

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION**

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

**DEFENDANT AMERICAN BAR ASSOCIATION’S BRIEF IN OPPOSITION TO
PLAINTIFF’S MOTION FOR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

After a detailed and painstaking process that included an on-site review, hearings, and the review of thousands of pages of material, the Council of the Section of Legal Education and Admissions to the Bar (the “Council”) of the American Bar Association (“ABA”) issued its decision that Lincoln Memorial University Duncan School of Law (“Duncan” or the “School”) had not met the Section’s requirements for provisional accreditation. As required by its rules, the Council promptly notified the public of its decision. Rather than pursuing an appeal, as provided by federal law and the Section’s Rules, the School asks this Court to intervene and immediately censor any notice of the Council’s decision.¹ This relief is undeserved and unprecedented, and should be denied.

As an initial matter, the Council’s decision is not ripe for review because Duncan has not exhausted its right to appeal to the Appeals Panel constituted in compliance with Department of

¹ Plaintiffs also seek a permanent injunction asking this Court to appoint itself the accreditor and to grant ABA provisional approval to Duncan. This request is not the subject of the current hearing on plaintiffs’ TRO request and therefore the ABA has not addressed it in this response.

Education (“DOE”) regulations. Further, the School has not met its heavy burden of clearly establishing each element required for the extraordinary relief it seeks. First, Duncan cannot establish any likelihood of success on the merits. Its challenge to the Council’s procedures and antitrust claims are both foreclosed by Sixth Circuit precedent. *Thomas M. Cooley Law Sch. v. ABA*, 459 F.3d 705, 715 (6th Cir. 2006); *Foundation for Interior Design Educ. Research v. Savannah College of Art & Design*, 244 F.3d 521, 531-32 (6th Cir. 2001).

The School is thus left with a challenge to the Council’s specific conclusions and findings. But given the “great deference” owed to expert accrediting bodies, Duncan must show that the decision was so lacking in support that it “was arbitrary or unreasonable” or breached “fundamental principles of fairness.” *Cooley*, 459 F.3d at 713. The School cannot do so. Based on the voluminous record, which included notice and ample opportunity for Duncan to be heard, the Council concluded that Duncan failed to satisfy the standards for provisional accreditation, which require “substantial compliance” with each of the Section’s Standards for Approval of Law Schools. The Council’s conclusions were fully supported by the record, consistent with applicable rules, and explained to Duncan in a written decision. They are not rendered arbitrary and capricious by positive comments in the record that do not address the specific issues of non-compliance, or by the views of other accrediting agencies, whose decisions were based on preliminary plans and do not show the Council improperly applied the Section’s Standards.

Second, Duncan makes no showing of substantial, immediate, and irreparable injury. Duncan has not yet exhausted its right to appeal the Council’s decision. Even if unsuccessful on appeal, Duncan remains in the same position as before the announcement of the Council’s decision—it can seek to remedy the deficiencies identified by the Council and reapply for provisional approval. Further, the success of Nashville School of Law, which has operated for

100 years without accreditation from the Council, belies Duncan's claim that lack of provisional approval has caused it to suffer irreparable injury justifying the unprecedented relief it seeks.

Finally, the requested injunction would harm the public interest and the Section. It would silence communication of the Council's denial of provisional approval, which is truthful speech that current and prospective students, as well as the public, have a strong interest in knowing.

In sum, none of the elements for a temporary or preliminary injunction are present here and Plaintiffs' motion should be denied.

STATEMENT OF FACTS

A. The Section's Role in the Accreditation Process.

Since 1952, the Council has been the national agency for the accreditation of law schools. Declaration of Hulett H. Askew ("Askew Decl.") ¶ 8. A school's decision to seek accreditation from the Council (known as "approval") is voluntary, and the Council's decisions are not binding on State bar admission authorities. *Id.* ¶ 4. Tennessee, for example, does not require bar applicants to graduate from a law school approved by the Council. *Id.* ¶ 5; Ex. 21 at ABA493.² Indeed, Nashville School of Law has operated for 100 years without such approval. Askew Decl. ¶ 6; Ex. 16 at ABA477, ABA481.

The Council is assisted by the Accreditation Committee (the "Committee"), which reviews accreditation materials, including site reports and school submissions, holds hearings, finds facts, reaches conclusions, and makes recommendations to the Council. *Id.* ¶¶ 17–19.

In making accreditation decisions, the Council applies written Standards, Interpretations, and Rules, which are adopted following an extensive notice and public comment process and

² All exhibits are contained in Defendant American Bar Association's Appendix to Brief in Opposition to Plaintiff's Motion for Temporary Restraining Order, filed concurrently herewith.

published on the Section’s website. *Id.* ¶¶ 10-12. These Standards, Interpretations, and Rules govern “provisional approval” and full approval of law schools. To receive provisional approval, a school must both (i) establish that it is in substantial compliance with each of the Standards and (ii) present a reliable plan for bringing the law school into full compliance within three years. Ex. 1, Standard 102(a) at ABA12; *see also* Askew Decl. ¶¶ 13-24.

B. The Founding of Duncan and Its Application for Provisional Approval.

In 2008, LMU prepared a feasibility study for a new law school. Ex. 14 at ABA446-74. The study projected a need for more lawyers in Tennessee based on factors including population, income, the retirement of lawyers, and the need for legal services among poor and low income residents (*id.* at ABA447-48). Citing “great demand” for legal education, the study predicted:

Should today’s “seller’s market” for law schools continue, even before gaining ABA approval LMU should be able to fill its classes with students whose academic credentials surpass those of many ABA-approved law schools in times of low demand.

