UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

LINCOLN MEMORIAL UNIVERSITY, DUNCAN SCHOOL OF LAW,	)	**Case No. 3:11-cv-608**
Plaintiff,	)	**Judge Varlan**
	)	**Magistrate Judge Shirley**
v.	)	
THE AMERICAN BAR ASSOCIATION,	)	
Defendant.	)	

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

The Plaintiff Lincoln Memorial University, Duncan School of Law, ("DSOL") hereby submits this Reply Memorandum in support of Plaintiff's Motion for Reconsideration and Memorandum in Support thereof filed on February 8, 2012. (Docs. 38, 39). As demonstrated by the DSOL's Motion for Reconsideration, (Doc. 38), new facts have emerged since the Court issued its decision. These new facts demonstrate that exhaustion of the ABA's internal appeals process is indeed futile and therefore the requirement that DSOL exhaust its remedies with respect to its application for provisional accreditation should be excused.

New Facts Support the Conclusion that DSOL's Failure to Exhaust Its Administrative Remedies Should be Excused

The ABA mischaracterizes the nature of DSOL's arguments concerning reconsideration of the Court's opinion with respect to exhaustion of administrative remedies. The "new fact" identified by DSOL in its Motion for Reconsideration is not simply "the timing of the

appointment of the Appeals Panel" as Defendant ABA contends. (*See* Doc. 47, ABA Response in Opposition to Plaintiff's Motion for Reconsideration ("ABA Response"), p. 7). Rather, the DSOL seeks reconsideration of the Court's decision on the issue of exhaustion because (1) the ABA's admission that the Appeals Panel was not appointed by the Council Chair to hear an appeal of the Council's denial decision until after the denial decision was made evinces bias on the part of the Council and renders the process fundamentally unfair, and (2) the Appeals Panel was not properly constituted pursuant to the ABA's own Rules of Procedure 10(g) and this procedural lapse denied DSOL's fundamental substantive due process right to a fair, impartial, and meaningful review. In addition, by permitting members of the Accreditation Committee to attend and participate in the December 2, 2011 Council Hearing, the ABA violated its Rules of Procedure 6 and IOP 2 and 19. These procedural anomalies clearly demonstrate the futility of the ABA's internal appeals process with respect to DSOL's application for provisional accreditation. DSOL's arguments in support of reconsideration are based on several long-standing legal precepts governing the exhaustion doctrine and the judicial review of accrediting authorities and other agency action.

First, as the Court and the ABA have acknowledged, the requirement that a plaintiff exhaust administrative remedies before resorting to federal court is not absolute: "the underlying test is whether the available procedures are adequate and reasonable in light of the facts of the particular case." *Geddes v. Chrysler Corp.*, 608 F.2d 261, 264 (6th Cir. 1979). The facts of this particular case demonstrate that the appeal procedures are neither adequate nor reasonable. Under the ABA's own Rules of Procedure, the Appeals Panel was supposed to be appointed in May 2011 and serve as a standing appellate body prepared to hear any appeal from any school seeking review of a Council decision on accreditation. However, as we now know, the Appeals

Panel was not appointed by the Chair of the Council until over **a month and a half after** the Council decision to deny provisional approval was rendered, **five days after** the deadline for DSOL to file its appeal, and **five months after** the ABA rules mandate appointment of the Panel members. The ABA was actually in receipt of DSOL's written appeal when the Council Chair selected and appointed the Appeals Panel members. These Appeals Panel members were thus selected and appointed by the very Council Chair whose denial decision the Appeals Panel is now charged with reviewing. As the Court's colloquy with undersigned counsel at the January 6, 2012 Hearing illustrates, it can hardly be considered reasonable or fair for the decision-maker whose decision is being reviewed to be empowered with the authority to appoint the reviewing panel and to make such panel appointments **after** having rendered the decision to deny accreditation. (See Doc. 36, January 6, 2012, TRO/Preliminary Injunction Hearing Transcript, pp. 160-61).

Second, contrary to the ABA's assertion, the burden is not on DSOL to demonstrate that the individual members of the Appeals Panel hold some personal bias against the school and its application for provisional approval where the ABA's implementation of the appeal process itself exhibits bias. *See Utica Packing Company, et al. v. John R. Block, et al.*, 781 F.2d 71, 78 (6th Cir. 1986)("It is of no consequence that Fenster and Utica were unable to prove actual bias… manipulation of a judicial, or quasi-judicial, system cannot be permitted.").

