UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FLORIDA COASTAL SCHOOL OF LAW, INC. and INFILAW CORPORATION, Plaintiffs, v. AMERICAN BAR ASSOCIATION; COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASSOCIATION; and ACCREDITATION COMMITTEE OF THE SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, AMERICAN BAR ASSOCIATION, Defendants.	)	Civil Action No. 3:18-cv-621-BJD-JBT

DEFENDANTS' DISPOSITIVE MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Beginning in 2013, Florida Coastal School of Law ("Coastal" or "the School") admitted numerous students with credentials significantly lower than in prior years. Its first-time bar passage rates plummeted from 76% in 2012 to 42.5% in July 2017, 26.3 percentage points below the state average. Other students, who spent their savings and took on non-dischargeable debt to attend Coastal, failed to complete the academic program.

The ABA's Accreditation Committee ("Committee") and Council of the Section of Legal Education and Admissions to the Bar ("Council," collectively the "ABA") carefully examined Coastal's downward trajectory. In written submissions and at hearings, Coastal acknowledged its problems—including that its bar passage rates were "too low." But in July 2017, Coastal contended that, due to recent changes in admissions and academic offerings, "Florida Coastal today is a very different school" from the School with those poor outcomes.

The Committee did not discredit Coastal's recent changes. Instead, it concluded that the changes had "not been in place for a sufficient time to provide evidence that they have been or will be effective in improving the Law School's outcomes." AR605.[1] The Committee found Coastal not in compliance with ABA Standards, directed the appointment of a fact finder, and instructed the School to display information about its accreditation status on its website and provide information to students. Coastal responded by filing this lawsuit and seeking a preliminary injunction, which this Court denied. Dkt. 39 at 12.

Coastal also appealed the Committee's decision to the Council. In a thorough

[1] In opposing Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, the ABA filed the Accreditation Record of the Committee's review of Coastal from May 2016 through April 2018. Dkt. 30-2 through Dkt. 30-9. Exhibit 1 to this motion is the remainder of the Accreditation Record through the Council's decision on appeal. The entire Accreditation Record is consecutively paginated. Citations are to "AR__."

decision, the Council concluded that the Committee "appropriately exercised its professional judgment in evaluating an extensive record" and "reasonably concluded" that, although the School has "changed its admissions policy and has made programmatic changes following the significant and extended downturn in student outcomes, these changes have not been in place for a sufficient time and have not provided sufficient evidence that they are effective." AR849, AR854. The Council affirmed the Committee's decision and the fact-finding and notice requirements the Committee had directed.

As this Court has recognized, the ABA is entitled to "great deference" in interpreting and applying its accreditation standards. Dkt. 39 at 8–9 (quoting *Thomas M. Cooley Law Sch. v. Am. Bar Ass'n*, 459 F.3d 705, 713 (6th Cir. 2006) ("*Cooley I*")). Courts are "not free to conduct a *de novo* review or substitute [their] judgment for that of the ABA or its Council." *Cooley I*, 459 F.3d at 713. Instead, the question for the Court is whether, based on the record before the accreditor, "the agency conformed its actions to fundamental principles of fairness." *Id.* (quotation marks, brackets, and citation omitted).

Review of the accreditation record makes clear that the ABA's decisions were the product of a fair process that generated factual findings plainly sufficient to support the ABA's determination. The decision was measured and appropriate. The Committee and Council reasonably concluded that further monitoring of Coastal was necessary, that students are entitled to accurate information, and that Coastal should receive more time to demonstrate compliance. In other words, the accreditation process is working. The Court should not permit Coastal to use this lawsuit to stop the ABA from seeking quality and transparency for students. Summary judgment should be granted for the ABA.

BACKGROUND

A. The ABA and Law School Accreditation

As a Department of Education–recognized accreditor, the Council adopts Standards for Approval of Law Schools and Rules of Procedure that govern accreditation. Dkt. 30-1[2] at vii. The Standards at issue require schools to admit students and educate them so that they are able to complete their legal education and enter the legal profession.

- **Standard 301(a)** requires a law school to "maintain a rigorous program of legal education" that prepares students "for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession." *Id*. at 15.

- **Standard 309(b)** requires a law school to "provide academic support designed to afford students a reasonable opportunity to complete the program of legal education, graduate, and become members of the legal profession." *Id*. at 21.

- **Standard 501(b)** requires a law school to "only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar." *Id*. at 31.

- **Interpretation 501-1** states that among the factors considered in assessing compliance with Standard 501 are (i) entering student credentials, (ii) academic attrition, (iii) bar passage rates, and (iv) the effectiveness of the academic support program. *Id*.

B. The Committee's Determination of Coastal's Non-Compliance

In May 2016, the Committee informed Coastal that it needed additional information to determine whether the School was in compliance with the above Standards. In particular, the Committee noted Coastal's low entering class credentials for the prior three years, with a "25th percentile LSAT score of 141 in 2015, 140 in 2014 and 141 in 2013." AR1-2. In its December 2016 response, Coastal represented that it had moved its 25th percentile LSAT

[2] The Rules were modified effective August 6, 2018. Citations are to the Rules in effect when the Committee and Council made the decisions discussed.

score up to 143 in 2016, and had made or planned to make academic and curriculum changes. AR25. But Coastal acknowledged problems with its bar passage rate, stating it was "not . . . comfortable with" a 20% first-time bar pass rate for the 2016 class's bottom quartile and believed "it is likely Florida Coastal will fall below" the minimum first-time bar pass level ABA Standard 316(a)(2) requires. AR30-32.

March 2017 Decision. Upon review of Coastal's submission, the Committee concluded it could not find Coastal in compliance with the Standards. Significantly, the Committee found that Coastal's 25th percentile LSAT was 141 in 2016, not 143 as Coastal claimed. AR75. It also found that Coastal's academic attrition rate had increased from 5.1% in 2013 to 23.6% in 2015. AR76. And, the School had "experienced declining first-time bar pass rates" from 2013 to 2015 and predicted the following rates for students in the 25th percentile for the entering class years below:

Year	25th Percentile LSAT	Predicted First Time Bar Pass Rate for 4th Quartile
2013	141	21.8%
2014	140	15.3%
2015	141	21.8%

AR75. The Committee requested that Coastal provide additional information. AR76-77.

Coastal's July 2017 Submission. Coastal admitted that, for several years, its "data models over-predicted future student success; this resulted in the admission of students with a lower probability of passing the bar exam on the first attempt than was actually predicted." AR84. Coastal also acknowledged that "some of [its] academic policies and procedures were supporting student under-performance," and its academic support program "did not maximize learning outcomes for students." AR81, AR91.

