

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ANDREW M. OSER	:	
	:	
Plaintiff,	:	Case No. 2:09-cv-709
	:	
v.	:	JUDGE MARBLEY
	:	
CAPITAL UNIVERSITY LAW SCHOOL,	:	Magistrate Judge Abel
	:	
Defendant.	:	

OPINION AND ORDER

I. INTRODUCTION

This matter is before the Court on Plaintiff Andrew Oser’s (“Oser”) Motion for Preliminary Injunction. (Doc. No. 3). In that Motion, Oser seeks to enjoin Defendant Capital University Law School (“Capital”) from dismissing him and from refusing to allow him to attend classes when the Fall 2009 Semester begins on August 24, 2009. On August 18, 2009, the Court held a hearing on Oser’s motion for a preliminary injunction. For the reasons set forth below, the Court **DENIES** the requested preliminary injunction.

II. BACKGROUND

During the 2008-2009 academic year, Oser was a first year law student at Capital. Oser struggled academically and performed poorly on his first semester exams, earning a cumulative grade point average (“GPA”) of 1.4 for the Fall semester. Capital maintains a school policy that any first year student whose cumulative GPA falls below 2.0 is placed on academic probation. Students who do not achieve a cumulative GPA of 2.0 or above after completing the Spring semester of their first year are automatically dismissed from the law school. If, however, a student’s cumulative GPA is between 1.9 and 2.0, he is permitted to petition for a reinstatement.

If the petition is granted, the student is given one extra semester to improve his cumulative GPA to the 2.0 cut-off.

Because of his poor performance in the Fall 2008 semester, Oser was placed on academic probation on January 29, 2009 by Associate Dean Mays (“Dean Mays”). He was also placed in Capital’s Academic Success Protocol program (“ASP program”), which was mandatory for students with a GPA of 2.3 or below. As part of the ASP program, Oser worked with Professor John Bodine (“Professor Bodine”), the director of the ASP program. Bodine met with Oser to create an individualized plan to improve his study techniques and academic performance. He also attended ongoing, individualized academic counseling with Professor Bodine, throughout the semester; was invited to attend ASP program workshops on study techniques; received individualized review of his Fall semester exams with his professors, and was offered resources to develop his legal writing skills.

In preparation for his first meeting with Bodine, Oser was required to complete a self-evaluation regarding his study patterns and general experience of his first semester of law school and a Learning and Study Skills Inventory. After reviewing those materials and meeting with Oser, Professor Bodine identified certain behavioral traits that indicated to him that Oser might be suffering from an attention deficit disorder. Professor Bodine reported this to Oser and recommended that Oser seek psychological counseling from Dr. Terry Thompson (“Dr. Thompson”), a licenced psychologist employed by Capital. After meeting with Oser, Thompson also suspected that Oser might be suffering from an attention disorder. Dr. Thompson suggested to Oser that he seek a medical evaluation and testing to determine whether he was suffering from an attention disorder and referred him to Dr. Nancy Krasa (“Dr. Krasa”)

for testing. On February 11, 2009, Dr. Krasa examined Oser and diagnosed him with Attention Deficit Hyperactivity Disorder (“ADHD”) of either the Inattentive Type or Combined Type.

Dr. Krasa submitted a report evaluating Oser’s condition to Capital. In the report, Krasa found that Oser’s “reading comprehension, reading speed, and recall of information are hampered by diminished focused [sic] and sustained attention and working memory.”

(2/11/2009 Krasa Report 6.) Krasa recommended that Oser receive an evaluation to determine if he should be medicated for his disorder. (*Id.*) She also made the following recommendations regarding academic accommodations for Oser:

It is difficult to know whether accommodations on the part of the law school would help him. Testing suggests that he might benefit from some extra time on exams (say 30 minutes for a 3-hour exam) to account for his uncontrollably wandering thoughts, although he may not need that if medication proves helpful. Mr. Oser is a bright young man with the insight to know that something is not quite right. He can be expected to do well with the appropriate care.

(*Id.* 7.)