Third, the failure of the ABA to adhere to its own Rules of Procedure is in and of itself a due process violation. "[I]t is an elemental principle of administrative law that agencies are bound to follow their own regulations." *Wilson v. Comm'r of Social Security*, 378 F.3d 541, 545 (6th Cir. 2004). Thus, where an agency's procedural rule is intended "to protect the interests of a party before the agency, 'even though generous beyond the requirements that bind such agency,

that procedure must be scrupulously followed'." *Id.* (quoting *Vitarelli v. Seaton*, 359 U.S. 535, 547 (1957)). Accordingly, the Sixth Circuit adheres to the general administrative law rule that the court will set aside agency action that does not follow the agency's own regulations. *Wilson*, 378 F.3d at 546. Sixth Circuit precedent counsels that the Court cannot excuse the denial of a mandatory procedural protection simply because, as the ABA urges, there is sufficient evidence in the record for the decision and therefore a different outcome if the case were to be remanded is unlikely. *Id.* "[A] procedural error is not made harmless simply because the aggrieved party appears to have had little chance of success on the merits." *Id.* (citing *Mazaleski v. Truesdell*, 562 F.2d 701, 719 n. 41 (D.C. Cir. 1977)).

As the *Wilson* Court aptly noted, "[t]o hold otherwise, and to recognize substantial evidence as a defense to non-compliance with [an agency regulation] would afford the [decision-maker] the ability to violate the regulation with impunity and render the protections promised therein illusory." *Id. Accord*, *Rabbers v. Comm'r of Social Security*, 582 F.3d 647, 662 (6th Cir. 2009)("Of great importance in the present case is the *Wilson* court's rejection of the argument that failure to follow the regulation in that case was harmless error. The court held that even if the record should show that there would be little chance for success if the case were remanded, a violation of the agency's own rules cannot be excused as harmless error."). In its Memorandum Opinion and Order, this Court cites to *Jones v. Comm'r*, 336 F.3d 469, 475 (6th Cir. 2003), a social security case like *Wilson* and *Rabbers*, *supra*, for enunciation of the principals governing review of agency decision-making based on substantial evidence. (Doc. 35, Memorandum Opinion and Order, pp. 34-35). Accordingly, it is clear that the Court recognizes the applicability of this line of Sixth Circuit case law governing agency decision-making in the context of this case.

As outlined above, the ABA's failure to follow its own Rules of Procedure resulted in three procedural anomalies both with regard to the improper participation of Accreditation Committee members at December 2, 2011 Council Hearing and with the *post hoc* appointment of the Appeals Panel. One, the participation of Accreditation Committee members at the December 2, 2011 Council Hearing violates the ABA's own Rules of Procedure 6 and IOP 2 and 19. Two, the *post hoc* appointment of the Appeals Panel violates Rules of Procedure 10(g). Three, the Chair of the ABA Council knew at the time he named the members of the Appeals Panel that he and the Council had already decided to deny the DSOL's application for provisional approval. These procedural defects are not mere technical violations of agency rules that are meant simply to guide the administrative aspects of the process, such as date, time or place of the hearing—they violate due process. *See Wilson*, 378 F.3d at 547; *Rabbers*, 582 F.3d at 662. In simple terms, the ABA's violations of Rules of Procedure 10(g) and 6 and IOP 2 and 19 mean that DSOL was deprived of a substantive right—the right to have a neutral appellate process, one that is uninfluenced by the person who's decision is being reviewed.

The Sixth Circuit has found that similar procedural irregularities in the appointment of reviewing or appellate officers violate due process. In *Utica Packing, supra*, the Sixth Circuit reversed an agency decision because the agency revoked the original hearing officer (who had decided an issue against the agency) and "redelegated" the case to a "hand-picked" judge to review the same issue on a motion to reconsider. 781 F.2d 71 (6th Cir. 1986). The irregularity that violated due process, according to the Sixth Circuit, was that the agency "hand-picked" a judge—after the original decision was made—to review and reconsider that decision. The Sixth Circuit agreed with the appellant that "fundamental fairness was sacrificed to gain a desired decision from a hand-picked judge and that all appearance of fairness was 'shattered'." *Id.* at 75.

It is significant that the Sixth Circuit reversed in *Utica* solely because of the procedural irregularities, even though appellants "were unable to prove actual bias":

> It is of no consequence for due process purposes that Fenster and Utica were unable to prove actual bias on the part of Franke or Davis. The officials who made the revocation and redelegation decision chose a non-career employee with no background in law or adjudication to replace Campbell. They assigned a legal advisor to the new Judicial Officer who worked under an official who was directly involved in prosecution of the Utica case. Such manipulation of a judicial, or quasi-judicial, system cannot be permitted. The due process clause guarantees as much. As the court stated in *D. C. Federation of Civic Ass'ns v. Volpe, 148 U.S. App. D.C. 207, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030, 31 L. Ed. 2d 489, 92 S. Ct. 1290 (1972)*:
>
> > With regard to judicial decision-making, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality.
>
> …
>
> Whether the Judicial Officer was correct or incorrect in his application of the law, the Secretary's efforts to change the result by the methods described in this opinion cannot be permitted to succeed.

Utica Packing, 781 F.2d at 78-79.

