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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Defendant American Bar Association ("ABA") submits this reply in support of its Motion to Dismiss the Complaint of Lincoln Memorial University Duncan School of Law ("Duncan" or "the School") under Federal Rules of Civil Procedure 12(b)(6) and 8(a).

Applying the deferential review standard required by *Thomas M. Cooley Law School v. ABA*, 459 F.3d 705, 713 (6th Cir. 2006), the administrative record establishes that the Council's denial of provisional approval was supported by substantial evidence and conformed to "fundamental principles of fairness." As a matter of law, therefore, the School's Complaint fails to state a claim for violation of federal common law due process and should be dismissed.

The School attempts to avoid this result by arguing that the ABA is seeking an "adjudication on the merits" that converts its motion into a motion for summary judgment, even while it acknowledges that the Court may look to the administrative record to determine whether the School has stated a plausible claim for relief. The School also argues that discovery is needed to determine whether the Council considered all the relevant factors in denying the

School provisional accreditation. However, neither exception the School cites to the rule prohibiting discovery is applicable.

The School further claims that the ABA violated its procedural rules and the School's due process rights by permitting two Accreditation Committee members to attend the Council hearing. In fact, this is permitted under the applicable rules, and the School never objected to their presence. Similarly, the School claims that the timing of the appointment of the Appeals Panel, which the ABA has already addressed in its opposition to the School's motion for reconsideration (Doc. 47), violated the School's due process rights. The timing will not delay the appeal, and the School does not contend it requested recusal of any Appeals Panel members.

Although the administrative record establishes that the School failed to carry its burden of establishing substantial compliance with three Standards and two Interpretations, the School asserts that the Council also should be required to establish why the allegedly favorable record evidence was not sufficient. This would impose a new obligation on the Council that is not supported by any authority, including the cases the School cites under the Administrative Procedure Act.

The School also fails to allege an antitrust injury, and its assertion that the denial of provisional accreditation was the result of an antitrust conspiracy by "Competitor Law Schools" that "dominate the Council" (Doc. 48 at 23) is unsupported by any well-pleaded facts and ignores that the majority of the Council are judges, public members, and practitioners. Finally, the School presents no opposition to the ABA's showing that neither Count II's putative state-law due process claim nor its Count V states a valid claim for relief.

While the School's reply thus contains many assertions and allegations, none establish that its Complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief

that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The ABA therefore respectfully requests that the School's Complaint be dismissed in its entirety.

I. THE ABA PROPERLY SEEKS DISMISSAL UNDER RULES 12(b)(6) AND 8(a).

A. The Court May Consider The Administrative Record.

The ABA has moved to dismiss the School's Complaint under Rules 12(b)(6) and 8(a) because the Complaint fails as a matter of law to state a claim upon which relief can be granted. The ABA seeks dismissal under the same standard for Rule 12(b)(6) dismissal that the School sets out. Doc. 48 at 3. However, the School asserts that the ABA is seeking an "adjudication on the merits" that converts its motion into a motion for summary judgment, even while the School acknowledges that "the Court may look to documents attached to the pleadings and filed in the case to determine whether [the School] has stated a plausible claim for relief." Doc. 48 at 4.

As the Sixth Circuit has stated, "[n]ormally, Rule 12(b)(6) judgments are dismissals on the merits." *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 917 (6th Cir. 1986). Further, when ruling on a Rule 12(b)(6) motion to dismiss, a court may consider documents that are "referred to in the Complaint and [that] are central to the claims contained therein." *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008). *See also BP Care, Inc. v. Thompson*, 337 F. Supp. 2d 1021, 1025 (S.D. Ohio 2003) ("Defendants may attach the administrative record . . . without converting their Motion to Dismiss into a Motion for Summary Judgment."); *Youssefi v. Renaud*, 794 F. Supp. 2d 585, 591 (D. Md. 2011) (same). The School's argument that the Court may "look to" but not "review" the record on a Rule 12(b)(6) motion to dismiss (Doc. 48 at 4-5) is contrary to Sixth Circuit law.

Further, it is a "well-settled rule" that where a document referenced in a complaint "contradicts allegations in a complaint …, the exhibit trumps the allegations." *Thompson v. Ill.*

Dep't of Prof'l Regulation, 300 F.3d 750, 754 (7th Cir. 2002) (citation omitted). The Court, accordingly, is not required to confine its review to the selected excerpts the School has proffered, but instead should consider the full context in which they appear.

Throughout the Complaint, the School references and quotes from documents contained in the administrative record. Having filed these documents with the Court, the School has admitted their authenticity and, contrary to the School's argument, their consideration does not convert the ABA's motion to dismiss under Rule 12(b)(6) into a motion for summary judgment.