Following Dr. Krasa’s recommendation, Oser sought medical treatment from Dr. Beach. On 27, 2009, Dr. Beach prescribed medication to treat Oser’s ADHD. At a follow-up appointment on March 18, 2009, Oser reported that the medication was helping his concentration but that the effects did not last for a full day. Dr. Beach altered Oser’s dosage. Oser experienced marked improvement in his ADHD symptoms. His dosage has not changed since March 18, 2009.

Oser gave a copy of Dr. Krasa’s report to Dr. Thompson. Dr. Thompson reviewed Krasa’s report, and considered the proposed accommodation. Dr. Thompson compared Dr. Krasa’s recommendation to that of similarly impaired students with ADHD diagnoses and ultimately recommended to Dean Mays that Oser be given an additional five minutes per hour of

exam time (15 minutes per 3 hour exam). Dr. Thompson also recommended that Oser be permitted to take exams in a private room with the aid of a fan or other white noise machine. Because Oser had reported that complete silence was detrimental to his concentration, however, Dr. Thompson also recommended that the room in which Oser took his exam be in a well-trafficked area of the law school so that there would be some ambient noise. Dean Mays accepted Thompson's recommendation.

On March 12, 2009, Dr. Thompson informed Oser via email that he was eligible for an accommodation based on his ADHD diagnosis. She informed him:

You will be permitted to take all midterms and exams in a separate room and will have 5 minutes extra per hour of exam testing. Also you will be permitted to use a fan or a white noise machine during the tests. Some of our testing rooms are located in relatively busy parts of the building, so we can try to place you in those locations to provide some additional background noise if that seems useful.

(3/12/2009 Email from Dr. Thompson to Oser.) In the email, she also instructed Oser to contact Jennifer Carlock to "provide specific information required to accommodate this semester's exams." (*Id.*) Finally, Dr. Thompson told Oser "I encourage you to contact me if you have any questions. Sometimes 'fine tuning' is required after a student has had some experience using the accommodations, and I am available for that process too." (*Id.*) The extra time component of the accommodation represented only 50 percent of the extra time recommended by Dr. Krasa (10 minutes per hour). Oser did not complain to Dr. Thompson or anybody else at Capital about the timing aspect or any other aspect of the proposed accommodation.

Although Oser was offered the option to take extra time on all of his exams, he only took the accommodation on two exams. Students are not required to use their accommodations on all or even any of their exams. To provide sufficient time for the scheduling of exam rooms and

proctors, Capital requires students using accommodations to inform the school of the courses in which they want to use their accommodations 30 days before the beginning of exam periods.

The record shows that Oser was informed of and reminded of the deadline. Nevertheless, Oser did not request to use any of his accommodations before the deadline. On April 20, 2009, Oser submitted his first request. In that request, he asked to use accommodations in two of his exams. Even though that request was untimely, Capital permitted Oser to use his accommodations in those classes. After Spring 2009 exams were already in progress, Oser requested to use his accommodation on his other three exams. Capital determined that it could not grant his eleventh hour request and Oser was not permitted to take his other three exams with accommodations.

Overall, Oser performed better on his Spring 2009 semester exams, earning a 2.1 term GPA. Oser performed better, however, on the exams for which he did not use the accommodation. Despite his improved performance for the term, Oser's cumulative GPA was only 1.82. Accordingly, he was dismissed for academic reasons on June 8, 2009.

On June 19, 2009, Oser wrote to Capital attempting to appeal his dismissal and seek reinstatement. He requested one extra semester in which to raise his GPA to the required 2.0 cut-off. On July 2, 2009 he was informed that the Committee for Admission and Readmission lacked the authority to consider his petition for reinstatement because his cumulative GPA was below 1.9.

On August 11, 2009, Oser filed a complaint against Capital alleging that the school dismissed him without reasonably accommodating his ADHD in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, et. seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 794;

and the Ohio Civil Rights Act, Ohio Rev. Code § 4112.022. Oser claims that Capital failed reasonably to accommodate him by: (1) providing him with 5 extra minutes per exam hour rather than the 10 extra minutes per exam hour recommended by Dr. Krasa; and (2) refusing to allow him an extra semester to achieve a 2.0 cumulative GPA while performing in a fully remediated state. Oser also asserts that Capital violated his rights by imposing an arbitrary requirement that students maintain a 2.0 cumulative GPA at the end of their first year studies, while other law schools allow students with lower GPAs to continue their studies.