In this case, the ABA has violated this most basic precept of due process by permitting the Accreditation Committee members whose recommendation was under review to participate in the Council Hearing reviewing that Recommendation and by empowering the Council Chair to appoint the Appeals Panel. Thus, the underlying Accreditation Committee decision-makers improperly participated in the Council decision-making process, and the Council decision-makers appointed the appeals tribunal charged with reviewing their decision **after** the ABA's received DSOL's written appeal of the accreditation decision. "**Such manipulation of a judicial or quasi-judicial, system cannot be permitted. The due process clause guarantees as much**." *Id.* at 78. Basic fundamental notions of due process demand a separation between the

decision-maker whose decision is being reviewed on appeal and the appellate decision-maker undertaking the review. *See Woods v. Willis*, 2010 U.S. Dist. LEXIS 108197, at *15-16 (N.D. Ohio Sept. 27, 2010)("But minimum due process nevertheless requires a hearing before a *neutral* adjudicator. . . . Where a plaintiff can show that a single individual performed more than one function or where the same person acted as both adjudicator and legal representative for the agency bias is more likely.")(emphasis in original).

The Sixth Circuit has plainly stated that "the due process rights of an administrative litigant are violated when "the risk of unfairness" to that litigant is "intolerably high." *Roadway Express, Inc. v. Reich*, 1994 U.S. App. LEXIS 22924, at *13 (6th Cir. Aug. 22, 1994)(citing *Utica Packing*, 781 F.2d at 77, 78)(internal citations omitted). In this case the risk of unfairness is unquestionably high given the Accreditation Committee's participation in the Council decision and the Council Chair's *post hoc* appointment of the Appeals Panel. Consequently, meaningful appellate review through the ABA's administrative process is clearly unobtainable and the appeals process is therefore futile. The Court, therefore, should excuse the DSOL's failure to exhaust its administrative remedies prior to filing this lawsuit.

Likelihood of Success on the Merits: Federal Due Process Legal Standard

In declining to grant Plaintiff injunctive relief, this Court found that Plaintiff was unlikely to succeed on the merits with respect to its claim that Defendant ABA had violated its right to federal due process in denying its application for provisional accreditation. (Doc. 35, p. 34). In reaching this decision, the Court applied the standard of review of accreditation decisions set forth in *Thomas M. Cooley Law School v. Am. Bar Ass'n.*, 459 F.3d 705 (6th Cir. 2006). This Court did not, however, apply the *Cooley* standard to the decision of Defendant ABA without error because the Court permitted Defendant ABA to evaluate only some facts in the record but

not all the relevant factors. In other words, the ABA's decision relied only on cherry-picked facts and did not consider, weigh, or even mention the considerable and compelling evidence that contradicted its decision. This cherry-picking of the facts, in the vernacular of the case law, is referred to as arbitrary and capricious decision-making, or a decision not based on substantial evidence.

Although this Court has recognized that a decision supported by substantial evidence must be "based upon the record as a whole," *Lyons v. Astrue*, 2012 U.S. Dist. LEXIS 20801, *3 (E.D. Tenn. Feb. 17, 2012)(Varlan, J.), it allowed the ABA to slip below this standard. In other words, substantial evidence means all of the evidence taken as a whole – good or bad/up or down – not just a subset of cherry-picked facts. The ABA's decision is based only on cherry-picked facts. However, the law requires that a decision-maker engage in a **reasoned** evaluation of the evidence and the decision-maker's conclusion must be **well explained** and **well supported** if contradicted by other evidence. *Adkins v. Astrue*, 2011 U.S. Dist. LEXIS 85134, at *20 (E.D. Tenn. Aug. 2, 2011)(Varlan, J.). The decision-maker must "properly outline[] … disagreement" with contrary evidence. *Lyons*, 2012 U.S. Dist. LEXIS 20801, at *7. While the decision-maker need not "discuss each piece of data that is a part of the record … [the decision-maker must] consider[] the record as a whole and reach[] a **reasoned** conclusion." *Id*. at *8 (emphasis added).

Standard 203

With respect to Standard 203, the ABA's finding that DSOL does not engage in goal setting and goal assessment is contradicted by the record evidence. The ABA Site Team found that:

> As a constituent LMU unit, DSOL regularly identifies specific goals for improving itself, identifies the means to achieve these goals, assesses the success in realizing these goals by assessing its

> activities daily, weekly, monthly, and annually, and uses this information to re-examine and revise its means and goals.

(Doc. 21-9, p. 6). This finding is uncontroverted. Indeed, the Site Team observed that DSOL's self-assessment of its "goals for improving the law school program" is a model for assessment driven legal education: "**DSOL is at the forefront of outcomes-based and assessment driven legal education**." (Doc. 21-9, p. 65). The Council fails to articulate why it discounted, rejected, or ignored the uncontroverted evidence that DSOL "regularly identifies specific goals for improving the Law School's program, identifies means to achieve the established goals, assesses its success in realizing the established goals, and periodically re-examines and appropriately revises the established goals."[1]

Specifically, the conclusion that DSOL "failed to establish that it has re-examined its goals and means to achieve them in light of unanticipated economic conditions," is directly refuted by undisputed evidence and the record as a whole. For example, DSOL considered changed national and regional economic conditions at its annual Strategic Planning Retreat in February 2011. The DSOL faculty adopted a goal to increase the entering academic credentials of the student body in light of lower student enrollment. (Doc. 1-1, p. 19). DSOL further specifically informed the ABA Accreditation Committee that it had secured LMU's authorization to offer up to a fifteen percent tuition discount to prospective students through scholarships to reduce student debt load and attract students with higher LSAT scores and undergraduate grade point averages. (Doc. 21-7, p. 35). The Accreditation Committee

