faculty members whose primary responsibilities are in its professional skills programs a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided other full-time faculty members.”¹⁰ There was considerable debate, however, as to whether the standard should obligate schools to afford clinical faculty this status by incorporating the term “shall,” or whether the standard should be aspirational, using the term “should.”¹¹ Arguing in favor of the more stringent “shall” standard, several deans drafted a letter that set forth the many reasons for protecting the security of position for clinical faculty:

Few have ever questioned the relationship of tenure status to quality of legal education when applied to traditional academic faculty. Tenure, or some equivalent status, provides the assurance of academic freedom, which has long been regarded as essential for a quality faculty. This is no less true for teachers in a professional skills training program. The assurance of academic freedom affects quality in at least two ways: (a) it permits teachers to perform their academic responsibilities, in the classroom and in scholarship, without fear of reprisal; and (b) it helps to recruit high-

accreditation committee, chaired by Gordon Shaber, to consider how the problem should be resolved.”

Id. (citations omitted).

⁸ *Id.* at 195-206. “The proposed Standard from the Accreditation Committee provided that “[f]ull-time clinical faculty members shall be entitled to an employment relationship substantially equivalent to that required for other members of the faculty under Standard 405.” *Id.* at 196. “The Interpretation explained that the employment relationship could be satisfied in one of three ways: (1) the same tenure track as the other members of the faculty; (2) a separate tenure track; or (3) ‘an approach that provides features substantially equivalent to tenure.’” *Id.* at 195-96.

⁹ David H. Vernon, then President of AALS, argued that “the proposed standard is an invasion of traditional law-school territory. It is an expression of lack of confidence in the law schools. It implies that we are unfit to govern ourselves.” *Id.* at 197 (citing Beverly T. Watkins, Teachers of Clinical Law Seek Recognition, Better Treatment, *Chron. Higher Educ.*, Jan. 19, 1983, at 14). Notably, “Vernon’s opposition did not address the merits of clinical education or the necessity of giving job security as a means of both advancing the acceptance of clinical legal education and ensuring academic freedom for clinical faculty. Rather, Vernon cast the proposed accreditation requirement as an intrusion into law school self-governance . . .” *Id.*

¹⁰ *Id.* at 199.

¹¹ *Id.* at 198-206.

quality faculty since potential teachers of distinction are more likely to be attracted to academic life if they can be assured of permanent status on a law school faculty.¹²

Despite the force of this logic, in 1984 the accreditation standard passed, incorporating the “should” language.

Joy and Kuehn explain that, in the years following the passage of 405(e), reports demonstrated that the standard was not having the desired effect of protecting clinical faculty.¹³ Therefore, in 1996, the ABA revised the standard, now re-numbered as 405(c), to incorporate the “shall” language, noting ““that full-time clinical faculty members must be afforded a form of security of position reasonably similar to tenure, and noncompensatory perquisites reasonably similar to other full-time faculty members.””¹⁴

Protection of clinical faculty remained contentious, however, as efforts continued to undermine the security of position articulated in the standards. Notwithstanding those efforts, the standard and its interpretations continued to be strengthened in meaningful ways. In 2001, “changes to Interpretation 405-6 clarified that once a faculty member had clinical tenure or a renewable long-term contract, the clinical faculty member could only be terminated for good cause, which includes termination or material modification of the ‘entire’ clinical program.”¹⁵ Moreover, in 2005, the ABA adopted additional language to Interpretation 405-6, explaining, “‘long-term contract’ means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom.”¹⁶

The changes to ABA Accreditation Standard 405(c) reflect the important value that clinical faculty members and, in increasingly numbers, legal writing faculty members¹⁷ bring

¹² *Id.* at 203 (citing Letter from Richard Huber, Dean, Boston Coll. Law Sch., et. al., to Deans of ABA-Approved Law Schools (June 18, 1984)).

¹³ *Id.* at 206 (noting “[a]fter the adoption of Standard 405(e) in 1984, ABA committees and reports continued to express concern about the treatment of clinical law faculty”).

¹⁴ *Id.* at 212 (citing Recodification of Standards Nears Completion, Syllabus (Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar), Winter 1996, at 1, 14).

¹⁵ *Id.* at 216 (citing Report No. 2 of the Section of Legal Education and Admissions to the Bar, 126 Annual Report of the American Bar Association 725-26 (2003)).

¹⁶ *Id.* at 221.

