UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

LINCOLN MEMORIAL UNIVERSITY, DUNCAN SCHOOL OF LAW,	:	**Case No.**
Plaintiff,	:	
v.	:	
THE AMERICAN BAR ASSOCIATION,	:	
Defendant.	:	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTION

Plaintiff Duncan School of Law ("DSOL"), for the reasons set forth in its Verified Complaint and below, offers this Memorandum in Support of its Motion for Temporary Restraining Order ("TRO") and for Preliminary and Permanent Injunction.

FACTUAL BACKGROUND

DSOL is a part of Lincoln Memorial University ("LMU"). LMU was established in 1888 and chartered by the State of Tennessee in 1897. LMU is a Level V institution accredited by the Southern Association of Colleges and Schools—Commission on Colleges ("SACS-COC"). It is approved to award associate, baccalaureate, master's, educational specialist, and doctoral degrees. LMU was founded upon Abraham Lincoln's principles of dedication to individual liberty, responsibility, and improvement of self, and has adopted a purpose of providing

educational opportunities, developing community leaders, and expanding economic and social forces within the southern Appalachian region.

DSOL's genesis began in the 1990's when LMU commenced planning for and expanding beyond its liberal arts mission to include professional and post-baccalaureate education. In July of 2007, at an annual LMU strategic planning retreat, LMU faculty and administration discussed establishing a juris doctorate ("J.D.") degree program. In November of 2007, LMU formed a preliminary steering committee to further explore the establishment of a J.D. program.

In January of 2008, LMU informed the Tennessee Board of Law Examiners ("TBLE") that it would consider seeking approval of a new law school that would be located in Knoxville, Tennessee. LMU hired a consultant to work on this proposal in March of 2008. LMU notified the SACS-COC, as its regional accrediting body, of its intent to offer a J.D. degree in April of 2008. Concurrently, LMU applied for approval by the TBLE for graduates of DSOL to sit for the Tennessee Bar Examination.

DSOL submitted to both the TBLE and SACS-COC extensive and thorough feasibility studies devoted to the consideration of its proposed degree offering and administrative structure. These two accrediting authorities hold law schools to standards for approval that mirror those of the ABA. After reviewing the data presented by DSOL, under these standards, both TBLE and SACS-COC found DSOL worthy of approval and accreditation.

In February of 2009, LMU received notification from the TBLE that DSOL graduates could take the Tennessee Bar Exam. TBLE based this decision upon its finding that DSOL was in compliance with the Rule 7, Article II, Sec. 2.03 of the Rules of the Supreme Court of the State of Tennessee. Section 2.03 imposes requirements upon law schools seeking approval that mirror those of the ABA.

In April of 2009, LMU received approval from SACS-COC to offer a J.D. degree. In its decision to accredit DSOL as a law school, SACS-COC specifically found that LMU's accreditation by that body would continue without change in light of LMU's J.D. program. SACS-COC based its finding that DSOL could continue in operation without a change in LMU's accreditation on the SACS-COC Report of the Substantive Change Committee that was completed following a site visit to DSOL in March of 2010. SACS-COC concluded that DSOL was in compliance with the requisite Comprehensive Standards it imposes. These standards are congruent with the ABA Standards and Rules of Procedure for Approval of Law Schools ("ABA Standards").

On August 15, 2009, DSOL conducted orientation of its inaugural class and began classes for the Fall 2009 semester two days later. This 2009 entering class is comprised of students pursuing a part-time course of study. They are expected to graduate in May of 2013. Likewise, in August of 2010, DSOL began classes for both part-time and full-time students in its second year of operation. The full-time students that began classes in August of 2010 are also expected to graduate in May of 2013. Those students who intend to sit for the July 2013 bar exam will be required by the rules of many state Supreme Courts to complete applications for permission to sit for the bar exam by early 2012 or sooner. Without ABA approval for DSOL, these students will neither be able to complete the application process nor apply for permission to sit for the bar exam in the 48 states, not including West Virginia and Tennessee, which require that all applicants for admission to the exam have attended an ABA accredited law school. This effectively vests the ABA with a monopoly on admittance to the bar in the United States.