Coastal further reported a significant decrease in its first-time bar passage rates in all states, particularly when compared to the average pass rate of other law schools:

Year	FCSL First Time Pass Rate	State First Time Pass Rate	Difference
2012	76.0%	79.9%	-4.0
2013	75.4%	79.8%	-4.4
2014	68.4%	78.4%	-10.0
2015	61.2%	73.1%	-11.9
2016	44.83%	66.85%	-22.02%

AR170. Coastal said "only 25% of the February 2017 first time takers passed the overall Florida Bar." AR138. *None* of the students in the bottom quartile by GPA passed the Florida bar on their first attempt. AR139.

The School, however, claimed that "Florida Coastal today is a very different school from the Florida Coastal of 2013 through 2016." AR81. It said it "expect[ed] to have at least a 145 bottom 25th percent quartile for calendar year 2017," and that its academic support program would improve. AR81-82. It acknowledged, however, that the median LSAT of students taking the bar would not change significantly until after the 2019 exam. AR139.

September 2017 Decision. The Committee issued a 16-page decision concluding that Coastal was not in compliance with the Standards. The Committee provided a detailed review of the poor outcomes for students in the bottom 25th percentile by LSAT and undergraduate GPA who matriculated from 2013-2016. AR171-77.[3] In February 2017, the

[3] As of July 2017, of the 139 students admitted in 2013 in the bottom quartile by LSAT or undergraduate GPA, 98 had graduated and had a 15% first-time bar pass rate and a 15% repeat taker pass rate. AR171-72. Of 115 students admitted in 2014 in the bottom quartile by LSAT or undergraduate GPA, 28 (24%) were academically dismissed, 63 had graduated, 19 had sat for the bar and only 4 had passed the bar by February 2017. AR172-74. Of 103 students admitted in 2015 in the bottom quartile by LSAT or undergraduate GPA, 33 (32%) were academically dismissed, 4 had graduated, and only 18 (17%) were not on probation or academic alert. AR174-

School had its lowest overall first-time bar pass rate of 24% and repeat takers passed at a rate of 31%. AR170. Despite Coastal's payment of a monthly stipend to fourteen graduates who had deferred taking the Florida bar, only one passed. AR181-82.

The Committee also found that the School had "tried . . . different methods" to improve the effectiveness of its academic support, with mixed results. AR178. It engaged BarBri to provide a student orientation program on "Lawyering Fundamentals"—but it "did not experience the desired results." AR178-79. Moreover, the Committee found that "[b]ecause these changes took place recently, their full impact will not be known until the current classes sit for the bar examination." AR177. The Committee asked the School to provide further information showing it had returned to compliance with the Standards and Interpretation at issue. AR183.

Coastal's November 2017 Submission. The School reported various "changes" to its academic program. AR193. But the School also reported that "its academic attrition rates for the years 2015-16 and 2016-17 were unsatisfactory." AR242. The School noted that it had increased the 25th percentile LSAT of entering classes and "expect[ed]" this would cause "first- and ultimate-pass rates for each class to improve" in the future. AR235-36.

December 2017 Decision. The Committee issued a second written decision finding the School not in compliance. It noted the continuation of the previously reported downward trend in Coastal's bar pass rate from 2012-2016: Coastal's first-time pass rate for the July 2017 Florida bar was 42.53%, 26.31 percentage points below Florida's average. AR438-39.

---

75. Of 112 students admitted in 2016 in the bottom quartile by LSAT or undergraduate GPA, 37 (33%) were academically dismissed, and only 24 (21%) were not on probation or academic alert. AR176-77.

The Committee noted the School's improvement in 25th percentile LSAT for newly admitted students and information related to attrition and academic support. It requested that Coastal provide updated 2017 information and preliminary admissions data on the 2018 class after the Fall semester, and that Coastal's President and Dean attend a March 2018 Committee hearing to address compliance with the identified Standards. AR437-41.

March 2018 Hearing. Coastal submitted updated information in advance of (AR442) and at the hearing through its President, Dean, Dean of Academic Programs, and counsel. AR460. The Dean acknowledged that Coastal had academically dismissed 30% (20 of 66) of first-year students who matriculated in Fall 2017, despite their higher LSAT scores than prior classes. AR491. Meanwhile, the academic programs director was working to address "what she has noticed with the other faculty as deficiencies" in the remaining 2017 1L students. AR496. The Dean also said: "unfortunately, what we found is that there are no objective factors" to identify students at risk of attrition. AR489. Coastal also could not reach statistically supported conclusions about the effectiveness of the academic support program. AR484-85. The Dean volunteered twice that the School's bar passage rate was "too low." AR464, AR516. And, while Coastal had increased its entering student LSAT scores in 2017, those students would not be included in bar pass rates until at least July 2019. AR517. The Dean projected a February 2018 bar pass rate of 63% but to be "conservative," it was "more likely to be in the low to mid 50s." AR464.

April 27, 2018 Committee Decision. The Committee found that "recent changes to the admissions policy of the Law School and its academic support programs have not been in place for a sufficient time to provide evidence that they have been or will be effective in

improving the Law School's outcomes," citing its Findings 8 and 9 to 12. AR605.

Bar Passage. The Committee found that Coastal had revised its July 2017 Florida first-time pass rate: it was "43 percent, six points lower than originally submitted," and nine points below its July 2016 Florida first-time pass rate of 52%. AR605. The July 2017 Florida first-time pass rate was 26.31 percentage points below the state average pass rate, "continu[ing] the negative trend in the Law School's bar exam passage outcomes," while Coastal's repeat taker pass rate was 24%, down from 25% in July 2016. AR605-06.

The Committee also noted that, while Coastal had satisfied Standard 316's minimum bar pass requirements from 2012-2015, "based on the Law School's first-time pass rate not being more than 15 percentage points below the weighted average state first-time pass rate," "[t]here was a steep drop in 2016, which continued in 2017," that took Coastal's first-time pass rate to 22%-26% below the state average. *Id*.

February 2018 Bar. The Dean reported that 46 students had taken a bar exam for the first time in all states in February 2018. AR606. The Committee noted, and did not question, the School's predicted "bar pass rate on the February 2018 [Florida] bar conservatively in the low 50s and more optimistically in the 60s." *Id*. The School emphasizes to this Court the 62.1% passage rate for the 29 Coastal students who took the Florida bar in February 2018. *E.g.*, Dkt. 62 ¶ 19. These results were not available (and thus not submitted) at the Committee hearing. Nonetheless, the Dean projected an improved pass rate in the 50s or 60s, and the results matched the School's projection, which the Committee accepted.

Attrition. The Committee noted that Coastal's overall attrition rate had increased from 10% (2013) to 19% (2014), 23% (2015), 26% (2016), and then 30% (2017). AR606-07.

Conclusions. Based on these and other findings, the Committee concluded that Coastal's "efforts and programmatic changes made have not sufficiently improved its outcomes," and that Coastal was not in compliance with Standards 301(a), 309(b), and 501(b) and Interpretation 501-1. AR608. The Committee further concluded that Coastal's issues of noncompliance "are substantial and have been persistent. The Law School's plans for bringing itself into compliance with the Standards have not been demonstrated to be effective or reliable." *Id*. The Committee directed (i) the School to "develop a written reliable plan for bringing itself into compliance," (ii) a fact finder to "provide information," (iii) the ABA and the School to post notice on their websites regarding the Committee's action, and (iv) Coastal to provide students with information about bar pass rates of prior students by class quartile. AR609-12. The ABA stayed the bar pass notice requirement pending Coastal's appeal to the Council.