¹⁷ According to an annual survey conducted by the Association of Legal Writing Directors (ALWD) and the Legal Writing Institute (LWI):

The number of programs reporting 405(c), 405(c)-track, and tenured or tenure-track increased from 119 in 2012-2013 to 124 in 2013-2014, which is significant given the slight decrease in Survey responders this year. Forty-two (42) programs reported having full-time faculty that were tenured or on the tenure track, 62 programs reported faculty with 405(c) status, and 20 reported faculty on the ABA Standard 405(c) track.

to legal education. Nonetheless, the creation of a separate standard applicable to clinical faculty has resulted in troubling issues. This essay focuses on security of position and what ABA Accreditation Standard 405(c) means in terms of “reasonably similar to tenure.” It does not address the range of additional problematic issues that arise from the hierarchy created by ABA Accreditation Standard 405(c), including inferior status and compensation, and inequity in faculty governance. As indicated, a Task Force on the Status of Clinicians and the Legal Academy Report (Task Force Report)¹⁸ extensively addresses those issues and recommends a unitary tenure model for all faculty, including clinical faculty,¹⁹ observing that “the implementation of the ‘reasonably similar’ standard has in the majority of cases failed to afford clinical faculty adequate governance rights with respect to important matters affecting the mission, function, and direction of law schools,”²⁰ and that a unitary tenure model “provides the security of position and academic freedom protections that free a professor to espouse positions on issues.”²¹ To the extent that the ABA has retained the hierarchy model set forth in 405(c), however, it is imperative that the “reasonably similar” language be explored to afford clinical and legal writing faculty the security of position warranted by that language.

The vast majority of those on contract (95%) were not limited in the number of years that they may teach at the law school; in other words, they have no “cap.” Association of Legal Writing Directors & Legal Writing Institute, Report of the Annual Legal Writing Survey, 2014 Survey Highlights x (available at <http://lwionline.org/uploads/FileUpload/2014SurveyReportFinal.pdf>).

¹⁸ Task Force Report, *supra* note __ at 388.

¹⁹ The Task Force Report did not address employment conditions for legal writing faculty.

²⁰ *Id.* at 392. The report explains:

No status model in the legal academy other than unitary tenure-track consistently provides security of position, full inclusion in faculty governance, and protection for academic freedom. Other status models that schools have created to comply with ABA regulations requiring conditions “reasonably similar” to tenure have been instrumental in helping to articulate and define hiring, retention, and promotion standards that recognize and value the differences in clinical teaching, scholarship, and service. However, these models have failed to fully integrate clinical faculty members into governance over important decisions affecting the mission, function, and direction of law schools. Moreover, the creation of separate clinical tenure tracks and presumptively-renewable long-term contracts have created permanent classes of faculty members with unequal status, power, and voice in faculty governance. Exceptions to unitary tenure-track clinical positions are warranted in limited circumstances to allow the expansion of clinic slots for students in experimental clinical programs and to provide training for new clinical faculty. These exceptions should be restricted in number, duration, and purpose, should not be used to create a permanent underclass of faculty members.

Id. at 388.

²¹ *Id.* at 389.

III. What Should “Reasonably Similar to Tenure” Mean?

Safeguarding security of position for tenured faculty is often tied to the American Association of University Professors (AAUP) Recommended Institutional Regulations on Academic Freedom and Tenure.²² Therefore, the AAUP recommendations establish the type of guidelines law schools can use to determine whether they have provided 405(c) faculty with requisite substantive and procedural protections associated with security of position. This essay outlines the AAUP standards applicable to tenure and explains the best practices that schools should therefore provide for faculty members with 405(c) status.

ABA Accreditation Standard 405(c) requires that a “law school [] afford [] full-time clinical faculty members a form of security of position *reasonably similar to tenure*, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members.”²³ Under Interpretation 405-6, a “form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts.”²⁴ A “‘long-term contract’ means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom.”²⁵ For purposes of both a separate tenure track or presumptively renewable, long-term contract, a faculty member holding such tenure or long-term contract “may be terminated only for good cause, including termination or material modification of the entire clinical program.”²⁶

Remedies for failure to provide these protections may range from informal grievance procedures provided by academic institutions; administrative proceedings under federal statutes such as Title VII and Title IX (both of which prohibit discrimination in employment); and legal remedies including claims under Title VII, Title IX, the Age Discrimination in

²² AAUP Recommended Institutional Regulations on Academic Freedom and Tenure, available at <http://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure>.