B. The School Cannot Avoid Dismissal By Its Request For Discovery.

The School also contends that it should be allowed discovery "before the Court can fully adjudicate the due process claims presented." Doc. 48 at 5. This contention fails for two reasons. First, the very purpose of a motion to dismiss is to avoid imposing on defendants "the burdens of discovery" when a plaintiff fails to state a claim. *Iqbal*, 129 S. Ct. at 1945; *see also id.* at 1954 ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."). As the Sixth Circuit recently concluded, since *Twombly* and *Iqbal*, a plaintiff whose complaint is deficient under Rules 12(b)(6) and 8 "may not use the discovery process" to cure such deficiencies after filing suit, "even if those facts [sought] are only within the head or hands of the defendants." *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011); *see also In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 2012 WL 716132, at *6 (E.D. Ky. Mar. 5, 2012) ("Under *Iqbal*, plaintiffs should not be permitted to conduct discovery in order to fix factually deficient complaints."); *Fresnius Med. Care Holdings, Inc. v. Wellmont Health Sys., Inc.*, 2011 WL 4585257, at *2 (E.D. Tenn. Sept. 30, 2011) (plaintiff is not entitled to discovery to obtain factual information requisite to state claim with facial plausibility, even where plaintiff alleges

information "is solely within the purview of the defendant or a third party") (citation omitted).

Second, the School recognizes that, in actions seeking administrative review, there is a "general prohibition against admission and discovery of evidence outside the administrative record." Doc. 48 at 9. The School also recognizes that judicial review generally is "confined to the administrative record" and that "the court's task is to apply the standard of review to the agency's decision based on that record." Doc. 48 at 8 (citations omitted). Nevertheless, the School asserts that two exceptions relevant to cases decided under the Administrative Procedure Act (APA) warrant permitting it to supplement the record here. Doc. 48 at 8-9. The School, however, cites no authority holding that these APA exceptions apply to the review of accreditation decisions, where the standard is narrower and more deferential. *See Thomas M. Cooley Law Sch. v. ABA*, 459 F.3d 705, 713 (6th Cir. 2006); Part II.A, *infra*.

Moreover, neither of the APA exceptions the School cites applies here. The first applies only where the agency has failed to issue a contemporaneous written decision, or its decision is so sparse as to make judicial review impossible. *See Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (absent a "strong showing of bad faith," review is limited to administrative record except "when the record is so bare that it prevents effective judicial review") (citation omitted); *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 458 (D.C. Cir. 1994) ("[D]iscovery is permissible . . . when it 'provides the only possibility for effective judicial review and . . . there have been no contemporaneous administrative findings' (so that without discovery the administrative record is inadequate for review.") (quoting *Cmty. for Creative Non-Violence v Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990)); *Common Sense Salmon Recovery v. Evans*, 217 F. Supp. 2d 17, 20 (D.D.C. 2002) (exception applies only where it "provides 'the only possibility for effective judicial review and when there have been no contemporaneous

administrative findings'") (quoting *Lujan*, 908 F.2d at 997). This exception has no application here, where the Accreditation Committee issued substantial written findings of fact, and where the Council and the Committee each issued a detailed explanation for its conclusions that the School did not establish substantial compliance with each of the Standards.[1] *See* Doc. 28-11 at 204-28, 370-75; *see infra* at Part II.D.

Further, supplementing the record is not justified because the School "fail[s]to point to a single factor that would suggest the administrative record was inadequate for an assessment of [its] claims." *Sierra Club v. Slater*, 120 F.3d 623, 639 (6th Cir. 1997). Indeed, the record alone is relevant to the School's claim that the "denial of provisional approval is not rationally related to the facts in the record." Compl. ¶ 90. Similarly, the School contends that it "was not given a meaningful opportunity to be heard before the Council," Compl. ¶ 91, but the record already includes the hearing transcript and the documents that were before the Council. Finally, the School asserts that it should be afforded discovery because "the ABA failed to consider all the relevant factors in rendering its adverse decision," Doc. 48 at 9, but again that is a determination that should be made based upon the record itself, which is voluminous, applying the proper standard of review. *See* Part II.D, *infra.*[2]

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[1] In *City of Lorain v. EPA*, 1992 U.S. Dist. LEXIS 22665, at *6 (N.D. Ohio Apr. 24, 1992) (cited Doc. 48 at 11), the court permitted limited discovery only because the agency record in that case was inadequate for judicial review. Here, there can be no serious claim that the voluminous record is inadequate to allow the Court to review the Council's decision. *See Cooley,* 459 F.3d at 713; *Foundation for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 532 (6th Cir. 2001).

[2] Even if the Council's decision and record did not provide sufficient detail to permit judicial review, the remedy under the APA cases would be remand for further explanation, not discovery. *N'Diom v. Gonzales*, 442 F.3d 494, 496 (6th Cir. 2006) ("[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.") (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

The second exception applies only where a plaintiff has made a "strong showing of bad faith" that could justify discovery. In *City of Mount Clemens v. EPA*, cited by the School (Doc. 48 at 11), the Sixth Circuit found that an "unsubstantiated allegation" that the agency acted in bad faith, when viewed in light of an extensive administrative record, "does not warrant an exception to the general rule that review of agency action is limited to the administrative record." 917 F.2d 908, 918 (6th Cir. 1990). The School's Complaint's similarly unsubstantiated allegations of bad faith through "antitrust conduct" made only on "information and belief" likewise do not justify going beyond the record. Compl. ¶ 11. The School also claims that "bad faith" is shown by unsupported allegations of the ABA's alleged "failure to adhere to its own the Rules of Procedure." Doc. 48 at 11. As shown further below, these allegations do not have merit and, thus, could not warrant an exception to the rule that a court's review in accreditation decisions is limited to the administrative record.