The Secretary of Education has delegated to the ABA and its Section of Legal Education the authority to accredit law schools in the United States. On January 10, 2011, DSOL applied to

the ABA for provisional approval pursuant to ABA Standard 104 and Rule 4 of the ABA Rules of Procedure for Approval of Law Schools in an application submitted to Hulett H. Askew, the Consultant on Legal Education to the ABA ("Consultant"). Pursuant to the requirements for ABA provisional accreditation set forth in ABA Rule 4(a), the application for provisional approval included: (1) a certification letter from the LMU President and DSOL Dean; (2) a completed site evaluation questionnaire; (3) a copy of the law school feasibility study commissioned by LMU; (4) a copy of the DSOL self-study; (5) financial operating statements; (6) a statement detailing LMU's and DSOL's ownership interests in any land used by the law school; (7) a request for a site evaluation; and (8) the requisite application fee. A site evaluation of DSOL was conducted on March 13-16, 2011, by the ABA's six member Site Evaluation Team. The Report of the Site Evaluation Team was issued to DSOL in a letter dated July 14, 2011, from Mr. Askew to LMU President, Dr. B. James Dawson, and DSOL Dean Sydney A. Beckman. (Hereinafter "Site Evaluation Report"). This Site Evaluation Report demonstrates that the ABA's own hand-picked fact finders found DSOL to be in substantial compliance with the ABA Standards.

The ABA's own Site Evaluation Report, the accreditation findings of SACS-COC and the TBLE, and the voluminous and candid record evidence presented to the ABA clearly demonstrated DSOL's compliance with all the ABA Standards and entitlement to provisional approval. Nevertheless, in September of 2011, the ABA Accreditation Committee issued a Recommendation, including its own Findings of Fact, finding that DSOL was not in compliance with four separate ABA Standards – 203, 303, 501 and 511 – and therefore provisional approval for DSOL should be denied.

DSOL responded to the ABA Accreditation Committee's Recommendation against provisional approval by appearing at the Executive Session of the Council in San Juan, Puerto Rico on December 2, 2011, and submitting a written Hearing Brief in support of its position. The Hearing Brief, attached to the Complaint as Exhibit A, details the disconnect between the Committee's findings with respect to ABA Standards 203, 303, 501, and 511, and the factual evidence on the record, and demonstrates that based on the record evidence, a determination that DSOL failed to comply with ABA Standards 203, 303, 501, and 511 is not supported by substantial evidence and is therefore arbitrary, capricious, and contrary to law. The Council's decision to adopt the Committee's Recommendation at the meeting—except with respect to Standard 511—was against the manifest weight of overwhelming record evidence and does not comport with the ABA's own Rules of Procedure for Approval of Law Schools. Given the fact that the Accreditation Committee's Recommendation, and the Council's decision based thereon, are so untethered and disconnected to the undisputed facts on the administrative record in this case, the decision fails to comport with even the most basic principles of due process as required by the ABA's own Rules and Procedures and the federal common law governing accreditation of post-secondary educational institutions.

Following an adverse accreditation decision of the Council, the ABA Rules of Procedure for Approval of Law Schools provide for an optional appeal to be filed in writing with the Consultant and referred to an appeals panel. *See* ABA Rules of Procedure for Approval of Law Schools, Rule 10(a) ("A law school **may** appeal the following adverse decisions of the Council. . . .")(emphasis added). Pursuant to Rule 10, the appeals process takes roughly 105 days to complete following the filing of a written appeal by the aggrieved law school. The roughly 3 ½ month duration of this process means that the Appeals Panel would not issue a final ruling until

approximately April 2012. As noted above, students graduating in May 2013 are required in many states to commence the application process for permission to take the July 2013 Bar Exam far earlier than April 2012. If a decision in favor of accreditation is not issued forthwith, the DSOL students will be hindered in their ability to complete bar exam applications. In addition, during the long appeal process, DSOL will be prejudiced and irreparably harmed as to its reputation and, therefore, in its ability to recruit future classes to the law school, to attract faculty, staff and funding.

The Council's decision is not based on the record evidence before it, including the evidence developed by its own Site Evaluation Team. This ABA team had first-hand knowledge, as did SACS-COC and TBLE. These teams visited the law school, examined the entire operation and interviewed numerous professors, administrators and students. Rational fact-based decision-making is necessarily dependent on what the three evaluating teams heard, saw and reported, and the documentary evidence submitted in connection with DSOL's application. As a corollary, a decision based on unsupported assumptions and facts or evidence not in the record is a decision dissociated from the facts, and therefore is, as a matter of law, arbitrary, capricious and an abuse of discretion. A TRO is necessary to stop the immediate and irreparable harm caused by the ABA's publication and dissemination of its arbitrary decision. A permanent injunction is necessary to prevent irreparable injury that will result if the ABA is not required to issue an award of provisional accreditation that adheres to its own accreditation standards and procedures and is based on the factual record evidence before it.