Capital's Fall 2009 Semester classes begin on August 24, 2009. Oser moved for a temporary restraining order ("TRO") and a preliminary injunction requiring Capital to suspend his dismissal and permit him to attend classes. The Court denied Oser's request for a TRO on August 12, 2009. On August 18, 2009, the Court conducted a hearing on Oser's motion for a preliminary injunction. At the conclusion of that hearing, the Court denied Plaintiff's motion. This Order memorializes this Court's oral ruling.

III. LAW & ANALYSIS

Oser seeks a preliminary injunction to enjoin Capital from dismissing him from the law school and refusing to allow him to attend classes when they begin on August 24, 2009. A preliminary injunction is a remedy used by the court to preserve the status quo between the parties pending a trial on the merits. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). It is "an extraordinary remedy that should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). A plaintiff seeking a preliminary injunction must demonstrate that: (1) there is a substantial likelihood that the plaintiff will prevail on the merits;

(2) the plaintiff will suffer irreparable injury without the injunction; (3) the balance of hardships tips in the plaintiff's favor; and (4) the injunction serves the public interest. *Langley v. Prudential Mortg. Capital Co., LLC*, 554 F.3d 647, 648 (6th Cir. 2009); *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir.2000). The elements are factors to be balanced against each other, and each element need not be satisfied to issue a preliminary injunction. *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1480 (6th Cir.1995) (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985)). It is, however, the movant's burden of proving that the circumstances clearly demand a preliminary injunction. *Leary*, 228 F.3d at 739.

1. Substantial Likelihood of Success on the Merits

To establish his claim that he was dismissed because of his ADHD in violation of the Rehabilitation Act, the ADA, or the Ohio Civil Rights Act, Oser must show that: (1) he is disabled or handicapped as defined in each statute; (2) he is "otherwise qualified" to continue in the program; (3) he was dismissed from the program on the basis of his disability or handicap. *Kaltenberger v. Ohio Coll. Of Podiatric Med.*, 162 F.3d 432, 435 (6th Cir. 1998).¹ Oser claims that his ADHD constitutes a handicap or disability under each of the acts. For the purposes of the Court's ruling on Oser's preliminary injunction motion, Capital does not dispute that element. Nor does the school dispute that it is subject to the mandates of the ADA and the

¹ Ohio disability discrimination claims employ the same analysis as ADA claims. *Kleiber v. Honda of Am. Mfg.*, 485 F.3d 862, 872 (6th Cir.2007). Similarly, the Sixth Circuit has held that, even though the Rehabilitation Act and the ADA are not identical, cases construing one statute are instructive in construing the other. *Doe v. Woodford Cty. Bd. of Educ.*, 213 F.3d 921, 925 (6th Cir. Ky 2000). Accordingly, the Oser's claims under the ADA, the Rehabilitation Act, and Ohio Rev.Code § 4112.02 are analyzed together.

Rehabilitation Act. Capital, however, does dispute whether the accommodations it provided to Oser were reasonable.

A disabled or handicapped individual is “otherwise qualified” to participate in a program “if [he] can meet its necessary requirements with reasonable accommodation.”² *Id.* Although an educational institution may be required to make reasonable accommodations, it is not required “to lower or to effect substantial modifications of standards to accommodate a handicapped person.” *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 413 (1979). Nor is a school required to make fundamental or substantial modifications to its programs to accommodate the disabled. *Kaltenberger*, 162 F.3d at 436 (citing *Alexander v. Choate*, 469 U.S. 287, 300 (1985)).

Moreover, when evaluating the reasonable accommodation requirement, “[c]ourts must give deference to professional academic judgments.” *Id.* “University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.” *Id.* (quoting *Regents of Univ. Of Mich. v. Ewing*, 474 U.S. 214, 225 n.11 (1985)). Therefore, academic decisions made by faculty in their professional judgment must be given great respect. *Id.*

This deference, however, is not absolute. To be entitled to deference, an academic institution must present evidence that in reaching its decision: (1) it made itself aware of the nature of the student’s disability; (2) it explored alternatives for accommodating the student; and (3) it exercised professional judgment in deciding whether the requested accommodations would give the student the opportunity to complete the program without fundamentally or substantially

²34 C.F.R. § 104.3(k)(3) defines “qualified” in the context of postsecondary education, as “meet[ing] the academic and technical standards requisite to ... participation in the ... education program or activity.”

modifying the school's standards. *Wong v. Regents of Univ. Of CA*, 192 F.3d 807, 818 (9th Cir. 1999). Such a limit is necessary to ensure that discriminatory requirements are not disguised as academic decisions. *Id.* at 817.

