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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 07-1817 PA (FMOx) Date May 7, 2007

Title Whittier College v. American Bar Ass'n

Present: The Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

C. Kevin Reddick	Bridget Montero	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Paul Kiesel William Larson	Patricia Larson Robert Stone Anne Rea

Proceedings: **Application for Preliminary Injunction**

Before the Court is a Motion for Preliminary Injunction filed by plaintiffs Whittier College and Whittier Law School (collectively "Whittier") (Docket No. 5). Whittier seeks injunctive relief against defendants the American Bar Association ("ABA") and the ABA's Council of the Section of Legal Education and Admissions to the Bar (the "Council") preventing the ABA from revoking Whittier's status as an ABA-approved law school. Whittier also seeks mandatory injunctive relief requiring the ABA to revoke the ABA's August 2005 decision placing Whittier on probation and to delete all references to Whittier's probationary status from all ABA websites and publications. Finally, Whittier requests that the Court enjoin the ABA from placing Whittier on probation for a period of five years and to forbid the ABA from proceeding against Whittier except in compliance with the ABA's published standards, interpretations, and rules of procedure.

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I. Factual Background

The Council is recognized by the United States Department of Education as the accrediting agency for law schools. An accredited law school qualifies for federal student loans and many states require graduation from an ABA-accredited law school to become a member of the bar. The Council's accreditation process, which the ABA calls "approval," is governed by the ABA's Rules of Procedure. In making its decisions, the Council is assisted by the Accreditation Committee (the "Committee"). The Committee and Council apply the ABA's published Standards for Approval of Law Schools (the "Standards") and Interpretations (the "Interpretations") which help clarify the Standards.

The Committee and Council monitor schools to ensure that they operate in compliance with the Standards. Among other methods, the ABA monitors schools through site visits. Following an inspection, the site team issues a report which is provided to the Committee and the school. The Committee considers the site visit report and any comments and evidence submitted by the school before making findings of fact and conclusions regarding the school's compliance with the Standards. These written findings of fact and conclusions are provided to the school. Representatives from the school may

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appear before the Committee and be represented by counsel. A school's appearance before the Committee is transcribed.

If the Committee concludes that it has reason to believe that a school is not in compliance with the Standards, the Committee will notify the school in writing of its concern and request additional information from the school. If, after reviewing additional information, the Committee determines that the school has not demonstrated compliance, the Committee may order the school to show cause why it should not be required to take appropriate remedial action or be sanctioned. Sanctions may include monetary penalties, censure, probation, and removal from the list of ABA-approved schools. When the Council considers a recommendation from the Committee to impose sanctions, the Council will consider the Committee's findings of fact and conclusions, the record before the Committee, and may permit the school to submit additional evidence. The school may appear before the Council and be represented by counsel. The school's appearance before the Council is transcribed. The Council then issues a written decision which is provided to the school.

When it decides that probation is warranted, the Council sets a time limit for the school to come into compliance. This time period may not exceed two years unless the Committee or Council extends the probationary period for good cause. If the Committee decides at the end of a school's period of probation that the school has not established that it is in compliance, and there is no cause to extend probation, the Committee may recommend that the Council remove the school from the list of ABA-approved schools. If the Council agrees to remove the school from the approved list, the school may appeal the decision to the ABA's House of Delegates.[1/] A school's removal from the approved list is stayed pending a decision by the House of Delegates. Any student who enrolls in an ABA-approved school prior to the decision to remove the school from the approved list becoming final is considered to have graduated from an ABA-approved school.

Whittier became an ABA-approved law school in 1985. The school moved from Los Angeles to Costa Mesa in 1997. Soon after moving to Costa Mesa, the first time success rate of Whittier's graduates on the California bar examination plummeted. In 1999, the Committee and Council communicated their concerns about Whittier's first-time passage rate on the California bar examination to Whittier.[2/] In many of these communications, the Committee expressed its concern that Whittier's "graduates are less successful on the California bar examination than graduates of other ABA-approved law schools in California." See Cogan Declaration, Exhibits 4, 9, 10 & 11. As a result of the unfavorable comparison between Whittier's bar passage rate and the passage rate of the other ABA-

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[1/] The control and administration of the ABA is vested in the House of Delegates, the policy-making body of the association.