Id. at ABA460-61. Based on these goals and projections, Duncan enrolled its first part-time class in 2009 and full-time class in 2010. Askew Decl. ¶ 36. Duncan charges \$28,665 full-time tuition and estimates the total annual cost for attending the School in 2011–12 to be \$49,975. *Id.* ¶ 38. Duncan is located approximately one mile from the UT-Knoxville Law School campus, where the in-state tuition for 2011–2012 is \$14,044. *Id.* ¶ 39.

C. The Site Team Visit to Duncan, Site Report, and Duncan’s Response.

In January 2011, Duncan applied to the Council for provisional approval and in March a site evaluation team visited the School and prepared a report. *Id.* ¶¶ 40-41. Duncan had projected that it would enroll 100 new full-time and 60 new part-time students in 2010. *Id.* ¶ 41, Ex. 9 at ABA355. However, the site team reported that Duncan enrolled just 55 new full-time and 36 new part-time students—40-45% below its projection. Askew Decl. ¶ 41.

The site team also observed that the admissions profiles of Duncan's first two classes "are somewhat low." Ex. 9, at ABA387. The site team provided a chart showing that from 2009 to 2010, applications to Duncan were down slightly but its acceptance rate had risen dramatically from 51% to 71%. *Id.* at ABA386-87. At the same time, Duncan's yield (the percentage of acceptances compared to offers) had dropped from 64.8% to 53.3%, leaving Duncan with a total of only 90 entering students compared to the 160 originally projected. *Id.* The LSAT scores and undergraduate GPAs ("UGPA") of the entering classes also had declined. *Id.* Noting that the Administration and Faculty expressed "concern" about these declines, the site team warned that Duncan's "progress, or lack thereof [of its recruitment efforts], ... needs to be monitored in order to ensure that [it] is only admitting students who can complete the educational program and be admitted to the bar."³ *Id.* at ABA388. It also reported that Duncan's new "Director of Academic Success" was a librarian admitted to practice in 2005 who did not appear to have training or experience in academic support. *Id.* at ABA371; Ex. 8 at ABA328, ABA344-46.

Duncan provided line-by-line responses to the site report but did not dispute any of these points. Ex. 88 at ABA323-42. The School also provided updated admissions data showing that applications to the School had decreased 27% between 2010 and 2011. *Id.* at ABA326. The size of the entering class had dropped by almost one-third, from 90 to 62 students, and the LSAT scores and UGPAs had not improved. *Id.* Rather than "fill[ing] its classes" with highly qualified students (Ex. 14 at ABA460), Duncan was falling further short of its goals. Yet during the site visit the School continued to project a 2012 entering class of 80 full-time and 25 part-time students. Ex. 6, Finding of Fact 10 at ABA211.

³ This language mirrored Standard 501, which states that "[a] law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar." Ex. 1 at ABA45.

Duncan also disclosed in its response to the site report that it had readmitted one-third (6 of 18) of its students who were academically dismissed. Ex. 8 at ABA343. Duncan's policy permits readmission only on a finding of "extraordinary" circumstances that will not recur. Askew Decl. ¶ 50; Ex. 9 at ABA367. The readmission of so many dismissed students raised questions about Duncan's adherence to its policies and whether it was retaining students who were unable to complete its educational program and be admitted to the bar. Askew Decl. ¶ 50.

D. The Accreditation Committee's Findings of Fact and Recommendation.

On September 29, 2011, the Accreditation Committee held a two-hour hearing on Duncan's application for provisional approval, and six representatives of LMU/Duncan attended. Ex. 7 at ABA232-321. The Committee discussed the School's failure to meet its enrollment projections, even after revising them downward, and the declines in applications and entering student credentials. The School admitted it had not done any reevaluation of the goals or assumptions in its 2008 feasibility study. *Id.* at ABA250-51, ABA315-16; *see also* Askew Decl. ¶ 55. The Committee also discussed reductions in the job market and the School's estimate that students would carry a debt load of \$80,000–\$100,000 upon graduation. Ex. 7 at ABA249-50, ABA315-17; Askew Decl. ¶¶ 56–57.

The Committee discussed the readmission of academically dismissed students. The School confirmed that the new Director of Academic Success had no experience in this area, it had not measured whether its academic support programs were effective, and it lacked other support for students on academic probation beyond more frequent meetings with the Director of Academic Success and faculty advisors. *Id.* at ABA273-74, ABA286-87; Askew Decl. ¶ 57.

On October 12, 2011, the Accreditation Committee issued a 23-page Recommendation containing 96 detailed Findings of Fact. Ex. 6 at ABA207-31. Based on these findings, the

Committee concluded that Duncan had not established under Standard 102(a) that it was in substantial compliance with each of the Standards and had not presented a reliable plan for achieving full compliance. *Id.* at ABA230. Specifically, the Committee concluded that Duncan failed to establish substantial compliance with the following Standards and Interpretations.

Standard 203—Strategic Planning and Assessment. Duncan failed to establish substantial compliance with Standard 203:

[A] law school shall demonstrate that it 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 its established goals.