II. THE SCHOOL'S FEDERAL DUE PROCESS CLAIM SHOULD BE DISMISSED.

A. The School Misstates The Standard Of Review For Accreditation Decisions.

In the School's response, it continues to misstate the standard of review for accreditation decisions, citing cases under the APA. As this Court has recognized, the standard of review for private accreditation decisions is "more limited than review under the [APA]," and "courts should focus on whether an accrediting agency such as the ABA followed a fair procedure in reaching its conclusions." Doc. 35 at 22 (quoting *Cooley Law School*, 459 F.3d at 713). So long as an accrediting agency conforms to "fundamental principles of fairness," its decision should not be disturbed. *Cooley Law School*, 459 F.3d at 713. As this Court stated, the agency's decision is entitled to deference "even if there is substantial evidence in the record that would have supported an opposite conclusion." Doc. 35 at 34-35 (quoting *Jones v. Comm'r*, 336 F.3d 469, 475 (6th Cir. 2003)).

The School, however, would impose the additional requirement that an accrediting agency must give "reasons for ignoring or rejecting" allegedly favorable evidence in the record. Doc. 48 at 15; *see also id.* at 10, 13-15. Any such requirement would be unreasonable, onerous and, at least in this case, impractical, as shown by the size of the accreditation record for the School (including an application that exceeded 400 pages).

Further, no accreditation decision has suggested such an obligation. Not even the APA decisions cited by the School support this position. Instead, those cases require that the agency "articulate a rational connection between the facts found and the choice made." *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 758 (6th Cir. 1995) (internal quotations and citation omitted); *see also McHugh v. Astrue*, 2011 U.S. Dist. LEXIS 141342 at *11 (S.D. Oh. Nov. 15, 2011) (requiring a "logical bridge" between "the evidence and . . . conclusion").[3] The Council's decision readily meets this test. After adopting the Accreditation Committee's Report and Recommendation (excluding the conclusion regarding Standard 511), which consisted of 23 single-spaced pages with 96 separate Findings of Fact and three Conclusions, which each cited specific Findings (Doc. 28-11 at 204-28), the Council set out its own conclusions and rationale. Doc. 28-11 at 370-378. *See infra* at Part II.D.

The School's position is also at odds with the governing Department of Education regulation, which the School does not discuss. That regulation, which governs accrediting bodies like the Council, provides that due process is satisfied so long as the agency "describes the basis for" any adverse accrediting action in writing. 34 C.F.R. § 602.25(e). The School does not argue, nor can it, that it did not receive a detailed explanation of the basis for the Council's

[3] The School's reliance on the decision in *Karce v. Building Service 32B-J Pension Fund*, 2006 U.S. Dist. Lexis 79818 (S.D.N.Y. Oct. 31, 2006) (cited Doc. 48 at 14) is also inapposite because it relies on an interpretation of an ERISA regulation that has no application here. *Id.* at *13-16.

decision. This regulation supersedes any additional requirement the School might hope to impose and supports the conclusion that due process does not require more. *Cf., Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (holding that agency delegation for regulating activities displaces federal common law claims).

B. The Presence Of Accreditation Committee Members At The Council Hearing Was Not A Violation Of The ABA's Rules Or Due Process.

With this Court having held that the School's allegations about the Council hearing "likely lack[ed] merit" (Doc. 35 at 23), the School now makes an argument that it did not raise in during the preliminary injunction proceedings: the School argues that the presence of two Accreditation Committee members denied the School "an impartial hearing." Doc. 48 at 6; *see also* Compl. ¶ 37. This argument fails for three reasons. First, having failed to object to the presence of the Committee members during the hearing, the School has waived any objection. Second, their presence was not a violation of the ABA's Rules of Procedure or Internal Operating Practices. Third, even assuming the Committee members' presence was not permitted, it was harmless and did not violate due process.

Accreditation Committee Chair Diane F. Bosse and Vice-Chair Charles W. Goldner were present at the Council hearing; the School did not object to their presence (*see* Doc. 28-11 at 71-160 (transcript)) and thus waived any alleged claim on this point. *See Davidson v. Dep't of Energy*, 838 F.2d 850, 855-56 (6th Cir. 1988) (noting failure "to voice their current concerns during the [agency] process," and concluding "plaintiffs will not be permitted to introduce new evidence in this judicial proceeding of their concerns"); *Toribio-Chavez v. Holder*, 611 F.3d 57, 67 (1st Cir. 2010) ("This court has applied a … 'raise-or-waive rule' when reviewing administrative actions," such that administrative actions cannot be challenged absent an "objection made at the [appropriate] time.") (internal citation omitted); *Power v. Fed. Labor*

Relations Auth., 146 F.3d 995, 1002 (D.C. Cir. 1998) (allegations of due process violation due to bias waived where plaintiff failed to object to agency).