[2/] The Committee had previously cited Whittier for its low bar first-time passage rate in 1992, 1993, 1994 and 1995. See Cogan Declaration, Ex. 14, p. 212-13.

approved law schools in California, the Committee concluded that Whittier had not established compliance with Standard 301(a), which states: "A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession." The Committee also found that Whittier had not established compliance with Interpretation 301-1, which provided: "Among the factors to be considered in assessing the extent to which a law school complies with [Standard 301] are the attrition rate of the school's students, and the bar passage and career placement rates of its graduates."[3]

In responding to the Committee's concerns, Whittier frequently compared its first-time bar passage rate to the overall bar passage rate of students from California's ABA-approved law schools. See Cogan Declaration, Exhibits 7, 8, 18, 22, 23 & 24. Indeed, as both the ABA and Whittier acknowledge, both in their submissions to the Court and in more than six years of correspondence, with only one exception, Whittier's first-time bar passage rate has been persistently and substantially below the average for all California ABA-approved law schools since at least the February 1997 California bar examination:

Examination	All California ABA-approved	Whittier	Difference
February 1997	69.8	60.9	-8.9
July 1997	82.4	67.9	-14.5
February 1998	62.8	73.9	11.1
July 1998	72.1	45.9	-26.2
February 1999	55.8	55.6	-0.2
July 1999	69	43	-26
February 2000	50	26	-24
July 2000	74	54	-20
February 2001	50	28	-22
July 2001	79	50	-29

[3] Interpretation 301-1 was amended and renumbered in 2004. The revised Interpretation 301-3 states: "Among the factors to be considered in assessing the extent to which a law school complies with this Standard are the rigor of its academic program, including its assessment of student performance, and the bar passage rates of its graduates." Unless otherwise noted, the Court will refer to Interpretation 301-3.

Examination	All California ABA-approved	Whittier	Difference
February 2002	52	38	-14
July 2002	72	42	-30
February 2003	57	25	-32
July 2003	72	31	-41
February 2004	49	24	-25
July 2004	69	41	-28
February 2005	58	33	-25
July 2005	70	40	-30
February 2006	60	38	-22
July 2006	74	59	-15

In light of its poor performance on the bar examination in comparison to the other California ABA-approved law schools, and after determining that Whittier's initial efforts to improve its bar passage rate had not resulted in any noticeable improvement, the Committee, in June 2004, ordered Whittier to show cause why it should not be required to take appropriate remedial action, be placed on probation, or be removed from the list of ABA-approved law schools. See Cogan Declaration, Ex. 12. The Committee conducted a hearing on its order to show cause in April 2005. Accompanied by counsel, Whittier Law School's Dean and Whittier College's President appeared at the hearing. In its April 2005 Recommendation, the Committee noted that "beginning in 1996, a significant double-digit gap developed between the School's first-time passage rate and the passage rate for all other ABA-approved schools in California." Id., Ex. 14, p. 214. The Committee concluded that Whittier "has not demonstrated that it is in compliance with Standard 301(a) and Interpretation 301-3 and that the Law School's noncompliance is substantial and has been persistent." Id. at p. 220. The Committee recommended that the Council place Whittier on probation for two years and require that Whittier demonstrate compliance with Standard 301 and Interpretation 301-3 before being removed from probation. Id. Whittier appealed the Committee's recommendation to the Council.

