UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

THOMAS M. COOLEY LAW SCHOOL, a Michigan non-profit corporation,

Plaintiff,

v.

THE AMERICAN BAR ASSOCIATION, an Illinois non-profit corporation, ACCREDITATION COMMITTEE OF THE AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, and COUNCIL OF THE AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR,

Defendants.

Case No. 2:17-cv-13708

Honorable Arthur J. Tarnow

Mag. David R. Grand

Oral Argument Requested

WMU-COOLEY'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF ISSUES PRESENTED

Is the ABA's requirement that law schools only admit students who "appear capable" a "clear standard" that "provides adequate written specification of its requirements" as mandated by 34 C.F.R. § 602.25(a)?

Plaintiff WMU-Cooley answers: No

Defendant ABA answers: Yes

Given that the ABA had found WMU-Cooley in full compliance with ABA Standards regarding "bar passage rate" and "adopting and adhering to sound admissions policies and practices," was there substantial evidence based on an examination of the whole administrative record to support the ABA's conclusion that WMU-Cooley was out of compliance with subpart (b) of Standard 501 based on bar passage rates and admissions policies?

Plaintiff WMU-Cooley answers: No

Defendant ABA answers: Yes

Is the ABA's enforcement of subpart (b) of Standard 501 arbitrary and capricious as it has twice reached opposite conclusions about WMU-Cooley's compliance with the subpart based on substantially similar available data?

Plaintiff WMU-Cooley answers: Yes

Defendant ABA answers: No

Does the Department of Education's 2016 Dear Colleague Letter setting out mandatory factors accreditation agencies must consider when making a decision sufficiently entwine accrediting agencies with the Department of Education to render the accreditors' actions subject to Constitutional due process scrutiny?

Plaintiff WMU-Cooley answers: Yes

Defendant ABA answers: No

Is "appear capable" in subpart (b) of Standard 501 void for vagueness because persons of common intelligence must necessarily guess at its meaning and differ as to its application?

Plaintiff WMU-Cooley answers: Yes

Defendant ABA answers: No

Do the ABA's procedures, which deny institutions a meaningful opportunity to be heard, be represented by counsel, cross-examine witnesses, and confront the evidence against them violate common law due process?

Plaintiff WMU-Cooley answers: Yes

Defendant ABA answers: No

Is a preliminary conclusion of noncompliance with an accreditation standard which the institution has an open invitation to rectify a "final decision to take adverse action" under 34 C.F.R. § 602.26?

Plaintiff WMU-Cooley answers: No

Defendant ABA answers: Yes.

Does the ABA have a lawful basis for refusing to acquiesce in WMU-Cooley's request to open a Kalamazoo location given that WMU-Cooley is in compliance with all ABA Standards and Interpretations?

Plaintiff WMU-Cooley answers: No

Defendant ABA answers: Yes.

Introduction

"We run all those [law school] questionnaires through our magic machine. All schools that trip triggers or flags are spit out." - ABA Managing Director of Accreditation and Legal Education Barry Currier[1]

The law demands more of accreditation agencies like the ABA than "Magic Machines." Accreditation agencies "wield enormous power over institutions—life and death power, some might say." *Prof'l Massage Training Ctr., Inc. v. Accreditation Alliance of Career Sch. and Colleges*, 781 F.3d 161, 170 (4th Cir. 2015). A school without accreditation "is likely to promptly go out of business." *Id.* Because of this immense power, accreditation agencies are not given carte blanche by the law or the courts. Accreditors must "employ fair procedures," and they "must conform their actions to fundamental principles of fairness." *Id.* at 169 (cleaned up).[2] "Their duty, put simply, is to play it straight." *Id.* at 170.

The ABA's duties are informed by the Higher Education Act and Department of Education ("DOE") regulations, which require accreditation agencies to provide schools "adequate written specification of [the accreditor's] requirements, including clear standards, for an institution or program to be

[1] Stephanie Francis Ward, *ABA Legal Ed council approves proposed rule change to end admission test requirement*, ABA Journal, May 11, 2018, at 2. (Ex. A.)

[2] This brief uses "cleaned up" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations in order to improve readability. *See, e.g.*, *United States v. Steward*, 880 F.3d 983, 986 n.3 (8th Cir. 2018) ("'Cleaned up' is a new parenthetical used to eliminate unnecessary explanation of non-substantive prior alterations.")

accredited." 20 U.S.C. § 1099b(a)(6)(A)(i); 34 C.F.R. § 602.25(a) (emphasis added). The regulations also impart the duty to specify alleged deficiencies in complying with the clear standards. 34 C.F.R. § 602.25(c).

The ABA breached its duty when it found WMU-Cooley out of compliance with subpart (b) of Standard 501, which requires that law schools only admit applicants who "appear capable." Subpart (b) of Standard 501 provides no objective metrics for assessing whether an applicant "appears capable." The ABA refused (and still refuses) to clarify what "appear capable" means, despite repeated requests from a number of law schools. An agency that forces the nation's law schools to guess whether applicants meet an unexplained test, here "appear capable," and then refuses to elaborate on the test or specify claimed deficiencies after a finding of non-compliance, is not an agency "providing adequate written specification of its requirements" with "clear standards." And it is not an agency "play[ing] it straight." *Prof'l Massage Training Ctr., Inc.*, 781 F.3d at 170.

This case stems from the ABA's November 2017 conclusion that WMU-Cooley was out of compliance with the "appear capable" language in subpart (b) of Standard 501. In support of the conclusion, the ABA pointed to raw statistical data about WMU-Cooley's matriculants (UGPA/LSAT) and graduates (bar passage rates) and declared that the raw data supported its conclusion. The ABA did not explain *why* the raw data led to the conclusion that WMU-Cooley's students did

not "appear capable" at the time of admission. And the unfounded conclusion is all the more puzzling given that the ABA found WMU-Cooley *in compliance* with the Standards regarding "adherence to sound admissions policies and practices" and "bar passage rates." (Doc. #60-7, PgID #5017; Doc. #60-9, PgID #5694.)

DOE regulations require that "agenc[ies] must consistently apply and enforce standards." 34 C.F.R. § 602.18. Agencies must also have "effective controls against the inconsistent application of the agency's standards." 34 C.F.R. § 602.18(b). Here, the ABA found WMU-Cooley in compliance with subpart (a) of Standard 501 ("adheres to sound admissions policies and practices") and Standard 316 ("bar passage rate"), but out of compliance with subpart (b) of Standard 501 based on "admissions practices" and "bar passage rate." These irreconcilably conflicting conclusions demonstrate that the ABA does not "consistently apply and enforce" its Standards and that it lacks "effective controls against the inconsistent application" of its Standards. Instead, the ABA ran WMU-Cooley's data through its "Magic Machine," which tripped mysterious "triggers" and raised ephemeral "flags." (Ex. A.) The "Magic Machine" then supposedly spit out a recommendation to initiate an interim monitoring review. (*Id.*)

In addition, the administrative record is woefully insufficient to support the November 2017 conclusion regarding "appear capable." The ABA's administrative record does not include *any* documents or information related to

how the ABA interprets the phrase "appear capable."[3] Instead, the ABA appears to rest entirely on the raw statistical data submitted by WMU-Cooley as "findings" for its conclusion that WMU-Cooley admitted students who did not "appear capable." But the ABA's "findings," as Magistrate Judge Grand pointed out, are "just data." (Ex. B, 3/13/18 Hr. Tr. at 10.) They are not an *application* of data to a standard with objective metrics for compliance. The ABA's "conclusions" from those alleged "findings" are the very definition of "arbitrary." *See U.S. v. Carmack*, 329 U.S. 230, 243 n.14 (1946) ("arbitrary is defined … as 'without adequate determining principle' and 'arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance.'") The ABA's "common sense" know-it-when-we-see-it "Magic Machine" is the epitome of arbitrary and capricious action.

