UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FLORIDA COASTAL SCHOOL OF LAW, INC.; and INFILAW CORPORATION,

Plaintiffs,

v. Case No.: 3:18-cv-00621-BJD-JBT

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,

Defendants.
_____/

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR STAY

Plaintiffs respectfully submit this opposition to Defendants' motion to dismiss without prejudice or, in the alternative, stay this action. *See* Doc. 36. For the reasons that follow, this Court should deny the motion and allow this action to proceed.

BACKGROUND

In this case, Florida Coastal School of Law ("Coastal" or "the law school") challenges an April 27, 2018 decision rendered by Coastal's accreditor, the Accreditation Committee of the Section of Legal Education and Admission to the Bar, American Bar Association ("Accreditation Committee" or "Committee"). *See* Compl. (Doc. 1); Committee Decision (Doc. 19-1, Ex. 2). Coastal contends in its complaint filed on May 10, 2018, that the Committee's decision violates the law school's right of due process. The Committee's decision imposes on Coastal immediate, injurious consequences and requirements. *See infra* at 5-8; Compl. ¶¶ 99-117.

After commencing this action, Coastal on May 29, 2018, appealed the Committee's

decision to the Council of the Section of Legal Education and Admission to the Bar, American Bar Association ("Council"). *See* Doc. 34-2. That internal appeal, however, does not stay or suspend any of the injury-causing consequences and requirements imposed on Coastal by the Committee's decision.

Defendants (collectively, "the ABA") have filed a motion to dismiss without prejudice or, in the alternative, stay the case. *See* Doc. 36 ("ABA Mot."). In support of that motion, the ABA argues that Coastal's pending internal appeal to the Council makes this case unripe. The ABA also seeks a stay based on its own pending motion filed with the multidistrict litigation ("MDL") panel. Notably, other than its argument based on the Council appeal, the ABA has not argued that Coastal's complaint fails to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6).

STANDARDS OF REVIEW

"When reviewing a motion to dismiss, the court must take the complaint's allegations as true and construe them in the light most favorable to the plaintiff." *Hoffman v. Grissett*, No. 3:16-cv-1091, 2017 WL 8751752, at *6 (M.D. Fla. Sept. 28, 2017) (citing *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008)). "While a complaint's factual allegations need not be detailed, it must still allege sufficient facts to render the claim plausible on its face." *Moss v. Liberty Mut. Fire Ins. Co.*, No. 3:16-cv-677, 2017 WL 4676629, at *2 (M.D. Fla. Aug. 18, 2017) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)).

> "The Supreme Court's most recent formulation of the pleading specificity standard is that 'stating such a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element." *Watts* [*v. Fla. Int'l Univ.*], 495 F.3d [1289] at 1295 [11th Cir. 2007] (quoting *Twombly,* 127 S. Ct. at 1965). This rule does not "impose a probability requirement at the pleading stage." *Twombly,* 127 S. Ct. at 1965. Instead, the standard "simply calls for

> enough fact to raise a reasonable expectation that discovery will reveal evidence" of the required element. *Id.* "It is sufficient if the complaint succeeds in 'identifying facts that are suggestive enough to render [the element] plausible.'" *Watts,* 495 F.3d at 1296 (quoting *Twombly,* 127 S. Ct. at 1965).

Rivell, 520 F.3d at 1309-10.

"The party moving for a stay bears the burden of demonstrating that it is appropriate; if a stay would create hardship for a party, however, then the movant must demonstrate that it would suffer hardship or inequity from going forward." *Gov't of Virgin Islands v. Neadle*, 861 F. Supp. 1054, 1055 (M.D. Fla. 1994) (citing *Landis v. N. Am. Co.,* 299 U.S. 248, 254-256 (1936)); *see also* ABA Mot. 8 (moving party bears the burden of showing clear hardship absent a stay or little possibility of harm to others from a stay). Motions to stay discovery, and other stay motions that have the same effect, "are not favored because when discovery is delayed or prolonged it can create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997) (quoting *Simpson v. Specialty Retail Concepts, Inc*., 121 F.R.D. 261, 262 (M.D.N.C. 1988)).