The School's claim also fails because it is based on an erroneous reading of ABA Rule of Procedure 6 and Internal Operating Practices ("IOP") 2 and 19. Doc. 48 at 6-7. Rule 6 is titled "Appearances Before Accreditation Committee and Council." Doc. 21-2 at 6. Rule 6(a) addresses a school's "right to have representatives of the school, including legal counsel, appear before the Committee and the Council." *Id.* Rule 6(b) addresses the circumstances under which a site team chair or member may be present at the Committee or Council meeting at a school's expense. *Id.* While the School is correct that Rule 6 "does not provide for members of the Accreditation Committee to attend the Council hearing," Doc. 48 at 6, this does not mean they are prohibited. Rather, Rule 6 concerns only two groups—school representatives and site team members—and does not purport to address the presence of Committee or Council members or others such as the Consultant and ABA staff who regularly attend meetings.[4]

The School's reading of IOP 2 is similarly erroneous. IOP 2 provides that "all matters relating to the accreditation of a law school shall be confidential," including "proceedings and deliberations of the Accreditation Committee and Council and all non-public documents and information received or generated by the Association." Doc. 21-3 at 2. The presence of two members of the Committee does not violate IOP 2, as they are part of the confidential

[4] To the extent that the School is invoking the *expressio unius* principle—the inclusion of things specified implies the exclusion of those not mentioned—the Supreme Court has explained that it "has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co*., 537 U.S. 149, 168 (2003); *see also Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) ("The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand."). Representatives of a school or members of a school-specific site team are different from other participants in the accreditation process such as the Committee and Council. This principle does not apply.

accreditation process and already privy to the School's application and administrative record.

The School further misreads IOP 19. IOP 19 sets out the ABA's "Conflicts of Interest" policy relating to the accreditation process. It contains nine subsections that delineate the rules governing conflicts of interest, recusal, and the presence during hearings and deliberations of members of the Accreditation Committee, Council, Appeals Panel, and Office of the Consultant. Doc. 21-3 at 11-13. For example, IOP 19(c) requires recusal if the member (or a family member) is affiliated with or has a business or professional relationship with a school under review. *Id.* at 11. IOP 19(d) addresses recusal from matters before the Council due to prior service on the Accreditation Committee:

> A Member of the Council shall recuse himself or herself from participating in review of a matter before the Council involving the status of a law school in any case where the Member of the Council participated in making the decision or recommendation on such matter as a member of the Accreditation Committee.

Id. at 12. IOP 19(f)(1)-(2) sets out the impact of recusal under any of the provisions in IOP 19: "A Member who is recused with regard to a matter related to a law school under review: (1) may not be present . . . before the Council" and (2) "shall refrain from participating in any discussions" regarding the law school.

Thus, as the School acknowledges, IOP 19(d) and (f) together bar *Council Members* from being present at a Council hearing and participating in discussions if (i) they "participated in any decision [about the school] as a member of the Accreditation Committee" or (ii) they are otherwise subject to recusal under IOP 19. Doc. 48 at 7. It does not, however, prohibit Committee Members from being present or participating in Council discussions.

Ms. Bosse and Mr. Goldner were not Council members or subject to recusal when they attended the hearing, and their presence therefore complied with IOP 19(d) and (f). Based on the plain language of IOP 19, the Section's interpretation of these Internal Operating Practices that

permitted their attendance at the Council hearing was not "clearly erroneous," and thus, is entitled to deference. *Cooley Law Sch.*, 459 F.3d at 714.

Further, this interpretation is fully consistent with IOP 19(i), which permits a "fact finder at a law school or of a law school program" to "be present and/or speak" during the Council's deliberations (Doc. 21-3 at 13), since the Accreditation Committee is the fact finder as to the School's application for provisional approval. *See* Doc. 21-2 at 3-4; Rule 3(b) ("The Committee shall make findings of fact . . . with respect to the law school's compliance with the Standards."). It is also consistent with Rule 8 which, contrary to the School's assertion, does not provide for *de novo* review by the Council. Doc. 48 at 6. Rather, Rule 8 provides that 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." Doc. 21-2 at 6.

The presence of these Committee members during the Council meeting and deliberations was not only permitted, it was harmless. The School does not—and cannot—assert that it would have received provisional accreditation but for the presence of the Committee members. *See Hiwassee Coll., Inc. v. S. Ass'n of Colls. & Schs*., 490 F. Supp. 2d 1348, 1351 (N.D. Ga. 2007), *aff'd* 531 F.3d 1333 (11th Cir. 2008) (allegations that member of Appeals Panel had conflict of interest did not show due process violation); *St. Andrews Presbyterian Coll. v. S. Ass'n of Colls. & Schs.*, 679 F. Supp. 2d 1320, 1333 (N.D. Ga. 2009) (rejecting allegation that accreditation committee member had conflict of interest because plaintiff "failed to show that the alleged conflict caused it any injury or otherwise affect[ed] the accreditation process"). The presence of two non-voting individuals at the Council hearing and deliberations, accordingly, did not constitute a violation of due process.