C. Coastal's Appeal to the Council and the Council's Decision.

Coastal's Appeal. On May 29, 2018, Coastal appealed the Committee's decision to the Council under ABA Rule 23. *See* AR613. Coastal devoted much of its appeal to arguments based on comparisons between Coastal and other law schools. AR626-73. Coastal also asked the Council to consider seven categories of new evidence, including evidence that 18 of the 29 Coastal students who took the Florida bar examination for the first time in February 2018 passed the examination, a rate of 62.1%.[4] AR674. However, Coastal did not submit any evidence regarding the February 2018 bar passage rate for the remainder of the

[4] In its Appeal, Coastal sometimes suggested that 28, rather than 29, Coastal graduates took the Florida bar examination for the first time in February 2018. *See* AR674. However, Coastal also cited Florida Board of Board Examiners information indicating that 29 Coastal graduates took that examination for the first time. AR739.

153 Coastal graduates who took the February 2018 bar in other states or who repeated the bar examination. *Compare* AR674 *with* AR454. Coastal asked the Council to consider new evidence showing that four of the 19 students who enrolled at Coastal in the Spring 2018 term were academically dismissed at the end of the semester, an attrition rate of 21%. AR691.

Coastal also objected to two remedial actions required by the Committee. First, it objected to informing students of bar passage rates by class quartile. AR727. Coastal argued that such a notice would be misleading, because the 19 students who enrolled at Coastal in the Spring of 2018 had higher average LSAT scores than students who had taken the six preceding bar examinations. AR727-29. Second, Coastal objected to having a fact finder review "[t]he rate of default on loans taken by the Law School's graduates to finance their program of legal education and the employment status of the graduates of the Law School" and "[t]he finances of the Law School," claiming these topics were irrelevant. AR732-33.

August 2018 Council Hearing. Coastal asked to appear before the Council (AR614), and the Council granted Coastal's request. Coastal's Dean, Dean of Academics, outside counsel, and InfiLaw's President were present. AR758.

The Dean acknowledged that Coastal had only reported February 2018 pass rates for 28 of 153 graduates who sat for that bar, and that Coastal had not reported results for graduates who took the bar in states other than Florida or for repeat takers. AR774-75. With respect to Coastal's changes to its academic programs, the Dean of Academics agreed that the School did not yet have verified information regarding the effectiveness of the program. AR789-90. The Dean of Academics also acknowledged that when Coastal's new student

orientation program was in place, during the Spring 2018 term, four of 19 students who matriculated in Spring 2018 were academically dismissed. AR793.

August 30, 2018 Council Decision.[5] The Council adopted the Committee's Findings of Fact (with one minor factual correction) and concluded that the "Committee's Conclusions were fully supported and reasonable based on the factual record presented" during the accreditation proceedings. AR849, AR854. The Council acknowledged that Coastal "has changed its admissions policy and has made programmatic changes following the significant and extended downturn in student outcomes," but "these changes have not been in place for a sufficient time and have not provided sufficient evidence that they are effective." AR854.

Attrition. The Council noted that Coastal's "attrition rates have increased significantly in recent years," with overall attrition rates of 10% in 2013, 19% in 2014, 23% in 2015, 26% in 2016, and 30% in 2017. AR850. The Council considered Coastal's new evidence that its Spring 2018 attrition had improved to 21%, but concluded that attrition "remains of concern," and reducing attrition for one semester and one cohort of students did "not provide a sufficient basis" to conclude that Coastal was in compliance. *Id.*

Bar Passage Rates. The Council noted that Coastal's bar pass rates for first-time takers "decreased significantly" from 2012 to 2017. *Id.* The Council also considered Coastal's February 2018 62.1% Florida first-time pass rate and acknowledged that this was "an improvement over prior examinations," but noted that Coastal had provided bar exam results for only 29 of the 153 graduates who took a February 2018 exam. AR851. The

[5] The Council initially issued a decision letter on August 29, 2018, and issued a corrected letter on August 30, 2018.

Council concluded, "in light of the sustained drop in bar pass rates over the past several years and the absence of data on other graduates who took the bar in February 2018, the new evidence presented by the Law School does not provide a sufficient basis on which to determine that the Law School is now in compliance with the Standards at issue." *Id.*

The Council also considered Coastal's predicted pass rate of 67% for first-time takers of the July 2018 Florida bar examination and acknowledged that if accurate, it would be an improvement over prior examinations. *Id.* However, the Council found the projection insufficient to determine that Coastal is currently in compliance with the Standards. *Id.*

Academic Program and Support. The Council considered the changes Coastal had made to its academic programs and support but found, as Coastal had acknowledged, that the prescriptive curriculum that Coastal introduced in 2016 "has not been in place for sufficient time for students who received the full benefit of that curriculum to graduate and to determine whether it is effective in improving student outcomes." AR852.

Comparisons to Other Law Schools. The Council noted the many comparisons Coastal drew in its appeal of its own performance and that of other law schools. *Id.* Citing Rule 24(b), the Council explained that in reviewing a Committee decision about a law school's compliance with the Standards, the Council "makes its decision based on the record before the Committee."[6] *Id.* The Council also explained that "[w]hether a law school complies with the Standards must be assessed based on the law school's actions and

[6] Coastal did not ask the Committee to consider most of the information on other law schools. AR853. It was not until its appeal to the Council that Coastal presented this data. Rule 24(c) says that a school "shall not present any evidence to the Council that was not before the Committee at the time of the Committee's decision," Dkt. 30-1 at 62, and the Council determined that Coastal had not established that much of the information it submitted regarding other law schools could not reasonably have been presented to the Committee. AR853 (citing Rule 24(c), 24(d)(2)).

outcomes, not on selected data comparisons with other schools, because no other law school has—or could have—the same circumstances, history, and trends." *Id.* The Council further noted that Coastal had "[s]electively cit[ed] data from different years, different schools, and on different topics" which did "not provide a meaningful basis for the Council to assess the compliance of [Coastal] with the Standards at issue." *Id.* For these reasons, the Council based its decision "on [Coastal's] circumstances, history, and trends." AR853.

Remedial Actions. The Council considered Coastal's request that it amend two of the remedial actions directed by the Committee.

First, regarding the bar passage notice, the Council found that the information the Committee directed Coastal to provide was neither misleading nor a misrepresentation. *Id.* While Coastal pointed to 19 students enrolled in Spring 2018 with higher LSAT scores than prior classes, the information provided showed that many students at Coastal were from earlier classes with average LSAT scores comparable to Coastal graduates who took the preceding six bar examinations. *Id.* Furthermore, the Council noted that "the Law School is free to supplement the required notice to students with additional accurate and non-misleading information to its students, such as the average LSAT scores of students in the law school GPA quartiles in the notice." AR854.