ARGUMENT

I. This Case Is Ripe Because the Committee's Decision Imposes on Coastal Immediate, Injurious Consequences and Requirements That Are Not Stayed by the Appeal.

Coastal's challenge to the Accreditation Committee's April 27, 2018 decision is ripe for the simple reason that the decision imposes on the law school immediate and injury-causing consequences and requirements that are not stayed by Coastal's appeal to the Council.

The purpose of the ripeness doctrine, as the Supreme Court explained in the leading case of *Abbott Laboratories v. Gardner*,

> is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies,

> and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

387 U.S. 136, 148-149 (1967).

From *Abbott Laboratories*, a two-prong analysis has emerged. "To determine whether a claim is ripe, we assess both the *fitness* of the issues for judicial decision and the *hardship* to the parties of withholding judicial review." *Harrell v. The Florida Bar*, 608 F.3d 1241, 1258 (11th Cir. 2010) (emphases in original) (citing *Coal. for Abolition of Marijuana Prohibition v. City of Atlanta,* 219 F.3d 1301, 1315 (11th Cir. 2000)).

"The fitness prong is typically concerned with questions of 'finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed.'" *Harrell*, 608 F.3d at 1258 (quoting *Ernst & Young v. Depositors Econ. Prot. Corp.,* 45 F.3d 530, 535 (1st Cir. 1995)). "The hardship prong asks about the costs to the complaining party of delaying review until conditions for deciding the controversy are ideal." *Harrell*, 608 F.3d at 1258. Yet "it is readily apparent that '[t]he "hardship" prong ... is not an independent requirement divorced from the consideration of the institutional interests of the court and agency,' *AT&T Corp. v. FCC,* 349 F.3d 692, 700 (D.C. Cir. 2003), and that '[w]here ... there are no significant agency or judicial interests militating in favor of delay, [lack of] "hardship" cannot tip the balance against judicial review,' *Consol. Rail Corp. v. United States,* 896 F.2d 574, 577 (D.C. Cir. 1990)." *Harrell*, 608 F.3d at 1259; *accord Mulhall v. Unite Here Local 355*, 618 F.3d 1279, 1293 (11th Cir. 2010).

Here, the fitness prong is satisfied because Plaintiffs' "claimed injury is immediate." *Harrell*, 608 F.3d at 1259. "When a plaintiff is challenging a governmental act, the issues

are ripe for judicial review if a plaintiff shows he has sustained, or is in immediate danger of sustaining, a direct injury as the result of that act." *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1358 (11th Cir. 2013) (quoting *Nat'l Advertising Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005)); *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc*., 438 U.S. 59, 81 (1978) (ripeness requirement satisfied where plaintiffs sustained "immediate injury" from the challenged action); *Clinton v. City of New York*, 524 U.S. 417, 429 n.16 (1998) (same).

The Accreditation Committee's April 27, 2018 decision inflicts immediate and direct injury on Coastal. The decision imposes on the law school immediate consequences and requirements—consequences and requirements that are not stayed by Coastal's appeal of the decision to the Council.

First, the decision concludes that Coastal "is not in compliance with Standards 301(a), 309(b), and 501(b) and Interpretation 501-1." Conclusion (1).[1] Furthermore, the decision concludes, for the first time, that "the issues of noncompliance … are substantial and have been persistent." Conclusion (3). Under the ABA's Rule 16, the ABA may impose sanctions on a law school for "[s]ubstantial or persistent noncompliance with one or more of the Standards." Rule 16(a)(1) (Doc. 30-1, pg. 73 of 123); *see also* Compl. ¶ 102. The Committee informed Coastal that there is a "two-year period for it to demonstrate compliance" with the standards which "commenced to run on September 28, 2017." Committee Decision pg. 8. If Coastal does not come into compliance by the end of the two-year period, the ABA will "take immediate adverse action," meaning "removal from the list of law schools approved" by the ABA, "unless good cause is shown for extending the period for achieving compliance." *Id*. *See also* Compl. ¶ 117.

[1] All citations to Conclusions are to the Committee's April 27, 2018 decision.