C. The Timing Of The Appointment Of The Appeals Panel Does Not Violate Due Process.

As previously discussed in the ABA's Response to the School's Motion to Reconsider (Doc. 47 at 3-14), the timing of the Appeals Panel's appointment does not violate due process because it has not resulted in any fundamental unfairness.[5] *Hiwassee Coll.,* 490 F. Supp. 2d at 1351 (due process not violated unless departure from rules "resulted in any fundamental unfairness arising out of the process employed"). The School does not dispute that the Panel will decide the School's appeal within the time provided in Rule 10 (no later than May 3, 2012). The School also does not dispute that the Appeals Panel members are qualified, or contend that it has sought recusal of any Panel member under the Section's IOP 19(h). Doc. 21-3 at 13.

The School incorrectly asserts that the timing of the appointment of the Appeals Panel violates a federal statute and regulation. Doc. 48 at 8. The statute that governs accrediting agencies, 20 U.S.C. § 1099b, contains no such provision. As discussed above, 34 C.F.R. § 602.25 addresses due process in accrediting agency decisions, and subsection (f)(1)(i), which the School cites (Doc. 48 at 8), provides that the "appeal must take place at a hearing before an appeals panel that (i) [m]ay not include current members of the agency's decision-making body that took the initial adverse action." It is undisputed that no member of the current Appeals Panel is a current member of the Council, or even of the Accreditation Committee.[6] The

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[5] Moreover, the School makes no such claim in its Complaint, which it filed "in lieu of pursuing an appeal." Compl. ¶¶ 13, 71-72. It cannot avoid dismissal based on claims not in the Complaint. *E.g., Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.").

[6] In contrast, in *Escuela de Medicina San Juan Bautista, Inc. v. Liasison Comm. On Med. Educ.*, 2011 WL 5114827 (D.P.R. Oct. 28, 2011), the allegation was that a member of the appellate body was also a member of the current underlying decision-making body. That finding is inapplicable here.

remaining aspects of 34 C.F.R. § 602.25(f) are satisfied because the Appeals Panel members are subject to a conflict of interest policy; the Panel has the authority to affirm, amend, or reverse adverse actions of the Council; and the School has the right to have counsel representation during the appeal. Rule 10, Doc. 21-2 at 8-10. Because the timing of the appointment of the Appeals Panel neither violates this federal statute nor otherwise gives rise to any "fundamental unfairness," *Hiwassee Coll.,* 490 F. Supp. 2d at 1351, it cannot provide the basis for a due process violation.

D. The Council's Conclusions Are Supported By Substantial Evidence.

Under the Standards, it is the School's burden to establish "that it is in substantial compliance with *each of* the Standards." Doc. 21-1 at 12 (Standard 102(a)) (emphasis added). Based on substantial evidence in the administrative record, the Council concluded that the School failed to carry its burden with respect to three Standards and two Interpretations. Doc. 28-11 at 372-73. As discussed above in Part II.A, however, the School continues to dispute the level of deference owed the Council as an expert accrediting agency and attempts to ignore the standard for review set out in this Court's Memorandum Opinion and Order. Doc. 35 at 22 (discussing standard under *Cooley,* 459 F.3d at 712-13). The School thus continues to insist that the Council was required to address facts that the School asserts were favorable to it, and to dispute that the Council's conclusions were supported by substantial evidence and conformed to "fundamental principles of fairness," *Cooley,* 459 F.3d at 713. These assertions fail to state a claim.

1. Standard 203 (Strategic Planning and Assessment)

The Council's conclusion that the School had not shown substantial compliance with Standard 203 was based on six Findings of Fact, which are discussed in the ABA's memorandum in support of its motion to dismiss. Doc. 44 at 9, 12-13. They relate to: (i) the School's failure

to reexamine and revise the goals and assumptions in its feasibility study and (ii) its failure to evaluate the cause or impact of its failure to meet enrollment projections. Doc. 28-11 at 372; *see also* Doc. 28-11 at 207-09, 227. The School argues that all six facts are "variation[s] on a single theme" that the School "had not engaged in a review of the market conditions and goals contained in its feasibility study." Doc. 48 at 2, 13. The School also claims that the Council applied "requirements and criteria" beyond the published Standards because "Standard 203 does not require review of a feasibility study." Doc. 48 at 13 (noting comment at the Council hearing that "the Standards do not require more than one feasibility study"). The School contends that it engages in "continual" strategic planning and has a "culture of assessment." Doc. 48 at 13-14. And the School says it "consistently revised its program projections" and "undertook strategic planning" to address these issues. Doc 48 at 14 (citing Doc. 28-11 at 268-71).

These broad generalizations, however, do not address the School's failure to engage in strategic planning regarding the issues identified in the Findings of Fact. The record was undisputed that the School did not reexamine the assumptions and goals in its feasibility study, analyze the causes of its failure to meet enrollment projections, or re-evaluate and revise its enrollment goals in light of the fact that it may be a "significantly smaller school." Doc. 28-11 at 372.

