

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

**Accrediting Council for Independent Colleges  
and Schools,**

Plaintiff,

v.

**John King, Jr., in his official capacity as  
Secretary of the Department of Education,**

**and**

**United States Department of Education,**

Defendants.

Civil Action No. 16-2448

ORAL ARGUMENT REQUESTED

**PLAINTIFF’S MOTION FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

Pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1, Plaintiff Accrediting Council for Independent Colleges and Schools (“ACICS”), by and through its undersigned counsel, hereby moves the Court for an Order granting a Temporary Restraining Order and Preliminary Injunction enjoining Defendants John King, Jr. (the Secretary of the Department of Education) and United States Department of Education (“Department” or “Department of Education”) asking that the Court, pending further judicial review, stay the Secretary’s decision terminating ACICS’s recognition status, restore ACICS’s recognition status, and also that the Court enjoin the Department and the Secretary from enforcing the Department’s requirements set forth in the Department’s “Provisional Program Participation Agreement and the Addendum. *See* Declaration of Roger L. Swartzwelder ¶ 30, Ex. 5. Plaintiff respectfully requests an oral hearing on this matter on Monday, December 19, 2016.

ACICS accredits postsecondary institutions. Prior to December 12, 2016, ACICS was recognized by the Department of Education. Defendants improperly terminated ACICS’s

recognition status through an agency review process that violated the Administrative Procedure Act. Defendants' unlawful decision will cause ACICS and has already caused ACICS irreparable and imminent harm; this necessitates granting ACICS's proposed order seeking relief.

Accordingly, ACICS seeks a temporary restraining order that would prevent the Department's unlawful decision from taking effect prior to resolution of ACICS's Administrative Procedure Act challenge. Specifically, ACICS requests a temporary restraining order that: (1) stays the Secretary of Education's decision revoking ACICS's recognition; (2) returns ACICS to the status quo and continues its recognition status; and (3) enjoins the Department from implementing and enforcing the Provisional Program Participation Agreement and any other provisions that the Department has immediately applied to ACICS-accredited institutions.

ACICS exhausted its administrative remedies prior to seeking federal court review. Pursuant to the Administrative Procedure Act and the Department of Education Regulations, 34 C.F.R. § 602.38, it is entitled to judicial review of Defendants' termination decision and can satisfy each of the factors relating to whether the Court should grant preliminary injunctive relief. Specifically, Defendants' actions in terminating ACICS's recognition violated the Administrative Procedure Act because the termination decision: (1) was arbitrary and capricious; (2) was the result of a procedurally defective process; and (3) was not supported by evidence in the record. Moreover, ACICS will suffer irreparable harm should Defendants' termination decision go into effect, Defendants will not suffer a substantial injury from the injunction, and the public interest favors an injunction.

In support of this motion, Plaintiff relies upon the attached memorandum of points and authorities. A proposed order is attached.

ORAL ARGUMENT IS RESPECTFULLY REQUESTED.

Dated: December 15, 2016

Respectfully submitted,

By: /s/ Allyson B. Baker

Allyson B. Baker (#478073)

Meredith L. Boylan (#978088)

Andrew T. Hernacki (# 1024442)

Hillary S. Profita (*pro hac vice* motion to be filed)

Venable LLP

575 7th Street, NW

Washington, DC 20004

202-344-4073 Telephone

202-344-8300 Facsimile

abbaker@venable.com

mlboylan@venable.com

athernacki@venable.com

hsprofita@venable.com

*Counsel for Accrediting Council for  
Independent Colleges and Schools*

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

**Accrediting Council for Independent Colleges  
and Schools,**

Plaintiff,

v.

**John King, Jr., in his official capacity as Secretary  
of the Department of Education,**

**and**

**United States Department of Education,**

Defendants.