Faced with this gap in the ABA's decision making, the ABA's *counsel* tries to fill the void. The ABA's summary judgment brief points to statistics and analysis outside of the administrative record, never relied on by the Committee or the Council, in an attempt to retroactively justify the ABA's November 2017

[3] Administrative records must include "all documents and material directly or indirectly considered by agency decision-makers" as well as "all materials that might have influenced the agency's decision, not merely those on which the agency relied in its final decision." *Lee Memorial Hosp. v. Burwell*, 109 F. Supp. 3d 40, 46-47 (D.D.C. 2015). These materials often include "internal memoranda, guidelines, directives, and manuals." *Tenneco Oil Co. v. Dept. of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979).

conclusion. This is not permissible. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 463 U.S. 29, 50 (1983).

The ABA's summary judgment brief makes much of the fact that the reasoning and decisions of accreditation agencies are normally entitled to deference. True enough, but here the ABA has not provided its reasoning on what "appear capable" means, and its *counsel's* reasoning enjoys no such protection. Rather, it is well settled that "no deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position." *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) (cleaned up). The ABA cannot, on-the-fly, interpret "appear capable" in this action, apply it to WMU-Cooley, and then demand that the interpretation, informed by information outside of the administrative record, be given deference by the Court. That is not permissible and it is not "playing it straight." *Prof'l Massage Training Ctr., Inc.*, 781 F.3d at 170.

The ABA's reliance on "deference" is also misplaced because when an agency issues conflicting decisions based on substantially similar facts, the decisions are not entitled to deference by the Courts. *See, e.g., Steger v. Defense Investigative Service Dept. of Defense*, 717 F.2d 1402, 1406 (D.C. Cir. 1983). Here, with respect to WMU-Cooley, on two separate occasions, the ABA has

found the Law School both in and out of compliance with subpart (b) of Standard 501 based on similar sets of available data. (December 2015 (in) / May 2016 (imposition of interim monitoring) and November 2017 (out) / April 2018 (in)). The ABA's November 2017 conclusion is therefore not entitled to deference.

The ABA should also be permanently enjoined from enforcing subpart (b) of Standard 501 because it is void for vagueness in violation of the Fifth Amendment. The unexplained phrase "appear capable" in 501(b) does not inform a reasonable actor what it must do or not do in order to stay in the ABA's good graces.

The ABA argues that that it is not a "state actor" and therefore not bound by the due process requirements of the Fifth Amendment. But the ABA's argument relies on outdated case law. In 2016, the DOE sent a "Dear Colleague" letter ("2016 DOE Letter") to accreditors, including the ABA, in which it set out precise factors accreditors must consider when making accreditation decisions. (Doc. #45-2, Am. Compl. Appx. B.) It was the *absence* of such direction that provided the foundation for the outdated case law the ABA relies upon. The ABA's Motion ignores WMU-Cooley's allegations regarding the 2016 DOE Letter entirely and instead cites *pre-2016* cases holding accreditation agencies to be non-state actors in the former scheme. The ABA's silence speaks volumes.

Additionally, the ABA's vague "appear capable" conclusion was the culmination of a process which itself did not "employ fair procedures" or "conform

to … fundamental principles of fairness." *Prof'l Massage Training Ctr., Inc.*, 781 F.3d at 169. WMU-Cooley was not made aware of the proceedings that resulted in the imposition of monitoring and the ABA has still not disclosed the mysterious "triggers" and ephemeral "flags" within the "Magic Machine" (Ex. A) that support the recommendation to initiate interim monitoring. WMU-Cooley had no opportunity to be heard or be represented by counsel at the *de novo* stage of proceedings in front of the Committee. While on appeal, WMU-Cooley was only given the opportunity to appear before the Council during the Council's regular meeting to offer opening and closing oral statements of 7.5 minutes each in support of its appeal. At the meeting, WMU-Cooley was also subjected to cross-examination without the assistance of its lawyer. This afforded WMU-Cooley no process, let alone a fundamentally fair one.

Put more simply, by the time WMU-Cooley had the opportunity to be very briefly heard under fundamentally unfairly prejudicial procedures, the Committee had long ago crafted a selected record to its liking. The Council was required to uphold the Committee's findings and conclusions if "substantial evidence exist[ed] in the record to support them." (Doc. #38-2, PgID #1424.) The only task left to the Council was to determine whether the Committee findings and conclusions were supported by substantial evidence, which the Council did not examine into. In fact, the Council mentions only the three submissions WMU-Cooley made on

appeal and ignores the Committee record entirely. The ABA's procedures are akin to giving a criminal defendant an attorney on appeal but not at trial, and where the rules at trial prohibit the defendant even to appear, let alone present argument and evidence, cross-examine witnesses, confront evidence against it, or contest proposed findings of fact or conclusions. In short, WMU-Cooley was offered none of the procedural protections that the principles of fundamental fairness dictate be embedded in a process critical to a school's survival.

The ABA has also unlawfully deferred decision on WMU-Cooley's request to open a location at Western Michigan University's main campus in Kalamazoo, Michigan. The decision on WMU-Cooley's request was originally "deferred" pending the resolution of whether WMU-Cooley is in compliance with subpart (b) of Standard 501, even though WMU-Cooley was in full compliance with 501(b) at the time. Now that WMU-Cooley has again been found in compliance with that subpart, the ABA has *still* elected to again delay until August 2018 the final decision on whether WMU-Cooley may open the location. This delay finds no support in the law, is beyond the ABA's rules, will result in another year of empty classrooms, and will deny significant opportunities to WMU-Cooley's matriculants.

It is an unfortunate fact of life for every law school that a small number of students will find themselves unable to handle the academic rigor of a legal

education or unable to pass the bar examination. The ABA, to our knowledge, is not contending that *every* school who has admitted such a student is violating the "appear capable" standard. But the ABA does seem to have a test in mind for what an "apparently capable" applicant looks like. (Ex. A.) If the ABA wishes to enforce that test against the nation's law schools, it must inform the schools what the test is so that schools can comply. What the ABA cannot do, under the Constitution or under common law due process, is keep the test a secret, run unspecified data through a "Magic Machine," and then demand absolute "because-we-said-so" deference from the courts. That is precisely what the ABA demands here and precisely what the law does not support. The ABA's Motion for Summary Judgment should be denied. [4]

Statement of Facts

Plaintiff WMU-Cooley is a Michigan non-profit educational corporation with its principal place of business in Lansing, Michigan. It has been accredited by the ABA since 1975. The majority of states rely on ABA accreditation to determine whether a school's graduates may sit for the state's bar examination, which makes ABA accreditation critical to a school's survival. The Council of the ABA Section of Legal Education and Admissions to the Bar ("Council") is an

[4] Pursuant to Federal Rule of Civil Procedure 56(d), WMU-Cooley maintains that summary judgment briefing is premature at this point due to an incomplete administrative record. (*See* Mot. to Stay Summ. J. Briefing at Doc. #68.)

accrediting agency under 20 U.S.C. § 1099b and is recognized by the United States DOE as the accrediting agency for professional law-degree programs pursuant to criteria for recognition established by 34 C.F.R. § 602. The Council approves new law schools and acquiesces in major changes proposed by accredited schools and is assisted by its Accreditation Committee ("Committee").