Id. at ABA230; *see also* Ex. 1 at ABA20. The Committee's conclusion was based upon specific Findings of Fact (Nos. 6–8, 10–11, and 13), including Duncan's admission that it had not revisited its feasibility study and how changed conditions and the failure to meet its projections "may affect strategic planning and the Law School's success in realizing its established goals." Ex. 6, Findings of Fact 6-8 at ABA210-11. For example, "[p]art of the mission of the Law School is to prepare young lawyers to serve a population that cannot afford legal services," but Duncan acknowledged that "Legal Aid of Eastern Tennessee has had to lay off lawyers, due to budget cuts" and it was unaware of any anticipated increase in public funding for legal services. *Id.*, Finding of Fact 7 at ABA210. Further, the "School's inability to reach projected enrollment targets has caused the Law School to revise projected enrollments downward, and appears to have caused a drop in the LSAT of the entering classes, negatively affecting student selectivity." *Id.*, Finding of Fact 13 at ABA212; *see also id.*, Finding of Fact 10 at ABA211. "This poses strategic planning challenges that the record does not establish the Law School has sufficiently addressed" *Id.*, Finding of Fact 13 at ABA212.

Standards 303(a) and (c) and Interpretation 303-3—Academic Standards and

Achievements. Duncan failed to establish substantial compliance with Standard 303(a) (“[a] law school shall have and adhere to sound academic standards”) and Standard 303(c):

A law school shall not continue the enrollment of a student whose inability to do satisfactory work is sufficiently manifest so that the student’s continuation in school would inculcate false hopes, constitute economic exploitation, or detrimentally affect the education of other students.

Ex. 6 at ABA230; *see also* Ex. 1 at ABA30. The Committee further concluded that Duncan failed to show substantial compliance with Interpretation 303-3: “A law school shall provide the academic support necessary to assure each student a satisfactory opportunity to complete the program, graduate, and become a member of the legal profession.” Ex. 6 at ABA230; *see also* Ex. 1 at ABA31. These conclusions were based upon specific Findings of Fact (40–42, 59 and 63) regarding Duncan’s low standards for continuing enrollment of students in academic distress, failure to demonstrate adequate academic support for such students, and readmission of a high percentage of students who were terminated for academic failure. The Committee found that the Director of Academic Success has “no prior academic support experience,” and the School “has limited data on which to assess the effectiveness of its Academic Success Program.” Ex. 6, Finding of Fact 42 at ABA217-18.

Standard 501(b) and Interpretation 501-3—Admission Policies and Practices.

Duncan failed to establish substantial compliance with Standard 501(b), which provides, “A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar,” and Interpretation 501-3 which provides:

Among the factors to consider 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.

Ex. 6 at ABA230-31; *see also* Ex. 1 at ABA45. The Committee's conclusion was based upon specific Findings of Fact (59 & 63). The Committee cited admissions data and the first-year class profile, which showed increases in acceptance rates and decreases in yield from 2009 to 2010–2011, coupled with a decline in every quartile of LSAT scores and UGPAs. Ex. 6, Finding of Fact 59 at ABA221. Finding of Fact 63 related to readmission of academically dismissed students, which raised questions as to whether they were capable of completing the program and being admitted to the bar.⁴ *Id.*, Finding of Fact 63 at ABA222-23.

E. December 2011 Council Meeting and Decision.

In December 2011, the Council met to consider Duncan's application for provisional approval. Duncan attended with eight representatives. Although meetings to consider an application for provisional approval typically last one hour, the Council gave Duncan two hours. Ex. 5 at ABA116, ABA205. Although Duncan says it was "given only 15 minutes to make its presentation," (Complaint ¶ 37), in fact it had 15 minutes to make *opening and closing remarks*. Ex. 5 at ABA120. Throughout the two-hour meeting, Duncan made extended remarks on topics relating to the School in response to questions from the Council.

The Council expressed concern in the meeting that Duncan had not reassessed its plans in light of the School's failure to achieve its goals and projections and changes in economic factors. Askew Decl. ¶¶ 95–97. The Council also noted Duncan's (i) admission of students with low credentials, (ii) inexperienced and unproven academic support, particularly for at-risk students, (iii) decision to allow students to continue their education despite very low cumulative GPAs, and (iv) re-admission of a high percentage of academically dismissed students. *Id.* ¶¶ 98–101.

⁴ The Committee also concluded that Duncan failed to establish substantial compliance with Standard 511 pertaining to career counseling. Ex. 6 at ABA231. Based on additional actions by the School, the Council found it in substantial compliance with Standard 511. Ex. 4 at ABA105.

On December 20, 2011, the Council issued its decision denying provisional approval. Ex. 4 at ABA103-11. The Council adopted the Committee's Findings of Fact and concluded that Duncan had "not established that it is in substantial compliance" with each of the Standards and had "not presented a reliable plan for bringing the School into full compliance with the Standards within three years after receiving provisional approval." Ex. 4 at ABA105. Specifically, the Council concluded:

Standard 203. Duncan "has not demonstrated that it 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." *Id.*

◆ "[T]he Law School has failed to establish that it has re-examined its goals and the means to achieve them in light of unanticipated economic conditions, affecting the assumptions in its feasibility study." *Id.*

◆ "The Law School has not established that it has determined the cause or evaluated the impact of the failure to meet its enrollment projections on its ability to meet its mission or to ultimately succeed as an institution." *Id.*

◆ "[T]he Law School has failed to establish that it has re-evaluated and revised its goals given that, as currently appears based on past enrollment and present projections, it may be a significantly smaller law school than anticipated when it was founded." *Id.*

Standard 303(a), (c); Interpretation 303-3. "[A]lthough the Law School has adopted and adheres to clearly defined academic standards, the Law School has not demonstrated that the standards are sound." *Id.* at ABA106.