Civil Action No. 16-2448

ORAL ARGUMENT REQUESTED

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

**TABLE OF CONTENTS**

**PRELIMINARY STATEMENT**..... 1

**STATEMENT OF FACTS AND PROCEDURAL POSTURE** .....5

    A.    ACICS Accredits Certain Postsecondary Institutions And Programs ..... 5

    B.    The Department of Education’s Regulations Prescribe A Specific Process For How Petitions For Continued Recognition Are Considered..... 8

    C.    ACICS Petitioned For Continued Recognition And During The Initial Step, Department Staff Violated Their Own Rules..... 11

    D.    The Final Department Staff Report Fails To Account For “All Available Relevant Information,” Has Numerous Errors, And Misapplies The Recognition Criteria 13

    E.    The NACIQI Panel Hearing Was Tainted By Politics And Improperly Relied On Immaterial Facts In Rendering A Decision ..... 17

    F.    The SDO’s Decision And The Secretary’s Decision Each Rely On Stale Information Derived From A Procedurally-Flawed Record And Process That Involved Numerous Violations Of Department Rules..... 20

    G.    The Department Is Mandating That ACICS-Accredited Schools Immediately Take Steps To Move To An Alternate Accrediting Agency As A Condition For Their Students Continuing To Be Eligible To Receive Federal Funds ..... 22

**ARGUMENT** .....25

**I.    ACICS HAS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE DEFENDANTS CLEARLY VIOLATED THE APA** ..... 26

**II.    IRREPARABLE INJURY WILL OCCUR IF PRELIMINARY EQUITABLE RELIEF IS NOT GRANTED** ..... 27

    A.    ACICS’s Business Operations And Revenue Streams Will Diminish Quickly ... 28

    B.    ACICS Will Suffer Substantial And Imminent Reputational Damage That Will Have Lasting Effects On The Agency’s Operations..... 32

**III.    THE PUBLIC INTEREST FAVORS GRANTING PRELIMINARY EQUITABLE RELIEF** ..... 34

    A.    Immediate Harm to ACICS-Accredited Schools ..... 35

    B.    Immediate Harm to Students at ACICS-Accredited Schools ..... 38

    C.    Additional Aspects Of The Public Interest Favor An Injunction ..... 39

**IV.    THE BALANCING OF THE EQUITIES TIPS IN FAVOR OF GRANTING PRELIMINARY EQUITABLE RELIEF** ..... 41

**CONCLUSION**.....43

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Armour &amp; Co. v. Freeman</i> , 304 F.2d 404 (D.C. Cir. 1962) .....	32
<i>Bayer HealthCare, LLC, v. U.S. Food &amp; Drug Admin.</i> , 942 F. Supp. 2d 17 (D.D.C. 2013) .....	40
<i>Brady Campaign to Prevent Gun Violence v. Salazar</i> , 612 F. Supp. 2d 1 (D.D.C. 2009) .....	40
<i>Cobell v. Norton</i> , 391 F.3d 251 (D.C. Cir. 2004) .....	25
<i>Honeywell, Inc. v. Consumer Prod. Safety Comm’n</i> , 582 F. Supp. 1072 (D.D.C. 1984) .....	33
<i>Hospira, Inc. v. Burwell</i> , 2014 WL 4182398 (D. Md. Aug. 19, 2014) .....	40
<i>Malarkey-Taylor Assocs., Inc. v. Cellular Telecomm. Indus. Ass’n</i> , 929 F. Supp. 473 (D.D.C. 1996) .....	32
<i>Morgan Stanley DW Inc. v. Rothe</i> , 150 F. Supp. 2d 67 (D.D.C. 2001) .....	32
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 27 (1983) .....	26
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983) .....	42
<i>Nalco Co. v. United States Envtl. Prot. Agency</i> , 786 F. Supp. 2d 177 (D.D.C. 2011) .....	27
<i>Nat’l Treasury Emps. Union v. United States</i> , 927 F.2d 1253 (D.C. Cir. 1991) .....	25
<i>Patriot, Inc. v. U.S. Dept. of Housing and Urban Dev’t</i> , 963 F.Supp.1 (D.D.C. 1997) .....	28, 32