A. Entitlement to Deference

Oser argues that, despite the various accommodations he received from Capital, he was not reasonably accommodated because he did not receive the full 10 minutes of additional exam time per hour recommended by Dr. Krasa. He also complains that the process used in fashioning the accommodation was improper and not entitled to deference because Dr. Thompson "simply half-ed the time [Oser] was to receive for his examinations" after a "cursory review" of Dr. Krasa's report. (Pf.'s Br. 13.) As an initial matter, the Court finds that Dr. Thompson's recommendations and Dean Mays' determination regarding what constituted a reasonable accommodation in light of both Oser's needs and the academic requirements of the law school and legal profession were "professional academic judgments" which are entitled to deference in this Court. *Kaltenberger*, 162 F.3d at 436.

First, it is clear from the record that Capital made itself aware of Oser's disability. Not only did Dr. Thompson review Dr. Krasa's report diagnosing Oser and inform Dean Mays of his diagnosis, Capital was responsible for Oser receiving his diagnosis. Before his placement on academic probation and his participation in the ASP program, Oser had never been diagnosed or treated for ADHD and appears to have been unaware that he might be suffering from the disorder. Professor Bodine first suggested to Oser that he might be suffering from an attention deficit disorder and referred him to Dr. Thompson. Dr. Thompson, in turn, encouraged Oser to get tested for an attention disorder and referred him to Dr. Krasa, who ultimately diagnosed him.

Thus, Capital's staff was not only aware of Oser's disorder but was instrumental in making Oser himself aware of his condition.

Second, the record shows that Capital explored alternatives for accommodating Oser. The accommodations provided by Capital gave Oser accommodations beyond those suggested by Dr. Krasa. In her report, Dr. Krasa recommended that Oser be given some additional time on his exams (10 minutes per exam hour) and suggested that he received medication. In addition to giving Oser 5 additional minutes per exam hour, however, Capital also allowed Oser to take his exams in a private room and allowed him to use a white noise machine during his exams. Furthermore, Capital offered to allow Oser to take his exams in a room with significant ambient noise and foot traffic to address his specific concern that a silent environment exacerbated his condition. All of this indicates that Capital explored a broad range of options and that Dr. Thompson plumbed her substantial experience accommodating ADHD students in fashioning an individualized accommodation targeted to Oser's needs.

Furthermore, through the ASP program, Oser was offered a broad array of additional help to improve his academic performance including: individualized exam review with his professors; instruction in test-taking skills and time management skills; individualized assistance of a writing professional to improve his writing; academic counseling; psychological counseling; and on-going counseling with Professor Bodine throughout the Spring 2009 semester. Also, during her initial meeting with Oser, Dr. Thompson explained to him that given his performance during the fall semester, it would be nearly impossible for him to bring his cumulative GPA to the 1.9 or 2.0 thresholds by the end of his first year. She explained to him that he had the option to withdraw with a full refund or to take a leave of absence during which he could address any

issues causing his difficulties performing academically and then reapply. Oser was uninterested in those options.

Third, on the record before the Court it is evident that Capital's employees exercised professional judgement in fashioning Oser's accommodation and considered whether the 10 minute per exam hour and waiver of the 1.9 cut-off for reinstatement petitions would substantially impact the school's standards. Capital uses a two-step procedure in fashioning accommodations. Initially, Dr. Thompson meets with students to attempt to determine if they might need to pursue an accommodation. If Dr. Thompson determines that an accommodation is necessary based on her meetings with a student and a review of the medical documentation presented by student, then she creates a proposed accommodation which she discusses with Dean Mays. Next, Dean Mays reviews the proposed accommodation in light of her experience with Capital's academic standards and curriculum and approves or modifies the accommodation. This process was followed in Oser's case.