◆ "The Law School has not demonstrated that its standards for academic dismissal and readmission are sufficiently rigorous as to ensure that the Law School does not continue the enrollment of students whose inability to do satisfactory work is manifest." *Id.*

◆ "While the Law School has established an academic support program, it has not established that the program is effective. The program is not currently directed by a person with specific experience in academic support..." *Id.*

Standard 501; Interpretation 501-3. 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." *Id.*

◆Factors include 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.” *Id.*

F. Publication of the Council’s Decision and Appeal Process

As required by Internal Operating Practice No. 5 (Ex. 3 at ABA92-93), the Council notified the public of its denial of provisional approval within 24 hours of notifying Duncan by issuing a memorandum and posting it on the Section’s website. Dkt. 2, Ex. A. That memorandum noted Duncan’s right to appeal the decision in accordance with Rule 10 of the Rules of Procedure (“Rules”) (Ex. 2 at ABA68-70), which implemented federal legislation enacted in 2008 that requires accreditation agencies to provide appeals for decisions involving the denial of accreditation. 20 U.S.C. § 1099b(a)(6)(C). Duncan has until January 19, 2012 to appeal, and if it does so, the Council’s decision will be stayed pending that appeal.

ARGUMENT

“A preliminary injunction is an extraordinary measure that has been characterized as ‘one of the most drastic tools in the arsenal of judicial remedies.’” *Bonnell v. Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001) (citation omitted); *see also Munaf v. Geren*, 553 U.S. 674, 691–92 (2008) (same). To justify such relief, Duncan must establish that the “circumstances clearly demand [its issuance],” *Overstreet v. Lexington-Fayette Urban County Gov’t*, 305 F.3d 566, 573 (6th Cir. 2002), considering “(1) whether the movant would suffer irreparable harm without the injunction; (2) whether issuance of the injunction would cause substantial harm to others; (3) whether the public interest would be served by the issuance of the injunction; and (4) whether the movant has demonstrated a strong likelihood of success on the merits.” *Moncier v. Jones*, 2011 WL 2940442, at *10 (E.D. Tenn. July 19, 2011).

The School does not and cannot carry this heavy burden. Moreover, the Council's accreditation decision is not ripe for review because the School has not exhausted the appeal process mandated by federal law.

I. DUNCAN HAS NOT PROPERLY EXHAUSTED THE ACCREDITATION APPEAL PROCESS BEFORE SEEKING THIS COURT'S INTERVENTION.

Under federal law, accrediting agencies must provide a hearing before an appeals panel for adverse accreditation decisions. 20 U.S.C. § 1099b(a)(6)(C); 34 C.F.R. § 602.25(f). This requirement is satisfied by Rule 10, under which Duncan has until January 19, 2012 to seek review of the Council's decision before the Appeals Panel. Askew Decl. ¶ 110; Ex. 2, Rule 10 at ABA68-70. Such an appeal will automatically stay the Council's decision pending the Appeals Panel's review. *Id.* Under these circumstances, Duncan's claims are not ripe for review by this Court because it has not properly exhausted the appeal process mandated by federal law.

As the Supreme Court recently recognized, “[g]enerally, when Congress creates procedures ‘designed to permit agency expertise to be brought to bear on particular problems,’ those procedures ‘are to be exclusive.’” *Free Enterprise Fund v. PCAOB*, 130 S. Ct. 3138, 3150 (2010) (quoting *Whitney Nat’l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)). This exhaustion principle bars disappointed applicants from forgoing available administrative remedies just because they would prefer a judicial one, ensuring that the expert agency “has had a full opportunity to consider a petitioner’s claims,” avoiding “premature interference with the agency’s processes,” and allowing the agency “to compile a record which is adequate for judicial review.” *Bi Xia Qu v. Holder*, 618 F.3d 602, 609 (6th Cir. 2010); *cf. Staver v. ABA*, 169 F. Supp. 2d 1372, 1377 (M.D. Fla. 2001) (“Because the ABA has not yet reached a final decision on Barry’s application [for accreditation], the Plaintiffs’ claims are not ripe.”).

Here, federal law designates the Council as the expert accrediting agency for law schools and mandates that it provide opportunity for “a hearing before an appeals panel . . . prior to [an adverse accreditation] action becoming final.” 20 U.S.C. § 1099b(a)(6)(C); *see also* 34 C.F.R. § 602.25(f). Federal law dictates the composition of the Appeals Panel to insure independence, requiring that it “not include current members of the agency’s decision-making body that took the initial adverse action,” and that it be “subject to a conflict of interest policy.” Federal law also outlines the authority of the Appeals Panel, requiring that it “not serve only an advisory or procedural role,” and has authority to “affirm, amend, or reverse adverse actions of the original decision-making body.” 34 C.F.R. § 602.25(f). Federal law thus clearly anticipates that any school seeking to challenge an accreditation decision will avail itself of the expert Appeals Panel before seeking judicial intervention. The fact that the federal statute and regulations do not expressly require exhaustion does not suggest otherwise. *See Coomer v. Bethesda Hosp., Inc.*, 370 F.3d 499, 504 (6th Cir. 2004) (requiring exhaustion where relevant statute required merely “a reasonable opportunity . . . for a full and fair review”); *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1092 (6th Cir. 1981) (“To conclude . . . that a party may seek judicial review . . . without first attempting to obtain temporary relief from the Secretary . . . would render the administrative relief provisions superfluous.”). Nor does Rule 10, which provides that a school “may” seek review from the Appeals Panel (Ex. 2 at ABA68), nullify this exhaustion requirement. This language simply recognizes that an applicant may elect not to challenge the Council’s decision; it does not authorize an applicant to forgo an appeal and seek judicial review.