Moreover, as set forth in the Verified Complaint, the conduct of the Accreditation Committee, the Council, the Consultant, and the ABA Section on Legal Education and

Admissions to the Bar constitutes anti-trust activity in violation of the Sherman Act §§ 1 and 2 and further demonstrates the necessity for issuing a preliminary injunction.

LEGAL STANDARD

The purpose of both a TRO and a preliminary injunction is "to prevent irreparable injury and to preserve the court's ability to render a meaningful decision on the merits of an action." *United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 348 (6th Cir. 1998)(quoting *Stenberg v. Cheker Oil Co.,* 573 F.2d 921, 925 (6th Cir. 1978)(internal quotation marks omitted)); *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981). The decision to grant or deny a TRO and/or a request for interim injunctive relief falls squarely within the sound discretion of the district court. *Friendship Materials, Inc. v. Michigan Brick, Inc.,* 679 F.2d 100, 102 (6th Cir. 1982). The movant bears the burden of establishing that the circumstances clearly demand the issuance of a TRO and/or an injunction. *Overstreet v. Lexington-Fayette Urban County Gov't,* 305 F.3d 566, 573 (6th Cir. 2002).

In determining whether to grant a TRO or a preliminary injunction, courts consider the same four factors: (1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not granted; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the injunction advances the public interest. *Jones v. Caruso,* 569 F.3d 258, 270 (6th Cir. 2009); *see also Winter v. Natural Res. Def. Council,* 129 S.Ct. 365, 374 (2008); *AIG Aviation v. Boorom Aircraft,* 142 F.3d 431 (6th Cir. 1998); *Mason County Med. Ass'n v. Knebel,* 563 F.2d 256, 261 (6th Cir. 1977). "These four considerations are 'factors to be balanced, not prerequisites that must be met'." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.,* 511 F.3d 535, 542 (6th Cir. 2007)(quoting *Jones v. City of Monroe,* 341 F.3d 474, 476 (6th Cir. 2003)). A stronger

showing of likelihood of success is required if the other factors militate against granting relief, but less likelihood of success is required when they do support granting relief. *Performance Unlimited, Inc. v. Questar Publ'rs, Inc.*, 52 F.3d 1373, 1385-86 (6th Cir. 1995). "Moreover, a district court is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary injunction if fewer factors are dispositive of the issue." *City of Monroe*, 341 F.3d at 476. As set forth more fully below, all four factors weigh heavily in favor of granting Plaintiff the relief sought.

ARGUMENT

1. DSOL Is Likely To Succeed On The Merits Warranting The Issuance Of A TRO And Preliminary Injunction

In reviewing accreditation decisions by the ABA, federal courts apply a standard of review resembling the review of administrative agency decisions under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"). *Cooley Law School v. ABA*, 459 F.3d 705, 712-13 (6th Cir. 2006). This standard of review is applicable—even though the ABA is not a government agency or authority—because the Secretary of Education has delegated authority regarding law school accreditation to the ABA. *Cooley*, 459 F.3d at 707; 20 U.S.C. § 1099b.

The ABA is required to articulate a "rational connection between the facts it found and the decision it made" to satisfy this standard. *Cincinnati Bell Tel. Co. v. F.C.C.*, 69 F.3d 752, 758-61 (6th Cir. 1995), *motion to recall mandate den. sub nom. Bell South Corp. v. F.C.C.*, 96 F.3d 849 (1996). The reviewing court may not supply its own rationale, but instead must rely on the reasons advanced by the agency in support of its action. *Ohio Bell Tel. Co. v. F.C.C.*, 949 F.2d 864, 872 (6th Cir. 1991). An accrediting agency acts arbitrarily and unreasonably where there is no rational connection between the facts in the record and the decision made. *Cincinnati*

Bell, supra.; *see also Foundation for Interior Design Education Research v. Savannah College of Art & Design*, 244 F.3d 521, 527-528 (6th Cir. 2001); *Chicago School of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools and Colleges*, 44 F.3d 448, 449 (7th Cir. 1994).