In August 2005, the Council considered the Committee's recommendation along with the arguments and evidence submitted in support of Whittier's appeal. Representatives from Whittier, including the Dean, President, Chairman of the Board of Trustees, and outside counsel appeared at the Council's meeting. In adopting the Committee's April 2005 findings of fact, the Council found that the Committee's findings were supported by substantial evidence. Id., Ex. 15, p. 240. The Council

concluded that Whittier "has not demonstrated that it is in compliance with Standard 301(a) and Interpretation 301-3 and that the Law School's noncompliance is substantial and has been persistent." Id. at p. 250. The Council placed Whittier on probation for two years. Id. at p. 251. The Council further determined that in order to be taken off probation prior to or at the end of the two year period, Whittier must demonstrate compliance with Standard 301(a) and Interpretation 301-3. Id. The Council also required Whittier to submit a plan for bringing the school into compliance with Standard 301(a) and Interpretation 301-3 by October 2005.

Since being placed on probation in August 2005, Whittier has submitted its remedial plan and adopted a "small school" model with reduced enrollment and higher admission standards. According to Whittier, its probationary status has made it more difficult to improve its bar passage results. Several of its faculty have left, students, including some of Whittier's most successful, have transferred to other schools, and the smaller class size has reduced the school's financial resources. Despite these challenges, Whittier's success rate on the July 2006 California bar exam improved by 19 points from the prior year from 40% to 59%. Even the 59% pass rate was, however, 15% below the average for all California ABA-approved schools.

In light of the improvement, Whittier petitioned the Committee in December 2006 to remove the school from probation. Although noting the progress made by Whittier, the Committee declined to remove Whittier from probation prior to the expiration of the two-year probationary period in January 2007. In rejecting Whittier's request, the Committee issued a written decision which concluded that Whittier "has not yet demonstrated that it is in compliance with Standard 301(a) and Interpretation 301-[3]." Id., Ex. 25, p. 798. Whittier appealed the Committee's denial of its request to the Council. In February 2007, the Council considered Whittier's appeal. Representatives from Whittier, including the Dean, President, and Chairman of the Board of Trustees appeared at the Council's meeting. Id. at Ex. 26. Following its review of the Committee's decision and the evidence submitted in support of Whittier's appeal, the Council concurred in the Committee's conclusion that Whittier was still not in compliance with Standard 301 and Interpretation 301-3. Id. As a result, Whittier remains on probation at least through August 2007.

On March 19, 2007, following the denial of its appeal, Whittier commenced this action. In its Complaint, Whittier alleges that the ABA has violated its rights to due process under Federal and California common law. Specifically, Whittier contends that in assessing its compliance with Standard 301(a) and Interpretation 301-3, the ABA has applied "unapproved and unpublished" criteria. In support of its allegations, Whittier asserts that Hulett Askew, the ABA's Consultant on Legal Education, has admitted that rather than relying on the flexible guidelines for bar passage contained in Standard 301 and Interpretation 301-3, the ABA actually applies a strict objective numerical requirement. In testimony before the United States Department of Education in December 2006, Mr. Askew stated:

> If [the] bar passage is over 70 percent for the graduating students in the main State in which the school is located, there typically is no problem with that law school. However, if that law school is more than ten points below the ABA State average in that [State], for instance, if the State average for all ABA schools is 90 percent, and the law school is at 75 percent, we may request additional information from the school as to why you are falling below your sister law schools in your State.
>
> So if it's above 70 percent and within ten points of the average, there's typically no problem. If it is between 70 and 60, I'll discuss that in a minute. If it's below 60 percent for the main jurisdiction in which the students take the exam, we will always request additional information from the law school in terms of what additional information it can provide us, the Accreditation Committee, at the first cut about bar passage in that State.