At the August 18,2009 hearing in this matter, Dr. Thompson discussed the process she used to decide the appropriate level of accommodation in Oser's case. Dr. Thompson explained that because the medical evaluations she receives are performed by so many different types of health care professionals, the recommendations for accommodations can vary wildly even for students with essentially identical diagnoses. Consequently, she must work to ensure that students with comparable disabilities are treated similarly, as well as to ensure that students are neither under-accommodated, nor over-accommodated relative to unimpaired students. Therefore, she evaluates whether the accommodation proposed by the health care professional should be implemented as proposed or modified.

The record shows that Dr. Thompson has 20 years of experience as a counselor at Capital, substantial experience in evaluating the specialized needs of law students with disabilities, and is adept in fashioning accommodations to aid such students. She counsels 6-10 ADHD students per week and has fashioned accommodations in hundreds of similar cases.

In Oser's case she determined that the 10 minutes per exam hour accommodation suggested by Dr. Krasa should be reduced because it was not in keeping with the level of accommodation Capital usually, and with success, had given to students with comparable ADHD impairment. She explained that she did not consider the possible effects of medication on Oser's conditioning when fashioning her proposed accommodation. Rather, Capital utilizes standards by which it categorizes various cases of ADHD. Students who get the highest level of accommodation in terms exam time have multiple diagnosis, i.e., they have ADHD or ADD and some other disorder such as an anxiety disorder. The middle category of ADHD students have profound cases of ADHD or ADD, meaning that their diagnostic test scores indicate multiple areas of impairment. Students with moderate conditions of ADHD, meaning they showed impairment in only one category, receive the lowest level of accommodation.

Dr. Thompson thoroughly reviewed Oser's performance on diagnostic tests presented in Dr. Krasa's report. She found that his test results only indicated impairment in one area: recall of information recently presented. Thus, she determined that Oser would fall into the moderately impaired category of ADHD students. The 5 minute per exam hour accommodation she recommended was in line with accommodations provided for other students with moderate ADHD impairment and, based on her experience, had helped other students with ADHD.

In fact, Dr. Thompson testified that in the Fall 2008 semester, Capital accommodated 14 students with ADHD or ADD diagnoses. Six of those students received the same or lesser exam time accommodations as Oser (some received no additional time at all). None of the 14 students were ultimately dismissed or placed on academic probation at the end of that semester. Therefore, the record before the Court indicates that Dr. Thompson and Dean Mays not only have considerable experience fashioning accommodations for students with ADHD, but that their accommodations are generally successful.

In deciding on the 5 minute per hour level of accommodation, Dr. Thompson also took into consideration the fact that Dr. Krasa's recommendation was stated in equivocal terms. Dr. Krasa stated that it was "difficult to know whether accommodations on the part of the law school would help" Oser at all. She then suggested that Oser might benefit from "some extra time on exams (say 30 minutes for a 3-hour exam)." According to Dr. Thompson, Dr. Krasa's recommendations for other students had been voiced in mandatory terms in previous cases. Accordingly, she considered Dr. Krasa's recommendation to be illustrative rather than prescriptive.³ She also testified that Dr. Krasa's evaluations, although above average in quality, tended to recommend accommodations on the high end of the spectrum.

Furthermore, based on her knowledge of ADD and ADHD, Dr. Thompson explained that, paradoxically, too much time on exams can sometimes be a negative factor for students suffering from ADHD. Extra time can increase the anxiety level of those individuals. Dr. Krasa testified similarly that for some ADHD sufferers too much time on an exam can be tantamount to

³Although Dr. Krasa testified that she did not intend her recommendation to be equivocal, the Court agrees that on its face, her recommendations are couched in speculative terms.

“torture.” The Court notes that this may have played some role in this case as the record shows that Oser performed better in his unaccommodated exams than those in which he utilized his accommodation.