This standard also necessarily includes a requirement that the applicant be afforded substantive and procedural due process. Due process is a flexible concept and the particular application of due process varies as the particular factual situation demands. *Matthews v. Eldridge*, 424 U.S. 319, 349 (1976). While review of an accrediting body's decision may be deferential, the review must analyze whether the accrediting body followed its own rules to comport with substantive due process. *Western State Univ. of So. Cal. v. American Bar Ass'n*, 301 F. Supp.2d 1129, 1135 (C.D. Cal. 2004); *Accord Chicago School*, 44 F.3d at 450-451; *Wilfred Academy of Hair & Beauty Culture v. Southern Ass'n of Colleges and Schools*, 957 F.2d 210, 214 (5th Cir. 1992)(due process analysis "focus[es] primarily on whether the accrediting body's internal rules provide a fair and impartial procedure **and whether it has followed its rules in reaching its decision.**")(emphasis added). In addition to assuring that an accrediting body's decision is fair and reasoned based on substantial record evidence, procedural due process also requires that an institution subject to action by an administrative body be given sufficient notice and a fair opportunity to be heard. *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). Thus, courts including the Sixth Circuit recognize that quasi-public accrediting agencies such as the ABA have a duty to employ fair procedures when making decisions affecting their members. *Cooley Law School v. ABA*, 459 F.3d at 712-13. The procedural and substantive requirements of common law due process thereby serve as a check on organizations

like the ABA that exercise significant authority in areas of public concern such as accreditation and professional licensing. *Id.* at 711-12.

In this instance, the Council's decision to deny provisional approval to DSOL is a violation of both procedural and substantive due process requirements. The Council's decision is clearly arbitrary and unreasonable. Not only is there a disconnect between the facts in the record and the Council decision to deny provisional accreditation, the undisputed facts contradict that decision. Rule 8 of the Rules of Procedure for Approval of Law Schools provides: "In considering a recommendation of the Committee, the Council shall adopt the Committee's findings of fact unless the Council determines that the findings of fact are not supported by substantial evidence on the record." ABA Rules of Procedure for Approval of Law Schools, Rule 8(a). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support [the finding]." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citing *Consolidated Edison C. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). The facts, as found and articulated by the Site Evaluation Team, as well as two independent accrediting authorities – SACS-COC and TBLE – lead inexorably and unquestionably to the conclusion that DSOL is in substantial compliance with all ABA Standards. As demonstrated in detail in the Hearing Brief submitted to the Council by DSOL, and attached to the Complaint as Exhibit A, the Committee's Recommendation is not supported by substantial evidence.

The Council adopted the Recommendation of the Accreditation Committee, which was based not on record evidence before the Committee, but on misplaced assumptions and inferences unsupported by any facts on the record. In so doing, the Council violated both the ABA's own procedural rules as well as the most basic notions of due process applicable to accreditation cases as set forth above.

The ABA failed to follow its own rules by applying evaluation considerations, such as whether DSOL had reviewed assumptions in its Feasibility Study, which are beyond the scope of the accreditation standards enumerated by the ABA, as the basis for DSOL's alleged non-compliance. *See* Hearing Brief at pp. 15 to 20 for full discussion of ABA's application of Feasibility Study considerations to evaluation and determination of DSOL's compliance with Standard 203. In addition, the ABA acted arbitrarily and capriciously by applying standards for LSAT scores and UGPA to its review of admissions and academic attrition standards that effectively treat DSOL differently than at least eight other similarly situated law schools that have gained full accreditation from the ABA. *See* Hearing Brief at pp. 27-30 and 34-39 for full discussion of comparison between LSAT and UGPA for DSOL students and other law schools with lowers scores which have been fully accredited by the ABA. Such conduct clearly violates DSOL's rights to common law due process. *See Auburn University v. Southern Ass'n of Colleges and Schools, Inc.*, 489 F. Supp.2d 1362, 1376, 1378-79 (N.D. Ga. 2002)(failure of accrediting agency to follow its own rules and procedures by undertaking an investigation that goes beyond the standards of accreditation published by the accrediting agency violates due process); *Hampton University v. Accreditation Council for Pharmacy Education*, 611 F. Supp.2d 557, 567 (E.D. Va. 2009)(failure to follow own rules and policies, treating the school differently than other similarly situated programs, and failure to provide a meaningful hearing supports a determination that university had some likelihood of success on the merits in support of motion for preliminary injunction); *Fine Mortuary College, LLC v. American Bd. of Funeral Service Educ., Inc.*, 473 F. Supp.2d 153, 159-160 (D. Mass. 2006)(accrediting agency's failure to follow own policies and procedures throughout the re-accreditation process raises genuine issue of

material fact precluding summary judgment on college's claim that re-accreditation decision violated due process rights).

The Council's (1) adoption of the Recommendation of the Committee, which is not based on substantial evidence and contravenes DSOL's common law due process rights and the ABA's own Rules of Procedure for Approval of Law Schools; (2) application of evaluation considerations that are beyond the scope of the ABA's published Standards for Accreditation of Law Schools; and (3) imposition of LSAT and UGPA requirements that result in DSOL being treated differently than other similarly-situated, fully-accredited law schools with lower scores all serve to demonstrate the high likelihood of DSOL's success on the merits of its claims before this Court.