Finally, the issue presented by Duncan’s Motion —whether Duncan merits accreditation—“fall[s] squarely within [the Council’s] expertise.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994). Under federal law, the Appeals Panel is required to provide the

same review of the Council's accreditation decision that Duncan now seeks from this Court. 34 C.F.R. § 602.25(f)(1)(iii) (requiring the Panel to have "the authority . . . to affirm, amend, or reverse" the adverse actions); Askew Decl. ¶ 30.⁵ Accordingly, Duncan should properly exhaust the appeal process mandated by federal law before seeking judicial review. *See United States v. Illinois Cent. R. Co.* 291 U.S. 457, 463 (1934) ("The various steps to be taken constitute parts of the administrative process which must be completed before the extraordinary powers of a court of equity may be invoked.").

No exception to the exhaustion principles is applicable here. Duncan argues that exhaustion is not required because it challenges "the ABA's accreditation scheme itself" as violating the Sherman Act. Br. at 14. But its Motion focuses entirely on the Council's accreditation decision and procedures, not on this collateral antitrust claim, and these accreditation matters are properly first exhausted before seeking judicial intervention, given that they lie at the heart of the Appeals Panel's assigned responsibilities. *See Thunder Basin Coal*, 510 U.S. at 215 (recognizing that claims within agency's expertise should be exhausted despite the existence of collateral claims that are not within agency's purview). Moreover, Duncan's antitrust claim does not challenge the appeals process itself, nor could it conceivably do so.

Duncan also contends that an appeal would be futile. But the standard for futility is onerous: "A plaintiff must show that it is certain that his claim will be denied on appeal, not merely that he doubts that an appeal will result in a different decision." *Fallick v. Nationwide*

⁵ The Section's rules also ensure that such review would be completed in a timely fashion. The Appeals Panel must issue a final decision within 105 days from a school's appeal. *See* Ex. 2, Rule 10(f) at ABA68 (Consultant must refer appeal within 30 days); Rule 10(i) at ABA69-70 (hearing occurs within 45 days of such charge and decision issues within 30 days thereafter). If Duncan had appealed December 22, 2011, instead of filing suit, the Appeals Panel would have issued a decision no later than April 5, 2012, before spring semester ended. Askew Decl. ¶ 111.

Mut. Ins. Co., 162 F.3d 410, 419 (6th Cir. 1998) (citation omitted). Duncan offers no evidence, only an assertion, that the Appeals Panel will fail to independently review the School's challenges. The Appeals Panel is constituted in accordance with requirements specified by the DOE for independence and includes "one legal educator, one judge or practitioner, and one public member," all "[e]xperienced and knowledgeable in the Standards" governing accreditation. Ex. 2, Rule 10(g) at ABA68-69; *see also* Askew Decl. ¶ 28. In sum, there is no basis for Duncan to avoid exhausting its internal appeal rights.

II. DUNCAN DOES NOT MEET ITS BURDEN TO JUSTIFY TEMPORARY INJUNCTIVE RELIEF.

Even if Duncan's request for extraordinary relief were ripe for review, it would still be without merit, for Duncan cannot establish that "circumstances clearly demand [its issuance]." *Overstreet*, 305 F.3d at 573; *Moncier*, 2011 WL 2940442, at *10.

A. Duncan Is Not Likely To Succeed On The Merits.

1. Duncan Cannot Show A Violation Of Due Process.

Although Duncan asserts due process claims under both federal and Tennessee law, Compl. ¶¶ 91–92, the Sixth Circuit has made clear that state-law claims relating to the Council's accreditation decisions are preempted by federal law. *Cooley*, 459 F.3d at 712–13. Applying federal common law, the Sixth Circuit also has repeatedly held that judicial review of accreditation decisions is extremely deferential. *Id.*; *Foundation*, 244 F.3d at 528–29. Such review is limited to "whether the decision of an accrediting agency such as the ABA is arbitrary and unreasonable or an abuse of discretion and whether the decision is based on substantial evidence." *Cooley*, 459 F.3d at 712; *see also* *Foundation*, 244 F.3d at 532 ("[Review] is limited to alleged procedural violations; it does not extend to the substance of the accreditation decision."); *accord* *Wilfred Academy of Hair & Beauty Culture v. So. Ass'n of Colleges & Sch.*,

957 F.2d 210, 214 (5th Cir. 1992); *Dietz v. American Dental Ass'n*, 479 F. Supp. 554, 559 (E.D. Mich. 1979) (“If the result was not based on arbitrary factors, but on substantive factors within the Board’s competence, this court cannot substitute its judgment for theirs.”); *Staver v. ABA*, 169 F. Supp. 2d at 1379 (same). As this Court has explained, “When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious.” *Save Our Cumberland Mountains v. Norton*, 297 F. Supp. 2d 1042, 1048 (E.D. Tenn. 2003) (citation omitted).

The rationale for judicial deference is that “the standards of accreditation are not guides for the layman but for professionals in the field of education,” and thus courts “are not free to conduct a *de novo* review or substitute [their] judgment for that of the ABA or its Council.” *Cooley*, 459 F.3d at 713 (internal quotations and citations omitted); *cf. Tenn. Clean Water Network v. Norton*, 2005 WL 2464675, at *9 (E.D. Tenn. Oct. 4, 2005) (“The Court may not substitute its judgment . . . for the judgment of [the agency.]”). Indeed, for these reasons, “judicial review of accreditation decisions is more limited than review [of federal agency decisions under the Administrative Procedures Act].” *Cooley*, 459 F.3d at 713.