In December 2015, after a two-year exhaustive review of the law school in connection with its regular re-inspection, the ABA reaccredited WMU-Cooley, confirming that WMU-Cooley met or exceeded all of the ABA's Standards and Interpretations for approval of law schools, including the entirety of Standard 501.

On May 19, 2016, just four and a half months after WMU-Cooley had been fully reapproved as meeting all ABA Standards, the ABA notified WMU-Cooley that it was subject to interim monitoring review to determine if it remained in compliance with certain ABA standards, specifically: Standard 202 concerning financial resources; Standard 301(a) regarding providing a rigorous program of legal instruction; Standard 309(b) regarding sufficient academic support to afford students a reasonable opportunity to complete the program of legal education, graduate, and become members of the legal profession; Standard 316 regarding bar passage rates; Standard 501(b) which requires that an approved law school only admit applicants who "appear capable of satisfactorily completing its program of legal instruction and being admitted to the bar;" and Standard 508, which requires

law schools to provide all students with basic student services and career counseling. (Doc. #60-5, PgID #4110-112.) This is the only notice WMU-Cooley received that it was subject to interim monitoring review, and thus it had no opportunity to participate in the decision to initiate monitoring review, nor was WMU-Cooley informed what caused the "Magic Machine" (Ex. A) to spit out a recommendation to initiate interim monitoring review just 4.5 months after full reaccreditation.

WMU-Cooley was twice directed to provide information by a date certain to demonstrate compliance with those standards. (Doc. #60-5, PgID #4110-112.) WMU-Cooley prepared two extensive submissions as well as multiple supplements. In its March 31, 2017 response, the Committee stated it needed no further information regarding Standard 316 and Standard 508, but added Standard 501(a) to its list of standards to monitor. (Doc. #60-7, PgID #5017-18.) Standard 501(a) requires law schools to "adopt, publish, and adhere to sound admission policies and practices." (Doc. #38-2, PgID #1394.)

In its October 4, 2017 response, the Committee concluded that WMU-Cooley was in compliance with Standards 202 (financial resources), 301(a) (rigorous instruction), 309(b) (academic support), and 501(a) (adheres to sound admission practices). (Doc. #60-9, PgID #5694.) However, the Committee

concluded that WMU-Cooley was not in compliance with Standard 501(b) and Interpretation 501-1. (*Id.*)

Interpretation 501-1 provides that:

> Among the factors to consider in assessing compliance with [Standard 501] are [1] the academic and admission test credentials of the law school's entering students, [2] the academic attrition rate of the law school's students, [3] the bar passage rate of its graduates, and [4] the effectiveness of the law school's academic support program. Compliance with Standard 316 is not alone sufficient to comply with the standard.

(Doc. #38-2, PgID #1394.) The ABA first deferred a decision on the Kalamazoo location on May 3, 2017 when WMU-Cooley was in full compliance with all Standards. (Doc. #60-9, PgID 5706.) In the October 4 letter, the Committee declared without explanation or justification that it was again deferring its decision on its acquiescence in the Kalamazoo location. (Doc. #60-9, PgID #5694.) WMU-Cooley then appealed the Committee's interim decision to the Council.

On appeal to the Council, contrary to the ABA's assertion in its Motion (Doc. #60, PgID #4073), WMU-Cooley's representatives were adamant that it was not given a meaningful opportunity to be heard during the review process. At the meeting, WMU-Cooley's Dean and President testified:

> **Mr. Murphy:** … Were you given a fair and reasonable opportunity to present your case to the Accreditation Committee?
>
> ***
>
> **President Leduc:** … I don't think so. I think the process -- the whole monitoring process to me doesn't make sense. We had no hearing. There was no opportunity to exchange -- to answer

> questions like we're doing today. To explore the basis for the various findings that were asserted. And, in particular, to see if we could engender findings from the Committee as to the meaning of Standard 501(b). That -- that just doesn't happen in this process and I think it's flawed.
>
> As a lawyer and as an administrative law professor, to go all the way to something that could take away or hurt your status as an institution without an evidentiary kind of process, without a personal appearance, I just think that's bad process.

(Doc. #60-9, PgID #5757-58.) The Committee proceedings are the consequential part of the interim monitoring review because that is when the Committee makes its record. Once the Committee's findings and conclusions get to the Council, the Council reviews them under the "substantial evidence" standard, and either remands or affirms. (ABA Rule 24(a), Doc. #38-2, PgID #1424.)

The Council purported to do that in a November 13, 2017 letter from Barry Currier, Managing Director of Accreditation and Legal Education for the ABA, to Don LeDuc (the "Letter"). There, the ABA informed WMU-Cooley that the Council had adopted the Committee's conclusion that WMU-Cooley was not in compliance with ABA Standard 501(b). (Doc. #60-9, PgID #5786.) The terse four-page letter included no rationale for its decision, no analysis of the evidence, and no application of the substantial evidence test. (*Id.*)

Over WMU-Cooley's objections, the ABA illegally published the Letter to the public and sent it to several licensing and accreditation bodies. On November 14, 2017, WMU-Cooley filed its Verified Complaint and a motion seeking

preliminary relief based on the Letter and its contents. That motion was denied on December 12, 2017. The Court held, however, that WMU-Cooley could pursue its claim that the ABA's publication of the letter was illegal. (Doc #42, PgID #2038.)

The Accreditation Committee and the Council are bound by the federal law and rules that empower them to act, including requirements that their standards be clear, applied consistently, and that any alleged deficiencies be specified in writing. 20 U.S.C. § 1099b(a)(6)(A). The bodies are, however, entitled to no deference at all regarding the federal statutes and rules. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). They are required to accord due process. 20 U.S.C. § 1099b(a)(6). And they are required to provide an appeal to a neutral appellate body. 20 U.S.C. § 1099b(a)(6)(C). Here, although the school sought an appeal to a neutral body, the Council, not the Appeal Panel, denied WMU-Cooley its right to appeal. (Ex. D.)

On April 18, 2018, the ABA informed WMU-Cooley that it had found WMU-Cooley to be in compliance with subpart (b) of Standard 501. (Ex. C.) Nevertheless, the April 18, 2018 Letter announced that WMU-Cooley would still be subject to burdensome and expensive monitoring review requirements to show continued "compliance" with subpart (b) of Standard 501. (*Id.* at 4.)