As normative expressions, the 1940 Statement of Principles on Academic Freedom and Tenure and related declarations act as private constitutional or contractual agreements at many academic institutions. For example, a typical faculty handbook will include the following statement:

[The university] is committed to academic freedom, for only with such freedom will the members of the University who teach and learn be able to benefit society by judgments and criticisms which might otherwise be withheld because of fear of offending a dominant social group or a transient social attitude

Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 Cath. U. L. Rev. 67, 73 (2006).

²³ ABA Standard 405(c) (emphasis added).

²⁴ ABA Standard 405(c), Interpretation 405-6.

²⁵ ABA Standard 405(c), Interpretation 405-6.

²⁶ ABA Standard 405(c), Interpretation 405-6.

Employment Act (ADEA), and contractual theories of liability such as breach of contract, unjust enrichment, and justifiable reliance.²⁷ To the extent that failure to adequately safeguard security of position may expose law schools to liability, it is important to identify processes and protections afforded the significant number of law faculty in the country who have security of position “reasonably similar to” tenure.

The AAUP recommendations authorize dismissal of a tenured faculty member for cause, in the case of financial exigency, or in the case of discontinuance of a program or department for educational reasons. Notably, the AAUP guidelines even provide relatively rigorous protections for part-time faculty²⁸ and graduate student employees.²⁹ Because the ABA standards link security of position for 405(c) faculty to *tenure*,³⁰ the processes and procedures outlined in the AAUP tenure recommendations provide the requisite security for tenured faculty and therefore provide the best guidance for the processes and procedures earned by faculty with security of position reasonably similar to tenure.

A. For-Cause Dismissal:

Tenured faculty members can be terminated for cause.³¹ Because of the strong security of position protections afforded tenured faculty, the AAUP guidelines provide

²⁷ See generally Ann C. McGinley, *Discrimination in Our Midst: Law Schools' Potential Liability for Employment Practices*, 14 UCLA Women's L.J. 1, 5 (2005) (explaining that the “concentration of women in the lower levels of law faculty hierarchies makes law schools vulnerable ethically and practically”).

²⁸ See e.g. AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 13, available at <http://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure>.

²⁹ See e.g. AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 14, available at <http://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure>. It is noteworthy that even academic staff members who do not fall within part-time or graduate student categories are entitled to be “provided with a statement of reasons and an opportunity to be heard before a duly constituted committee.” AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 15.

³⁰ Because the standards for promotion and retention for full-time faculty with 405(c) faculty are typically similar to those applicable to tenured faculty, the protections afforded 405(c) should be greater than those for part-time or graduate students who are not likely subject to similarly rigorous teaching, service, and scholarship standards. Further, consistent with the “reasonably similar to tenure” language of the ABA Accreditation Standards, the protections extended to 405(c) faculty should mimic those afforded tenured faculty.

³¹ “Adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens.” AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 5(a).

significant procedural protections to an affected faculty member whose position is being considered for termination due to cause.

1. *Substantive Protections:* The guidelines provide that “[a]dequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens.”³² “In general, cause has been found to exist based on professional incompetence, illegal activity, or sexual harassment, which may involve illegal activity or a violation of university policies. An employee's actions that are illegal or violate university policy provide a clearer case for cause to dismiss than one based on incompetence.”³³

2. *Procedural Protections:* “Dismissal of a faculty member with continuous tenure, or with a special or probationary appointment before the end of the specified term, will be preceded by (1) discussions between the faculty member and appropriate administrative officers looking toward a mutual settlement; (2) informal inquiry by the duly elected faculty committee [insert name of committee], which may, if it fails to effect an adjustment, determine whether in its opinion dismissal proceedings should be undertaken, without its opinion being binding upon the president; (3) a statement of charges, framed with reasonable particularity by the president or the president’s delegate.”³⁴

The affected faculty member has a right to a hearing.³⁵ “The burden of proof that adequate cause exists rests with the institution and will be satisfied only by clear and convincing evidence in the record considered as a whole.”³⁶ During the proceedings the faculty member is “permitted to have an academic adviser and counsel of the faculty member’s choice,”³⁷ shall be “afforded an opportunity to obtain necessary witnesses and documentary or other evidence,”³⁸ and will “have the right to confront and cross-examine all witnesses.”³⁹

3. *Best Practices for 405(c) Faculty:* To the extent they have earned security of position “reasonably similar to tenure,” faculty whose positions are governed by 405(c) are entitled

³² AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 5(a).