Duncan invites this Court to ignore this Sixth Circuit precedent and appoint itself the accrediting body, reweighing evidence before the Council to determine whether the School met the Section’s Standards for provisional accreditation. But “in analyzing whether the ABA abused its discretion or reached a decision that was arbitrary or unreasonable,” the proper focus is only on whether the Council “conform[ed] its actions to fundamental principles of fairness.” *Id.* (quoting *Medical Inst. of Minn. v. NATTS*, 817 F.2d 1310, 1314 (8th Cir. 1987)). Moreover, a court “must defer . . . even if there is substantial evidence in the record that would have supported an opposite conclusion, so long as substantial evidence supports the conclusion reached.” *Jones*

v. Commissioner, 336 F.3d 469, 475 (6th Cir. 2003). Because Duncan cannot establish that the record lacks such support, or that the Council acted arbitrarily, or that the School was denied a sufficient opportunity to be heard, it cannot prevail.⁶

Duncan was provided a full and fair opportunity to be heard. Duncan asserts that it was denied “a meaningful opportunity to be heard” due to the alleged “cursory nature of the Council hearing,” contending it was given only fifteen minutes to present its case. Dkt. 5 at 12. This claim is demonstrably false. Duncan appeared before the Council for *two hours*. Ex. 5 at ABA116, ABA205.

Duncan appears to assert that due process requires that it be given the opportunity to make an uninterrupted presentation in addition to what it was given: the opportunity for opening and closing remarks, responding to questions from the Council, and presenting lengthy written materials, all of which were in addition to the Council’s review of the material presented in connection with the School’s two-hour transcribed hearing before the Committee. By contrast, the Sixth Circuit typically affords litigants at oral argument fifteen minutes per side, 6th Cir. R. 34(f), with no guaranty of any uninterrupted time for the presenters. No one would suggest this procedure violates due process. Indeed, due process does not require a live hearing at all, let alone one that fits Duncan’s preferred format of an uninterrupted presentation. *See* 34 C.F.R. § 602.25(d) (due process requirement is met if agency “[p]rovides sufficient opportunity for a *written* response by an institution”) (emphasis added)).

⁶ Notably, Duncan does not contend that the Council breached any of the due process requirements imposed by the DOE on accrediting bodies. *See* 34 C.F.R. § 602.25. The Council’s undisputed compliance with these DOE regulations is strong evidence that it also has satisfied the federal common law standard. *See Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (recognizing that when a federal regulatory authority “speaks directly to the question at issue,” it excludes any expanded obligations under federal common law).

The Sixth Circuit has already ruled that the Section's procedures in this regard fully satisfy principles of due process. In *Cooley*, the court found that the school "was afforded ample process at each of the ABA hearings—it was notified well in advance, afforded the opportunity to submit evidence to support its case, and permitted to appear before the body with counsel present." 459 F.3d at 715. Duncan enjoyed all of the procedures described in *Cooley*, plus an available administrative appeal. Duncan's claims therefore fail.

The accreditation decision was neither arbitrary nor without substantial evidence. The Council provided three separate grounds for its denial of provisional approval, each with specific, articulated justifications. Ex. 4 at ABA105-06. First, the Council concluded that Duncan failed to establish substantial compliance with Standard 203, citing the School's failure to reexamine its assumptions and goals in light of declining enrollment and its failure to meet enrollment projections as well as unanticipated economic conditions. Second, the Council concluded that Duncan failed to establish substantial compliance with Standard 303(a) and (c) and Interpretation 303-3, because the School had not demonstrated sound academic standards, including standards for dismissal and readmission of students, or that the School had an effective academic support program. Third, the Council concluded that Duncan did not show substantial compliance with Standard 501(b) and Interpretation 501-3, which require schools not to admit applicants who appear unable to complete the educational program and pass the bar. That conclusion was based not only on the low and declining credentials of admitted students but also on readmission rates and the School's failure to demonstrate an effective academic support program. Particularly in light of the substantial deference accorded to the Council, *Cooley*, 459 F.3d at 715, the decision is on its face not arbitrary, unreasonable, or without evidentiary support.

Duncan contends that "at least eight other similarly situated law schools [with respect to

LSAT scores and UGPA] . . . have gained full accreditation.” Dkt. 5 at 11. But the Sixth Circuit, like other courts, has specifically rejected efforts “to give consideration to the relative qualifications of other schools accredited by” an accrediting body, for reference to such comparative evidence is contrary to the deferential review standard that applies. *Foundation*, 244 F.3d at 529; *see also Marlboro Corp. v. Ass’n of Indep. Colls. and Sch., Inc.*, 556 F.2d 78, 80 n.2 (1st Cir. 1977); *Transport Careers, Inc. v. Nat’l Home Study Council*, 646 F. Supp. 1474, 1484–85 (N.D. Ind. 1986). Even if a disparate treatment analysis were appropriate, accreditation decisions are based on the totality of circumstances and Duncan’s argument overlooks the range of factors the Council considered under the Standards. Under Standard 501(b), for example, Duncan’s students may have similar LSAT scores, but the Council was also concerned about Duncan’s lack of an effective academic support program. Duncan also readmitted one-third of its academically dismissed students, notwithstanding (i) its stated “extraordinary circumstances” standard for readmission; (ii) the need for such student to earn “A” or “B” grades to maintain good standing upon their return; and (iii) the lack of proven academic support to help them do so. In other words, Duncan failed to establish that it admits (or readmits) students who are capable of completing the educational program and being admitted to the bar, and failed to show it provides adequate resources to help those students to do so.⁷

The Council faithfully followed all applicable rules. Duncan also claims, without factual support, that the Council failed to follow its own rule that Committee findings must be rejected if they are not supported by substantial evidence. Dkt. 5 at 10. Even apart from the “great deference” owed to the Council’s interpretation of its own rules, *Cooley*, 459 F.3d at 713,

⁷ The Council also noted that its students “have yet to sit for a bar examination,” Ex. 4 at ABA106, so Duncan cannot show that its students have been admitted to the bar.

this is nothing more than a restatement of Duncan's argument that the Council's decision was not supported by substantial evidence. *Supra* at 18-19.