The Council also rejected Coastal's objection to the Committee's direction that a fact finder review information relating to the employment and student loan repayment status of Coastal's graduates and Coastal's finances. It found this information relevant to the Standards at issue. *Id.* For example, the employment and student loan repayment status of Coastal's graduates bore on Standard 301(a)'s requirement that a law school "prepare[ ] its

students for effective, ethical, and responsible participation as members of the legal profession." *Id.* Similarly, the "Committee exercised its judgment reasonably in requesting information about [Coastal's] financial resources to provide a rigorous program of legal education and adequate academic support." *Id.*

D. This Litigation

Coastal filed this lawsuit and, more than one month later, moved for a preliminary injunction. Dkt. 1, 18. After briefing and hearing, this Court denied the motion. Dkt. 39. The Court focused its review on whether the ABA had complied with the requirements of common law due process, holding that there is no private right of action under the Higher Education Act and Coastal had "failed to present (likely because they cannot) sufficient evidence that the ABA is a governmental actor bound by the Fifth Amendment's due process clause." *Id.* at 7. With respect to Coastal's February 2018 bar pass results that were not available until after the Committee's March 2018 hearing, the Court found "no due process violation" in the Committee's decision to rely on information submitted by Coastal as of the hearing and said the ABA was under no obligation to "h[o]ld in abeyance" an unfavorable decision "in hopes that the next round of results were more favorable." *Id.* at 11-12. In sum, Coastal "failed to show a substantial likelihood of success on the merits" of its claims. *Id.*

The Court further held that Coastal had not established irreparable harm from posting notice of the ABA's decision on its website or responding to fact finding. The Court held that the notice "is an exercise in transparency . . . ." *Id.* at 13.

Following the Council's decision on Coastal's appeal, Coastal filed an Amended Complaint on September 20, 2018 with updated factual allegations but advancing the same

causes of action and theories as in the initial Complaint. Dkt. 62.

ARGUMENT

Summary judgment is appropriate if "there is no genuine dispute as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Coastal challenges the ABA's actions as a Department of Education-authorized accreditor of law schools. The ABA is entitled to "great deference" in interpreting and applying its standards. Dkt. 39 at 8-9 (quoting *Cooley I*, 459 F.3d at 713); *see also Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 39 F. Supp. 2d 889, 894 (W.D. Mich. 1998), *aff'd*, 244 F.3d 521 (6th Cir. 2001) ("There is probably no area of the law where deference is as necessary [as] it is when a court reviews the decision of an accreditation association." (quotation marks and citation omitted)). Indeed, judicial review of private accreditation decisions is even "more limited" than the very deferential review of government agencies. *Cooley I*, 459 F.3d at 713; Dkt. 39 at 8 (this Court holding that review of an accreditation action is "more narrowly pursued" than review under the Administrative Procedures Act).

Summary judgment is appropriate in accreditation cases without discovery, because the Court's review is limited to the accreditation record. *See* Dkt. 44 at 4–7 (collecting cases); Dkt. 59. "In accordance with th[e] deferential standard of review" that courts apply when assessing private accreditation decisions, courts limit their review to "the facts in the record before the accrediting agency." *Picard v. Am. Bd. of Family Med.*, No. 13-CV-14552, 2014 WL 7157084, at *3 (E.D. Mich. Dec. 15, 2014); *see also Cooley I*, 459 F.3d at 710

(affirming a grant of summary judgment based on the administrative record).[7]

I. Coastal Cannot Establish A Common Law Due Process Violation.

As this Court noted in denying Coastal's preliminary injunction motion, the "Eleventh Circuit has not decided whether accrediting agencies have a common law duty to comport with the strictures of due process, but to the extent that they must, the court adopted the 'standard of review delineated in *Cooley* . . . .'" Dkt. 39 at 8 (quoting *Hiwassee Coll., Inc. v. S. Ass'n of Colls. & Sch.*, 531 F.3d 1333, 1335 n.4 (11th Cir. 2008)). Under the standard described in *Cooley I*, courts "review '*only* [1] whether the decision of an accrediting agency such as [the ABA] is arbitrary and unreasonable or an abuse of discretion and [2] whether the decision is based on substantial evidence.'" *Hiwassee Coll., Inc.*, 531 F.3d at 1335 n. 4 (quoting *Cooley I*, 459 F.3d at 712) (emphasis added); Dkt. 39 at 8. Review under this standard is "extremely limited." *Margate Sch. of Beauty, Inc. v. Nat'l Accred. Comm'n of Cosmetology Arts & Scis.*, No. 06-60258, 2006 WL 8432528, at *6 (S.D. Fla. Mar. 10, 2006).

Coastal repeatedly relies on the provisions of the Higher Education Act and its implementing regulations. Dkt. 62 ¶¶ 34, 43–46, 126, 162, 167. But the "Eleventh Circuit has explicitly rejected attempts by parties to assert a private right of action pursuant to the Higher Education Act." Dkt. 39 at 7 (citing *Hiwassee Coll., Inc.*, 531 F.3d at 1335 & *McCulloch v.*

[7] *See also Found. for Interior Design*, 39 F. Supp. 2d at 894 (W.D. Mich. 1998) ("[C]ourts have reviewed denials of accreditation similarly to decisions of administrative agencies, limiting review to the record before the accrediting body at the time of its decision."); *Mountain State Univ., Inc. v. Higher Learning Comm'n*, No. 5:14-16682, 2016 WL 958717, at *3–4 (S.D. W. Va. Mar. 14, 2016) (same); *Phila. Wireless Tech. Inst. v. Accred. Comm'n of Career Sch. & Colls. of Tech.*, No. CIV. A. 98-2843, 1998 WL 744101, at *9 (E.D. Pa. Oct. 23, 1998) (same); *Rockland Inst. v. Ass'n of Indep. Colls. & Sch.*, 412 F. Supp. 1015, 1019 (C.D. Cal. 1976) (same).

PNC Bank Inc., 298 F.3d 1217, 1224 (11th Cir. 2002)).[8] In seeking to avoid the *Cooley I* standard, Coastal asserts that the "HEA and DOE regulations also help to inform the ABA's duty under federal common law." Dkt. 62 ¶ 47. But common law due process does not provide an end-run around established law: whether an accreditor's action "meets the requirements of the Department of Education is not a matter of due process." *Hiwassee Coll., Inc. v. S. Ass'n of Colls. & Sch., Inc.*, No. 1:05-CV-0951, 2007 WL 433098, at *15 (N.D. Ga. Feb. 5, 2007).

A. The ABA's 2018 Decisions Were Neither Arbitrary and Unreasonable Nor An Abuse of Discretion.

The "focus" of *Cooley I* review is procedural: "whether the agency conform[ed] its actions to fundamental principles of fairness." 459 F.3d at 713 (quotation marks omitted). Coastal's procedural claims fail because, as a matter of law, Coastal received fair process.