The School argues that it should be able to take discovery to "connect the dots." Doc. 48 at 14. However, the Committee's recommendation and the Council's decision were mapped to specific findings of fact, all of which were amply supported by the record. Further, the record was developed in the course of the administrative proceedings. Because it was the School's burden to establish substantial compliance with the Standards through that record, there is no

basis for discovery as to this Standard, and the Council's decision should be upheld based on the administrative record. *See also* Part I.A-B, *supra.*

2. Standard 303 and Interpretation 303-3 (Academic Standards)

The Council's conclusion that the School did not show substantial compliance with Standard 303 and Interpretation 303-3 was based on five separate Findings of Fact relating to the School's (i) low standards for continuing enrollment of students in academic distress, (ii) absence of proven effective academic support, and (iii) readmission of a high percentage of academically dismissed students. Doc. 28-11 at 372-73; *see also* Doc. 28-11 at 214-15, 217-20, 227**.**

The School does not dispute the finding relating to its low standards for continuing enrollment; this alone justifies the Council's decision. Regarding academic support, the School argues that its program is taught in small sections, includes a bar examination course, and utilizes computer software. Doc. 48 at 15. However, the issue identified by the Council was that the School had "not established that the [academic support] program was effective." Doc. 28-11 at 373. While the School insists that the director of academic support "is qualified by virtue of his skill, knowledge, and background," Doc. 48 at 15, the record is undisputed, and the School's representatives admitted to the Committee and the Council, that he did not have specific experience in academic support. Doc. 28-8 at 75-77; Doc. 28-11 at 123-26, 243. Based on the School's failure to establish the effectiveness of its academic support and the lack of experience of its director, the Council was well within its discretion in concluding that the School had not established compliance with Standard 303 and Interpretation 303-3.

As for the readmission of one-third (6 of 18) of the students dismissed for academic failure, the School asserts that "DSOL's re-admission policy is successful 85% of the time" because, as of August 2011 (when the School submitted its information on this topic), only one

of the six readmitted students had subsequently been dismissed.[7] Doc. 48 at 16. However, the School's readmission standard does not depend on the later performance of a student, but requires a showing of "extraordinary circumstances" at the time of readmission (*see* Doc. 28-11 at 214, 246), and the School did not attempt to show that the students met this requirement. Further, of the remaining five readmitted students, only one had completed a full semester following readmission, and four were in their first semester. Doc. 28-8 at 55. There was no evidence that any of the five remaining students would graduate and no evidence before the Committee or Council that the School had properly applied its readmission standard.

3. Standard 501(b) and Interpretation 501-3 (Admissions)

Standard 501(b) requires that the School "not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar." Doc. 21-1 at 45. The School argues that the ABA must "define the factors subject to its analysis with consistency and uniformity." Doc. 48 at 18. Interpretation 501-3, however, provides that "[a]mong the factors …consider[ed] in assessing compliance with Standard 501(b) are the academic and admission test credentials of the law school's entering students, the academic attrition rate of the law school's students, the bar passage rate of its graduates, and the effectiveness of the law school's academic support program." Doc. 48 at 17-18. The record includes a chart and detailed analysis of the School's applications, acceptance rate and entering student credentials, including LSAT scores and UGPA compiled over a three-year period. Doc. 28-11 at 218. That analysis showed dramatic declines in the School's applications and

[7] The School claims this "empirical evidence" is "totally consistent with the facts found by the Site Evaluation Team." Doc. 48 at 16. However, the School did not provide this information until August 2011, *after* the site visit. The site team's statement that the School "has not readmitted any of its own students who have been previously disqualified for academic reasons" (Doc. 28-11 at 45), was thus made before the School provided this information.

enrollment and corresponding increases in the School's acceptance rate from 2009-2011. *Id.* It also shows that the less selective admissions criteria produced decreases in both LSAT scores and UGPAs in every quartile. *Id.* Indeed, the School's own administration and faculty expressed concern about the decline in median LSAT scores "in contravention of the proposed movement toward higher LSAT medians." Doc. 26-6 at 191.

The School focuses on the Council's comment about the "comparatively low entering academic credentials" of the School's class and argues that its scores are higher than those of students at eight other schools. Doc. 48 at 18-19. Assuming *arguendo* that this is true, the fact that the School's scores are not at the bottom does not mean they are not "comparatively low." The School's claim of inconsistency, further, is based solely on a comparison of LSAT scores and UGPAs and fails to consider the full range of factors considered by the Council in concluding that the School failed to establish substantial compliance with Standard 501 and Interpretation 501-3. Doc. 28-11 at 373; *see also* Doc. 28-11 at 217-20, 227-28. Moreover, courts "refus[e] to consider claims of disparate treatment of accreditation applicants." *Foundation for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 528 (6th Cir. 2001).