Additionally, the cursory nature of the Council hearing on December 2, 2011, implicates serious due process concerns regarding whether the process afforded DSOL was fair and meaningful. DSOL was given only fifteen minutes to present its appeal of the Committee's Recommendation to the Council, despite having requested additional time to address the Council well in advance of the December 2, 2011, hearing. Similar to the situation in *St. Andrew's Presbyterian College v. So. Ass'n of Colleges and Schools*, 2007 U.S. Dist. LEXIS 87953, *16-17 (M.D. N.C. Nov. 29, 2007), the cursory nature of the hearing and emphasis on oral testimony coupled with a lack of opportunity to provide corrections or clarifications when the Council relied on inaccurate information, and the voluminous nature of the record before the Council, create due process concerns regarding whether DSOL had a meaningful opportunity to be heard. *See also Western State*, 301 F. Supp.2d at 1137 ("The question is not whether [DSOL] has some opportunity to be heard, but whether [DSOL] has had '**a fair and effective opportunity to be heard**.'")(emphasis added); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)("[T]he fundamental

requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.")(internal quotations omitted). In addition, members of the Accreditation Committee participated in the Council's Hearing and deliberations. This anomaly--having the entity whose decision is being appealed assist in deciding the appeal--is also an egregious violation of procedural due process.

1a. DSOL Is Not Required To Exhaust Administrative Remedies.

To the extent Defendant may argue that DSOL has not exhausted its administrative remedies under the ABA Standards and Rules of Procedures for Approval of Law Schools, DSOL notes that exhaustion of the accrediting body's procedural review process is neither required by the ABA's procedure itself, nor by the Higher Education Act ("HEA"), which is the statute that confers accrediting authority on the ABA by the Department of Education. *See* 20 U.S.C. 1099b. Where a statute, such as the HEA, does not expressly require exhaustion, a court must exercise its discretion and balance the interest of the individual plaintiff in retaining prompt access to a federal judicial forum against the countervailing institutional interests that may favor exhaustion. *Maxwell v. New York University*, 2009 U.S. Dist. LEXIS 45859, *27 (S.D. N.Y. June 1, 2009)(citing *Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90, 93-93 (2nd Cir. 1998)).

Under the APA, the availability of the doctrine requiring exhaustion of administrative remedies is limited to that which the statute or rule clearly mandates. *Califano v. Sanders*, 430 U.S. 99, 107 (1977). Where the APA applies, a district court cannot require a party to exercise an optional administrative appeal process as a prerequisite to judicial review. *Id.* The HEA grants accrediting authority to the ABA and provides federal courts exclusive jurisdiction over actions challenging an accreditation decision. *See* 20 U.S. C. § 1099b(f). However, neither the statute nor its enabling regulations requires exhaustion with respect to a law school's appeal of

an adverse accreditation decision. *See* 34 C.F.R. § 602.25 (due process provisions of regulations for accrediting bodies). Moreover, as noted above, *supra* p. 7, the ABA Rules of Procedure for Approval of Law Schools make clear that an appeal of an adverse decision by the Council to the Consultant and the Appeals Panel is an optional process. *See* Rule 10(a)("A law school **may** appeal the following adverse decisions of the Council. . . .") and Rule 10(b)(A law school **may** appeal the adverse decisions specified . . . in this Rule, by filing with the Consultant a written appeal. . . .")(emphasis added).

Finally, exhaustion is not required because the ABA's accreditation review process constitutes a restraint on competition in violation of the Sherman Act, (*see* Verified Complaint at ¶¶ 70-78), thereby challenging the ABA's accreditation scheme itself. *American Ass'n of Cosmetology Sch v. Riley*, 170 F.3d 1250, 1260 (9th Cir. 1999)("The federal courts universally dispense with the exhaustion requirement in situations where the very administrative procedure under attack is the one that the agency says must be exhausted.")(citing *Barry v. Barchi*, 443 U.S. 55, 65, n.10 (1979)). Indeed, actions such as these, which violate the antitrust laws and are incorporated into the ABA's accreditation procedure, have been found to be a *per se* indication of a lack of due process. *Life University, Inc. v. Council on Chiropractic Educ., Inc.*, 2003 U.S. Dist. LEXIS 28165, at *4 (N.D. Ga. Feb. 12, 2003).