³³ Adams, *supra* note __ at 75-76 (citations omitted).

³⁴ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 5(b).

³⁵ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 5(c). “A dismissal, as defined in Regulation 5a, will be preceded by a statement of charges, and the individual concerned will have the right to be heard initially by the elected faculty hearing committee . . . Members deeming themselves disqualified for bias or interest will remove themselves from the case, either at the request of a party or on their own initiative.”

³⁶ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 5(c)(8).

³⁷ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 5(c)(5).

³⁸ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 5(c)(10).

³⁹ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 5(c)(11).

to the same protections afforded tenured faculty in the case of for cause dismissal. There is no sound rationale for a lesser substantive standard of the cause associated with dismissal for this category of faculty. Moreover, fairness and consistency with the “reasonably similar” language suggests that a similar process be afforded these faculty members for full consideration of such contemplated dismissal.

B. Financial Exigency:

The AAUP guidelines authorize termination of faculty with tenure in the case of financial exigency. As expected due to the strong protections afforded by tenure, there are relatively rigorous guidelines an institution must adhere to in order to activate this form of dismissal.⁴⁰

1. *Substantive Protections:* First, the institution must make a determination of a “demonstrably bona fide financial exigency, i.e., a severe financial crisis that fundamentally compromises the academic integrity of the institution as a whole and that cannot be alleviated by less drastic means.”⁴¹ Faculty involvement is contemplated for both the determination that a financial exigency exists, and a determination of how best to allocate resources to respond to such an exigency. The guidelines recommend that there “be an elected faculty governance body, or a body designated by a collective bargaining agreement, that participates in the decision that a condition of financial exigency exists or is imminent and that all feasible alternatives to termination of appointments have been pursued . . .”⁴²

Importantly, “[b]efore any proposals for program discontinuance on grounds of financial exigency are made, the faculty or an appropriate faculty body will have opportunity to render an assessment in writing of the institution’s financial condition.”⁴³ Faculty members are entitled to review detailed financial and programmatic information, including “at least five years of audited financial statements, current and following-year budgets, and detailed cash-flow estimates for future years; [and] detailed program, department, and administrative-unit budgets.”⁴⁴

In terms of determining how to allocate resources to respond to a bona fide financial exigency, faculty should consider alternatives to the termination of faculty with tenure or

⁴⁰ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4. The guidelines emphasize the nature of this determination, “Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur *under extraordinary circumstances* because of a demonstrably bona fide financial exigency . . .” *Id.* (emphasis added).

⁴¹ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(1).

⁴² AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(1).

⁴³ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(2).

⁴⁴ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(2) (i), (ii).

tenure-like⁴⁵ security of position, “including expenditure of one-time money or reserves as bridge funding, furloughs, pay cuts, deferred-compensation plans, early-retirement packages, deferral of nonessential capital expenditures, and cuts to noneducational programs and services, including expenses for administration.”⁴⁶ To the extent that the regulations note that the financial exigency provisions apply to “appointment[s] with continuous tenure, or of a probationary or special appointment before the end of the specified term,”⁴⁷ any determination of termination of a 405(c) faculty member should require consideration of the listed alternatives. In terms of making determinations to terminate faculty, “[j]udgments determining where within the overall academic program termination of appointments may occur involve considerations of educational policy, including affirmative action, as well as of faculty status.”⁴⁸ Moreover, to the extent that impacted faculty members are entitled to severance in accordance with AAUP guidelines,⁴⁹ such determinations should take into account the financial impact of such severance.

2. *Procedural Protections:* In the event the faculty or appropriate body determines that terminations for financial exigency are warranted, “[f]aculty members in a program being considered for discontinuance because of financial exigency will promptly be informed of this activity in writing and provided at least thirty days in which to respond to it. Tenured, tenure-track, and contingent faculty members will be informed and invited to respond.”⁵⁰ Prior to termination “the institution, with faculty participation, will make every effort to place the faculty member concerned in another suitable position within the institution.”⁵¹ Affected faculty members are entitled to a full hearing before a faculty committee.

The issues in this hearing may include the following:

(i) The existence and extent of the condition of financial exigency. The burden will rest on the administration to prove the existence and extent of the condition. The findings of a faculty committee in a previous proceeding involving the same issue may be introduced.

⁴⁵ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(1).

⁴⁶ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(1).