III. THE SCHOOL'S ANTITRUST CLAIMS SHOULD BE DISMISSED.

The School's response establishes that its antitrust claims under Sections 1 and 2 of the Sherman Act are based solely on conclusory assertions and unreasonable inferences. First, the School fails to allege an antitrust injury. Second, the School's claimed Section 1 antitrust conspiracy rests on its argument that the only explanation for the Council's denial of accreditation is an antitrust conspiracy among unnamed Council members, which is implausible on its face and disregards the substantial evidence in the record supporting the Council's decision. Third, the School fails to allege facts that meet the applicable rule of reason test and

fails to allege any support for its Section 2 monopolization claim.

A. The School Has Not Alleged Antitrust Injury.

The School does not dispute that antitrust injury is required for its Section 1 and Section 2 antitrust claims. Nor does the School attempt to distinguish the Sixth Circuit's conclusion in *Foundation for Interior Design* that "[w]e have not found a case … in which a denial of school accreditation gave rise to a successful allegation of antitrust injury." 244 F.3d at 531. The School also largely ignores the Sixth Circuit's decision in *Bassett v. NCAA*, which rejected analogous antitrust claims based on allegations that the NCAA's adjudication of plaintiff's misconduct was inconsistent with due process, and upheld dismissal because the plaintiff failed to allege facts suggesting injury to competition generally. 528 F.3d 426, 434 (6th Cir. 2008).

Instead, the School contends that it has adequately alleged antitrust injury by simply asserting, without any facts or explanation, that the Council's decision "increases the price of legal education," "increases the cost of legal services," and "decreases the consistent quality of legal education." Doc. 48 at 27-28; Compl. ¶¶106-08. Numerous courts have rejected virtually identical allegations of injury as insufficient to constitute a well-pleaded antitrust injury. *E.g., CBC Cos., Inc. v. Equifax, Inc.*, 561 F.3d 569, 571-72 (6th Cir. 2009) (affirming dismissal of antitrust complaint that contained only "generalized allegations of antitrust injury," including "increasing reissue costs and decreasing options for mortgage lenders," and "restricting competition between its … subsidiary … and other resellers."); *Guinn v. Mount Carmel Health*, 2012 WL 628519, at *5 (S.D. Ohio Feb. 27, 2012) (allegations that "the quality of medical services was harmed, consumers had less choice, and the cost of medical services was negatively impacted" did not sufficiently allege antitrust injury); *HTC Sweden AB v. Innovatech Prods. & Equip.* Co., 2008 U.S. Dist. LEXIS 76690, at *25 (E.D. Tenn. Sept. 30, 2008) (Varlan, J.) ("The claimant must allege facts that suggest that an antitrust injury occurred; mere allegations are not

sufficient.").

Indeed, the School's assertion that "the price of legal education" will increase due to the Council's decision, is implausible on its face, given that the School makes no claim—nor could it—that its tuition is lower than competitor law schools, or that it will be forced to raise tuition, or that the School's failure to receive provisional accreditation will impact the price for legal education regionally or nationally. The same is true regarding the School's assertions that the cost of legal services will increase and the quality of legal education will suffer because, out of hundreds of accredited and unaccredited law schools throughout the United States, one law school was denied provisional accreditation. In short, there are no facts—or even inferences—that might link the allegations of the Complaint to an antitrust injury.

The School argues that the Third Circuit, in *Massachusetts School of Law v. ABA ("MSL")*, 107 F.3d 1026 (3d Cir. 1997), recognized that "the ABA's enforcement of an anticompetitive standard which injures *MSL* would not be immune from possible antitrust liability." Doc. 48 at 28-29. But *MSL* merely recognized that the ABA is not a state actor, and thus theoretically might be subject to an antitrust claim. 107 F.3d at 1038. *MSL* did not establish that there was a viable antitrust claim in that case, and it says nothing about this case. Further, the School asserts that injuries to student recruiting, faculty hiring, fundraising, and loss of goodwill are the "type of injury that *MSL* contemplated the antitrust laws were designed to handle." Doc. 48 at 29. However, these are precisely the type of injuries to competitors, but not to competition, that the Sixth Circuit has held cannot support a claim of antitrust injury. *Bassett,* 528 F.3d at 434; *Foundation*, 244 F.3d at 531-32; *see also Warrior Sports, Inc. v. NCAA*, 623 F.3d 281, 285-86 (6th Cir. 2010) (affirming judgment on the pleadings where the "complaint fails to identify any anticompetitive effects on the market" as opposed to individual injury to a

competitor); *Care Heating & Cooling, Inc. v. Am. Standard, Inc.,* 427 F.3d 1008, 1014 (6th Cir. 2005) ("[T]he foundation of an antitrust claim is the alleged adverse effect on the market."). The School's failure to allege antitrust injury requires dismissal of Counts III and IV.