Second, the Committee in the decision "directed" (*i.e.*, ordered) the law school to "develop a written reliable plan for bringing itself into compliance with Standards 301(a), 309(b), and 501(b) and Interpretation 501-1." Conclusion (4-a). The Committee added that "[i]n developing its plan, the Law School must address, inter alia, each of the factors identified in Interpretation 501-1. In addition, the reliable plan must include the Law School's admissions data and methodology, including its admissions practices and policies, for the fall 2018 entering class." *Id*. The Committee directed that Coastal "shall report" how factors "other than undergraduate GPA and LSAT are used to support an admission decision" and "explain how they are determined and applied in the review of applicant files, and report on any analyses that have been done or are contemplated to review the outcomes of admissions decisions based on these factors." *Id*. The Committee also imposed a deadline for the written reliable plan: "The Law School shall submit that plan to the Managing Director by October 1, 2018." *Id*.

Third, the Committee ordered its Managing Director to "appoint a fact finder to visit the Law School to review the admissions data and admissions methodology provided by the Law School, as well as the overall rigor of its program of legal education." Conclusion (4-b). The Committee also ordered the fact finder to investigate certain financial matters: "The 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, particularly as they related to the stated tuition and fees for 2016-17, the current and succeeding years, the amount of tuition discount, and the range of net tuition paid by class quartile." Conclusions (4-b-v and 4-b-vi). Coastal contends that these financial matters are irrelevant to the specific ABA standards at issue in the Committee's April 27, 2018 decision. *See* Compl. ¶ 116. The Committee ordered the fact finder to "produce a report regarding the

above matters to the Managing Director" so that the Committee may "evaluate the Law School's compliance with Standards 301(a), 309(b), and 501(b) and Interpretation 501-1" and "take any appropriate action" pursuant to its rules if the law school is not in compliance. Conclusion (5).

In May 2018, the ABA's Managing Director advised Coastal's Dean that the fact finder would come to campus to conduct his investigation in the Fall of 2018. *See* 5/2/18 Email from Barry Currier to Scott DeVito ("Scott, 1. The fact finder will not visit until the fall semester is underway.") (Doc. 34-1). Notably, Mr. Currier was responding to an email from Dean DeVito in which the Dean had stated "I also assume that the fact finder will not be sent until after our appeal has been decided by the Council." *Id*. Yet Mr. Currier's email in response did not confirm the Dean's assumption. Thus, Coastal could only read Mr. Currier's email to mean that the fact finder's visit would occur during the Fall semester, whether or not the law school's appeal to the Council was still pending at that time. *But cf*. ABA Mot. 16 (stating that the fact finder will not visit the law school until the Council has decided Coastal's appeal)

Fourth, the Committed ordered Coastal to "provide all admitted students and publish on its website along with other ABA disclosures a statement of the specific remedial action the Law School is required to take." Conclusion (4-d). The Committee attached the "Public Notice of Specific Remedial Action" that Coastal was required to publicize. *See* Doc. 1-1. Coastal contends that the Public Notice is the product of the ABA's due process violations and compels Coastal to communicate the ABA's flawed determinations and views to the law school's current and prospective students, alumni, faculty, the legal community, and the public. *See* Compl. ¶ 104. Coastal also contends that the Public Notice will harm the law school's ability to attract and retain higher credentialed students and to demonstrate compliance with the ABA's standards. *See id*. ¶ 105. The Committee gave Coastal five business days from the date of its

April 27, 2018 decision to post the public notice, and Coastal timely complied with that directive. *See id*. ¶ 106.

Fifth, the Committee directed Florida Coastal to communicate to all of its current students, "each semester, within 30 days of the completion of the assignment and distribution of semester grades," the following information: "(a) the Florida and Georgia first-time bar examination passage rates, by class quartiles, for Law School graduates sitting for the Florida and Georgia bar examinations over the six administrations preceding the semester; (b) the class quartile in which the student then falls; and (c) attrition rates." Conclusion (4-e). Coastal contends that this requirement forces the law school to provide misleading information to its students and will harm Coastal's ability to attract and retain higher credentialed students and to demonstrate compliance with the ABA's Standards. *See* Compl. ¶¶ 109-112. The Committee directed that "[t]he Law School shall provide evidence to the Managing Director's office, within five days of its distribution to students, that the required information has been appropriately and timely communicated." Conclusion (4-e).