The ABA has provided Coastal with fair process in all respects. Coastal received "ample" notice: the Committee first raised concerns about its compliance with identified Standards more than *two years ago*; Coastal has had five opportunities to submit information; it has appeared, represented by counsel, at two hearings; and it has received five written decisions. It has had an opportunity to appeal.[9] *Cooley I*, 459 F.3d at 715 (finding process

[8] To the extent Coastal attempts to state a claim under the Act, the ABA is entitled to judgment on that claim. *See* Dkt. 62 at 41 (Prayer for Relief § (c)).

[9] In August 2018, the ABA Standards and Rules were amended to restore to the Council responsibilities that the Council had previously delegated to the Committee. *See* Declaration of Barry A. Currier in Support of Defendants' Dispositive Motion for Summary Judgment ¶ 9 (filed concurrently herewith). Coastal contends that the Council's resumption of these responsibilities "deprives Florida Coastal … of the benefit of having the ABA's accreditation function and powers separated between two bodies." Dkt. 62 ¶ 135. This structural change is irrelevant here, as Coastal indisputably had the opportunity to appeal the Committee's decision to the Council. In any event, due process does not require an appeal of every accreditation decision. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (explaining that "the specific dictates of due process" vary based upon "the private interest that will be affected"). And Department of Education regulations require an accreditor to allow

"ample" when a school "was notified well in advance [of a hearing], afforded the opportunity to submit evidence to support[] its case, and permitted to appear . . . with counsel present."); *see also Bristol Univ. v. Accred. Council for Indep. Colls. And Sch.*, 691 F. App'x 737, 742 (4th Cir. 2017) (finding adequate process where accreditor "informed [school] of its deficiencies, gave [school] multiple opportunities to respond to those deficiencies, . . . and provided [school] a written explanation for denying its application for renewal").[10]

The extensive and fair process Coastal received differentiates this case from those on which it has relied. For example, in *Edward Waters College, Inc. v. S. Ass'n of Colls. & Sch., Inc.*, No. 3:05-cv-180, 2005 WL 6218035 (M.D. Fla. Mar. 11, 2005), an accreditor removed a school's accreditation through a process rife with defects: among other things, the accreditor "had not given the College notice" that it would consider compliance with standards relating to governance and leadership—and then stripped the school's accreditation on that ground. *Id.* at *5, *10. Indeed, "so unique" were the facts in *Edward Waters* that courts have declared it to be "distinguishable" and "of limited value." *Hiwassee Coll., Inc.*, 2007 WL 433098, at *5 n.4; *Lincoln Mem'l Univ. v. Am. Bar Ass'n*, No. 3:11-CV-608, 2012 WL 137851, *19 n.10 (E.D. Tenn. Jan. 18, 2012).

B. The ABA's Decisions Were Supported by Substantial Evidence.

In the second part of the *Cooley I* review, the Court asks whether an accreditor's

---

appeal from only certain specified decisions. *See* 34 C.F.R. § 602.25(f); 34 C.F.R. § 602.3. The revised ABA Rules permit appeals of such decisions to an Appeals Panel. *See* ABA Rule 3 (2018-19).

[10] *See also Med. Inst. of Minn. v. v Nat'l Ass'n of Trade & Tech. Sch.*, 817 F.2d 1310, 1314–15 (8th Cir. 1987) (finding adequate process where a school "submitted several responses" and "was given the opportunity to present its case orally" on appeal); *St. Andrews Presbyterian Coll. v. S. Ass'n of Colls. & Sch., Inc.*, 679 F. Supp. 2d 1320, 1331 (N.D. Ga. 2009) (finding adequate process where school had the opportunity to "present sufficiently complete information about its financial condition and operations").

decision is supported by substantial evidence—that is, evidence that a "reasonable mind might accept as adequate to support [the accreditor's] conclusion." *Prof'l Massage Training Ctr., Inc. v. Accred. All. of Career Sch. & Colls.*, 781 F.3d 161, 174 (4th Cir. 2015) (quotation marks and citation omitted). Courts will not "conduct a *de novo* review" of the merits "or substitute [their] judgment for that of the ABA." *Cooley I*, 459 F.3d at 713.

The record provides abundant support for the ABA's conclusions. Coastal experienced a "steep drop" in first-time bar pass rates in 2016 and 2017—with the Florida first-time pass rate falling to *26.31 percentage points* below the state average in 2017. AR606. And Coastal's attrition rate rose—about one in four students who entered Coastal in 2015, 2016, and fall 2017 left without a degree. AR606-07. The nineteen students entering in spring 2018 had higher credentials than students entering in the preceding years, but four (21%) were academically dismissed by the end of the first semester. AR850. The Council noted the improvements in entering credentials and in the bar passage rates of 29 graduates in February 2018, but found that "following the significant and extended downturn in student outcomes, these changes have not been in place for a sufficient time and have not provided sufficient evidence that they are effective." AR851, AR854. A reasonable mind could reach this conclusion—and that is the end of the matter under *Cooley I*.

Instead of applying the *Cooley I* standard, Coastal asks this Court to engage in an unprecedented reweighing of the evidence, including comparing cherry-picked aspects of other accredited institutions, to reach an intrusive judgment that Coastal's efforts have already brought it into compliance. This Court should not accept Coastal's invitation to "substitute its judgment for that of the ABA." *Staver v. Am. Bar Ass'n*, 169 F. Supp. 2d 1372,

1379 (M.D. Fla. 2001); *Ambrose v. New Eng. Ass'n of Sch. & Colls., Inc.*, 252 F.3d 488, 497–99 (1st Cir. 2001) (recognizing "the patent undesirability of having courts attempt to assess the efficacy of the operations of academic institutions").

ABA Standards. Coastal complains that the ABA Standards at issue are "vague" and "lack objective metrics for determining compliance." Dkt. 62, ¶¶ 33, 39, 75, 80, 158, 173. Courts routinely rebuff attempts to force accreditors to use only "strict guidelines." *Med. Inst. of Minn.*, 817 F.2d at 1314. "[F]lexibility in fashioning accrediting standards long has been recognized as a virtue," not a basis for a common law due process violation. *Ambrose*, 252 F.3d at 494–95.