B. The School's Conclusory Allegations Do Not Support Its Antitrust Claims.

The School claims that it has adequately set out the "who, what, when, and how" of the alleged antitrust conspiracy as required by *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield,* 552 F.3d 430, 437 (6th Cir. 2008). Doc. 48 at 22-24. But its allegations, like those in *Total Benefits,* "fall significantly short of the required pleading threshold." 552 F.3d at 436. In its Complaint, the School alleges only "on information and belief" that the accreditation denial arose from "an agreement and understanding with certain accredited law schools." Compl. ¶ 11. In response to the question of "who conspired," the School now asserts that it was the "ABA itself, in tandem with Competitor Law Schools," who are "either in the southern Appalachian region," or in "a national market" of similar schools. Doc. 48 at 22. The School also asserts that they have "infiltrated the ABA's Accreditation Committee and the Council, and are in a position to control or influence their decisions." *Id.* at 23.

However, the public record shows that a majority of Council members are judges, practitioners and public members, none of whom the School suggests are involved in the conspiracy.[8] The remaining Council members include deans and faculty from law schools that include the University of Montana, University of Minnesota, University of Kansas, Boston University, and Georgetown University. While these schools are in the national market of law schools, the School has alleged no facts that might support its claim that these schools—or their

[8] Available at http://www.americanbar.org/groups/legal_education/about_us/leadership.html (last visited March 19, 2012).

deans or faculty members—would "have an economic interest in ensuring that [the School] specifically is not allowed to enter the market." Doc. 48 at 21.[9] Indeed, during the Council proceedings, the School did not exercise its right under IOP 19 to request recusal of any Council member based on a conflict of interest arising from an alleged affiliation with a "competitor" school or for any other reason. *See* IOP 19, Doc. 21-3 at 11-13.

The only "evidence" of a "conspiracy" among the Council members that is asserted by the School is its claim that it *should* have been granted provisional accreditation. Doc. 48 at 21 (asserting conspiracy resulting in alleged wrongful denial of provisional accreditation evidenced by the School's alleged compliance with ABA Standards and degree to which other schools are accredited that are not in compliance or otherwise had lower student credentials). However, this "evidence," without more, is not sufficient to state an antitrust claim because the decision to deny provisional accreditation is fully consistent with pro-competitive activity. *See Twombly*, 550 U.S. at 556-57 (conduct consistent with competitive behavior cannot by itself support an antitrust claim).

Further, the Complaint should be dismissed because the denial of provisional approval does not "plausibly sugges[t]" an antitrust conspiracy. *Id.* at 557. Contrary to the School's response (Doc. 48 at 25), this is not an assertion that a claim must be "probable." *See Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage.").

Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc., 648 F.3d 452, 456-57 (6th

[9] In fact, the only law school identified by Duncan as within its "Competitor Law Schools" is Appalachian School of Law ("ASL") (Doc. 48 at 22 n.3), which has no actual or alleged connection to the Council, the Accreditation Committee, or the ABA. If Duncan is claiming that ASL is part of the alleged antitrust conspiracy, it must allege facts connecting it with the ABA.

Cir. 2011) (cited Doc. 48 at 25), does not support the School's assertion that it has adequately alleged an antitrust claim. In *Watson,* the plaintiff asserted a series of well-pleaded facts supporting its alleged antitrust conspiracy, including an express conspiratorial agreement, named coconspirator competitors, and specific instances where the alleged coconspirators falsely maligned and refused to deal with the plaintiff. *Id.* Here, in contrast, no facts are pleaded that give rise to a plausible inference of a conspiracy. *See Twombly*, 550 U.S. at 551.[10]

The School is also wrong in arguing that the rule of reason, which applies to accreditation decisions, cannot justify dismissal. Doc. 48 at 26. The Sixth Circuit's *Total Benefits* decision affirmed dismissal precisely because the complaint did not make out a case under the rule of reason. 552 F.3d at 436. Similarly, the School cannot ignore its obligation under the rule of reason to define the relevant market and describe the net economic effect of the alleged violations on competition within that market. *Id.* at 436-37.

Finally, as to its Section 2 monopolization claim, the School provides no response to the ABA's showing that the School cannot support an antitrust claim by asserting that the Council "enjoys monopoly power in accrediting law schools." Compl. ¶ 123. Rather, such monopoly power must be "accompanied by an element of anticompetitive conduct." *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004). The Complaint has not alleged that the Council's accreditation role is the consequence of anticompetitive conduct, nor could it, given that the Department of Education's selection of the Council is state action and therefore

[10] *Starr v. Sony BMG Music Entm't*, cited by the School (Doc. 48 at 25), confirms that conclusory allegations, including an "allegation that defendants agreed to [a] price floor," are "not accepted as true." 592 F.3d 314, 317 n.1 & 319 n.2 (2d Cir. 2010). The plaintiff in that case alleged a long series of "specific facts" that were "sufficient to plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants." *Id.* at 323-24. Here, in contrast, the School has not alleged any conduct suggesting an antitrust conspiracy.

immune from antitrust suit. *See CBC Cos.*, 561 F.3d at 573.

IV. THE SCHOOL DOES NOT CONTEST THAT ITS COUNTS II AND V SHOULD BE DISMISSED.

The School also provides no response to the ABA's showing that Counts II and V should be dismissed. Counts II and V should therefore be dismissed for the reasons stated in the ABA's opening brief.

CONCLUSION

For the foregoing reasons the Complaint should be dismissed in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 19, 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.

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