<i>Professional Massage Training Center Inc. v Accreditation Alliance of Career Schools and Colleges,</i> 951 F.Supp.2d 851 (E.D. Va. 2012) .....	33, 34
<i>Regents of Univ. of Cal. v. Am. Broad. Cos.,</i> 747 F.2d 511 (9th Cir. 1984) .....	33
<i>S.E.C. v. Chenery Corp.,</i> 318 U.S. 80 (1943).....	42
<i>Smoking Everywhere, Inc. v. Food &amp; Drug Admin.,</i> 680 F. Supp. 2d 62 (D.D.C. 2010) .....	27
<i>Sterling-Commercial Credit-Michigan, LLC v. Phoenix Indus. I, LLC,</i> 762 F. Supp. 2d 8 (D.D.C. 2011) .....	25
<i>Subscription Television of Greater Wash. v. Kaufmann,</i> 606 F. Supp. 1540 (D.D.C. 1985).....	28
<i>Tex. Children’s Hosp. v. Burwell,</i> 76 F. Supp. 3d 224, 242 (D.D.C. 2014).....	28, 29
<i>United Mine Workers of Am. v. Int’l Union, United Mine Workers,</i> 412 F.2d 165 (D.C. Cir. 1969) .....	42
<i>Univ. of Texas v. Camenisch,</i> 451 U.S. 390 (1981).....	42
<i>Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.,</i> 559 F.2d 841 (D.C. Cir. 1977) .....	26, 28
<i>Winter v. Nat’l Res. Defense Council,</i> 555 U.S. 7 (2008).....	25, 41
<b>Statutes</b>	
5 U.S.C. § 706(2) .....	26
20 U.S.C. § 1099a.....	6
20 U.S.C. § 1099b.....	6
20 U.S.C. § 1099c .....	6
20 U.S.C. § 1099c(a).....	6, 7
<b>Rules and Regulations</b>	
34 C.F.R. § 602.10 .....	8, 10, 14

34 C.F.R. § 602.14.....	8
34 C.F.R. § 602.15(a)(1).....	14
34 C.F.R. § 602.16.....	9, 15, 16
34 C.F.R. § 602.28.....	8, 10, 14
34 C.F.R. § 602.30.....	8
34 C.F.R. § 602.31.....	5
34 C.F.R. § 602.32.....	9, 11
34 C.F.R. § 602.34.....	9, 10
34 C.F.R. § 602.35.....	10
34 C.F.R. § 602.36.....	10, 21
34 C.F.R. § 602.38.....	11, 24
Fed. R. Civ. Proc. 65.....	25
Fed. R. Civ. Proc. 65(b)(1).....	25



## **PRELIMINARY STATEMENT**

The Accrediting Council for Independent Colleges and Schools (“ACICS” or “the Agency”) is a non-profit agency that has accredited institutions of higher learning since 1912. Today, ACICS accredits schools that educate approximately 320,000 students across the country and the world. ACICS schools are likely to educate working adults, who are attending school to enhance their lives – either to enter a new vocation or profession or to obtain additional credentials and skills. Students at ACICS schools are likely to be Pell Grant recipients, women, people of color, and, they often live in areas where ACICS schools are the only educational opportunity within their geographic proximity.

In 1956, the Commissioner of Education (the precursor to the Department of Education) first recognized ACICS as a federally recognized accreditor. Students who attend a school that is accredited by a federally recognized accrediting agency receive numerous benefits. ACICS-accredited schools’ students are eligible to receive Title IV student financial aid – that is the program that offers federally-funded student loans and grants. Students at ACICS-accredited schools are also eligible to receive state-based student loans, which are often tied to attendance at schools that are accredited by a federally-recognized accrediting agency. In addition, many state licensing entities require that students seeking a state license, such as a nursing license, for example, attend schools that are accredited by federally-recognized accrediting agencies.

ACICS, along with at least four other accreditors, previously accredited some campuses of the Corinthian Colleges and ITT. Each of those school systems was alleged to have engaged in corporate-wide fraud. Those allegations generated a deluge of negative press regarding the for-profit sector overall. However, the campuses of these schools that ACICS accredited are a miniscule fraction of the total numbers of schools that ACICS has accredited during the six decades that it has been federally recognized. As a result of this prior accreditation, and the

ongoing political scrutiny of the for-profit sector generally, ACICS has become a high-profile political target. Indeed, it has unfairly been made into an example – a message – that is being sent to the accreditation community. Unfortunately, this message-making has real-world consequences for the schools themselves, the tens of thousands of students who attend them, and, of course, for the Agency and its 104-year old legacy.