[1] Regardless of whether the Site Team's observations and conclusions are labeled as "findings" or not by the ABA's internal procedures, the semantics involved cannot and should not override the facts. The Site Team evaluated and observed DSOL students, faculty, staff and facilities and recognized that the law school's self-assessment process is a model for other schools. These **facts** are on the record and the ABA cannot simply push them aside or ignore them by arguing that because they are facts presented by the Site Team, they do not warrant consideration. Rather, the law requires the ABA to consider the record as a whole and to articulate in its decision the reasons why evidence favorable to DSOL, such as this, was discounted, rejected, or ignored.

acknowledges that the University has pledged its support of the law school until the school achieves fiscal independence. (Doc. 21-6, p. 24). University President Dr. James Dawson and LMU's Chief Financial Officer testified at the Accreditation Committee Hearing regarding LMU's unequivocal support of resources, including financial resources, in support of the law school program. (Doc. 21-5, pp 26-30). The record includes evidence that DSOL has revised and continues to revise its pro forma budgets and its projected student enrollment numbers to make strategic adjustments to sustain and improve the law school program. In short, as illustrated by testimony from the Council Hearing, the record makes clear that the law school has considered the impact of "market conditions" on its strategic planning. (Doc. 21-5, pp 29-47). All of this evidence was on the record before the Council. The Council neither discussed nor explained this evidence vis-à-vis its decision. The ABA simply chose to ignore this evidence. This cherry-picking is the essence of arbitrary and capricious agency decision-making.

Standard 303(a) and (c) and Interpretation 303-3

The ABA's determination that DSOL was not in substantial compliance with Standard 303(a) and 303(c) and Interpretation 303-1 was based on the ABA's conclusion that DSOL has not demonstrated that: (1) it adheres to "sound academic standards"; (2) its standards for academic dismissal and readmission are "sufficiently rigorous"; and (3) its academic support program is "effective." (Doc. 35, p. 31)(citing December 20, 2011 Council Decision Letter, Doc. 21-4 at 3–4). Again, the ABA failed to base its conclusions on a rational evaluation of the record as a whole.

The ABA concluded that DSOL permits the matriculation of underperforming students. (Doc. 35, p. 32). The ABA bases its conclusion on DSOL's readmission of six of 18 students who were subjected to dismissal for academic underachievement. The ABA concluded, based

on this raw data, that DSOL had a 33% readmission rate and that such a rate evinced a lack of sound academic standards. However, the evidence is undisputed that these six students were readmitted based on an individualized determination of "extraordinary circumstances" pursuant to DSOL's readmission policy. (Doc. 21-6, p. 16). The evidence is also undisputed that only one of these six students was subsequently and permanently dismissed for academic underachievement. (Doc. 21-6, p. 16). This represents a success rate of 85% in DSOL readmissions. Rather than demonstrating unsound academic standards or a weak readmission policy, the successful readmission of five of the six students demonstrates the effectiveness of DSOL's Academic Success Program. The readmitted students received academic support, and as noted above, five of six students were successful on readmission. The success rate of 85% indicates the effectiveness of both DSOL's Academic Success Program as well as the Program Director. (Doc. 21-6, p. 16).

The ABA bases its finding that DSOL has failed to demonstrate the effectiveness of its academic success program on the Academic Success Program Director's lack of "prior experience in academic success." The ABA has failed to articulate in any meaningful and rational way how Professor Walker's professional background, knowledge, and skills are deficient with respect to his role as Director of the Academic Success Program. In addition to having earned both a J.D. and a Masters of Library Science from Rutgers University, Professor Walker has past experience as a law librarian, three years of experience teaching legal research and writing, and experience as a judicial clerk on the Superior Court of New Jersey. Legal research and writing is obviously critical to a student's success in any law school course and an essential element of that student's success in the profession. Contrary to the ABA's characterization of Professor Walker's background, legal research and writing skills are an

essential element of any academic success program and therefore experience teaching in that field clearly qualifies him to direct the Academic Success Program. Stated differently, the academic success of any law student depends on the student's proficiency in legal research (finding and understanding cases and other law) and legal writing (being able to organize and express complex legal principals and conclusions). The ABA simply concludes that the lack of a position title on Professor Walker's resume equates with an ineffective program. This conclusion fails to take the entire record into account and represents an agency finding based more on whim than reasoned decision-making.