In *Hiwassee College*, the district court rejected a school's argument that standards requiring "financial stability, and adequate physical resources" were invalid for lack of "definite requirements." 2007 WL 433098 at *5 n.5. The Eleventh Circuit affirmed. *Hiwassee Coll., Inc.*, 531 F.3d at 1335; *see also St. Andrews Presbyterian Coll.*, 679 F. Supp. 2d at 1329 (rejecting argument that a standard was too "vague" because it did not include "set standards or benchmarks"). Likewise, the Fourth Circuit recently *reversed* a decision that an accreditor's standard was too "general[ ]" and did not provide "practical guidance," *Prof'l Massage*, 781 F.3d at 174, stating "[i]t was not necessary, or indeed practical, for the Standards to outline more specific numerical goals." *Id.*

Reweighing Evidence. The School also maintains that the record does not support the ABA's conclusions. *See, e.g.*, Dkt. 62 at ¶ 81 (arguing "the Committee's factual findings, far from supporting the Committee's conclusions, actually undermine those conclusions."). Coastal's request that the Court reweigh the evidence ignores the standard of review. *See*

Prof'l Massage, 781 F.3d at 174 (courts may not "re-weigh conflicting evidence, [or] make credibility determinations" (quotation marks omitted)).

Specifically, Coastal says the Committee unreasonably "failed to account for" February 2018 Florida bar results published *after* the March 2018 Committee hearing. Dkt. 62 at ¶¶ 84–86, 172. But as the Court held, "it was certainly reasonable for the ABA to rely on the evidence submitted by the hearing date." Dkt. 39 at 11–12; *see also* AR851 (concluding that the Committee "appropriately did not consider" the February 2018 Florida bar results, "which w[ere] not available before the Committee hearing").

And in any event, the Council *did* review the February 2018 bar results in Coastal's appeal, but found them "entitled to limited weight" in light of "the sustained drop in bar pass rates over the past several years," "the small number of graduates represented," and the "absence of any data about outcomes for more than 80 percent (124 of 153) of the Law School's February 2018 bar exam takers." AR851. This too was reasonable. As this Court stated, "the February Bar result, while promising, does not necessarily mean Coastal will sustain a break from its pattern of poor performance on the Bar." Dkt. 39 at 6. The School is entitled to its opinion that the ABA "was wrong to say that Florida Coastal's changes 'have not been in place for a sufficient time . . . .'" Dkt. 62 ¶ 87. But it is not entitled to a judicial determination that its opinion, rather than the ABA's, is correct. *See Hiwassee Coll., Inc.*, 2007 WL 433098, at *5 n.6 (refusing to consider school's "disagree[ment] with [the accreditor's] view of the data").

The School also argues that it complied with a *different* Standard requiring minimum bar pass rates (Standard 316). But, even if a school has not yet sunk below the floor set forth

in Standard 316, the ABA can reasonably conclude that a steep decline in bar pass rates is relevant to Standards that address admissions (Standard 501(b)) and how the school is educating and supporting students once enrolled (Standards 301(a) and 309(b)). In fact, Interpretation 501-1 specifies that "[c]ompliance with Standard 316 is not alone sufficient to comply with" Standard 501. Dkt. 30-1 at 31. Further, the data the School relied on to show compliance with Standard 316 comes from classes enrolled prior to 2013, after which the School's entering student credentials declined precipitously. Dkt. 62 ¶ 38 (listing ultimate pass rates for students who matriculated from 2008 to 2012).[11]

Moreover, even if the School is in compliance with Standard 316, compliance with one Standard does not establish compliance with all Standards. An accreditor must assess whether—when *all* relevant factors are considered—a school has demonstrated that it warrants approval. The ABA thus "consider[s] all relevant factors in the context of the law school as a whole," and finds that "weaknesses in some areas may outweigh strengths in others." AR852; *see Ambrose*, 252 F.3d at 494 (an accreditor may "apply[ ] the standards in a way that lets an institution's strengths compensate for its weaknesses, thus allowing the standards as a whole to be satisfied by the overall assessment of the institution as a whole").

Adequate Explanation. Coastal contends that the ABA failed to provide an adequate explanation for its conclusions. Dkt. 62 ¶¶ 75, 157. The record disproves that assertion.

Courts review accreditors' decisions only for a "rational connection" between the evidence and the accreditor's conclusions. *Thomas M. Cooley Law Sch. v. Am. Bar Ass'n,*

[11] The Amended Complaint includes purported ultimate bar pass rates for more recent classes that were not presented to the Committee or Council. Dkt. 62 ¶ 141. The School alleges it "possessed" this data "in September 2018"—after the Council decision. *Id.* It is thus irrelevant to whether the Council acted reasonably.

376 F. Supp. 2d 758, 770 (W.D. Mich. 2005), *aff'd by Cooley I*. An accreditor affords "ample process" by providing a "written report outlining its findings and conclusions." *Cooley I*, 459 F.3d at 715. Courts have concluded that an accreditor adequately articulated the basis for its decision on records and reasoning much more limited than the robust determinations the ABA provided here. For example, the Fourth Circuit recently reversed a district court that held that an accreditor had not adequately explained an accreditation decision where the decision letter merely "identified" "24 unresolved violations" without elaboration. *See Bristol Univ.*, 691 F. App'x at 741–42. As the Fourth Circuit explained, "[n]othing more was required to satisfy due process." *Id.* at 742.

The ABA's challenged decisions are more than adequate. The Committee and Council provided "detailed written report[s] outlining [their] findings and conclusions," citing the relevant Standards and Rules, noting which findings supported which conclusions, and rejecting Coastal's arguments. *Cooley I*, 459 F.3d at 715; *see* AR 602-10 (eight-page, single-spaced Committee decision); AR847-57 (ten-page, single-spaced Council decision). There is a rational connection between the findings—including a history of admittedly "unacceptably low" bar pass rates, high attrition rates, and unproven academic programs—and the Committee's conclusions that the School was out of compliance. *See Thomas M. Cooley Law Sch.*, 376 F. Supp. 2d at 770 ("Because a rational connection between the facts found and choice made [could] reasonably be discerned, the decision must be upheld."). And there is a rational connection between "the significant and extended downturn in student outcomes" the Council noted (AR854), and its conclusion that the School's noncompliance

has been substantial and persistent.[12] The Committee and Council letters make these connections and reject the School's arguments. *See, e.g.*, AR608, AR851.

Other Schools. Coastal argues that other schools—in particular, Thomas M. Cooley Law School ("Cooley")—are worse and yet deemed compliant. *See* Dkt. 62 ¶¶ 100, 120–24. For decades, courts have rejected attempts to turn case-by-case substantial evidence review into a comparative analysis. First, "delving into the comparators and their treatment . . . reduces the court's role to conducting 'de novo review of [an accreditor's] evaluative decisions.' This is impermissible." *Mountain State Univ., Inc. v. Higher Learning Comm'n*, 2017 WL 963043, at *14 (S.D. W. Va. Mar. 10, 2017) (quoting *Transport Careers, Inc. v. Nat. Home Study Council*, 646 F. Supp. 1474, 1485–86 (N.D. Ind. 1986)); *see also Marlboro Corp. v. Ass'n of Indep. Colls. & Sch., Inc.*, 556 F.2d 78, 80 n. 2 (1st Cir. 1977); *Found. for Interior Design*, 39 F. Supp. 2d at 894.