Patton Declaration, Ex. 4, p. 95-96. Whittier further contends that the ABA's March 2007 publication of a proposed amendment to the Standards, which would add Interpretation 301-6, provides additional evidence that the ABA has enforced a "secret" bar passage requirement. The proposed Interpretation 301-6 states:

> In considering bar passage rates when determining a school's compliance with Standards 301(a) and 501(b), the first-time bar passage rates of a school's graduates for the most recent three years in the three jurisdictions in which the largest number of the school's graduates take the bar examination are initially reviewed. If data demonstrate to the Accreditation Committee that the school's first-time bar passage rates frequently are seventy percent or below, the school shall be asked to provide additional information in order to demonstrate compliance with the Standards. Such additional information may include, without limitation, first-time bar passage rates for a number of years in other jurisdictions in which a substantial number of the school's graduates take the bar examination, second-time taker bar passage rates of the school's graduates for a number of years, and ultimate bar passage rates of the school's graduates for a number of years; and, for the previous three years, information on academic support, attrition rates, bar preparation programs, and the entering credentials of students.

Supplemental Cogan Declaration, Ex. 2, p. 7; see also id. at p. 5 ("The 'trigger of 70% or below is the benchmark that the Accreditation Committee has most frequently used in recent years.").

II. Legal Standard for Issuance of a Preliminary Injunction

Whittier filed its Motion for Preliminary Injunction one day after commencing this action. To obtain a preliminary injunction in the Ninth Circuit, a party must demonstrate: "(1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor." Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1201 (9th Cir. 1980); accord Textile Unlimited, Inc. v. A..BMH Co., Inc., 240 F.3d 781, 786 (9th Cir. 2001). "'These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.'" MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 516-17 (9th Cir. 1993) (quoting Diamontiney v. Borg, 918 F.2d 793, 795 (9th Cir. 1990)). "'Where a party can show a strong chance of success on the merits, he need only show a possibility of irreparable harm. Where, on the other hand, a party can show only that serious questions are raised, he must show that the balance of hardships tips sharply in his favor.'" Id. at 1517 (quoting Bernard v. Air Line Pilots Ass'n, Int'l, 873 F.2d 213, 215 (9th Cir. 1989)). Delay in requesting injunctive relief may rebut an allegation of irreparable harm. See Miller v. Cal. Pac. Med. Ctr., 991 F.2d 536, 544 (9th Cir. 1993) ("'Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.'") (quoting Oakland Tribune, Inc. v. Chronicle Publ'g Co., 762 F.2d 1374, 1377 (9th Cir. 1985)).

For purposes of injunctive relief, "'serious questions' refers to questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo.'" Gilder v. PGA Tour, Inc. 936 F.2d 417, 422 (9th Cir. 1991) (quoting Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988); see also id. ("Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a 'fair chance of success on the merits.'"). "Under any formulation of the test, the moving party must demonstrate a significant threat of irreparable injury." Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987) (citing Oakland Tribune, Inc., 762 F.2d 1374 at 1376). Additionally, in cases "'where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff.'" Harris v. Board of Supervisors, 366 F.3d 754, 760 (9th Cir. 2004) (quoting Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992)). "The public interest inquiry primarily addresses impact on non-parties rather than parties." Sammartano v. First Judicial District Court, 303 F.3d 959, 974 (9th Cir. 2002).

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L. Ed. 2d 162 (1997). However, a preliminary injunction "is not a preliminary adjudication on the ultimate merits." Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1423 (9th Cir. 1984). "[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." University

of Texas v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834, 68 L. Ed. 2d 175 (1981); see also Sierra On-Line, 739 F.2d at 1423 (for preliminary relief, the court need only find a probability that necessary facts will be established, not that such facts actually exist).

In seeking mandatory injunctive relief in addition to a prohibitory injunction, Whittier acknowledges that some of the injunctive it seeks goes well beyond maintaining the status quo. Stanley v. University of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994) ("A prohibitory injunction preserves the status quo. A mandatory injunction 'goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored.' When a mandatory preliminary injunction is requested, the district court should deny such relief 'unless the facts and law clearly favor the moving party.'") (citations omitted) (quoting Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1979)); Martin v. International Olympic Comm., 740 F.2d 670, 675 (9th Cir. 1984) ("In cases such as the one before us in which a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing a preliminary injunction."); Anderson, 612 F.2d at 1115 ("'[M]andatory injunctions, however, are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.'") (quoting Clune v. Publishers' Assn., 214 F. Supp. 520 (S.D.N.Y. 1963)).