Nor did the ABA explain why or how the depth and breadth of the Academic Success Program is insufficient or ineffective under the Standard. The undisputed evidence shows that the Academic Success Program is implemented by a collaborative team of faculty and staff, including the Associate Dean for Academics, the Director of the Law Library, and several other Associate and Visiting Professors, as well as the Director of Lawyering Skills and Academic Success, David Walker. (Doc. 1-1, pp. 24-25; Docs. 28-8, 28-9). In addition, the undisputed evidence demonstrates that the Academic Success Program encompasses a range of effective and accessible academic support strategies including the following: Bridge Week; ASP courses taught in small sections; ASP courses required of all first year students (ASP I) and those students in subsequent years who are on academic probation (ASP II and III); a Bar Examination Course required of students with a GPA of 2.5 or below; DSOL's utilization of an interactive computer software program, TurningPoint, and midterm exams to identify potentially at-risk students prior to the end of the term so that academic support services can be initiated before the end of the term; and counseling given to at-risk students which includes sessions with writing tutors. (ABA Site Team Report, pp. 12, 22-23; Committee Hearing Transcript, pp. 41-43). The

ABA never mentions, let alone explains or articulates why, given the full range and depth of the Academic Success Program and the number of qualified faculty and staff charged with implementing this multi-layered program, the program is nevertheless deemed deficient.

Finally, the ABA has failed to articulate or explicate its decision in a manner that explains how it is that DSOL can be in compliance with Standard 301(a) and Interpretation 301-3, but not in compliance with Standard 303(a) 303(c) and Interpretation 303-3. It is undisputed that the ABA found DSOL in substantial compliance with Standard 301 and Interpretation 301-3. Standard 301(a) provides that "[a] law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession." Interpretation 301-3 states that "the factors to be considered in assessing the extent to which a law school complies with this Standard are the rigor of its academic program, including its assessment of student performance, and the bar passage rate of its graduates." Thus, insofar as Standard 301 is concerned, DSOL has been found to have a sufficiently rigorous academic program which prepares student to pass the bar and for responsible and effective participation in the legal profession. Only by cherry-picking certain facts with respect to the readmission of six students and the Academic Success Program Director's lack of previous experience in the particular field of "Academic Success" could the ABA find that DSOL fails to comply with Standard 303 and Interpretation 303-1. Again, the ABA's findings are not based on a review of the entire record, nor does the ABA provide any explanation of why the favorable evidence was discounted, ignored, or rejected.

Standard 501(b) and Interpretation 501-3

The ABA found that DSOL was not in substantial compliance with the requirement within Standard 501 that a law school only admit students "capable of satisfactorily completing

its educational program and being admitted to the bar." Standard 501(b). The Court summarily set forth the following quotation from the Council Letter as the reasoning underlying Defendant ABA's decision:

> [I]n light of the **comparatively low entering academic and admission test credentials** of a significant percentage of the Law School's students, the **attrition rates** of its inaugural classes, the **failure of the School to establish the effectiveness of the academic support program,** and the fact that **the Law School's graduates have yet to sit for a bar examination,** the Law School has not demonstrated that it is not admitting applicants who do not appear capable of completing the educational program and being admitted to the bar. [Doc. 21-40 at 4].

(Doc. 35, p. 34)(emphasis added).

The ABA first finds that DSOL did not meet Standard 501 because of declining LSAT scores. Yet these so called "declines" are *de minimus* and insignificant. Specifically, the Committee Letter presents as Finding of Fact (59) that DSOL experienced a decline in LSAT scores from the DSOL inaugural class of 2009. (Doc. 21-6, pp. 14-15). At the 75th percentile the "decline" is all of 1 point from 2008-2010 and absolutely no decline from 2010 to 2011: 2009/152, 2010/151, 2011/151. (*Id.*). At the 50th percentile, the decline is all of 2 points from 2009-2010 and absolutely no decline from 2010 to 2011: 2009/149, 2010/147, 2011/147. (*Id.*). Similarly, at the 25th percentile, the "decline" is 2 points from 2009 to 2010 and absolutely no decline from 2010 to 2011: 2009/146, 2010/144, 2011/144. (*Id.*). No rational mind can believe that such a minor decline establishes by substantial evidence that DSOL admits applicants who are not capable of completing law school and passing the bar.

Defendant ABA reaches a similar conclusion with respect to DSOL entering student UGPAs. The Accreditation Committee draws further support in a "decline" in entering UGPAs which is as insignificant as the "decline" in LSAT scores. The UGPA in the 75th percentile

evidences a decline of merely 0.19 points from 2009 to 2011 – 2009/3.5, 2010/3.38, 2011/3.31 – not even two tenths of a point. The 50th percentile UGPA declined merely .06 from 3.05 to 2.99 – six hundredths of a point: 2009/3.05, 2010/2.97, 2011/2.99. For the 25th percentile, the decline was from 2.8 to 2.66 – a mere .14 – fourteen hundredths of a point: 2009/2.8, 2010/2.7, 2011/2.66. (Doc. 21-6, pp. 14-15). At a minimum, the ABA needs to explain why these *de minimus* declines disqualify DSOL. Due process also requires the ABA to explain why the fluctuations similar to other schools do not disqualify them, but disqualify DSOL.