The ABA informed WMU-Cooley that the decision on the Kalamazoo campus would be "considered by the Committee at its June 28-30, 2018 meeting."

(*Id*.) Since, according to the ABA, the recommendation by the Committee would need to be approved by the Council, a step the ABA insists it will not take up until August 2018 at the earliest, even a favorable decision for WMU-Cooley would mean that another school year would go by without a Kalamazoo location. This extensive delay is completely unnecessary. While the ABA rules delegate to the Committee the authority to make recommendations to the Council concerning acquiescence in a major change, there is nothing in the rules that require the Council to obtain that recommendation before acting. Rather, the rules give the Council the unqualified authority to grant or deny acquiescence under the Standards. (Rule 2(c) at Doc. #38-2, PgID #1412.)

Standard of Review

"Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Epcon Gas Sys., Inc. v. Bauer Compressors, Inc.*, 243 F. Supp. 2d 729, 733 (E.D. Mich. 2003) (Tarnow, J.) It is the movant's burden to show an "absence of a genuine issue of material fact as to an essential element of the non-movant's case." *Id.* (cleaned up).

Argument

I. The ABA's November 2017 Conclusion that WMU-Cooley was Admitting Students who did not "Appear Capable" was Unlawful

A. Subpart (b) of Standard 501 is unenforceable because it is not a clear standard and it does not provide adequate written specification of its requirements

Although the ABA is not formally governed by the Administrative Procedure Act, the Court's "standard of review resembles the review applied under the Act." *Thomas M. Cooley Law School v. ABA*, 459 F.3d 705, 713 (6th Cir. 2006) ("*Cooley I*"). Accreditation agencies, "like all other bureaucratic entities, can run off the rails." *Prof'l Massage Training Ctr., Inc.*, 781 F.3d at 169. Accordingly, "there exists a common law duty on the part of … accreditation associations to employ fair procedures when making decisions affecting their members." *Id.* (cleaned up). *See also Cooley I*, 459 F.3d at 712 ("Courts developed the right to common law due process as a check on organizations that exercise significant authority in areas of public concern such as accreditation").

The Higher Education Act, 20 U.S.C. § 1099b(a)(6), and DOE regulations, 34 C.F.R. § 602.25, govern the type of due process protections accreditors are required to afford institutions. Their provisions are enforceable in an accreditation proceeding alleging a violation of common law due process. *See, e.g.*, *Bristol Univ. v. Accrediting Council for Independent Colleges and Sch.*, 691 Fed. App'x 737, 741 (4th Cir. 2017) ("ACICS was a federally-recognized accrediting agency

when it reviewed and denied Bristol's renewal of accreditation application. As such, its actions were subject to the due process requirements of 20 U.S.C. § 1099b(a)(6) and its supporting regulation, 34 C.F.R. § 602.25."); *Sojourner-Douglass College v. Middle States Ass'n of Colleges and Sch.*, 2015 WL 5091994, at *4-6 (D. Md. Aug. 27, 2015) (analyzing institution's complaint that accreditor did not afford it due process by "set[ting] forth the way[s] in which the Secretary [of Education] has said that an 'agency meets' the requirements of due process.")

The ABA is correct that the HEA does not create a private cause of action. However, the ABA is incorrect when it argues that the HEA and its related regulations are irrelevant in an accreditation dispute. Courts use the "due process" requirements contained in 20 U.S.C. § 1099b(a)(6) and 34 C.F.R. § 602.25 as a *guidepost* for whether accreditors have abided by common law due process rather than as the vehicle for the claim itself. *See Bristol University*, 691 Fed. App'x at 741; *Sojourner-Dogulass Coll.*, 2015 WL 5091994, at *4-6. The ABA's position—that Congress enacted a law requiring accreditors to provide specific due process protections to institutions, but that those requirements should be *ignored* when an institution alleges it was not afforded due process—is illogical.

DOE regulations require accreditors to "demonstrate that the procedures it uses throughout the accrediting process satisfy due process" and set out specific safeguards accrediting agencies must have in place in order for the accreditor's

procedures to comply with due process. 34 C.F.R. § 602.25. The first safeguard listed is the pertinent one here, and it mirrors a requirement on accreditors contained in the HEA (20 U.S.C. § 1099b(a)(6)(A)(i)): accreditors must "Provide[] adequate written specification of its requirements, including clear standards, for an institution or program to be accredited or preaccredited." 34 C.F.R. § 602.25(a).

The ABA's requirement that law schools only admit students who "appear capable," a phrase the ABA refuses to explain, is not a "clear standard" and it does not "provide[] adequate written specification of its requirements." *Id.* It is devoid of objective metrics for assessing a law school's compliance with the standard. It provides no guardrails to contain the discretion of the accreditor. And it provides no guidance to institutions seeking to conform their practices to the standard. Instead, subpart (b) of Standard 501 is subjective and tied only to the ABA's preferred (and secret) benchmarks. Indeed, the ABA's administrative record does not contain a single document reflecting how the ABA determines whether an applicant "appears capable."

In November, the Court asked the ABA's counsel to address whether subpart (b) of Standard 501 is vague. The ABA's counsel responded that ABA Interpretation 501-1 "cites four specific factors that amplify what does it mean to appear capable." (Doc. #55-4, PgID #4039-40.) No, it doesn't. The ABA found WMU-Cooley *in compliance* with the Standards that correlate to each of the four

factors but *still* out of compliance with subpart (b) of Standard 501. Interpretation 501-1 provides:

> Among the factors to consider in assessing compliance with [Standard 501] are [1] the academic and admission test credentials of the law school's entering students, [2] the academic attrition rate of the law school's students, [3] the bar passage rate of its graduates, and [4] the effectiveness of the law school's academic support program. Compliance with Standard 316 is not alone sufficient to comply with the standard.

(Doc. #38, PgID #1394.) Standard 316 deals only with bar passage rates, so naturally, compliance with that standard "alone" does not mean Standard 501 is satisfied. It does mean, though, that the bar passage factor in Interpretation 501-1 is satisfied. Any other conclusion is illogical.

The same is true for all "four specific factors" in Interpretation 501-1. The ABA found that WMU-Cooley *complies* with the corresponding Standards for all four factors, both in the most recent full accreditation review (December 2015) and in the subsequent interim monitoring review (Oct. and Nov. 2017):

(1) Adheres to sound admission policies and practices (Standard 501(a)) (Doc. #60-9, PgID #5694);

(2) Academic attrition rate (Interpretation 501-3) (ABA has never found WMU-Cooley out of compliance);

(3) Bar passage rate (Standard 316(a)) (Doc. #60-7, PgID #5017); and

(4) Academic support services (Standards 309(b) and 508) (Doc. #60-9, PgID #5694 [309(b)], (Doc. #60-7, PgID #5017) [508]).

Because WMU-Cooley was in compliance with the listed factors in Interpretation 501-1, all WMU-Cooley and the Court are left with to figure out what "appear capable" means is Interpretation 501-1's gauzy allusion to unspecified other "factors" and ABA's counsel's empty assurances to the Court that subpart (b) of Standard 501 "is a very basic rule, and we all know it. It's a very common sense rule." (Doc. #55-4, PgID #4040.) Respectfully, it's not.