Second, accreditors exercise judgment in applying standards to "varied institutions ranging over many different fields and disciplines." *Prof'l Massage*, 781 F.3d at 174. Comparisons between schools are not helpful, because no one school is "similar [] in *all other relevant respects*" to another school. *Med. Inst. of Minn.*, 817 F.2d at 1314 (emphasis added) (rejecting a claim of inconsistent treatment because the plaintiff's limited comparison—another school "was in worse financial condition" and "had similar placement

[12] Coastal complains that the ABA stated that "issues of noncompliance" were substantial and persistent, suggesting that this is somehow different from stating that its *noncompliance* was substantial and persistent. Dkt. 62 ¶ 104. The Committee letter makes clear that "issues of noncompliance" and noncompliance are the same thing. *See* AR 608 ("The Committee further concludes . . . *in accordance with Rule 16(a)*, that the issues of non-compliance . . . are substantial and have been persistent." (emphasis added)); Rule 16(a)(1), Dkt. 30-1 at 56 (sanctions may be imposed for "[s]ubstantial or persistent noncompliance with one or more of the Standards").

statistics"—"ignore[d] all of [the schools'] other attributes.").[13] The Council explained that "[w]hether a law school complies with the Standards must be assessed based on *the law school's* actions and outcomes, not on selected data comparisons with other schools, because no other law school has—or could have—the same circumstances, history, and trends." AR852-53 (emphasis added). Indeed, Coastal admitted in a recent filing that "no single law school's situation is identical to that of any other." Opp., MDL No. 2855 (Dkt. 11) (June 22, 2018). Courts are ill-prepared to second guess the Council's considered judgment, which takes all these factors into account.

Third, Coastal characterizes data that it presented about other schools as "precedent" that the ABA was obligated to follow. Dkt. 62 ¶¶ 165-67. But it presented only a mishmash of statistics regarding other schools' performance on various metrics. *See* AR626-73. As the Council explained, the data comparisons the School presented were not "precedent"—they were evidence and argument that the School did not present to the Committee and that were not properly before the Council under Rules 24(c)-(d). *See* AR852-53; *supra*, n.6. The Council nonetheless considered the data points Coastal presented and found the "isolated and inconsistent data comparisons" not helpful, because they did not provide a full picture of each school's overall strengths and weaknesses: "Selectively citing data from different years,

[13] Coastal's argument makes even less sense than the argument rejected in *Medical Institute of Minnesota*. Coastal asserts that a school must be found in compliance when it takes "concrete steps" toward improvement, and "[l]ike Cooley, Florida Coastal has taken 'concrete steps' with respect to its admissions policy and practices." Dkt. 62 ¶¶ 122, 166; *see also id.* ¶ 131 (asserting similar "concrete steps" argument with respect to North Carolina Central University School of Law). The Standards do not contain a "concrete steps" test. But even if they did, not all "concrete steps" are equal. Coastal ignores that it started further back on key criteria than Cooley did—with, for example, significantly lower first-time bar pass rates in Florida than Cooley had in Michigan (66% in 2016 for Cooley compared to 42% for Coastal) and much higher non-transfer 1L attrition rates (8.9% in 2016-2017 for Cooley compared to 25.25% for Coastal). *Compare* Dkt. 30-13, Cooley Feb. 1, 2018 Resp. at 33, 35, *with* AR242, AR251, AR605.) The fundamental point remains that no two schools are "similar in all other relevant respects." *Med. Inst. of Minn.*, 817 F.2d at 1314.

different schools, and on different topics does not provide a meaningful basis for the Council to assess the compliance of this Law School with the Standards at issue." AR852-53.

Remedial Actions. The Court should also reject Coastal's claim that the ABA acted arbitrarily and capriciously by directing Coastal to take remedial actions to address the School's non-compliance. *See* Dkt. 62 ¶¶ 75, 172. Courts do not generally review the accreditor's choice of sanctions. The "severity of the sanction, being a matter peculiarly within the agency's expertise, is not open to review." *Thomas M. Cooley Law Sch.*, 376 F. Supp. 2d at 769–70. Nor are accreditors required to provide a detailed explanation of the sanction. *Id.*; *see also*. *Bristol Univ.*, 691 F. App'x at 741–42.

Regardless, each of the specific remedial actions the ABA instructed Coastal to take was reasonable and related to Coastal's noncompliance.

First, having found Coastal out of compliance with ABA Standards, it was reasonable for the ABA to require Coastal to publish a notice of that finding and of the remedial actions the school is required to take, to "ensure that students, prospective students and the public are accurately informed of the Council's assessment of the Law School's accreditation status." AR856. There is a strong public interest "in having those who look to the [ABA]'s evaluation of legal education receive prompt and accurate information." *Lincoln Mem'l*, 2012 WL 137851, at *20. Coastal advertises in multiple places on its website that the school is "ABA-accredited," "fully approved," and "fully accredited."[14] As the Court held, requiring the School "to disclose the outcome of the ABA's determination" does not cause irreparable

[14] *See* Florida Coastal Website, *Homepage*, https://www.fcsl.edu/index.php; *id*., *Accreditation*, https://www.fcsl.edu/about-coastal-law-accreditation.html; *id*., *About*, https://www.fcsl.edu/about-coastal-law.html.

harm, "especially where this determination is an exercise in transparency." Dkt. 39 at 13. It was reasonable for the ABA to require the School to display the notice when it discusses its status as an ABA-approved law school—not "buried" in a single, obscure location. *See id.*

Second, it was reasonable for the ABA—having determined that a school is out of compliance with standards relating to bar pass rates and attrition rates—to require the school to notify students of its recent bar pass and attrition rates. *See Whittier Coll. v. Am. Bar Ass'n*, No. CV 07-1817, 2007 WL 1624100, at *10 (C.D. Cal. May 7, 2007) (noting "the interests of prospective students in being informed of the history of poor first-time bar passage rate[s] of [the law school's] graduates"). Coastal argues that the qualifications of the most recent entering classes have improved. But, as the Council noted, the School's improvement was recent, and "[m]any students currently enrolled at the Law School matriculated in earlier classes and have LSAT scores comparable to the data [in] . . . the bar passage notice." AR853. Moreover, Coastal is free to "supplement the required notice to students with additional accurate and non-misleading information to its students, such as the average LSAT scores of the students in the law school GPA quartiles in the notice." AR854.

As this Court has explained, "consumers of a legal education . . . are college graduates and '[b]y anyone's definition a sophisticated subset of education consumers, capable of sifting through data . . . .'" *Casey v. Fla. Coastal Sch. of Law, Inc.*, No. 3:14-cv-1229, 2015 WL 10818746, at *3 (M.D. Fla. Sep. 29, 2015) (Davis, J.) (citation omitted). But if they do not receive the data in the first instance, they cannot evaluate the investment they are the making in their education.