Dean Mays explained how Oser’s accommodation was correlated to Capital’s academic standards. She explained that time pressure on exams plays an important academic role to ensure that law students can perform legal analysis in real-time. She also explained the necessity of ensuring a level playing field between students given the competitive grading environment at the school and because class rank factors heavily into employers’ hiring decisions after graduation. She testified that the 2.0 GPA cut-off for academic dismissal is designed to ensure that only students with the ability to graduate from law school and to successfully sit for the bar exam are allowed to continue in law school. The academic dismissal policy reflects a faculty concern that students not be strung along for years and accumulate ever increasing amounts of debt to finance studies that will likely end in failure. Dean Mays also credits the 2.0 GPA floor along with other academic initiatives with securing Capital’s current status as the Ohio law school with the highest bar passage rate.

In sum, the Court concludes that the process used to fashion Oser’s accommodation was disciplined, thorough, and based on Dr. Thompson and Dean Mays’ exercise of professional judgment regarding both the needs of disabled students and the academic requisites of a successful legal education. As such, Capital’s determination of what constituted a reasonable accommodation is entitled to deference. *Kaltenberger*, 162 F.3d at 436.

B. Reasonableness of Accommodation

Capital provided Oser with extra exam time and a wide range of other accommodations including the provision of a private exam room, white noise, and an array of counseling and study-skill training. Although some of the academic skills courses available to Oser were also offered to the general student body, he received ongoing individualized counseling with Professor Bodine geared specifically to his challenges. The Court finds that Professor Bodine was uniquely qualified to provide assistance to Oser. Professor Bodine was not only experienced in providing academic counseling to students with ADHD and well-versed in educational literature, but also had personal experience with the disorder. Professor Bodine was diagnosed with ADHD in the sixth grade and successfully earned a J.D. himself notwithstanding his disorder. The record also establishes that Professor Bodine devoted considerable time and effort to helping Oser succeed.

Furthermore, as discussed *supra*, accommodations nearly identical to those provided to Oser had repeatedly proven to be successful with other Capital students suffering from a comparable ADHD impairment. Although Capital's accommodation differed from Dr. Krasa's proposal by providing only half of the extra exam time she recommended, Capital's decision to modify Dr. Krasa's recommendation was rational, geared towards preserving Capital's academic standards, and is an academic decision entitled to deference by this Court.

Moreover, Oser failed to object to the proposed accommodation even though he now claims that it was insufficient. On March 12, 2009, Thompson informed Oser by email of Capital's proposed accommodation. In the email, Thompson also states "I encourage you to contact me if you have any questions. Sometimes "fine tuning" is required after a student has

had some experience using the accommodations, and I am available for that process too.”

(3/12/2009 Thompspon Email.) Despite Thompson’s invitation, Oser did not contact her about the proposed accommodation and did not indicate any concern about the fact that he was receiving 5 extra minutes per hour instead of 10 extra minutes per hour. Nor did Oser raise concerns about the accommodation to Dean Mays or anyone else at the law school until after he received his Spring 2009 grades and learned that he had not made the 2.0 GPA cut-off.

Oser testified that he was unaware that he could complain about his approved accommodation. But Capital maintains an accommodation “complaint procedure” policy on its website that directs students who feel that their approved accommodations are insufficient to raise their concerns with the Dean. It states:

Students with a claimed handicap or disability who feel that their requests for accommodations or exceptions or Law School academic policies and procedures have not been appropriately addressed by the Dean or Dean’s delegate may direct their complaint to the Dean or Dean’s delegate.

(Manual of Policies & Procedures §6.6.06.) Dean Mays testified that students are repeatedly informed of the location of the school’s policies and procedures beginning at orientation. She also testified that other students had challenged the adequacy of approved accommodations in the past and that in such instances she would get back together with Dr. Thompson and re-review the accommodation. In the absence of any evidence that Oser was unsatisfied with his approved accommodation, the Court cannot find Capital unreasonable for assuming that Oser was satisfied with the accommodation he received.

Furthermore, the evidence before the Court suggests that Oser’s dismissal was a result of his effort level, not Capital’s failure to provide reasonable accommodations. Oser self-reported to Professor Bodine that he tended to procrastinate and that he failed to study until late in the

evening. Professor Bodine testified that Oser failed to make a concerted effort to improve his course work and never addressed his non-ADHD related tendency to procrastinate. For example, even after being placed on academic probation and receiving repeated counseling about the need to use the full time allotted to complete legal writing assignments, Oser revealed to Professor Bodine that he did not begin legal writing assignments until the night before they were due.