⁴⁷ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(1) (emphasis added).

⁴⁸ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(1).

⁴⁹ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(6) (noting that, “[i]n all cases of termination of appointment because of financial exigency, the faculty member concerned will be given notice or severance salary” in accordance with the guidelines).

⁵⁰ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(2) (iii).

⁵¹ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(5).

(ii) The validity of the educational judgments and the criteria for identification for termination; but the recommendations of a faculty body on these matters will be considered presumptively valid.

(iii) Whether the criteria are being properly applied in the individual case.⁵²

With respect to challenging such an action, an affected faculty member can assert that individuals with less security have been inappropriately protected, emphasizing the guidelines' requirement that "[t]he appointment of a faculty member with tenure [or tenure-like security] will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result."⁵³ The affected faculty member may also challenge any action by the institution to add faculty or replace the dismissed faculty member, citing guidelines that preclude such action.⁵⁴

3. *Best Practices for 405(c) Faculty*: To the extent that the ABA Standards require security of position "reasonably similar to tenure," faculty with 405(c) status are entitled to similar considerations and procedural safeguards for dismissal for financial exigency. Law schools should be required to make the same type of showing of bona fide financial exigency, and faculty should be involved in the consideration of 405(c) faculty termination. Specifically, law faculties should be required to demonstrate consideration of alternatives "including expenditure of one-time money or reserves as bridge funding, furloughs, pay cuts, deferred-compensation plans, early-retirement packages, deferral of nonessential capital expenditures, and cuts to noneducational programs and services, including expenses for administration."⁵⁵ Moreover, in order to give full meaning to the "reasonably similar to tenure" language of the standards, "the institution, with faculty participation, will make every effort to place the faculty member concerned in another suitable position within the

⁵² AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(3)(i-iii).

⁵³ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(4).

⁵⁴ "If the institution, because of financial exigency, terminates appointments, it will not at the same time make new appointments, except in extraordinary circumstances where a serious distortion in the academic program would otherwise result." AAUP guidelines 4(c)(4). Moreover, "[i]n all cases of termination of appointment because of financial exigency, the place of the faculty member concerned will not be filled by a replacement within a period of three years, unless the released faculty member has been offered reinstatement and at least thirty days in which to accept or decline it." AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(7).

⁵⁵ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(7).

institution,”⁵⁶ and “[t]he appointment of a faculty member with tenure [or tenure-like security] will not be terminated in favor of retaining a faculty member without tenure.”⁵⁷

C. Discontinuance of Program or Department for Educational Reasons

AAUP Guidelines similarly allow an institution to terminate tenured faculty members in the case of a bona fide formal discontinuance of a program for educational reasons. As with termination for financial exigency, the strong security of position protections afforded tenured faculty obligate the institution to demonstrate the existence of educational considerations warranting the discontinuance of the program or department, and the efforts made by the institution to relocate affected faculty members in lieu of termination.

1. *Substantive Protections:* In the case of dismissal of a tenured faculty member for a “bona fide formal discontinuance of a program or department of instruction,”⁵⁸ the institution must demonstrate that “the decision to discontinue formally a program or department of instruction [] [is] based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof.”⁵⁹ However, “[e]ducational considerations’ do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance.”⁶⁰ Moreover, “[a]cademic programs cannot be defined ad hoc, at any size; programs must be recognized academic units that existed prior to the decision to discontinue them. The term ‘program’ should designate a related cluster of credit-bearing courses that constitute a coherent body of study within a discipline or set of related disciplines.”⁶¹

Prior to dismissal for discontinuance of a program for educational considerations, an institution must consider placing the impacted faculty member elsewhere within the institution. Specifically, “[b]efore the administration issues notice to a faculty member of its intention to terminate an appointment because of formal discontinuance of a program or department of instruction, the institution will make every effort to place the faculty member concerned in another suitable position. If placement in another position would be facilitated by a reasonable period of training, financial and other support for such training will be

⁵⁶ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(5).

⁵⁷ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(c)(4) (excepting “extraordinary circumstances where a serious distortion of the academic program would otherwise result”).

⁵⁸ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(d).

⁵⁹ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(d)(1).

⁶⁰ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(d)(1).