Coastal maintains that the notices it is required to provide to the public and students

will "harm [its] ability to attract and retain higher credentialed students." Dkt. 62 ¶¶ 107, 114. If the accurate information Coastal provides may influence students' and potential students' choices about whether and where to invest thousands of dollars in tuition, that is all the more reason to ensure access to that information. "As future applicants to the bar, students should have access to reliable information to enable them to make informed decisions on where to attend law school." *See Thomas M. Cooley Law Sch. v. Am. Bar Ass'n*, No. 17-13708, 2017 WL 6342629, at *4 (E.D. Mich. Dec. 12, 2017) ("*Cooley II"*).

Finally, the ABA did not act arbitrarily and capriciously by appointing a fact finder to provide the ABA with information relevant to Coastal's compliance with the Standards. Coastal has conceded that additional fact finding "is not objectionable in light of the issues before the ABA." Dkt. 18 at 23. But it claims that certain topics are "irrelevant," including "the rate of default on loans taken by the Law School's graduates," "the employment status of the graduates," and "the finances of the Law School." *Id.*; Dkt. 62 ¶¶ 117–18.

This argument has two problems. *First*, gathering information to use in assessing compliance enhances the process Coastal receives. *See* Dkt. 39 at 13 n.8 (the Court did not "see how an irreparable injury would result" from a fact finder visit). *Second*, asking a fact finder to inquire into these issues is consistent with ABA Rules and Standards. Rule 12 authorizes the Committee to appoint a fact-finder and does not restrict what information the fact-finder may be directed to examine. Moreover, the matters the School identifies are, as the Council explained, "relevant to the Standards." AR854. Whether Coastal graduates obtain employment in the legal profession is relevant to, among other things, whether Coastal is providing a legal education that prepares its students for participation in that profession. *Id.*

Similarly, "in light of the decrease in student enrollment" at Coastal, it was reasonable for the Committee to request information about whether the School had sufficient resources to "provide a rigorous program of legal education and adequate academic support." *Id.*

II. Coastal Cannot Establish a Constitutional Due Process Violation.

To the extent Coastal's complaint asserts a claim under the Fifth Amendment, that claim also fails as a matter of law.[15] "[T]he overwhelming majority of courts who have considered the issue have found that accrediting agencies are not state actors," and the Eleventh Circuit has rejected the argument that an accreditation decision "constitute[s] state action." *Hiwassee Coll., Inc.*, 531 F.3d at 1335.[16]

This established law governs here. Coastal asserts, on "information and belie[f]," that "during the prior Administration one or more [Department of Education] officials coerced, pressured, or significantly encouraged the ABA to take adverse accreditation actions against for-profit law schools, including law schools owned by InfiLaw." Dkt. 62 ¶ 57. But Coastal's only factual, non-conclusory allegation on this topic is that, "[i]n 2017, a now-former [Department] official publicly touted on social media as one of his personal 'achievements' leading *the [Department]* to impose an 'unprecedented restriction on a for-profit law school's' access to the Title IV student loan program." Dkt. 62 ¶ 58 (emphasis added). That

[15] Whether the School asserts such a claim is unclear. *Compare* Dkt. 62 ¶ 56 *with* Jun. 29, 2018 Hr'g. Tr. at 24–25 ("THE COURT: . . . The ABA is not the government in this case. Is that--. MR. BARTOLOMUCCI: It's not, Your Honor.").

[16] *See also, e.g.*, *Cooley I*, 459 F.3d at 712 (6th Cir.) (the ABA "is not a government authority"); *Prof'l Massage*, 781 F.3d at 169 (4th Cir.) ("Accreditation agencies are private entities, not state actors"); *Chi. Sch. of Automatic Transmissions, Inc. v. Accred. All. of Career Sch. & Colls.*, 44 F.3d 447, 449 n.1 (7th Cir. 1994) (court did not "imply that an accrediting agency is a 'state actor,'" as a "governmental body may rely on the decisions of a private association without turning that association into 'the government' itself"); *McKeesport Hosp. v. Accred. Council for Grad. Med. Educ.*, 24 F.3d 519, 523–26 (3d Cir. 1994) (collecting cases).

statement is not relevant to *the ABA's* interaction with the Department.

Accordingly, this is not one of the "rare circumstances" when a private party may be subject to constitutional due process constraints. *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992). Coastal has not alleged facts showing the Department "provided such significant encouragement that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 992 (1982); *see Nat'l Broad. Co. v. Commc'ns Workers of Am., AFL-CIO*, 860 F.2d 1022, 1026 (11th Cir. 1988) (no state action when the plaintiff "did not attempt to demonstrate that the city *entered into the decision-making process* which resulted in" the challenged decision (emphasis added)). A Department official's alleged statement about what *the Department* has done is not encouragement of the sort that would allow a court to treat the ABA as standing in the government's shoes.

As this Court observed, Coastal "has failed to present (likely because [it] cannot) sufficient evidence that the ABA is a governmental actor bound by the Fifth Amendment's due process clause . . . ." Dkt. 39 at 7. Coastal also has not made any showing that would entitle it to discovery on this issue. Indeed, recently, the Eastern District of Michigan denied a school's request for discovery regarding "the relationship between the ABA and the Department of Education," citing "binding precedent" that "the ABA is not a government authority." *Thomas M. Cooley Law Sch. v. Am. Bar Ass'n.*, Dkt. 82 at 4, Case No. 17-13708 (E.D. Mich. June 11, 2018) (citing *Cooley I.*, 459 F.3d at 712) (Dkt. 59, Ex. B).

CONCLUSION

The ABA respectfully requests that this Court grant summary judgment in its favor.

Dated: Oct. 11, 2018

Respectfully submitted,

/s/ ***Anne E. Rea***
Kevin E. Hyde
FL Bar No. #0768235
khyde@foley.com
Emily Friend O'Leary
FL Bar No. #73042
eoleary@foley.com
FOLEY & LARDNER LLP
One Independent Drive, Suite 1300
Jacksonville, FL 32202-5017
Telephone: 904.359.2000
Facsimile: 904-359-8700

and
James A. McKee
FL Bar No. 0638218
jmckee@foley.com
106 East College Avenue, Suite 900
Tallahassee, FL 32301
Telephone: 850-222-6100
Facsimile: 850-561-6475

Anne E. Rea (IL 6188384)*
area@sidley.com
Tacy F. Flint (IL 6284806)*
tflint@sidley.com
Joseph R. Dosch (IL 6303209)*
jdosch@sidley.com
Jillian Sheridan Stonecipher (IL 6329019)*
jstonecipher@sidley.com
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
Telephone: (312) 853-7000
Facsimile: (312) 853-7036
**Admitted pro hac vice*

Attorneys For Defendant American Bar Association; Council Of The Section Of Legal Education And Admissions To The Bar, American Bar Association; And Accreditation Committee Of The Section Of Legal Education And Admissions To The Bar, American Bar Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of October, 2018, I electronically filed the foregoing document with the Clerk of Court by using the CM/ECF system, which will send notice of electronic filing to all participants.

/s/ ***Anne E. Rea***
Attorney