The decline experienced by DSOL in entering student LSAT scores and UGPAs is no different from the fluctuation experienced by the 8 fully accredited law schools that presented lower entering student LSAT scores and UGPAs. From 2008 to 2011, Appalachian School of Law, the very law school actively recruiting DSOL students, experienced a decline in both LSAT scores and UGPAs. With respect to the LSAT, Appalachian School of Law declined 1 point from 2008 to 2011 at the 50th percentile: 2008/149 and 2011/148. The median UGPA for these years declined .03 points, three-hundredths of a point, from 2.97 in 2008 to 2.94 in 2011. Florida A&M University College of Law experienced a decline in UGPA of .07, seven-hundredths of a point, in its 75th percentile from 3.39 in 2008 to 3.32 in 2011. North Carolina Central University School of Law also experienced declines. It suffered a decline in the LSAT of 1 point in its 25th percentile from 144 in 2008 to 143 in 2011 and 3 points in the 75th percentile from 153 in 2008 to 150 in 2011. Southern University Law Center experienced a decline of 1 LSAT point in its 75th percentile in these years from 149 in 2008 to 148 in 2011. Southern University Law Center also experienced a decline in UGPAs: .31, over three-tenths of a point, at the 50th percentile (2008: 3.15 to 2011: 2.84) and .13, over one-tenth of a point, at the 75th Percentile (2008:3.34 to 2011:3.21). Lastly, The Thomas M. Cooley Law School similarly experienced a decline in

UGPAs – at the 25th percentile a decline of over a tenth of a point, .11, from 2.73 in 2008 to 2.62 in 2011 and at the 50th percentile a decline of .06, six-hundredths of a point, from 3.05 in 2008 to 2.99 in 2011. [2] Therefore, DSOL does not present a significant decline in LSAT scores and UGPAs.

Finally, and perhaps most significantly, Defendant ABA did not reasonably consider the importance of the fact that the LSAT scores and UGPAs of DSOL students are not "comparatively low" and are in fact higher relative to eight law schools that Defendant ABA has deemed worthy of full accreditation. (Doc. 1-1, p. 30). With this phrase "comparatively low," the Council itself introduces the comparison of DSOL to other schools. Having done so, due process requires the Council to explain why it is that schools with lower scores meet Standard 501 but DSOL does not. Due process requires that the Council explain why it says DSOL's scores are "comparatively low" when they are not vis-à-vis 8 fully accredited law schools.

DSOL acknowledges that Defendant ABA is permitted to analyze the totality of an applicant law school's circumstances when reaching a decision. However, the "totality of the circumstances" doctrine requires uniform and consistent decision-making based upon established definitions and the presentation of explanation. *PDK Laboratories, Inc. v. U.S. Drug Enforcement Administration*, 438 F.3d 1184, 1194 (D.C. Cir. 2006). Defendant ABA must present a reasonable explanation for why a law school with higher entering credentials than fully accredited schools is not worthy of provisional accreditation.

The Court summarized the ABA's explanations as follows:

> [A]ccreditation decisions are made on the totality of the circumstances, and plaintiff's argument seemingly overlooks the

[2] http://www.lsac.org/LSACResources/Publications/official-guide-archives.asp

> range of facts the Committee and Council considered. As an example, although plaintiff's students may have similar or even better LSAT scores than students of an accredited school, the Council found the law school lacked an effective academic support program and readmitted one-third of its academically dismissed students despite its policy to readmit only for extraordinary circumstances, which are circumstances that may not have been present with respect to the accredited schools.

(Doc. 35, p. 37).

The due process problem with the ABA's explanations—lack of an effective academic success program and readmission of one-third of its academically dismissed students—is that it is contradicted and undermined by the totality of the record and the ABA never explains (or even acknowledges) the contradictions.

Specifically, the ABA conveniently overlooks without explanation the fact that five of the six students readmitted were ultimately academically successful thus establishing the success rate of 85% for readmissions. (Doc. 21-6, p. 16). The ABA Site Team, itself, reported that: "[t]here appear to be adequate policies and procedures in place to determine whether such students possess the ability to successfully complete law school studies." (Doc. 21-9, p. 42). This fact is further supported by the finding that six of eighteen students academically dismissed prior to fall of 2011 had LSAT scores of 148 or greater indicating that DSOL could not have concluded that they were likely to do poorly academically at the time of admission. (Doc. 11, pp. 37-38). Again, none of these facts were even mentioned, let alone rationally explained and incorporated into a reasoned decision.

The ABA's conclusion that DSOL's Academic Success Program was ineffective also is not reasonable. The arbitrariness of this decision in light of the total record is fully discussed and demonstrated above at pages 10-13.

Defendant ABA reached its decision that DSOL is not in substantial compliance with Standards 203, 303(a) and (c), and 501(b) and Interpretations 303-3 and 501-3 without undertaking a full, complete and reasoned review of the record. Defendant ABA looked at one or two facts and reached a conclusion, disregarding other facts in contradiction without attempting to reconcile the conclusions a reasoned analysis would reach. It is as if Defendant ABA were visiting the Antarctic one day in the summer when the weather was relatively mild and offered a finding that Antarctic weather was uniformly mild. This decision would not pass muster as a reasoned decision because it does not consider the year as a whole. Defendant ABA should not be permitted a similar method of reasoning here.