III. Analysis

Although Whittier has characterized its claims as arising under "common law due process," because the ABA is a private organization, it is more accurate to characterize the claims as arising under Whittier's rights to "fair procedure." See Thomas M. Cooley Law School v. ABA, 459 F.3d 705, 711 (6th Cir. 2006) ("Many courts, including this one, recognize that 'quasi-public' professional organizations and accrediting agencies such as the ABA have a common law duty to employ fair procedures when making decisions affecting their members. Courts developed the right to common law due process as a check on organizations that exercise significant authority in areas of public concern such as accreditation and professional licensing.") (citations omitted); see also Applebaum v. Bd. of Directors of Barton Mem'l Hosp., 104 Cal. App. 3d 648, 657, 163 Cal. Rptr. 831, 836 (1980) ("The distinction between fair procedure and due process rights appears to be one of origin and not of the extent of protection afforded an individual; the essence of both rights is fairness. Adequate notice of charges and a reasonable opportunity to respond are basic to both sets of rights.").

Whether a fair procedure claim is brought pursuant to federal or California law, the legal analysis a court performs is nearly identical. In assessing a federal fair procedure claim, courts review "only whether the decision of an accrediting agency such as the ABA is arbitrary and unreasonable or an abuse of discretion and whether the decision is based on substantial evidence." Thomas M. Cooley Law School, 459 F.3d at 712. Similarly, under California law, "an organization's decision to expel or exclude an individual may be arbitrary either because the reason underlying the rejection is irrational or because the organization has proceeded in an unfair manner. . . . [W]henever a private association is

legally required to refrain from arbitrary action, the association's action must be both substantively rational and procedurally fair." Pinsker v. Pac. Coast Soc'y of Orthodontists, 12 Cal. 3d 541, 550, 126 Cal. Rptr. 245, 251-52 (1974). Because of the similarities between fair procedure claims, the Court concludes that the result it reaches would be the same whether it is analyzed under federal or California law. As a result, the Court, at least at this stage, need not determine if Whittier's state law claim is preempted by federal law. Compare Keams v. Tempe Technical Inst., Inc., 39 F.3d 222 (9th Cir. 1994) (finding no preemption of state law wrongful accreditation claim brought by student against accrediting agency) with Thomas M. Cooley Law School, 459 F.3d at 712 ("Federal courts have exclusive jurisdiction over any action brought by a school challenging an accreditation decision made by an organization approved by the Secretary (such as the ABA). This grant of exclusive federal jurisdiction necessarily implies that federal law should govern disputes relating to decisions made by those bodies. It would make little sense for state law to govern claims that could not be heard in any state court.") (citing 20 U.S.C. § 1099b(f) and Chicago School of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools & Colls., 44 F.3d 447, 450 (7th Cir. 1994) (declining to follow Keams)).

The standard of review on a fair procedure claim is even more deferential than the review a court undertakes in an action brought pursuant to the Administrative Procedure Act:

> Although accrediting agencies perform a quasi-governmental function, they are still private organizations. Courts have made the policy decision to ensure that these organizations act in the public interest and do not abuse their power, but judicial review is limited to protecting the public interest. Recognizing that "the standards of accreditation are not guides for the layman but for professionals in the field of education," great deference should be afforded the substantive rules of these bodies and courts should focus on whether an accrediting agency such as the ABA followed a fair procedure in reaching its conclusions. We are not free to conduct a de novo review or substitute our judgment for that of the ABA or its Council.