Contrary to Duncan's claims that the site report is the "opposite" of the Committee's findings and that the Council's conclusions are contrary to the site report, the site report contained critical facts that formed the basis of the Committee's findings and the Council's conclusions. *See supra* at 4-6. Furthermore, Duncan's argument depends entirely on its mischaracterization of the role of the site team. Dkt. 5 at 10. As stated on the cover page of its report, the site team is not a fact-finding body. Rather, the site team's report is merely information on which the Committee may rely, along with other materials and presentations, in reaching its factual findings. Askew Decl. ¶¶ 17-19.

Nor can the conclusions of other accrediting bodies such as the Southern Association of Colleges and Schools ("SACS") and the Tennessee Board of Law Examiners ("TBLE")—which evaluated the School at different times and under different standards—constitute "facts" that might justify this Court's jettisoning of the facts found by the Committee, which is the expert fact-finder under the Standards. Both SACS and TBLE initially approved the School before any students arrived on campus, and when SACS later sent a committee to see Duncan in operation, it noted that key administrators lacked "extensive experience in legal education." Ex. 11 at ABA427; Askew Decl. ¶¶ 86-91. In any event, consideration of evidence comparing what other accrediting bodies may have done and why is contrary to the case law establishing the parameters of this Court's limited review. *Foundation*, 244 F.3d at 529.

Duncan also contends that the Council considered facts "beyond the scope of the ABA's published Standards," Dkt. 5 at 12, such as Duncan's failure to re-examine the out-of-date assumptions and projections in its feasibility study, Dkt. 5 at 11. But the feasibility study was

required by Rule 4(b)(4) and is evidence of Duncan's strategic planning, the focus of Standard 203, as Duncan's representative admitted. Ex. 5, Tr. at ABA157. The Council must consider the School's strategic planning, regardless of the title of the particular document. *See Ambrose v. New England Ass'n of Sch. and Colleges, Inc.*, 252 F.3d 488, 495 (1st Cir. 2001) (recognizing that "flexibility" in accreditation "benchmarks . . . long has been recognized as a virtue"). Moreover, the Council's finding of non-compliance was based on the School's failure to determine the cause or evaluate the impact of its failure to meet its enrollment projections, or to re-evaluate its goals in light of these events, all of which are within the scope of Standard 203.

2. Duncan's Antitrust Claims Fail As A Matter Of Law.

Duncan does not allege a single fact to support its antitrust claims. Instead, Duncan admits the claims are derivative of its due process claims (Dkt. 5 at 15), and they thus fail for the same reasons. Indeed, Duncan does not even mention its antitrust claims in support of its Motion, effectively conceding that they provide no independent support for its demand for temporary injunctive relief.

In any event, Duncan's antitrust claims are foreclosed by a series of accreditation decisions decisively holding that the injuries Duncan alleges arising from the Council's accreditation decision (Compl. ¶¶ 109-11) are "the result of state action and thus immune from antitrust action." *See Mass. Sch. of Law at Andover, Inc. v. ABA*, 107 F.3d 1026, 1036, 1038 (3d Cir. 1997); *see also Foundation*, 244 F.3d at 531; *Zavaletta v. ABA*, 721 F. Supp. 96, 98 (E.D. Va. 1989) ("In accrediting a law school, the ABA merely expresses its educated opinion . . . , [which] is provided to state supreme courts and bar examiners, who have the sole power to determine if a school's graduates are entitled to . . . practice in their states.") Indeed, the Sixth Circuit recognized that there has been no case "in which a denial of school accreditation gave rise to a successful allegation of antitrust injury." *Foundation*, 244 F.3d at 531.

B. Duncan Has Not Shown Irreparable Harm.

Duncan offers only bare assertions, not evidence, of irreparable harm, and for that reason alone its motion should be denied. *Michigan Coalition v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (movant must show harm that is “both certain and immediate, rather than speculative or theoretical”). “[T]o substantiate a claim that irreparable injury is likely to occur,” Duncan must come forward with “specific facts,” not simply assertions of potential injury. *Id.*; *see also Hartsel v. Keys*, 87 F.3d 795, 801 (6th Cir. 1996) (affidavits containing “bald assertions and conclusory statements” failed to provide factual support for plaintiff’s claim).