Assuming *arguendo* that the Court finds exhaustion of the administrative process could be considered a necessary element of the accreditation scheme under the HEA and the ABA Rules of Procedure, DSOL should not be required to exhaust the ABA appeal process because any further appeal of the Council's decision would be futile. As described in the Verified Complaint, the ABA Accreditation Committee, Council, Consultant, and Appeals Panel are part of a conspiracy to restrain free commerce and preclude competition among law schools in

violation of the Sherman Act. *See* Complaint, pp. 30-33, ¶¶ 79-91. Thus, the Council has acted in furtherance of this scheme by adopting a recommendation of the Committee, which was clearly arbitrary, capricious and contrary to law. *See* Complaint at pp. 34-37, ¶¶ 101-125. Clearly, any appeal to the Appeals Panel, which is a participant in the scheme in violation of the Sherman Act, would be futile. Moreover, an appeal of the underlying accreditation decision would be wholly inadequate to address the Sherman Act claims that are intertwined with the due process claims. *Holden v. Jensen*, 2011 U.S. Dist. LEXIS 102687, *16-17 (W.D. Mich. Sept. 21, 2011)(Under IDEA, court noted exhaustion not required where it would be futile or inadequate to protect plaintiff's rights.); *Wilfinger v. St. John Health*, 2009 U.S. Dist. LEXIS 31130 (E.D. Mich. April 13, 2009)(Failure to exhaust administrative remedies is excused where resorting to administrative procedure would simply be futile or the remedy inadequate).

As discussed, *supra* pp. 8-9, in this case, the appeal process to the ABA Appeals Panel requires up to 105 days to complete. Courts have long held that where exhaustion of internal administrative remedies would unreasonably delay the opportunity to obtain a judicial hearing on the merits, the Court may properly excuse the failure to exhaust the administrative process. *See e.g. Clayton v. UAW*, 451 U.S. 679 (1981); *Monroe v. International Union UAW*, 540 F. Supp. 249, 255 (S.D. Ohio 1982). Such a long delay not only indicates the futility of exhausting administrative remedies but also causes irreparable harm to DSOL and its students and faculty.

2. DSOL Will Suffer Irreparable Harm If A TRO And Preliminary Injunction Are Not Issued

Federal Courts have acted to grant TROs and preliminary injunctions to preserve the status quo and protect the reputation of a school where the facts show a strong likelihood of success on the merits and where relief is necessary to prevent the immediate and irreparable harm occasioned by the notice of an accreditation decision that was made in violation of due

process. *See Florida College of Business v, Accrediting Council for Independent Colleges and Schools*, 954 F. Supp. 256, 258 and 260 (S.D. Fla. 1996)(harm caused by taint to school's community and academic reputation constitutes harm in support of TRO and preliminary injunction, even if school were later successful on merits of its due process claims); *Edward Waters College v. So. Ass'n of Colleges and Schools*, 2005 U.S. Dist. LEXIS 39443, at *1-2 and *43-44 (M.D. Fla. March 11, 2005)(TRO restraining and enjoining accrediting body from notifying the Secretary of Education or any other party that school had been subject to adverse accreditation decision converted to preliminary injunction where school demonstrated strong likelihood of success on the merits of due process claims). As set forth in detail above, *supra* pp. 11-16, there is an overwhelming likelihood of success on the merits of Plaintiff's claims of substantive and procedural due process violations. In the absence of a TRO and preliminary injunction, the harm suffered by DSOL will be irreversible, and money damages are wholly inadequate compensation to remedy such harm.

Likewise, the issuance of a permanent injunction granting provisional approval is reasonable and necessary when an accrediting body refuses to follow its own rules and procedures. *See Florida College of Business*, *supra*, at 259-60. As demonstrated above, the Council's adoption of the Committee's Recommendation to deny DSOL provisional approval was a direct result of the Council's and the Committee's failures to adhere to the ABA's own published Standards for Approval of Law Schools and Rules of Procedure for Approval of Law Schools. Federal courts recognize that an injunction is necessary and warranted when an accrediting body does not follow its own rules with respect to review of an educational institution's accreditation. *See Western State*, 301 F. Supp.2d at 1137-38 (preliminary injunction issued where plaintiffs offered evidence indicating that ABA may be failing to follow its own

rules, thereby violating due process and precluding plaintiff's right to a fair and effective appeal); *St. Andrews*, 2007 U.S. Dist. LEXIS 87953 at *7, 10-12, 18-19 (preliminary injunction granted to school which demonstrated likelihood of success on merits given cursory review process, compressed time frame to present school's position, limited appellate process, and slight harm, if any, to accrediting body by issuance of injunction); *Edward Waters College*, 2005 U.S. Dist. LEXIS 39443, at *43-44 (TRO previously granted was converted to preliminary injunction where college demonstrated likelihood of success because accrediting body's procedures applied in the case did not meet minimum due process standards); *Florida College of Business*, 954 F. Supp. at 258-60 (injunction granted because accrediting body's conclusions were not supported by substantial evidence and issues of irreparable harm and public interest weighed in favor of college).