There are other indications that Oser did not take his legal studies entirely seriously. In the course of counseling Oser, Bodine learned that he was frequently absent, disrespectful to professors, and chronically unprepared for class. Even in his self-evaluation, Mr. Oser supported many of the observations that Professor Bodine made. All of this would have effected his academic performance.

Tellingly, Oser performed better on the unaccommodated exams than he did on the accommodated exams. This fact certainly is strong proof that Oser's failure to reach the 2.0 cumulative GPA cut-off was not caused by Capital's failure to provide reasonable accommodations as the provision of extra time on exams did not appear to improve Oser's performance.⁴

In light of the multiple accommodations provided to Oser, Oser's failure to object to the proposed accommodations as insufficient, Oser's failure to take advantage of the accommodations on three of his five exams, indications that Oser was not engaging in a full

⁴Oser argues that the accommodation provided (5 minutes per exam hour) was too insignificant to improve his scores. That fact, however, does not explain why he performed worse on the exams in which he received the accommodation. Specifically, he received a D and a C+ in courses on which he used the accommodation, but received a B, C+, and a B- on the exams on which he did not use the accommodation.

effort to improve his academic work, and the fact that Oser performed more poorly on the exams on which he used the accommodation, the Court cannot conclude that Capital failed to reasonably accommodate Oser merely by refusing to provide him with 15 more minutes of additional exam time.

Oser also argues that his rights were violated because he was denied an extra semester to raise his GPA to the 2.0 mark and because Capital's 2.0 cumulative GPA requirement and its 1.9 GPA cut-off for reinstatement petitions are arbitrary and unnecessary.⁵ It is clear from the record that both the requirement that students achieve a 2.0 cumulative GPA by the end of their first year and that students with a cumulative GPA below 1.9 are not permitted to petition for reinstatement are part of Capital's standard academic policies. Nevertheless, Oser argues that those requirements should have been altered or waived in his case so that he could have a full semester in his remediated state to improve his cumulative GPA to the required level.

Capital's decision not to waive its standard academic policies and to refuse to lower the academic standards for continuation in its J.D. program is entitled to deference. *Kaltenberger*, 162 F.3d at 437 ("The decision of the College not to waive this requirement and lower the standards for continued training in podiatric medicine is entitled to deference."). The grading

⁵Oser also argues that Capital discriminated against him by failing to make an exception to the 1.9/2.0 GPA policies because Professor Bodine indicated to him that exceptions to those policies had been made in the past for other students. Professor Bodine denied ever making this statement. Professor Bodine explained that he told Oser that Capital's two year waiting period for re-admission after academic dismissal had been waived in exceptional cases. Oser has not produced any evidence of specific students who were granted exceptions to the 1.9/2.0 policies, thus the Court concludes that Oser's contention was based on a misunderstanding of what Professor Bodine told him. Moreover, "[a]n institution's past decision to make a concession to a disabled individual does not obligate it to continue to grant that accommodation in the future, nor does it render the accommodation reasonable as a matter of law." *Wong*, 192 F.3d at 820.

policies of other law schools are not binding on Capital and do not indicate that Capital failed reasonably to accommodate Oser. As the Sixth Circuit has directed, this Court should only “reluctantly intervene in academic decisions” particularly when, as here, the academic decision at issue involves degree requirements and the conferral of a degree “places the school’s imprimatur upon the student as qualified to pursue his chosen profession.” *Id.* (internal quotation marks omitted). In light of the competitive, curved grading environment of law school and the demands placed on a practicing lawyer the Court finds that Capital did not abuse its discretion. The Court finds that Capital did not fail to reasonably accommodate Oser’s ADHD by refusing to waive its policies regarding academic dismissal, particularly in light of the accommodations which were made for Oser and the fact that the accommodations did not appear to improve Oser’s performance.

Therefore, because Oser has failed to establish all the requisite elements of his Rehabilitation Act, ADA, and Ohio Civil Rights Act claims, he has failed to demonstrated a substantial likelihood of success on the merits.