Sixth, the Committee "request[ed] that the Dean of the Law School appear at a hearing before the Committee" on a date to be determined "to assist the Committee in determining whether the Law School has come into compliance with the Standards and, if not, to determine whether to impose any further appropriate action." Conclusion (6).

None of the six consequences and requirements that the Accreditation Committee visited upon the law school are stayed by the law school's pending appeal to the ABA Council. *See* Compl. ¶ 107. Coastal was required to, and did, disseminate to admitted students and post on its website the Public Notice within five business days of the Committee's decision. Notwithstanding its appeal, Coastal's written reliable plan for coming into compliance with the

ABA's standards is still due on October 1, 2018. And Coastal expects that, as the Managing Director stated in his May 2, 2018 email to the Dean, the fact finder will come to the law school this Fall.

It is true that, as the direct result of Coastal's lawsuit, the ABA has voluntarily suspended, pending Coastal's appeal to the Council, the requirement of providing students with the bar pass by quartile information. But "[i]t long has been the rule that 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.,* does not make the case moot.'" *Sec'y of Labor v. Burger King Corp.,* 955 F.2d 681, 684 (11th Cir. 1992) (quoting *United States v. W.T. Grant Co.,* 345 U.S. 629, 632 (1953)); *accord Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004).[2]

Because the Accreditation Committee's decision imposes immediate consequences and requirements on Coastal, the "fitness" prong of the ripeness analysis is satisfied here. The same considerations also support the conclusion that the "hardship" prong is satisfied. "[I]t is readily apparent that '[t]he "hardship" prong ... is not an independent requirement divorced from the consideration of the institutional interests of the court and agency,' and that '[w]here ... there are no significant agency or judicial interests militating in favor of delay, [lack of] "hardship" cannot tip the balance against judicial review.'" *Harrell*, 608 F.3d at 1259 (citations omitted); *accord*

[2] The ABA states that "Coastal never asked the Council to stay this requirement pending its appeal." ABA Mot. 14. But the record makes clear that Coastal's Dean expressly articulated to the ABA's Managing Director the law school's serious concerns regarding the requirement. *See* 5/2/18 Email from Scott DeVito to Barry Currier (stating that "I am concerned that this direction requires Florida Coastal to provide misleading information to our students" and then elaborating on those concerns) (Doc. 34-1). Yet the ABA never offered to suspend the requirement pending appeal or suggested that Coastal could request such suspension. Furthermore, the ABA's rules do not permit a law school to request reconsideration of a Committee decision. *See* ABA Rule of Procedure 15(a) ("A law school does not have the right to request reconsideration of a decision or recommendation made by the Accreditation Committee") (Doc. 30-1, pg. 73 of 123).

Mulhall, 618 F.3d at 1293.

The ABA argues that "Coastal's Complaint is not ripe because the Council has not resolved Coastal's appeal." ABA Mot. 9. But the mere fact that Coastal has appealed the Committee's decision to the Council does not end the ripeness analysis. As the Eleventh Circuit has explained, "to determine whether a future contingency creates fitness (and ultimately ripeness) concerns, a court must assess the *likelihood* that a contingent event will deprive the plaintiff of an injury." *Mulhall v. Unite Here Local 355*, 618 F.3d 1279, 1291-92 (11th Cir. 2010) (emphasis in original). "In other words, it is not merely the existence, but the *degree* of contingency that is an important barometer of ripeness." *Id*. at 1292 (emphasis in original) (quotation marks and brackets omitted). Thus, it is not enough for the ABA to observe that Coastal has a pending appeal to the Council. For the ABA to prove that Coastal's claim is not ripe, the ABA must make a showing that goes to the likelihood that Coastal will prevail on appeal. But the ABA studiously avoids making any representation as to Coastal's likelihood of success before the Council. That dooms the ABA's ripeness argument.[3]

In *Mulhall*, an employee, Mulhall, sued a union, Unite Here, seeking to void a Memorandum of Understanding between the union and Mulhall's employer, Mardi Gras Gaming. The union argued that the employee's challenge to the MOU was not ripe because his employer was also arguing in a pending appeal that the MOU should be declared void. If Mardi Gras were successful on appeal, the union argued, Mulhall would have no injury and thus his challenge was not ripe in the union's view. *See id*. at 1291. The Eleventh Circuit, however, rejected the union's ripeness argument. The court held that the possibility that the employer