The ABA argues in its Motion that "it is true but irrelevant that Cooley was found to comply" with the "four specific factors." (Doc. #60, PgID #4084.) This is a textbook case of the ABA moving the goalposts. In November, the ABA told the Court in response to the Court's question about the vagueness of "appear capable" that the "four specific factors" of Interpretation 501-1 "amplifie[s] what … it mean[s] to appear capable." (Doc. #55-4, PgID #4039-40.) But after it was pointed out to the ABA that it had already determined WMU-Cooley *meets* each of those "four specific factors," the ABA now abandons the explanation it previously gave the Court and declares the factors "irrelevant." (Doc. #60, PgID #4084.)

And the ABA's Motion for Summary Judgment does not actually attempt to defend the language of subpart (b) of Standard 501. Instead, the ABA ducks behind the concept of "deference" and declares that the Court has no right to look behind the curtain. The ABA is wrong. "Deference" is not a rubber stamp. Common law due process developed in the accreditation arena so that Courts could

"operate as a 'check on [accreditation] organizations that exercise significant authority in areas of public concern.'" *Prof'l Massage Training Ctr., Inc.*, 781 F.3d at 170 (quoting *Cooley I*, 459 F.3d at 712). Accreditation agencies are not entitled to "total deference." *Id.* But that is precisely what the ABA demands here. It tells the Court it has no choice but to accept the ABA's drafting, interpretation, and enforcement of the "appear capable" language lock, stock, and barrel. That is not what "deference" means.

Subpart (b) of Standard 501 is not a "clear standard" and it does not "provide[] adequate written specification of its requirements." 34 C.F.R. § 602.25(a). Therefore, the ABA cannot enforce subpart (b) of Standard 501 because to do so would violate common law due process. Accordingly, the ABA's Motion for Summary Judgment should be denied.

B. The ABA's attempted enforcement of subpart (b) of Standard 501 against WMU-Cooley demonstrates its arbitrary and capricious nature

Another DOE regulation applicable to accreditors like the ABA requires consistency in decision-making with respect to enforcement of standards. 34 C.F.R. § 602.18, captioned "Ensuring consistency in decision-making," provides that accrediting "agenc[ies] must consistently apply and enforce standards." And the agency must also have "effective controls against the inconsistent application of the agency's standards." 34 C.F.R. § 602.18(b).

The ABA's attempted enforcement of subpart (b) of Standard 501 against WMU-Cooley demonstrates that the ABA lacks "effective controls against the inconsistent application" of its Standards. The November 2017 Letter alleged that WMU-Cooley was out of compliance with 501(b) on the basis that WMU-Cooley supposedly admitted students who did not "appear capable." In support, the ABA recited raw data about WMU-Cooley's bar passage rates and the LSAT and GPA credentials of its incoming students. But the ABA also found WMU-Cooley *in compliance* with Standard 316, that the "law school's bar passage rate … [is] sufficient." (Doc. #60-7, PgID #5017.) And the ABA found WMU-Cooley *in compliance* with subpart (a) of Standard 501, i.e. that it "adopt[s], publish[es], and adhere[s] to sound admission policies and practices." (Doc. #60-9, PgID #5694.)

The ABA's conclusions that WMU-Cooley "adheres to sound admissions policies and practices" and has a "sufficient … bar passage rate" cannot be squared with the its conclusion that WMU-Cooley was out of compliance with subpart (b) of Standard 501 because of its admissions practices and bar passage rates. That the ABA concluded WMU-Cooley complies with the ABA's Standards regarding "bar passage rate" and "adher[ence] to sound admissions policies," but, based on those same "admissions policies and practices" and "bar passage rates," was out of compliance with 501(b), demonstrates that the ABA lacks "effective controls against the inconsistent application of the agency's standards." 34 C.F.R. §

602.18(b). Further, the ABA did not even question that WMU-Cooley complied with the academic attrition requirement referenced in Interpretation 501-1.

The inconsistent application of subpart (b) of Standard 501 is also demonstrated by the fact that the ABA twice concluded WMU-Cooley was both in and out of compliance, at each instance having substantially similar data. WMU-Cooley was fully reaccredited in December of 2015. That means that the ABA concluded WMU-Cooley was in compliance with all ABA standards, including subpart (b) of Standard 501. For two months before the ABA fully reaccredited WMU-Cooley, it had WMU-Cooley's 2015 annual questionnaire responses, which contain raw data about WMU-Cooley's matriculants and bar exam data.

In May of 2016, *with precisely the same available data*, the ABA informed WMU-Cooley it was subject to interim monitoring review for compliance with subpart (b) of Standard 501. The ABA was privy to no new information and no new statistics, yet, based on the same data available five months prior when the ABA determined WMU-Cooley complied with 501(b), the ABA abruptly decided WMU-Cooley could be out of compliance with 501(b). The only difference between December 2015 and May 2016 is that apparently the ABA ran that same data through its "Magic Machine" which apparently tripped some mysterious "triggers," raised some ephemeral "flags," and "spit out" a recommendation to the

Committee to initiate an interim monitoring review of WMU-Cooley's compliance with the still undefined vague "appear capable" "Standard." (Ex. A.)

The same is true for the ABA's November 2017 and April 2018 Letters. The November 2017 Letter concluded that WMU-Cooley was out of compliance with 501(b). Based on substantially the same bar exam and matriculant data, in its April 2018 Letter, the ABA concluded WMU-Cooley was in compliance with 501(b). As it did in May of 2016, the ABA changed its position about WMU-Cooley's compliance with 501(b) without explanation or rationale.

The ABA's inconsistency with respect to 501(b) demonstrates that the ABA does not "consistently apply and enforce [its] standards." 34 C.F.R. § 602.18. And it shows that the ABA lacks "effective controls against the inconsistent application of the agency's standards." 34 C.F.R. § 602.18(b). Indeed, the bare minimum for meeting those requirements would logically be that substantially similar data should lead to the same conclusion. Here, it plainly did not.

The ABA's inconsistent application of subpart (b) of Standard 501 in light of substantially similar available data not only demonstrates that the ABA's actions violated its responsibilities under DOE regulations, it also demonstrates that its November 2017 conclusion constituted arbitrary and capricious agency action. An agency "cannot[,] despite its considerable discretion, treat similar situations dissimilarly, and, indeed, can be said to be at its most arbitrary when it does so."

Steger v. Defense Investigative Service Dept. of Defense, 717 F.2d 1402, 1406 (D.C. Cir. 1983). The Seventh Circuit noted, "treating similar situations differently without adequate explanation is the very embodiment of arbitrary conduct." *Rupcich v. UFCW Int'l Union*, 833 F.3d 847, 856 (7th Cir. 2016).

Here, the ABA had substantially the same data and found WMU-Cooley out of compliance with 501(b) in November 2017 and in compliance with 501(b) in April 2018. And it had *identical available data* when it found WMU-Cooley in need of interim monitoring review for 501(b) compliance in May 2016, just 4.5 months after it found WMU-Cooley in full compliance with 501(b) in December 2015. The ABA's actions with respect to 501(b) are "the very embodiment of arbitrary conduct." *Id.* The November 2017 conclusion that WMU-Cooley was out of compliance with subpart (b) of Standard 501 should be declared unlawful and the ABA's Motion should be denied.