Thomas M. Cooley Law School, 459 F.3d at 713 (citing 5 U.S.C. § 706(2)(A) and quoting Wilfred Acad. of Hair & Beauty Culture v. S. Ass'n of Colls. & Schools, 957 F.2d 210, 214 (5th Cir. 1992)); see also id. ("[I]n analyzing whether the ABA abused its discretion or reached a decision that was arbitrary or unreasonable, we focus on whether the agency 'conform[ed] its actions to fundamental principles of fairness.'") (quoting Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Technical Schools, 817 F.2d 1310, 1314 (9th Cir. 1987)); W. State Univ. Of S. Cal. v. American Bar Ass'n, 301 F. Supp. 2d 1129, 1135 (C.D. Cal. 2004) ("The Court's review is very deferential, but review includes the inquiry whether the accrediting body followed its own rules.").

A. Likelihood of Success on the Merits/Serious Questions

Given the number of hearings and opportunities Whittier has had to present evidence to the Committee and Council, it cannot seriously argue that the ABA violated its procedural rules. Whittier had adequate notice of each hearing, was provided with written decisions, was represented by counsel, was allowed to appear at hearings, was permitted to supplement the record with additional evidence, and took appeals of the Committee's adverse rulings to the Council. Instead, Whittier contends that despite the flexible guideline codified in Standard 301(a) and Interpretation 301-3, it has actually been subject to a far stricter "secret" numerical bar passage requirement. Relying on the December 2006 testimony of Mr. Askew before the United States Department of Education and the recent promulgation of proposed Interpretation 301-6, Whittier claims that this "unpublished and unapproved" criteria for bar passage rates has denied it a fair procedure by giving it no notice of the actual standard against which the ABA was measuring it.

The Court concludes that Whittier has little likelihood of success on the merits of its claims. Nor has Whittier raised a serious question. There appears to be little that is new or different about either Mr. Askew's testimony or proposed Interpretation 301-6. Both are, as Mr. Askew and proposed Interpretation 301-6 make clear, merely a "trigger" for further review. That further review, as Whittier appears to have known all along, measures a law school's bar passage rate against the bar passage rates of other ABA-approved schools in the same jurisdiction. There is little evidence that the ABA's conclusions concerning Whittier's failure to establish compliance with Standard 301(a) and Interpretation 301-3 were arbitrary or without substantial evidentiary support. The ABA consistently and repeatedly expressed its concern that Whittier failed to establish compliance with Standard 301(a) and Interpretation 301-3 given the fact that its bar passage rate was persistently and substantially below the average for ABA-approved schools in California. The ABA was not alone in measuring Whittier's bar passage rate against the other ABA-approved schools in California. Indeed, that is precisely how Whittier measured itself when responding to the ABA's concerns. Put simply, and particularly in light of the "great deference" to which the decisions of the ABA are entitled, the Court finds that Whittier has failed to raise serious questions or to establish a likelihood of success on the merits of its claims.

B. Irreparable Injury/Balance of Hardships

Though significant, the harm suffered by Whittier as a result of the ABA's decision to place the school on probation does not justify the issuance of preliminary injunctive relief. Importantly, after being placed on probation in August 2005, Whittier waited approximately eighteen months before filing this action and bringing its Motion for Preliminary Injunction. Such a delay rebuts any contention of irreparable injury. See Miller, 991 F.2d at 544; Oakland Tribune, Inc., 762 F.2d at 1377; see also Richard Feiner & Co. v. Turner Entm't Co., 98 F.3d 33, 34 (2d Cir. 1996) ("The presumption [of irreparable harm] may be rebutted, if the defendant is able to demonstrate that the plaintiff delayed in bringing an action requesting preliminary injunctive relief.") (holding eighteen-month delay in seeking

injunctive relief rebutted presumption of irreparable harm); High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc., 49 F.3d 1551, 1557 (Fed. Cir. 1995) ("Absent a good explanation, not offered or found here, 17 months is a substantial period of delay that militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief."); Playboy Enters., Inc. v. Netscape Commc'ns Corp., 55 F. Supp. 2d 1070, 1090 (C.D. Cal. 1999) (finding five month delay in seeking injunctive relief "demonstrates the lack of any irreparable harm").