[3] The standard of review on appeal to the Council is not *de novo*. Rather, "in any appeal from a Committee decision, the Council shall give substantial deference to the conclusions, decisions, and recommendations of the Committee." ABA Rule 25(a) (Doc. 30-1, pg. 709 of 123).

would prevail in its appeal did not make the employee's challenge unripe because in the court's estimation it was unlikely the employer would prevail. *See id*. at 1292. In the instant case, the ABA makes no forecast about Coastal's likelihood of prevailing before the Council. Thus, the ABA has not even attempted to show "the *likelihood* that a contingent event will deprive the plaintiff of an injury." *Mulhall*, 618 F.3d at 1291-92. Under *Mulhall*, the ABA's failure to make that showing requires rejection of the ABA's ripeness argument.

Western State Univ. of S. Cal. v. Am. Bar Ass'n, 301 F. Supp. 2d 1229 (C.D. Cal. 2004), also undermines the ABA's argument. In that case, the Council decided to withdraw Western's provisional accreditation. Western appealed the Council's decision to the ABA House of Delegates. *See id*. at 1132. While its appeal to the House was pending Western filed suit against the ABA, asserting a due process claim. Western also moved for a preliminary injunction, and the court granted the motion. In opposition to the motion, the ABA had argued that Western's "claim of irreparable injury is too speculative because the House may or may not vote to withdraw Western's accreditation at its upcoming meeting." *Id*. at 1137. The court, however, rejected the argument. It explained: "The harm if accreditation is withdrawn is real and substantial. Western need not wait for the axe to fall before seeking an injunction." *Id*. at 1137-38. The court observed that "[t]he ABA may continue with its normal process, if it wishes." *Id*. at 1138. Just as Western's appeal to the House did not cause the court to stay its injunctive hand, Coastal's appeal to the Council should not cause this Court to stay the case.

The ABA relies (Mot. 10) on *Staver v. Am. Bar Ass'n*, 169 F. Supp. 2d 1372 (M.D. Fla. 2001), but that case is easily distinguished. In *Staver*, an unaccredited law school, the Barry School of Law, applied to the ABA for provisional accreditation. The Accreditation Committee recommended that Barry should be granted provisional approval, but the Council denied Barry's

application. *See id*. at 1374-75. Barry appealed the decision to the ABA House of Delegates, but later "agreed with the Council to drop its appeal and continue its application before the Council." *Id*. at 1375. The Council then conducted an additional site visit at Barry. *See id*. A lawsuit challenging the Council's decision was filed, not by Barry, but by current and former Barry students. *See id*. at 1373. The court held that the students' claims were not ripe because Barry had dropped its appeal to the House of Delegates and the Council was still processing Barry's application. *See id*. at 1376-77; *see also Lincoln Memorial Univ. Duncan Sch. of Law v. Am. Bar Ass'n*, No. 3:11-CV-608, 2012 WL 137851, at *7 n.6 (E.D. Tenn. Jan. 18, 2012) (explaining that the students' claims were not ripe in *Staver* because the students filed suit "prior to the Council rendering a decision on Barry's application").

Staver is very different from the instant case because in *Staver* the ABA did not make a decision that changed Barry's status for the worse. Barry came to the ABA as an unaccredited law school seeking provisional accreditation. The Council initially denied the application and, after Barry dropped its appeal to the House of Delegates, the Council continued to consider Barry's application. The Council's initial decision to deny accreditation left Barry in the same status it had when it came to the ABA—without accreditation. Here, in contrast, the Committee changed Coastal's status for the worse. The Committee found, for the first time, that Coastal's "issues of noncompliance … are substantial and have been persistent." Conclusions (1) and (3). And the Committee ordered Coastal to take certain remedial actions—actions that Coastal was required to take even if it appealed the Committee's decision to the Council. Thus, the situation facing the Barry Law School in *Staver* is not comparable to Coastal's situation in this case.