C. In the alternative, the November 2017 conclusion was not supported by substantial evidence

In the event that the Court disagrees with WMU-Cooley and finds that subpart (b) of Standard 501 is a "clear standard" that "provides adequate written specification of its requirements," the Court should still hold that the November 2017 conclusion was not supported by substantial evidence. To be supported by "substantial evidence," a decision must contain sufficient evidence in light of the whole record to where a "reasonable mind might accept the evidence as adequate

to support a conclusion." *Prof'l Massage Training Ctr., Inc.*, 781 F.3d at 174. Neither the Committee nor the Council examined the substantiality of the evidence on the whole record, made any effort to apply the substantial evidence test, or gave a rationale for determining the conclusions were supported by substantial evidence.

The ABA makes much of the fact that it is normally owed "deference" with respect to its decisions. This is ordinarily true, within limits. However, as noted in the previous section, the ABA has reached contradictory conclusions on WMU-Cooley's compliance with 501(b) based on substantially the same available data. In such a situation, no deference is owed to the agency's conclusion. *See, e.g.*, *Local 777, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978) (granting no deference to an agency decision that, on same facts as previous contrary decision, held certain drivers were "employees"); *Brown v. Blue Cross Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1569 (11th Cir. 1990) ("That Blue Cross would reach opposing conclusions on the basis of the same evidence seriously challenges the assumptions upon which deference is accorded.") *overruled on other grounds by Doyle v. Liberty Life Assur. Co. of Boston*, 542 F.3d 1352 (11th Cir. 2008)).

Regardless of the level of deference the ABA is owed, the ABA's own conclusions prove that the November 2017 conclusion was not based on substantial evidence. The November 2017 Letter justified its conclusion that WMU-Cooley

was admitting students who did not "appear capable" by pointing to WMU-Cooley's entering student data and bar exam results. But the ABA had *already concluded* that WMU-Cooley was in compliance with subpart (a) of 501 which addresses adherence to sound admissions practices and Standard 316 which addresses a law school's bar passage rate. In simpler terms, the ABA's "conclusion" that WMU-Cooley was out of compliance with 501(b) based on allegedly poor bar exam results and admissions practices is belied *by the ABA's own conclusions* that WMU-Cooley's bar exam results, and its adherence to sound admissions policies and practices, complies with ABA Standards. (*See supra* Section I(A)).

Subpart (b) of Standard 501 says that "a law school shall only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar." (Doc. #38-2, PgID #1394.) The ABA concedes that, from 2009 through 2015, the period the November 2017 conclusion was based on, 83% of WMU-Cooley bar takers passed it. (Doc. #60-9, PgID #5693-94 at Finding 34.) Unquestionably, they are "capable of being admitted to the bar."

Faced with the uncontroverted fact that greater than 8 out of 10 WMU-Cooley bar takers pass the bar exam (*id.*), the ABA resorts to playing with statistics to justify the November 2017 conclusion. For example, the ABA says that "the

first-time bar passage rate for Cooley students had dropped dramatically, from 76% to 48% over a seven-year period." (Doc. #60, PgID #4071.) But subpart (b) of Standard 501 says nothing about "first time pass rate." It says students should "appear capable of … being admitted to the bar." (Doc. #38-2, PgID #1394.) And the Committee admits that 83% of WMU-Cooley bar takers pass the bar exam. (Doc. #60-9, PgID #5693-94.)

The ABA's emphasis on the decline in "first-time bar passage rate" over a "seven year period" also fails to take into account that the Michigan Board of Law Examiners (most of WMU-Cooley's students take the Michigan bar) radically changed the scoring on the Michigan bar exam in 2012 resulting in dramatic declines in bar passage rates among all Michigan law schools. The scoring change had a pronounced effect on the first-time bar exam pass rates of all schools. (Doc. #60-5, PgID #4325.) The *overall* 2011 pass rate of Michigan bar exam was 82%; it fell to 64% in 2012 and remained low over the subsequent years. (Doc. #60-7, PgID #4531.) Yet the ABA compares WMU-Cooley's statistics during the period to the *national* pass rate as opposed to other Michigan law schools. (*See, e.g.*, Doc. #60-9, PgID #5691-92 at Findings 31, 32.)

The ABA says in its motion that "Cooley did not raise this issue in accreditation proceedings and cannot raise it here for the first time." (Doc. #60, PgID #4081.) That is false. The administrative record reflects:

> The Law School states that more of its graduates take the Michigan bar examination than bar exams in any other state. According to the Law School, a recent decrease in the Michigan bar exam passage rate, beginning in 2012, has had an impact on the Law School's bar passage rates as well as for the other ABA-approved law schools in Michigan.

(Doc. #60-5, PgID #4325) (emphasis added).

Despite WMU-Cooley bringing the scoring change to the ABA's attention during accreditation proceedings, a fact the ABA's Motion falsely says it did not do, the ABA still elected to compare WMU-Cooley's statistics to the national pass rate as opposed to other Michigan law schools. The ABA's *counsel's* attempt to mount an "even if" defense by comparing WMU-Cooley's statistics to other Michigan law schools (Doc. #60, PgID #4081-82) must be ignored because "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 50. *See also Williams Gas Processing - Gulf Coast Co., L.P. v. F.E.R.C.*, 373 F.3d 1335, 1345 (D.C. Cir. 2004) (Roberts, J.) ("[Courts] may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review, *post hoc* rationalizations by agency counsel will not suffice.")

The ABA's counsel also tries to justify the November 2017 conclusion by citing a study done by Lisa Anthony that is not contained in the administrative record. The ABA's counsel uses Ms. Anthony's study to suggest that WMU-Cooley's matriculants have LSAT scores comparatively lower than many other law

schools, in an attempt to show that WMU-Cooley was admitting students who did not "appear capable." (Doc. #60, PgID #4071.) The ABA's counsel goes on to cite that same impermissible material along with numerous other documents outside the administrative record multiple times through the remainder of the brief. (*See* WMU-Cooley's contemporaneously filed Motion to Strike.)

The ABA's tactics are not permissible. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 50. The ABA's November 2017 Letter did not use Ms. Anthony's study to allege that WMU-Cooley's performance was comparatively worse than other law schools and the study is not contained in the administrative record. The ABA's *counsel* cannot use material an agency never considered in order to support that agency's conclusion. Accordingly, the ABA's conclusion that WMU-Cooley was out of compliance with subpart (b) of Standard 501 due to its bar passage rate and entering student statistics was not supported by substantial evidence and therefore unlawful.

II. Subpart (b) of Standard 501 is Void for Vagueness in Violation of the Fifth Amendment

A. The ABA's acts as an accreditor are state action subject to Fifth Amendment scrutiny

The Fifth Amendment provides in pertinent part that no person shall be "deprived of life, liberty, or property without due process of law." The reach of

the Fifth Amendment extends to private actions with a sufficiently "close nexus between the State and the challenged action" such that "seemingly private behavior may fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (cleaned up). Recent developments in the relationship between the DOE and the ABA demonstrate that the ABA's accreditation actions are now fairly attributable to the DOE and subject to Fifth Amendment scrutiny.