DSOL argues that the Court must realize that DSOL's application for provisional accreditation, when taken as a whole, presents evidence to support a reasonable conclusion that DSOL is in substantial compliance with all relevant ABA Standards and Rules. There is a strong likelihood that DSOL will be successful in its claim that Defendant ABA violated its right to federal due process when Defendant ABA found that DSOL was not in substantial compliance. This Court must review the record in this case in light of the more reasonable interpretation DSOL has offered and revise its decision denying injunctive relief to DSOL.

Irreparable Injury

The Court erred in finding the evidence DSOL presented of the irreparable harm resulting from Defendant ABA's denial of provisional accreditation to be "unsupported or speculative." (Doc. 35, p. 39). The damage to an institution denied accreditation is an example of *per se* irreparable harm. *Western State University of Southern California v. American Bar Association*, 301 F. Supp. 2d 1129, 1137-38 (C.D. Calif. 2004) ("The harm if accreditation is withdrawn is **real and substantial**.") (emphasis added); *Wiki v. American Medical Association*, 671 F. Supp.

1465, 1490 (N.D. Il. 1987) ("Participation by hospitals in the accreditation program is voluntary … However, obtaining accreditation is important to a hospital and loss of accreditation would be devastating …'**Denial or loss** of accreditation can close a hospital.'") (emphasis added).

Defendant ABA asserts that these cases are inapplicable because *Western* involves the grant of an injunction to prevent withdrawal of accreditation previously granted by the ABA rather than a denial of accreditation never granted, and *Wiki* involves the accreditation of a hospital rather than a law school. (Doc. 47, pp. 20-21). Defendant ABA is incorrect in both of these assertions.

Accreditation is a seal of approval that the public relies upon as an indication of quality and acceptability in goods and services. *Auburn University v. The Southern Association of Colleges and Schools, Inc.*, 489 F. Supp. 2d 1362, 1368 (N.D. Geo. 2002) (emphasis added) ("Congress continues to delegate to the Secretary of Education the responsibility of determining whether an accrediting agency should be recognized as 'a reliable authority as to the **quality** of education or training offered.' *20 U.S.C. § 1099b(a).*")(emphasis added; italics in original). The accreditation of a hospital is not materially different from that of a law school. Once an accrediting agency decides that an institution does not merit accreditation, the public immediately concludes that it is of poor quality and that its goods and services should be rejected. There is no difference between the withdrawal of accreditation and the denial of accreditation. Both are unequivocal statements that the institution in question lacks quality. The potential for irreparable harm exists for all institutions – regardless of whether law schools, hospitals, or trade schools – when they undergo review of eligibility for accreditation. The court stated in *Western* that: "[t]he loss of reputation and good will resulting from the loss of accreditation could be very damaging to a law school." 301 F. Supp. 2d at 1138.

The Court acknowledges in its decision that: "Plaintiff cites a plethora of harms that would result in the absence of an injunction." (Doc. 35, p. 38). The Court lists these irreparable harms in detail: 1) harm to DSOL's reputation; 2) the inability of DSOL students to obtain federal student loan funds; 3) "the likelihood that students and faculty will transfer to or seek positions at other law schools;" 4) "the likelihood that recently admitted but non-matriculated students will choose to attend another law school;" 5) "the inability of the school's future graduates to sit for certain state bar exams;" 6) the possibility that TBLE might withdraw its grant of approval for plaintiff's graduates to sit for the Tennessee bar exam; 7) that LMU will find it difficult to financially maintain the law school; 8) that DSOL's students "will not be able to compete for scholarships, occupational positions, externships, or internships;" 9) "that [DSOL] faculty members will be precluded from presenting at conferences, seminars, and panel presentations open only to members of ABA approved law schools;" and 10) that DSOL's " very existence will be compromised." (Doc. 35, p. 38)The Court committed error in not concluding that these examples of irreparable harm flowed *per se* from the ABA's decision.

Nevertheless, faced with the Court's decision, DSOL submitted Supplemental Declarations of Dean Sydney Beckman that detailed the specific and immediate harm to DSOL. (Docs. 7-3, 40-1, 46-1). As set forth in the Declarations of Dean Beckman, these harms are:

- DSOL is experiencing fewer applications for admission since the ABA accreditation decision for as of February 4, 2012, DSOL has received approximately 26% fewer applications for admission into the fall 2012 matriculating class of full-time students compared to fall of 2011 and 15% fewer part-time applications. (Doc. 40-1, p. 2).

- Eight DSOL students have withdrawn from the law school and have cited the ABA accreditation decision as the reason for their withdrawal. (Doc. 40-1, p. 2).

- A greater number of students are requesting good standing letters in preparation to transfer to another law school. (Doc. 40-1, p. 2).