In January, ACICS filed its regularly-scheduled Petition for Continued Recognition (the “Petition”), asking that the Department of Education (the “Department” or “ED”) renew its status as a federally-recognized accrediting agency. The Department Regulations provide for a multi-step Recognition Process. As it pertains to ACICS, each step of this process was tainted by unfairness and infected with politics and procedural irregularity. The Department’s own rules contemplate a Recognition Process that is a fair and impartial one that considers relevant facts and applies those facts to the Recognition Criteria, provided for in Department regulations. The opposite happened here. The irregular and politically-tainted nature of this process suggests that the outcome of ACICS’s Petition was pre-ordained.

For example, the Department Staff analyzed ACICS’s operations and then issued a rushed and incomplete report in early June that fails to account for all of the information that the Department had asked ACICS to submit in support of its Petition and for consideration in that report. That Final Staff report found that ACICS was out of compliance with certain Recognition Criteria, even though the underlying analysis either overlooked relevant facts or misapplied the relevant Recognition Criteria. That Final Staff report was sent to the Senior Department Official (“SDO”) at the Department and also to the National Advisory Committee on Institutional Quality and Integrity (“NACIQI”), which is a Department advisory panel comprised of academics, administrators and others in the field of education who are appointed by the

Congress to six-year terms. NACIQI is supposed to make independent determinations about the federal recognition of accrediting agencies. Nevertheless, the NACIQI Panel meeting was tainted by politics and relied on irrelevant facts and, at times, polemical statements from third parties, such as think tank researchers and state prosecutors, who came to the NACIQI Panel to showcase their politics, and offered no facts that are relevant to the Criteria that inform the Recognition Process.

The SDO, who makes the initial Department decision, rendered a conclusory analysis in two and a half pages and recommended revocation of ACICS's recognition status. The SDO did not consider relevant and material facts. The SDO ignored ACICS's substantial submissions in support of its Petition, including a thirty-page appendix that described how the Agency was working to address the Staff Report findings. The SDO ignored the fact that ACICS has had substantial leadership and management changes, implemented a more robust and systemized way of assessing student success rates, created an even more aggressive regime for monitoring and addressing any instances of noncompliance. The SDO, who received ACICS's supporting materials in July, declined to consider how the Agency's operations had improved and evolved over a nine-month time period since ACICS had first filed its Petition and submitted supporting materials.

In fact, the SDO had the option of renewing ACICS's recognition status, on grounds that the agency "could demonstrate or achieve compliance with the criteria for recognition and effective application of those criteria within 12 months or less." Rather, the SDO declined to even consider ACICS's submissions of additional material and relevant information that would have properly informed that option. Instead, the SDO recommended revocation of ACICS's recognition status and ignored the reams of evidence that ACICS submitted to the Department.

On December 12, 2016, relying on this incomplete and procedurally-flawed record, the Secretary of Education issued a decision and order that revoked ACICS's federal recognition after 60 years. Simultaneously with this decision, the Department issued a Provisional Program Participation Agreement (PPPA) that, among other things, requires that all ACICS-accredited schools take immediate steps to obtain an alternate federally-recognized accreditor. As a result, it is probable that many ACICS-accredited schools will no longer pay sustaining fees, renew their accreditation with ACICS, or otherwise adhere to ACICS's accreditation directives. Indeed, ACICS has been and will continue to be imminently and irreparably harmed; it will lose and has already started to lose substantial sources of revenue that will affect its operation. It also has suffered imminent and irreparable harm to its goodwill and reputation.

Schools are also harmed as they work overtime to find an alternate accrediting agency for which their programs are eligible and that can on-board their applications in accordance with the Department's directives. And, of course, most importantly, students are substantially harmed by the Secretary's decision revoking ACICS's recognition. As a result of this decision, some students are immediately in danger of no longer being eligible for state-based licensing. Students who attend ACICS-accredited schools must now contend with whether those programs will continue to exist and if so, whether they will be eligible to receive Title IV funds if they remain enrolled. Indeed, even the Department has acknowledged the uncertainty that stems from its own actions. Its website explains that: "Additionally, some states have different rules as they do for licensure, for example . . . If the school loses its license to operate from the state, it will likely close, so watch for more information." The Department's matter-of-fact statement, of course, glosses over certain realities. Many students, especially at ACICS-accredited schools, are working adults who attend classes in the evening in hopes of obtaining additional credentials

that can improve their financial lives. It is not so easy to simply leave an educational program or course of study, especially one into which a student has already invested substantial time.