In addition to the harm inherent in an accreditation process that is patently unfair by virtue of the accrediting body's failure to apply and adhere to its own rules and procedures, the ABA's denial of provisional approval causes irreparable and obvious harm to DSOL's reputation that cannot be remedied by an award of mere money damages. In addition, the arbitrary and capricious decision to deny ABA approval to DSOL precludes the flow of any federal student loan funds to students attending DSOL. These damages, in turn, cause a domino effect of additional harm including: (1) the likelihood that students and faculty will transfer to or seek positions at other law schools; (2) the likelihood that recently admitted but non-matriculated students will choose to attend another law school; (3) the inability of the school's future graduates to sit for state bar exams in jurisdictions beyond Tennessee; and (4) the possibility that under Tennessee Supreme Court Rule 7 the TBLE might withdraw its grant of approval permitting DSOL graduates to sit for the Tennessee bar exam. This potential irreparable harm is

"obvious and considerable." *Hampton University*, 611 F. Supp.2d at 565-66. The damage to DSOL's reputation and the concomitant disruption of its ability to recruit an entering class and retain students and faculty, as well as the denial of federal loan assistance to any DSOL students constitute an irreparable and immediate injury. *See Grutter v. Bollinger*, 247 F.3d 631, 633 (6th Cir. 2001).

3. The Issuance Of A TRO And A Preliminary And Permanent Injunction Will Not Harm The ABA

The ABA will in no way be harmed by the TRO and preliminary injunction. Nor will the ABA be harmed by a permanent injunction that the Council grant DSOL provisional approval. Had the Council not acted arbitrarily and capriciously and had it adhered to its own Standards and Rules of Procedure in the first instance, namely ensuring that its accreditation decision was based on substantial evidence on the administrative record, rather than on information, speculation, and inferences that were beyond the record in this case, DSOL would have been granted provisional approval and neither this lawsuit nor DSOL's present request for a preliminary and permanent injunction would have been necessary.

Similarly, the ABA cannot justifiably argue that it will be harmed in any way by revoking a decision to deny accreditation where that decision is clearly inconsistent with the application of the ABA's Rules of Procedures and Standards to other similarly situated, fully accredited law schools. As demonstrated to the Council and as set forth in the Hearing Brief, the ABA has fully accredited many other law schools that have LSAT scores and UGPA for incoming cohorts that are below the level implicitly required by the Accreditation Committee's Recommendation. *See* Hearing Brief, pp. 35-40. Indeed, the ABA cannot seriously argue that it suffers any harm by requiring it to apply its Standards in a consistent manner. In fact, the HEA's implementing regulations require that the ABA apply its standards in a consistent manner. *See* 34 C.F.R. §

602.18(b)(Agency must consistently apply and enforce its standards including having effective controls against the inconsistent application of the standards). If there is any minimal harm or inconvenience to the ABA it flows from the ABA's own actions. *See St. Andrews Presbyterian College*, 2007 U.S. Dist. LEXIS 87953, at *7 (the relative harm to SACS is slight and is tied to its credibility among member institutions and its ability to enforce the Association's decisions).

4. The Issuance Of A TRO And Preliminary And Permanent Injunction Will Further The Public Interest

The dissemination of inaccurate, misinformed, and arbitrary and capricious accreditation decisions is clearly contrary to the public interest. As a quasi-public entity approved by the Secretary of Education to set independent standards for accreditation and to accredit law schools in the United States, the ABA is charged with serving an important public interest. The public at large has an interest in a timely and trustworthy accreditation process the results of which the public can turn to as a "reliable authority as to the quality of training offered by an educational institution." *Auburn University*, 489 F. Supp.2d at 1368 (quoting Pub. L. No. 82-550, 66 Stat. 663 (1952))(internal quotations omitted). The requested TRO and preliminary injunction would serve to protect the public from the dissemination of misinformation based on an arbitrary accreditation decision. The TRO and preliminary injunction will prevent the irreparable harm visited upon DSOL and protect the public from inaccurate information regarding DSOL's accreditation status. *See Florida College of Business*, 954 F. Supp. at 258-60; *Edward Waters College*, 2005 U.S. Dist. LEXIS 39443, at *1-2 and 12-13. If the Court declines to issue the requested TRO or preliminary injunction, the public will be harmed by the ABA's wrongful decision to deny accreditation remaining uncorrected in the public domain. The longer Exhibit A remains uncorrected, the more difficult it will be to mitigate and rehabilitate the law school's reputation. *See Florida College of Business*, 954 F. Supp. at 260 (irreparable harm supports

TRO and injunction because "FLORIDA's reputation in the local community and academic community will be tainted even if it were later successful on the merits following a full presentation of the evidence.").