- DSOL is receiving telephone calls from prospective students who have indicated that the ABA accreditation decision is preventing them from attending DSOL. (Doc. 40-1, pp. 2-3).

- The national publicity given to the ABA accreditation decision has caused DSOL to lose goodwill and experience diminished standing before the public. (Doc. 40-1, p. 3).

- One Competitor Law School, Appalachian School of Law, has made a direct and explicit solicitation for DSOL students considering transferring offering DSOL students a "complete waiver of the application fee." (Doc. 46-1, p. 1-2).

This case is very similar to *Hampton University v. Accreditation Council for Pharmacy*, 611 F. Supp. 2d 557, 566 (E.D. Va. 2009)(irreparable harm found when imposition of probationary accreditation would "likely lead[] some current students to consider transferring, or to apply to transfer … and current faculty members may well be currently seeking positions at other schools …. Accepted prospective students may choose to attend another school and students considering applying to the School may cross it off their lists."). Although *Hampton* involved the withdrawal of accreditation rather than the denial of initial accreditation, that fact is not a material difference. In *Hampton* and here, the accreditor's decision connotes the same fact: the institution lacks quality.

For this reason, the Court was incorrect in its conclusion that these irreparable harms result from DSOL's continued status of being an unaccredited law school. (Doc. 35, p. 39). Prior to the Council's decision, DSOL, although unaccredited, had not been adjudged by the ABA as lacking quality. Once the ABA, however, arbitrarily determined that the DSOL lacked quality (even though it amply demonstrates quality greater than other fully-accredited law schools), DSOL's world turned upside down. It has now been unfairly branded. This brand is new, not merely a continuation of the status of being unaccredited with an application pending.

A Preliminary Injunction Will Not Harm The ABA

The ABA will not be harmed in any way by the issuance of a preliminary injunction. Had the ABA followed its own Procedures, including properly constituting the Appeals Panel and complying with Rule 6 and IOP 2 and 19 in the conduct of the Council Hearing, and had the ABA reviewed DSOL's application for provisional approval in light of the entire record, DSOL would have been granted provisional approval and neither this lawsuit nor the request for injunctive relief would have been necessary. DSOL does not seek relief that impinges on any rights of the ABA. DSOL simply asks that the Court order the ABA to post the fact that this Court has reconsidered DSOL's request for a preliminary injunction and granted that request. The ABA cannot justifiably argue that it will be harmed in any way by injunctive relief that accurately reflects the findings of this Court in the present case. There is no harm to the ABA in requiring that it adhere it its own Rules, apply its Standards in a consistent and rational manner, and render an accreditation decision that is neither arbitrary nor capricious. *See St. Andrews Presbyterian College v. So. Ass'n of Colleges and Schools*, 2007 U.S. Dist. LEXIS 87953, *7 (M.D. N.C. Nov. 29, 2007)(harm to accrediting agency caused by issuance of injunction is minimal).

An Injunction Protects the Public Interest

As an accrediting agency approved by the Secretary of Education, the ABA is charged with serving the public interest. The public has an interest in a timely and trustworthy accreditation process and in results from that process which the public can turn to as "reliable authority as to the quality of training offered by an educational institution." *Auburn University*, 489 F. Supp. 2d at 1368. DSOL's amended request for relief does not seek to impose any prior restraint on the ABA's first amendment rights or serve to undermine the public's interest in the

protection of those rights. Rather, upon reconsideration of the Court's prior Memorandum Opinion and Order, and upon a finding that the evidence demonstrates a likelihood of success on the merits and a showing of irreparable harm, DSOL merely requests that the Court direct the ABA to communicate these facts to the public. This would serve to protect the public from the dissemination of inaccurate information based upon an accreditation decision that is arbitrary and capricious and thereby violates due process. *Florida College of Business v. Accreditation Council for Independent Colleges*, 954 F. Supp. 256, 258-60 (S.D. Fla. 1996).

An injunction requiring the ABA to post notice of the Court's reconsidered opinion on its website and an announcement that its decision is currently subject to federal court review would in no way confuse law school students, applicants, or the public at large. Moreover, the ABA's arbitrary and capricious decision as embodied in its posting of the decision to deny provisional accreditation should not be allowed to stand before the public without question for a lengthy period of time. The requested injunctive relief will serve to remedy the irreparable harm and injury to DSOL and the harm to the public caused by publication of the ABA's arbitrary and capricious decision to deny accreditation.

Conclusion

The Memorandum Opinion and Order issued by the Court on January 18, 2012, (Doc. 35), must be revisited in light of the new facts now before the court that confirm DSOL's earlier assertions with respect to the unfair and improper method used by Defendant ABA in accrediting law schools. The Court must review its finding that Defendant ABA acted reasonably and based its decision on substantial evidence. Defendant ABA arbitrarily and capriciously denied provisional accreditation to DSOL.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on March 8, 2012, I am filing the foregoing Reply Memorandum in Support of Plaintiff's Motion for Reconsideration via the Court's CM/ECF system which will automatically generate a Notice of Electronic Filing that will be emailed to the following registered Filing Users:

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