The ABA also cites (Mot. 11) *Lincoln Memorial* but that case did not involve the ripeness doctrine. Instead, it involved the doctrine of exhaustion of administrative remedies. *See Lincoln*

Memorial, 2012 WL 137851, at *7. The two doctrines are different. *See, e.g.*, *Peachlum v. City of York*, 333 F.3d 429, 436-437 (3d Cir. 2003) ("However, ripeness is not to be confused with exhaustion. 'The doctrines of ripeness for adjudication and of exhaustion of administrative remedies are distinct and not interchangeable.'") (citations omitted); *see also Lincoln Memorial*, 2012 WL 137851, at *7 n.6 (stating that *Staver*, a ripeness case, "provides little guidance on whether [the court] should require exhaustion in this case").

The court in *Lincoln Memorial* found that "it is likely that exhaustion is required before a law school complaining that it should have been awarded provisional approval may bring a civil suit in federal court." 2012 WL 137851, at *7. But Coastal is not challenging a decision denying provisional approval, which does not change for the worse the status of an unaccredited school. Thus, the holding in *Lincoln Memorial* with respect to the doctrine of exhaustion of administrative remedies—a doctrine the ABA has not raised in this case—does not apply here.

II. Coastal Has Stated a Due Process Claim Even Though It Has Appealed to the Council.

Repackaging its ripeness argument, the ABA contends that Coastal has not stated a claim because the Council has not rendered its decision on appeal. *See* ABA Mot. 17-19. The repackaged argument fails for the same reason that the ripeness argument fails. The Committee's decision imposes consequences and requirements on Coastal *now*. Coastal's appeal to the Council did not suspend those consequences and requirements.

The ABA states that "[p]ut simply, the ABA, which is composed of both the Committee *and* the Council, has not yet completed its review." ABA Mot. 18. It is true that the Committee and the Council are both parts of the ABA, but it also true, and much more relevant, that the Committee has independent accreditation authority. *See* Compl. ¶¶ 5-6. Here, the Committee did not merely make a recommendation to the Council. It made a decision that imposes

immediate, real world effects on Coastal. And those effects are not stayed pending Coastal's appeal to the Council. Accordingly, the court may grant relief based on the Committee's violation of due process even though Coastal's appeal to the Council is ongoing.

As noted above, in *Western State University*, the court granted preliminary relief to Western in its action against the ABA, and the court did so despite the ABA's argument that Western's due process claim was "too speculative" because it had a pending appeal before the ABA House of Delegates. *See* 301 F. Supp. 2d at 1137-38. *Western State University* thus confirms that a due process claim may be asserted against an ABA entity even when an appeal to another ABA entity is pending.

The Higher Education Act and Department of Education regulations demand that accrediting agencies provide "due process" to the schools they accredit. 20 U.S.C. § 1099b(a)(6); 34 C.F.R. § 602.25. Those provisions require an accrediting agency, among other things, to specify in writing any deficiencies identified at the school; to consider the school's written response regarding any deficiencies before any adverse action is taken; and to describe the basis for any adverse accrediting action. *Id*.; *see also* 34 C.F.R. § 602.18 (accrediting agency must "consistently apply and enforce" its standards).

Accrediting agencies also have a duty under federal common law to provide due process. *See Hiwassee Coll., Inc. v. S. Ass'n of Colls. & Schs*., 531 F.3d 1333, 1335 (11th Cir. 2008); *Edward Waters Coll., Inc. v. S. Ass'n of Colls. & Schs., Inc*., No. 3:05-cv-180, 2005 WL 6218035 (M.D. Fla. Mar. 11, 2005); *Fla. Coll. of Bus. v. Accrediting Council for Indep. Colls. & Schs*., 954 F. Supp. 256 (S.D. Fla. 1996); *see also Prof'l Massage Training Ctr., Inc. v. Accreditation All. of Career Schs. & Colls*., 781 F.3d 161, 169-70 (4th Cir. 2015) (citing cases from six other circuits recognizing due process rights against an accreditor). The "contours" of

the federal common law right of due process are "informed by the Secretary's definition of due process as contained in the Secretary's regulations." *Edward Waters*, 2005 WL 6218035, at *5 n.7 (citing 34 C.F.R. § 602.25); *accord Bristol Univ. v. Accrediting Council for Indep. Colls. & Schs*., 691 F. App'x 737, 741 (4th Cir. 2017).