Even if Duncan’s assertions of harm were based in fact, they could not justify the requested relief. Virtually all the alleged injury arises from Duncan’s status as a law school unaccredited by the Council, but that is precisely how Duncan has operated since opening in 2009: Duncan is not, and never has been, Council-accredited. Duncan publishes this fact to prospective students on its website in bold-faced italicized type, saying it “*makes no representation to any applicant that it will be approved by the American Bar Association prior to the graduation of any matriculating student.*” Askew Decl. ¶ 114. Whatever reputational issues Duncan faces by being unaccredited by the Council—whether with prospective students, faculty, or donors, *see* Dean Beckman Decl., Dkt. 7-3 ¶¶ 7, 10—already existed, and cannot be shown to arise from the Council’s recent publication of its decision on provisional accreditation. *See Thompson v. Hayes*, 748 F. Supp. 2d 824, 832 (E.D. Tenn. 2010) (holding harm too “speculative” where negative reputation already existed).⁸ As Duncan recognizes, the purpose of

⁸ The accreditation cases Duncan cites are thus inapposite because they involve schools that had their preexisting accreditation withdrawn. *See Florida College of Business v. Accrediting Council*, 954 F. Supp. 256, 257 (S.D. Fla. 1996) (enjoining revocation of accreditation); *Edwards Waters College, Inc. v. So. Ass’n of Colleges & Schools*, 2005 U.S. Dist LEXIS 39443, at *1–2 (M.D. Fla. Mar. 11, 2005) (same).

temporary relief is “to preserve the status quo,” *Moncier*, 2011 WL 2940442, at *9 (citation omitted), but doing so here would leave Duncan unaccredited by the Council.

Duncan’s claim of irreparable harm is particularly weak given that neither Tennessee nor nearby West Virginia require graduation from a Section-approved law school for bar admission. Askew Decl. ¶ 37. Indeed, the Nashville School of Law has operated successfully for 100 years without Council accreditation. Askew Decl. ¶ 6. Duncan’s claim that it cannot attract students, faculty or donors without Council accreditation is contradicted by that fact.

Finally, even if the posting of Council’s decision on the Section website (as required by Section Internal Operating Practices) could have caused Duncan any reputational harm, Duncan provides no basis to believe the alleged harm would be undone by the requested Court-ordered retraction. Indeed, the School’s filing of this lawsuit has already resulted in widespread national and local media publicity far beyond the limited publication made by the Section. *See* David Segal, *New Law School Sues Bar Association*, N.Y. Times, Dec. 22, 2011, at B1, available at <http://nyti.ms/tPZ04v>; M. Boehnke, *LMU Suing American Bar Association Over Law School Accreditation*, Knoxville News Sentinel, Dec. 23, 2011.

C. Granting A Preliminary Injunction Would Be Contrary To The Public Interest and Harm The Section.

In asking this Court to order removal of the Council’s decision from the Section’s website, Duncan seeks to censor speech and conceal information the public has a right to know—that the Council denied the School’s application for provisional approval. Duncan fears that readers will wrongly draw negative inferences about the quality of its programs, but “the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech.” *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670–71 (2011).

There is a strong public interest in having those who look to the Council’s evaluation of legal education—including current and prospective law students, faculty, state supreme courts and bar admission authorities, the U.S. Department of Education and the public—receive prompt and accurate information. *See Dayton Area Visually Impaired Persons*, 70 F.3d at 1490 (“the public as a whole has a significant interest in . . . protection of First Amendment liberties”). Duncan’s requested restraint on truthful speech would harm this public interest. *See Philadelphia Wireless Tech. Inst. v. Accrediting Comm.*, No. 98-cv-2843, 1998 WL 744101, at *8, 12 (E.D. Pa. Oct. 23, 1998) (noting harm caused by “mislead[ing] students into believing that the School . . . meets the standards of excellence embodied in the accrediting standards”); *Am. Micromax Sys., Inc. v. Nat’l Home Study Council*, No. 87-cv-2342, 1987 WL 14119, at *2 (D.D.C. Oct. 2, 1987) (noting “students who may decide to participate in the program not understanding that there is a pending question concerning accreditation”).

Further, the relief requested would also harm the Section. Interference with free speech, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Here, Duncan seeks to compel the Section to convey a message to the public—that the accreditation decision will be made by the Court—thereby forcing the Council “to be an instrument for fostering” Duncan’s preferred view, and violating the Council’s right not to be compelled to speak. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Indeed, Judge McKeague recognized that enjoining publication of a Council decision regarding a law school raises “legitimate and not insignificant” First Amendment concerns. *Thomas J. Cooley Law School v. ABA*, No. 1:04-cv-221, Dkt. No. 120 (W.D. Mich. July 11, 2005), attached as Ex. A. Similarly, this Court rejected a request for an order enjoining speech

harmful to the reputation of a business, concluding that such extraordinary relief could not issue unless the communications “threaten[ed] an interest more fundamental than the First Amendment itself.” *Thompson*, 748 F. Supp. at 831 (quoting *County Sec. Agency v. Ohio Dep’t of Comm.*, 296 F.3d 477, 485 (6th Cir. 2002)). Neither Duncan’s reputation, nor its ability to attract students, faculty, or donors (e.g., Decl. of Dr. Hess, Dkt. 7-1 ¶ 8), is sufficient to outweigh the harm inherent in a prior restraint. See *Zavaletta*, 721 F. Supp. at 98 (“[T]he ABA has a First Amendment right to communicate its views on law schools to governmental bodies and others.”); *Mass. Sch. of Law at Andover, Inc. v. ABA*, 937 F. Supp. 435, 443–44 (E.D. Pa. 1996).

CONCLUSION

For these reasons, Plaintiffs’ Motion for Temporary Restraining Order should be denied.

Dated: January 3, 2012

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CERTIFICATE OF SERVICE

I certify that on January 3, 2012, I properly served all parties by operation of the Court’s electronic filing system to all parties indicated on the electronic filing receipt and U.S. Mail.

By: s/ Howard H. Vogel (0001015)