2. Irreparable Harm

“A plaintiff’s harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages.” *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir.1992). To demonstrate irreparable harm, the mere possibility of injury is not enough; rather, the injury must be likely. *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 80 (2d Cir. 1990). If Capital is not enjoined, Oser will be unable to attend classes when they begin on August 24, 2009 and his academic dismissal will stand during the pendency of this case and potentially beyond. Oser asserts that he will suffer irreparable injury if Capital is not enjoined because he

would suffer dignitary harm, personal and emotional loss as a result of knowing that he had been dismissed on the basis of his disability, and would be unable to gain admittance to another law school due to his academic dismissal.

The Court does not doubt that Oser will suffer dignitary harm and emotional loss if he is not permitted to return to law school; however, given the Courts determination that Oser had not shown a likelihood of success on the merits, that injury is unlikely to be legally cognizable, i.e., not a consequence of Capital's failure to reasonably accommodate his disability. In other words, Oser has not shown that it is likely that harm would stem from Capital's discrimination against him on the basis of his disability, the allegedly illegal act.

Similarly, while Oser might have difficulty gaining admittance to another school if his academic dismissal stands, he has no general right to attend law school. As he has failed to demonstrate a likelihood of success on his anti-discrimination law claims the Court does not believe he will suffer irreparable harm if his academic dismissal is allowed to stand pending the resolution of this suit. The Court also takes into consideration the fact that Oser is not permanently prohibited from pursuing a law career or even a law career at Capital. He is in no way prevented from applying to other law schools and will be able to re-apply to Capital. The testimony during the preliminary injunction hearing indicated that Capital would give full and fair consideration to any readmission application. Furthermore, it augers in Oser's favor that he did improve his second semester grades so the Court finds that there is more than a conjectural possibility that he could gain readmission.

Moreover, Oser's injury would not be irreparable. Even if the Court were ultimately to find that Capital had failed reasonably to accommodate Oser, it could then order Capital to

readmit Oser so that he could complete his legal education. Any delay in his degree conferral, as well as his pain and suffering in the interim could be adequately compensated by monetary damages. Therefore, Oser has not established a substantial likelihood that he will suffer irreparable harm.

3. Balance of Hardships

This Court must balance the hardships that Oser may suffer if Capital is not enjoined against those Capital will suffer if the injunction is issued. If the injunction is denied, Oser will be unable to start fall semester classes on time and may fall behind in the normal progression of his legal career. On the other hand, an injunction would force Capital to readmit Oser and to allow him another full semester to improve his performance to the 2.0 GPA threshold, in contravention of its standing academic policies. The injunction, would interfere with Capital's ability to use its judgment to craft policies that ensure a level playing field between law students, who are graded on a competitive basis, and to set academic standards to ensure that it can graduate students who can successfully sit for the bar exam and practice law (factors which also influence the reputation and stature of the school). Furthermore, the injunction would be preventing a harm that could be compensated monetarily in a case where the Court believes Oser is unlikely to succeed on the merits. Therefore, because Oser is seeking an injunction for harm that could be compensated by damages, and because the injunction would interfere with Capital's ability to set academic policy, the balance of hardships tips in Capital's favor.

4. Public Interest

The public interest factor does not clearly weigh in either party's favor. If an injunction was issued, the Court could be interfering in the public's interest in receiving legal services by

attorneys who are rigorously trained pursuant to uncompromised academic standards and vetted by their academic institutions. Also, the Court could be harming the interest of other law students who must compete for grades with students who are receiving accommodations and who would be harmed if their classmates are over-accommodated. The public also has an interest, however, in ensuring that anti-discrimination laws are followed. But, because there is no irreparable harm that the injunction would prevent and Oser is unlikely to succeed on the merits, the public interest would not be served by issuing an injunction.

V. CONCLUSION

None of the factors weigh in favor of granting a preliminary injunction in this case. The balance of hardships in this case, as well as the public interest, however, do not point very strongly in Capital's favor. Nevertheless, the Court finds it most problematic that Oser has not established a likelihood of success on the merits and has not shown that he will suffer any irreparable harm in the absence of an injunction. This Court concludes that the extraordinary remedy of a preliminary injunction is not warranted based on the circumstances of this case. For the foregoing reasons, this Court **DENIES** Oser's Motion for Preliminary Injunction.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT COURT

Dated: September 8, 2009