In adjudicating federal common law due process claims, courts apply principles of administrative law. *See Prof'l Massage*, 781 F.3d at 170; *Chi. Sch. of Automatic Transmissions, Inc. v. Accreditation All. of Career Schs. & Colls*., 44 F.3d 447, 450 (7th Cir. 1994) ("We think that principles of administrative law supply the right perspective for review of accrediting agencies' decisions."). Judicial review of such claims is "similar to the inquiry under the Administrative Procedure Act. ('APA')." *Fine Mortuary Coll., LLC v. Am. Bd. of Funeral Serv. Ed., Inc*., 473 F. Supp. 2d 153, 157 (D. Mass. 2006). Thus, courts consider whether the accreditor's decision is arbitrary, capricious, unreasonable, an abuse of discretion, not based on substantial evidence, or otherwise not in accordance with law or reached without observance of procedure required by law. *See Prof'l Massage*, 781 F.3d at 171-72; *Hiwassee Coll.*, 531 F.3d at 1335 & n.4; *Chicago Sch.*, 44 F.3d at 449; *Edward Waters*, 2005 WL 6218035, at *5, *13 n.17; *Fla. Coll. of Bus*., 954 F. Supp. at 258.

The APA requires an agency to provide a "reasoned explanation" for its actions. *Judulang v. Holder*, 565 U.S. 42, 53 (2011); *see Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 920 (D.C. Cir. 2017) (APA "prohibits arbitrary and capricious actions by federal agencies and mandates that they give reasoned explanation for the actions that they do take"). And so it is with accrediting agencies. Due process requires that an accreditor's decision "be provided in writing and supported by the evidence." *Prof'l Massage*, 781 F.3d at 179. Both kinds of agencies must give a reasoned explanation for any departure from agency precedent.

See Ramaprakash v. FAA, 346 F.3d 1121, 1124 (D.C. Cir. 2003). "An agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Id*. at 1125 (quotation marks omitted).

To satisfy due process, it is not enough for an accrediting agency to have fair rules of procedure. The outcome of the accreditor's procedures must comport with due process by producing a decision that is not arbitrary and capricious. *See Fla. Coll. of Bus*., 954 F. Supp. at 258 (accreditor's "internal rules … provided a fair and impartial procedure" but its decision still could not be "arbitrary, capricious, … or not supported by substantial evidence").

Like an administrative agency, an accrediting agency receives "a measure of deference" from a reviewing court but not "total deference." *Prof'l Massage*, 781 F.3d at 171, 169. Indeed, "judicial oversight of the accreditation process surely has its place," *id*. at 172, because accrediting agencies, "like all other bureaucratic entities, can run off the rails," *id*. at 169. "[T]he accreditors wield enormous power over institutions—life and death power, some might say—which argues against allowing such agencies free rein to pursue personal agendas or go off on some ideological toot." *Id*. at 170.

Coastal's Complaint alleges that the Committee's April 27, 2018 decision violated due process. The ABA, except for its ripeness-like argument based on the Council appeal, does not argue that Coastal has failed to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). Because the Committee's decision imposed immediate consequences and requirements on Coastal that are not stayed by the pending appeal, the ABA's argument lacks merit and its request for dismissal should be denied.

III. The Court Should Not Grant a Stay Based on the ABA's Pending MDL Motion.

As a fallback to its ripeness argument, the ABA argues that this Court should grant a stay because the ABA has filed a motion with the U.S. Judicial Panel on Multidistrict Litigation ("the MDL Panel") to transfer this case (and another case pending in the District of Arizona) to the Western District of North Carolina (where a third case is pending). Coastal, two other law schools, and InfiLaw Corporation have opposed the ABA's motion to consolidate the cases in North Carolina. In the alternative, the law schools have argued that, if consolidation is to occur, the Arizona and North Carolina cases should be transferred here, to the Middle District of Florida. The action filed by Coastal in this Court was the first of the three actions to be filed.

