UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

LINCOLN MEMORIAL UNIVERSITY, DUNCAN SCHOOL OF LAW, Plaintiff, v. THE AMERICAN BAR ASSOCIATION, Defendant.	Case No. 3:11-CV-608 Hon. Thomas A. Varlan Magistrate Judge C. Clifford Shirley

DEFENDANT AMERICAN BAR ASSOCIATION'S RESPONSE TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff's Notice of Supplemental Authority ("Notice") is improper under the Local Rules and this Court's briefing schedule for Plaintiff's Motion for Temporary Restraining Order and For Preliminary and Permanent Injunction. Even if the Court considers the Notice, however, it provides no support for Plaintiff's Motion and, instead, supports the ABA's position.

First, Local Rule 7.1(d) bars supplemental filings without the Court's prior approval except to raise "developments occurring *after* a party's final brief is filed" (emphasis added). The Notice cites a nineteen-year-old case, *Darby v. Cisneros*, 509 U.S. 137 (1993), and the School offers no explanation for having not cited *Darby* in its opening brief or a reply brief.

Second, *Darby* offers no support for the School's argument that it can refuse to exhaust its appeal rights before coming to this Court. This is because *Darby* considered the Administrative Procedure Act ("APA"), which does not apply here. *Thomas M. Cooley Law School v. ABA*, 459 F.3d 705, 712 (6th Cir. 2006) (ABA "is not a government authority and thus is not governed by the [APA]."). Rather, this case is controlled by 20 U.S.C. § 1099b(a)(6)(C) and the Department of Education's implementing regulation, 34 C.F.R. § 602.25(f), under which

an accrediting agency must establish and apply review procedures that provide "an opportunity, upon the written request of an institution or program, for the institution or program to appeal any adverse action prior to such action becoming final." If the School were entitled to obtain judicial review without first seeking relief from the Appeals Panel, the result would be circumvention of both 20 U.S.C. § 1099b(a)(6)(C) and 34 C.F.R. § 602.25(f). Further, in contrast to *Darby*, in which the final agency action had already occurred, 509 U.S. at 146, the Council's accreditation decision will not be final until *after* the appeals period concludes. 34 C.F.R. § 602.25(f). Even under the APA, nevertheless, an appeal is a prerequisite to judicial review "when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby*, 509 U.S. at 153-54; *see also Free Enterprise Fund v. PCAOB*, 130 S. Ct. 3138, 3150 (2010) ("when Congress creates procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive") (internal quotation marks and citation omitted).

Third, the School misapplies *Darby* when discussing the Section's Rule 10. In *Darby,* the Court noted that exhaustion was not required under a statute that provided that a party "may" seek rehearing but that did not automatically stay the underlying decision pending rehearing. *Darby,* 509 U.S. at 150. Under Rule 10, however, an applicant "may" appeal an adverse decision *and* the appeal automatically stays the Council's accreditation decision. *See* Rule 10 at ABA68-70. Rule 10 appropriately uses the word "may," since whether to appeal is controlled by the applicant.

Fourth, the School wrongly contends that the Council's decision was treated as final by publicizing it in contravention of the Section's Rules. As stated by the *Cooley* Court, "This court must defer to an agency's interpretation of its own rules unless plainly erroneous." *Cooley,* 459

F.3d at 714. Publication of the decision was required by the Section's Internal Operating Practice No. 5(c) (Ex. 3 at ABA92-93) (requiring "written notification to the public within twenty-four (24) hours of the time the Consultant notifies the law school in writing of any decision to deny … provisional approval"). In conformance with the controlling statutes and regulations, however, the determination of when that decision is final must be established under the procedures set out in the Section's Rule 10.

Dated: January 17, 2012

Respectfully submitted,

By: s/ Howard H. Vogel

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CERTIFICATE OF SERVICE

I certify that on January 17, 2012, I properly served all parties by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt and U.S. Mail.

By: s/ Howard H. Vogel (001015)