After World War II, Congress passed the G.I. Bill and needed a way to ensure that the G.I. Bill funds were going to legitimate schools, which it did by making the funds only available to institutions that were "accredited." Rather than performing the accreditation function itself, Congress charged the U.S. Commissioner of Education with "publishing a list of federally recognized accrediting agencies and associations, once the Commissioner determined them to be reliable for identifying quality educational programs." Julee T. Flood, David Dewhirst, Shedding the Shibboleth: Judicial Acknowledgment That Higher Education Accreditors Are State Actors, 12 Geo. J.L. & Pub. Pol'y 731, 744 (2014). By relying on the guidance of already existing voluntary accreditation associations, the government had a near instantaneous list of accredited schools.

Since the voluntary accreditation associations remained separate from the DOE, the accreditors' decisions on whether to accredit an institution were not

treated as actions attributable to the State. The seminal accreditation case, *Parsons College*, reasoned, "the fact that the acts of the [accreditor] in granting or denying accreditation may have some effect under government programs of assistance to students or colleges does not subject it to the limits applicable to government." *Parsons Coll. v. North Central Ass'n of Colleges and Secondary Sch.*, 271 F. Supp. 65, 70 (N.D. Ill. 1967). This decision made good sense at the time, as the State played no substantive role in determining whether a school should be accredited.

Parsons College was decided before the Supreme Court's decision in *Brentwood Academy*, which dramatically increased the universe of actions fairly attributable to the state. *Brentwood Academy* established that a private actor's actions could be attributable to the State when the government acts as a "willful participant in a joint activity" with a private actor, when the private actor's actions are "entwined with governmental policies," or when the government is "entwined in [the private actor's] management or control." 531 U.S. at 296. *Brentwood Academy*, however, did not change the fundamental fact that had shielded accreditors since the passage of the G.I. Bill: the government still was not involved with how accreditors made their decisions.

That fact changed in 2016, when, through its "Dear Colleague" Letter, the DOE began *mandating* specific factors accreditors "must consider," when deciding whether to accredit or reaccredit a school. (Am. Compl. Appx. B at 4.) Because

the DOE mandates what factors accreditors must consider and because accreditation is a prerequisite to accessing DOE funds, (including student loan funds), the Department has now set its own *substantive* standards for what an accreditation agency must consider in order to accredit an institution, the polar opposite of how the accreditation structure was set up in 1952.

The 2016 DOE Letter declared that accreditors "*must* assess institutions or programs for all of the [DOE] required factors as well as for the agency's own standards and policies." (*Id.*) Because part of the ABA's accreditation analysis is a mandatory requirement from the DOE, the Department is now a "willful participant in joint activity" with the accreditors. *Brentwood Acad.*, 531 U.S. at 296. The ABA's accreditation decisions, which now "must" account for the DOE factors, are also necessarily "entwined with governmental policies." *Id.*

WMU-Cooley's Amended Complaint makes clear that the 2016 DOE Letter is the basis for its claim that the ABA's actions can be attributed to the DOE. (Am. Compl. ¶¶ 167-171.) The ABA ignores WMU-Cooley's well-plead allegations entirely. Indeed, the ABA ignores the 2016 DOE Letter *entirely*. Instead, the ABA quotes pre-2016 cases and even some pre-*Brentwood Academy* cases and declares that WMU-Cooley's claim has already been rejected. It hasn't. The ABA's refusal to engage with WMU-Cooley's actual allegations speaks volumes.

B. "Appear capable" is void for vagueness

A law or regulation is void for vagueness in violation of the Fifth Amendment when it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). In the interest of brevity, WMU-Cooley incorporates Section I as if fully set forth herein. The reasons why subpart (b) of Standard 501 is not a "clear written standard" that "provides adequate written guidance" about what law schools must do to remain accredited are equally applicable here. The ABA should be enjoined from enforcing subpart (b) of Standard 501.

C. WMU-Cooley's Fifth Amendment claim is not tethered to the administrative record and should not be dismissed prior to discovery

To the extent the Court does not find the 2016 DOE Letter attached to WMU-Cooley's Verified Amended Complaint as sufficient to deny the ABA's Motion for Summary Judgment on the claim, the Court should hold that WMU-Cooley's Fifth Amendment claim is not ripe for summary judgment adjudication because discovery is needed. The ABA is correct that WMU-Cooley's common law due process claims are tied to the administrative record and therefore justiciable when the Court has the full administrative record, (which it does not). But WMU-Cooley's Fifth Amendment claim is not a common law due process claim, and WMU-Cooley has requested discovery directly pertinent to the inquiry

of whether the ABA is a state actor in light of the 2016 mandate from the DOE. (*See* Doc. #55-2, PgID #3999 Doc. Reqs. #24 and #25.)

The Sixth Circuit has explained that "the context-specific nature of the state-action question" means that discovery will often be needed to examine the relationship. *Minges v. Butler Cnty. Agr. Soc.*, 585 Fed. App'x 879, 881 (6th Cir. 2014). *See also Dushane v. Leeds Hose Co. #1 Inc.*, 6 F. Supp. 3d 204, 210 n.3 (N.D.N.Y. 2014) (allowing discovery on state actor issue because "it is entirely plausible that discovery might reveal [sufficient] … government involvement"); *Flomo v. Bridgestone Americas Holding, Inc.*, 2009 WL 1456736, at *5 (S.D. Ind. May 20, 2009) ("The state action inquiry is a highly fact sensitive one. The Court thus needs a full and fair exposition of the facts to properly rule on the issue. It will, therefore, afford Plaintiffs some latitude in their discovery requests.") (citing *Brentwood Acad.*, 531 U.S. at 296).

An immediate ruling on the merits of WMU-Cooley's Fifth Amendment claim in the ABA's favor would be premature and unjust. WMU-Cooley would be subjected to defending its claim under the Rule 56 standard with a Rule 12 record. WMU-Cooley should have the opportunity like every other litigant to conduct discovery to support the fact-based elements of its claims. That *some* of WMU-Cooley's claims can be lawfully resolved without discovery does not mean that it is lawful to dispose of *all* of WMU-Cooley's claims without discovery. The

ABA's Motion should be denied as to WMU-Cooley's Fifth Amendment claim.

III. The ABA's Publication of the November 2017 Letter Was Illegal

The ABA purported to publish the November Letter "in accordance with U.S. Department of Education regulation 34 C.F.R. § 602.26." (Doc. #60-9, PgID #5789.) That regulation lists five specific decisions authorized to be published to the public: [1] A decision to award initial accreditation or preaccreditation to an institution or program, [2] A decision to renew an institution's or program's accreditation or preaccreditation; [3] A final decision to place an institution or program on probation or an equivalent status, [4] A final decision to deny, withdraw, suspend, revoke, or terminate the accreditation or preaccreditation of an institution or program, [and 5] A final decision to take any other adverse action, as defined by the agency, not listed in [4]." 34 C.F.R. § 602.26(b)(1)-(3).