The MDL Panel has scheduled oral argument on the ABA's motion for July 26, 2018. *See* ABA Mot. 21. The ABA states that it "anticipate[s]" a decision "a week or two thereafter." *Id*. The basis for the ABA's forecast is, however, not stated. Although Coastal will not venture to predict the outcome of the MDL process, it should be noted that the MDL Panel has stated that "[i]n litigation such as this, where only a few actions are involved, the proponent of centralization bears a heavier burden to demonstrate that centralization is appropriate." *In re: Walden Univ., LLC, Doctoral Program Litig.*, 273 F. Supp. 3d 1367, 1368 (J.P.M.L. 2017).

Under the MDL Panel's rules, the ABA's motion to transfer does not have any effect on this case unless and until the Panel grants the motion. Rule 2.1(d) of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation provides:

> The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in any pending federal district court action and does not limit the pretrial jurisdiction of that court.

"In other words, a district judge should not automatically stay discovery, postpone rulings on pending motions, or generally suspend further rulings upon a parties' motion to the MDL Panel

for transfer and consolidation." *Jozwiak v. Stryker Corp*., No. 6:09-cv-1985, 2010 WL 147143, at *2 (M.D. Fla. Jan. 11, 2010) (quoting *Rivers v. Walt Disney Co.,* 980 F. Supp. 1358, 1360 (C.D. Cal. 1997)) (denying stay); *accord Guerrero v. Target Corp*., No. 12-21115-CIV, 2012 WL 2054863, at *1 (S.D. Fla. June 7, 2012) (quoting *Jozwiak* and denying stay); *see also Hopkins v. Transocean Ltd*., No. 10-0221, 2010 WL 2104548, at *1 (S.D. Ala. May 25, 2010) ("A critical point is that a stay pending transfer to MDL proceedings is not automatic.") (quotation marks and brackets omitted) (denying stay); *Toppins v. 3M Co*., No. 4:05CV1356, 2006 WL 12993, at *1 (E.D. Mo. 2006) ("A court need not automatically stay a case merely because a party has moved the MDL for transfer and consolidation.") (denying stay).

The reasons the *Guerrero* court gave for denying a stay apply here as well. First, "Defendant has failed to demonstrate that it will endure hardship and inequity if this case is not stayed." *Guerrero*, 2012 WL 2054863, at *1. Second, "Defendant must respond the complaint regardless of whether the case is ultimately transferred to an MDL." *Id*. "Finally, it is unfair to Plaintiff to stay resolution of this case indefinitely when consolidation and transfer to a potential MDL is far from certain." *Id*.

The ABA cites only one case in support of its request for a stay based on its MDL motion, *Hedberg v. Actavis Grp*., No. 810-cv-592, 2010 WL 963196 (M.D. Fla. March 16, 2010), but in that case the stay motion was unopposed. *See id*. at *1 ("Defendants' Unopposed Motion to Stay Proceedings … is Granted").

IV. If the Court Is Inclined to Grant the ABA's Motion, It Should Stay the Case Rather Than Dismiss.

The Court should neither dismiss nor stay this case for the reasons stated in this brief. If, however, this Court is inclined to grant the ABA's motion, the Court should stay the case rather than dismiss it. The Council will hear the ABA's appeal on August 2, 2018. According to the

ABA, the Council's decision could come "as early as September." ABA Mot. 13. Coastal will be able to seek leave to amend its complaint after the Council decides the appeal. *See* Fed. R. Civ. P. 15(a)(2) (party may amend complaint "with the opposing party's written consent or the court's leave" and "[t]he court should freely give leave when justice so requires"); *Woldeab v. Dekalb Cty. Bd. of Ed*., 885 F.3d 1289, 1291 (11th Cir. 2018) ("A district court's discretion to deny leave to amend a complaint is 'severely restricted' by Fed. R. Civ. P. 15, which stresses that courts should freely give leave to amend 'when justice so requires.'"). It would be a waste of resources for this Court to dismiss this action and make Coastal file a new action after the Council decides the appeal. Finally, the Court should not dismiss the case because it is possible that the MDL Panel will transfer to this Court the other two cases at issue in the ABA's MDL motion. *See supra* at 17.

CONCLUSION

For the foregoing reasons, the ABA's motion to dismiss without prejudice or, in the alternative, stay should be denied.

Respectfully submitted,

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Dated: July 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notification of the filing to all counsel of record in this case.

/s/ H. Christopher Bartolomucci
H. Christopher Bartolomucci