Whittier claims that it moved quickly in bringing this action and seeking injunctive relief once it became aware of the ABA's use of "unpublished and unapproved" criteria. As the Court explained earlier, there appears to be little that is new or different about either Mr. Askew's December 2006 testimony or proposed Interpretation 301-6. Whittier has known for years that the performance of its graduates on the bar examination was being measured against the bar passage rates of the other ABA-approved schools in California. Moreover, the harm Whittier claims to have suffered must have begun when it was placed on probation. This is true regardless of whether the school is correct when it alternatively alleges that the ABA either failed to give the school adequate notice of the standard against which it was being measured or was applying a "secret" standard. At a minimum, Whittier was put on notice of the way in which the ABA analyzed bar passage information in December 2005 when ABA sent a memorandum to its member schools explaining the use of bar passage data in the accreditation process. See ABA Exh. 4. The December 2005 Memorandum notified member schools that the Committee and Council "do not apply Standard 301(a) to require that a school's graduates have any specific minimum bar passage rate. Adopting such a rigid standard would be unrealistic in light of the wide variation in bar passage rates and minimum score requirements that exist across jurisdictions in the United States." Id., p. 193. The December 2005 Memorandum further stated:

> In examining bar passage data, the Accreditation Committee and the Council initially do focus on first-time bar passage success of a school's graduates in the jurisdictions in which the largest number of the school's graduates sit for the bar. . . .
>
> If examination of those first-time bar passage data indicate concerns as to a school's compliance with Standard 301, however, the school is encouraged to gather and provide more extensive bar passage data, such as "ultimate" bar passage data for those of its graduates who take a bar examination more than once, and first-time and repeat-taker bar passage data for the school's graduates in any jurisdictions in which a substantial number of its graduates sit for a bar examination. . . .
>
> It also should be emphasized that, in considering bar passage data when determining compliance with Standard 301, the Accreditation Committee and the Council look at bar passage results over a number of

> administrations. One "bad" result in one administration of a bar examination is not likely to result in a school's being found out of compliance with Standard 301, and one "good" result is not likely to result in a school that is on report for non-compliance with Standard 301 being relieved of an obligation to continue to report on this issue.

Id. at p. 193-94. As a result of its delay of eighteen months prior to seeking injunctive relief, the Court concludes that Whittier cannot establish irreparable harm.

Nor does the balance of hardships tip sharply in Whittier's favor. Although being placed on probation has resulted in no small amount of difficulty for Whittier, the integrity of the ABA's accreditation process, and the interests of prospective students in being informed of the history of poor first-time bar passage rate of Whittier's graduates argues against the issuance of the injunctive relief Whittier seeks. The Court therefore concludes that neither the balance of hardships nor the public interest would be served by the issuance of injunctive relief.

IV. Conclusion

The Court applauds the efforts Whittier has made to promote diversity and address the challenge of increasing the level of minority participation in the legal profession. The Court also recognizes the improvement that Whittier's graduates achieved on the most recent California bar examination, as well as the efforts Whittier has made to improve the quality of its student body and educational programs since it was placed on probation by the ABA. Nevertheless, Whittier has not established its entitlement to the injunctive relief it seeks. Whittier's probationary period continues through at least August 2007. Whether Whittier should continue on probation beyond August 2007, or removed from the ABA's list of approved schools, is a decision which must be made, in the first instance, by the ABA. For all of the foregoing reasons, Whittier's Motion for Preliminary Injunction is denied.

The Court sets a Scheduling Conference for June 4, 2007, at 10:30 a.m. The parties' Federal Rule of Civil Procedure 26(f) Joint Report shall be filed by May 25, 2007.

IT IS SO ORDERED.