The November 2017 Letter was none of these. The Letter did not award, renew, revoke, withdraw, or place WMU-Cooley's accreditation on probation. But the ABA asserts that a "determination that an institution is significantly out of compliance with one … of the accrediting agency's standards" constitutes a "final decision" to "place an institution on probation or an equivalent status" because a preliminary conclusion is an "equivalent status." (Doc. #60, PgID #4098.)

It does not. "Status" is defined as "A person's legal condition." BLACK'S LAW DICTIONARY (10th ed. 2014). Thus, an "equivalent status" must be something

on equal legal footing to "plac[ing] an institution on probation." A preliminary conclusion which WMU-Cooley had the opportunity to (*and did*) rectify does not affect WMU-Cooley's "legal condition" at all. Indeed, the ABA's Letter is explicit that WMU-Cooley's accreditation status, its "legal condition," was not subject to change for up to *two years* and remained a fully accredited law school. (Doc. #60-9, PgID #5789.) The ABA's argument also fails because there was no conclusion in the November 2017 Letter, or for that matter in any ABA decision, that WMU-Cooley was "significantly out of compliance" with Standard 501. (*Id.*) Rather, this is the ABA's *counsel* arguing that the November 2017 Letter demonstrated "significant noncompliance."

That the ABA adopted internal rules and the DOE recently released "guidance" purportedly allowing publication of the Letter is irrelevant. An agency cannot circumvent the regulations under which it operates by adopting a different internal rule, and DOE "guidance" does not supersede the text of the regulation. *See Christensen*, 529 U.S. at 587 (noting that "interpretations contained in policy statements, agency manuals, and enforcement guidelines ... lack the force of law.") *See also San Luis Obispo Mothers for Peace v. Nuclear Reg. Com'n*, 789 F.2d 26, 33 (D.C. Cir. 1986) ("To accept petitioners' argument … we would have to hold that … a staff document intended as guidance supersedes the regulation itself. The only virtue of that approach is novelty.")

If the ABA or DOE want to expand the universe of occasions where publication of accreditation proceedings is appropriate, the DOE must amend its regulations through normal notice-and-comment procedures. It cannot, however, unilaterally stop deciding to follow its regulations because the ABA or the DOE thinks it would be "in the public interest." And, again, there was no conclusion to that effect, only the ABA's counsel's *post hoc* litigation argument.

IV. The ABA's Decision to Deny WMU-Cooley an Appeal of the November 2017 Decision Violated Common Law Due Process

The DOE's "due process" regulation for accreditors, which serves as a framework for analysis here, requires that accreditors "provide[] an opportunity, upon written request of an institution or program, for the institution or program to appeal any adverse action prior to the action becoming final." 34 C.F.R. § 602.25(f). Yet, despite the fact that, as shown in Section III, the ABA insists that the November 2017 Letter constitutes an "adverse action" under DOE regulations (Doc. #60, PgID #4098), it still refused WMU-Cooley's written request to appeal that adverse action. (Ex. D.)

It is well settled that "language in one portion of a statute should be deemed to have the same meaning as the same language used elsewhere in the statute." *Mertens v. Hewitt Associates*, 508 U.S. 248, 260 (1993). Here, the ABA cannot explain why the November 2017 Letter is a final decision to take "adverse action" under section 602.26 but not under section 602.25. Either the ABA unlawfully

published the November 2017 Letter or it unlawfully denied WMU-Cooley the opportunity to appeal the Letter's conclusion. The ABA cannot have it both ways.

V. The ABA's Procedures Did Not Afford WMU-Cooley Due Process

Accreditors like the ABA have a "common law duty … to employ fair procedures when making decisions affecting their members." *Prof'l Massage Training Ctr., Inc.*, 781 F.3d at 169 (cleaned up). Accreditors "must conform their actions to fundamental principles of fairness." *Id.* The ABA's procedures here did not comply with those requirements.

The Committee acts as the fact-finder tasked with determining *de novo* whether a law school is in compliance with ABA Standards. The Rules do not allow law schools to appear or to be represented by counsel during either the Committee or Council meetings where their accreditation fates are decided.

But the Council is *required* to affirm the Committee's findings and conclusions unless it finds there is not substantial evidence in the record to support the conclusions. This means the Council must examine the whole administrative record to determine whether the record embodies substantial evidence to support the Committee's conclusions and give its rationale for why that is so, which the Council did not do. And, at that point in the process, the Council is bound by a record established by the Committee without the procedural protections that the principles of fundamental fairness demand. That is, an evidentiary hearing, not a

closed meeting, at which the accused is afforded a meaningful opportunity to be represented by counsel, present argument and evidence, and confront evidence against it. This is the bare minimum of any reasonable definition of "due process." The ABA's process has none of those protections and accordingly it does not conform to "fundamental principles of fairness."

VI. The ABA's Refusal to Grant WMU-Cooley's Application to Open a Kalamazoo Location Violates the ABA's Rules

The ABA violated its rules when it refused to consider WMU-Cooley's application for its Kalamazoo location on WMU's main campus. Accreditation agencies are required to follow their own rules. *Wilfred Acad. of Hair and Beauty Culture, Houston, Tex. v. So. Ass'n of Colleges and Sch.*, 957 F.2d 210, 214 (5th Cir. 1992). ABA Standard 105(a) provides that a law school must obtain the "acquiescence of the Council" if it wishes to "establish a separate location." (Doc. #38-2, PgID #1368). Standard 105(b) says the Council can "grant acquiescence" "if the law school demonstrates that the change will not detract from the law school's ability to remain in compliance with the Standards." (*Id.* at PgID #1369.)

Despite the fact that the ABA returned a favorable site review and WMU-Cooley was in compliance with all Standards at the time the application was considered in May 2017, the ABA unjustifiably deferred making a decision. (Doc. #60-7, PgID #5020.) At the time, all facts necessary to show that the law school met the substantive requirements for opening another location were in the record,

and the Committee never found that opening at Kalamazoo would detract from the School's ability to comply with the Standards. Therefore, there was nothing left to decide, and the Council should have granted acquiescence.

The only rationale ever offered by the ABA for the deferral was offered by its *counsel*, that WMU-Cooley was out of compliance with Standard 501 and therefore could not show acquiescence would not detract from its ability to remain in compliance. (Doc. #60, PgID 4092.) This is an after-the-fact rationalization that deserves no consideration. But even if this litigation rationalization were credited, in April 2018, the ABA found WMU-Cooley in compliance with all Standards and yet *still* did not grant approval for the proposed Kalamazoo program. (Ex. C at 4.)

The ABA has articulated in the record no basis or rationale for its continued refusal to acquiesce in WMU-Cooley's request for its Kalamazoo location. Indeed, even after the April 2018 Letter finding WMU-Cooley in compliance with all ABA standards, despite WMU-Cooley's requests and its unqualified authority to do so, the Council refused to consider WMU-Cooley's Kalamazoo application at its May 2018 meeting. (*Id.*) The Council should be ordered to immediately consider WMU-Cooley's Kalamazoo location application.

Conclusion

The Court should deny the ABA's Motion for Summary Judgment.

Respectfully submitted,

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Dated: May 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2018, a copy of the foregoing was served via the Court's ECF filing system which will serve all counsel of record.

/s/ Conor T. Fitzpatrick

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