Similarly, the requested injunction granting provisional approval would serve the public interest by requiring the ABA to carry out its accreditation function according to its published procedures, rules and standards, and to apply those rules, procedures, and standards consistently among all law schools. Likewise, issuance of the requested injunction serves the public interest by requiring the ABA to comport with the requirements of due process and ensure that its accreditation decisions are based on substantial record evidence presented to the accrediting body in the course of the accreditation review process, not based on assumptions, inferences, and conclusions, or information and interpretations that are not found anywhere in the record. The public interest is clearly served by an injunction which prevents the ABA from continuing to deny the right to a legal education to socio-economically disadvantaged students who are at the heart of DSOL's mission.

Furthermore, the public interest is served by granting a preliminary and permanent injunction, which would obviate the illegal restraint on trade occasioned by the anti-trust behavior of the ABA's Section on Legal Education and other ABA member participants. The injunction would grant provisional approval as warranted by the facts and as necessitated by the requirement that the ABA apply its standards with consistency.

Lastly, an injunction granting provisional approval would serve the public interests of the DSOL law students, faculty, and the citizens of Tennessee who have an interest in graduates of DSOL being able to sit for the bar exam following completion of their legal studies. The TBLE's approval of DSOL and determination that DSOL graduates may take the Tennessee bar

exam indicates that any public policy considerations in favor of the ABA are not as significant as the harm to DSOL if an injunction does not issue. *See Life University,* 2003 U.S. Dist. LEXIS 28165, at *4-5.

CONCLUSION

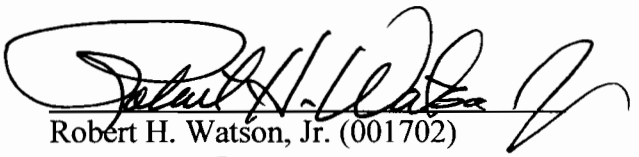
Based on the foregoing reasons, as well as the reasons set forth in DSOL's Verified Complaint, the Court should grant DSOL's motion for a TRO and Preliminary Injunction ordering the ABA to post on its website a statement that it has been ordered by this Court to remove Exhibit A from its website and to replace it with a statement that the ABA has been further ordered by this Court to hold any decision about DSOL's accreditation in abeyance until further instructed by the Court. The injunction should further order the ABA to send this statement to all of the entities and organizations that received notice of Exhibit A. The Court should likewise grant the DSOL's motion for a permanent injunction and order the ABA to grant provisional accreditation to the DSOL. All four factors discussed above weigh heavily in favor of granting DSOL mandatory relief. *Certified Restoration Dry Cleaning,* 511 F.3d at 542 (four factors are to be balanced, not prerequisites that must be met); *Jones,* 341 F.3d at 476 (same); *Performance Unlimited,* 52 F.3d at 1385-86 (the stronger the showing of likelihood of success on the merits the less showing is required as to the other factors and vice versa).

The Plaintiff respectfully requests the Court consolidate its hearing on the within motion for preliminary and permanent injunction with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2).

Because Defendant will not suffer any costs or damages, DSOL requests that the Court exercise its discretion to not require the posting of any security to issue the preliminary injunction. *Moltan v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995).

Respectfully submitted,

WATSON ROACH BATSON ROWELL & LAUDERBACK



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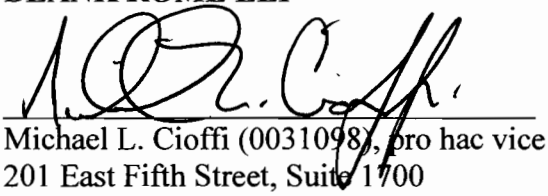

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Plaintiff's Motion for TRO and for Preliminary and Permanent Injunction and Memorandum in Support of Plaintiff's Motion for TRO and for Preliminary and Permanent Injunction were served on the American Bar Association by CM/ECF and email on December 22, 2011.

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