⁶¹ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(d)(2) (emphasizing that “[w]hen feasible, the term should designate a department or similar administrative unit that offers majors and minors”).

proffered.”⁶²

2. *Procedural Protections*: “Faculty members in a program being considered for discontinuance for educational considerations will promptly be informed of this activity in writing and provided at least thirty days in which to respond to it.”⁶³ Impacted faculty members are entitled to protest a determination of termination or relocation and, in such a case, have a right to a full hearing.⁶⁴

3. *Best Practices for 405(c) Faculty*: In order to ensure that 405(c) faculty are protected in a manner “reasonably similar” to faculty with tenure, similar considerations must be demonstrated in the event an institution seeks to dismiss 405(c) faculty for educationally-driven, programmatic discontinuances. As an initial matter, existing programs⁶⁵ must be evaluated based on educational considerations, which should be defined to exclude “cyclical or temporary variations in enrollment.”⁶⁶ Any decision to discontinue a program “must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance.”⁶⁷

If a law school considered discontinuing an existing clinic and determined this discontinuance was justified as a programmatic reduction, at the very least it would be obligated to demonstrate that the discontinuance enhanced the educational mission of the law school. It would also have to demonstrate that it made efforts to place clinicians from the discontinued clinic in other suitable positions even if such a relocation requires training and financial and other support.

⁶² AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(d)(3). The regulations note, “When an institution proposes to discontinue a program or department of instruction based essentially on educational considerations, it should plan to bear the costs of relocating, training, or otherwise compensating faculty members adversely affected.” *Id.* Further, “If no position is available within the institution, with or without retraining, the faculty member’s appointment then may be terminated, but only with provision for severance salary equitably adjusted to the faculty member’s length of past and potential service.” *Id.*

⁶³ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(d)(2).

⁶⁴ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure (d)(4). The regulations indicate, “The issues in such a hearing may include the institution’s failure to satisfy any of the conditions specified in Regulation 4d. In the hearing, a faculty determination that a program or department is to be discontinued will be considered presumptively valid, but the burden of proof on other issues will rest on the administration.” *Id.*

⁶⁵ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(d)(2) (noting that “Academic programs cannot be defined ad hoc, at any size; programs must be recognized academic units that existed prior to the decision to discontinue them”).

⁶⁶ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure (d)(1).

⁶⁷ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(d)(1).

Because the ABA standards require law schools to provide legal writing instruction in the first year,⁶⁸ the standards appear to prohibit a “bona fide formal discontinuance of a program or department of instruction”⁶⁹ involving first year legal writing. For example, if a law school had a legal writing *program* staffed by legal writing professors with security of position “reasonably similar to tenure,” it could not terminate those faculty members for programmatic discontinuance and then replace the required first year instruction with new faculty.⁷⁰ For law schools that provide first year legal writing instruction with faculty who

⁶⁸ Standard 303(a) provides:

A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:

(2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised . . .

⁶⁹ AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 4(d).

⁷⁰ It appears to be unacceptable under AAUP guidelines to terminate tenured faculty and replace those faculty with adjuncts, or to rehire terminated faculty into inferior positions. In a report investigating the conduct of National Louis University (Illinois), the AAUP concluded that the school had violated the standards relating to discontinuance of a program for educational reasons when it terminated tenured faculty pursuant to that provision and then hired adjuncts to teach the courses formerly taught by the tenured faculty. AAUP Reports and Publications, *Academic Freedom and Tenure: National Louis University* available at <http://www.aaup.org/report/academic-freedom-and-tenure-national-louis-university>. The AAUP report concluded:

courses taught by the faculty members with terminated appointments by and large have continued to be taught, but by adjunct faculty members who serve at will and receive a small fraction of the compensation paid to the full-time faculty members they have replaced. The administration retained a few of the senior faculty members on an adjunct basis after their appointments were terminated, thus violating their tenure rights regarding procedural safeguards and continued compensation.

Id. at 13.

The AAUP similarly determined that Northwestern State University had violated AAUP guidelines pertaining to programmatic reductions when it determined to discontinue a concentration in economics, thereby terminating the tenured appointment of a faculty member who taught courses in economics. AAUP Reports and Publications, *Academic Freedom and Tenure: Northwestern State University of Louisiana and Southeastern Louisiana University* available at <https://www.aaup.org/report/academic-freedom-and-tenure-northwestern-state-university-louisiana-and-southeastern-0>. Following the termination, the faculty member was rehired as an untenured instructor, at half his original salary, to teach the same economics courses he had been teaching prior to the termination of his tenured position. The AAUP reported:

The “rehiring” of released tenured professors into untenured instructor positions, however, raises the investigating committee’s most significant concerns about the administration’s lack of respect for tenure in the discontinuance process. According

are not part of a formal program, the programmatic reductions mechanism would be inapplicable.⁷¹

Conclusion: Faculty members with 405(c) status must satisfy standards for promotion and retention similar to those required of tenured faculty⁷² and the ABA Accreditation standards require that they be afforded protections reasonably similar to those afforded tenured faculty.⁷³ Admittedly, the standards do not require that the protections be *identical*. Nevertheless, the AAUP Recommended Institutional Regulations on Academic Freedom and Tenure outline fair and principled substantive and procedural protections that explicitly apply to tenured faculty. Given the “reasonably similar” language of 405(c), they provide a template for fair and reasonable protections for faculty who hold 405(c) status.⁷⁴ To the extent that a law school deviates from those protections with respect to its treatment of a faculty member who holds 405(c) status, the burden is on the law school to demonstrate that the protections afforded that faculty member are reasonably similar to the AAUP standards.

to the appeal of one of the professors who spoke to the investigating committee, his position was not technically eliminated when his concentration was discontinued, but in order to continue teaching his courses, he was forced to accept a position that stripped him of his tenure, his rank of associate professor, and almost half his salary.

Id. at 15-16.

⁷¹ A programmatic reduction requires the elimination of an *entire* program of instruction. The AAUP found the College of Saint Rose in violation of AAUP principles when it attempted to terminate, for programmatic reductions, certain faculty within academic departments or programs. AAUP Reports and Publications, Academic Freedom and Tenure: College of Saint Rose available at <https://www.aaup.org/report/college-saint-rose>. Finding that such reductions were not the result of a bona fide program discontinuance, the AAUP reported the “cases represent a flagrant violation of Regulation 4d, which permits terminating faculty appointments only as a result of program *discontinuance*, not program *reduction*.” *Id.* at 8 (emphasis in original).

⁷² ABA Accreditation Standard 405(c) (indicating “A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members”).

⁷³ ABA Accreditation Standard 405(c) (indicating “A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members”).

⁷⁴ To the extent that 405(c) faculty hold presumptively renewable contracts, a law school that seeks to terminate 405(c) faculty bears the burden of proof to establish that the protections afforded those faculty are reasonably similar to those outlined in the AAUP recommendations. ABA Accreditation Standard 405(c), Interpretation 405-6 (indicating “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”).

Finally, the AAUP recommended regulations provide

[a]ll members of the faculty, *whether tenured or not*, are entitled to academic freedom [and] ... protection against illegal or unconstitutional discrimination by the institution, or discrimination on a basis not demonstrably related to the faculty member's professional performance, including but not limited to race, sex, religion, national origin, age, disability, marital status, or sexual orientation.⁷⁵

To the extent that the majority of American law faculty members who hold 405(c) status are women,⁷⁶ law schools must carefully safeguard the security of position earned by this category of faculty and outlined in the ABA Accreditation Standards and AAUP Recommended Institutional Regulations on Academic Freedom and Tenure.⁷⁷

⁷⁵ The AAUP Recommended Institutional Regulations on Academic Freedom and Tenure 9 (emphasis added).

⁷⁶ While it is difficult to determine exact figures, approximately 70% of legal writing faculty members are female and many of these faculty hold 405(c) status. See, e.g. ALWD/LWI Survey, available at <http://lwionline.org/uploads/FileUpload/2014SurveyReportFinal.pdf>. Question 65 indicates that the majority of legal writing faculty members are employed on long-term contracts and many of those are classified as 405(c) and Question 71 indicates that 69% percent of legal writing faculty members are female. The percentage of women in clinical faculty positions has actually risen from 55.75% in 2008 to 63% in 2014. Center for the Study of Applied Legal Education, *The 2013-14 Survey of Applied Legal Education* 39 (2014) and *The 2007-08 Survey of Applied Legal Education* 29 (2008), both available at <http://www.csale.org/results.html>. See also

American Bar Association, Section of Legal Education and Admissions to the Bar, *Law School Faculty and Staff by Ethnicity and Gender* (2013) (indicating that in 2013, women comprised 41% of full-time law faculty and only 36% of tenure or tenure-track faculty) [hereafter 2013 ABA REPORT], available at http://www.americanbar.org/groups/legal_education/resources/statistics.html (last visited March 4, 2015).

⁷⁷ See potential remedies for impacted faculty outlined in note ___ *infra*.