The Secretary's decision and the Department's PPPA have caused imminent and irreparable harm to students, their schools and to ACICS. This harm to ACICS will continue, if the Court does not stay the Secretary's decision revoking ACICS's recognition, restore ACICS's recognition status and enjoin the Department from enforcing the PPPA as to ACICS-accredited schools, pending disposition of ACICS's underlying case.

### **STATEMENT OF FACTS AND PROCEDURAL POSTURE**

#### **A. ACICS Accredits Certain Postsecondary Institutions And Programs**

ACICS is a nonprofit accreditor of postsecondary institutions and programs, and it was founded in 1912. *See* Declaration of Roger J. Williams ("Williams Decl.") at ¶ 6. The Agency is a respected and long established national accreditor of institutions of higher education, and it has been continuously recognized as an accreditor of higher education institutions by the Department of Education since 1956. *See id.* ¶ 7.

On January 8, 2016, ACICS petitioned the Department for re-recognition as an accrediting agency in accordance with the applicable procedures for renewing its recognition. *See* Declaration of Allyson B. Baker ("Baker Decl.") ¶ 4, Ex. 1; *see also* 34 C.F.R. § 602.31. ACICS filed a 136-page submission as part of the initial step of its Petition. *See id.*

Up until December 12, 2016, the scope of ACICS's recognition by the ED included private postsecondary institutions that offer certificates, diplomas, associate's, bachelor's and master's degrees in programs that educate students for professional, technical or occupational careers. *See* Williams Decl. ¶ 8. ACICS accredits 691 campuses that currently enroll an estimated 320,000 students. *See id.* ¶ 4. Accreditation by a nationally-recognized accreditation agency carries numerous benefits to accredited schools and their students. First, accreditation by

a nationally-recognized accreditor is a prerequisite for a school's eligibility to receive access to Title IV federal student loan programs, pursuant to 20 U.S.C. § 1099c. Second, many state licensing bodies require schools to be accredited by a nationally-recognized accrediting agency as a condition of licensure or as a prerequisite for access to state-based student loan programs. *See* Declaration of Roger L. Swartzwelder ("Swartzwelder Decl.") ¶ 10. Third, many state licensing bodies and programmatic accrediting bodies (i.e. specialized organizations that accredit programs in particular professions, such as certain health-care specialties) require that a student attend an institution accredited by a nationally-recognized accrediting agency in order for that student to sit for state licensing exams or other program-based exams or certifications. *Id.* ¶¶ 10-16. The Department's revocation of ACICS's recognition also impacts all of these benefits that inure to students who attend ACICS-accredited institutions. Revocation of ACICS's recognition status means that, going forward, students who attend the schools that ACICS accredits will not be eligible to receive Title IV funding, unless those schools are able to obtain accreditation from another agency that the Department recognizes. *Id.* ¶¶ 17-32.

Pursuant to federal statute, higher education institutions are governed by three distinct entities: the Department, the various states, and accrediting agencies recognized by the Secretary of Education. *See* 20 U.S.C. § 1099a (discussing state role); 20 U.S.C. § 1099b (discussing role of accreditors); 20 U.S.C. § 1099c(a) ("[T]he secretary shall determine the legal authority to operate within a State, the accreditation status, and the administrative capability and financial responsibility of an institution of higher education in accordance with the requirements of this section."). In general, accreditors help ensure the academic quality of institutions, while the Department of Education ensures the institutions' financial and administrative capabilities and

states typically oversee various consumer protection functions, as well as confer on the institution the authority to confer degrees and certificates. *See id.*

ACICS, which is governed by its by-laws, has a mission that is to advance the educational excellence at independent, nonpublic career schools, colleges, and organizations in the United States and abroad. *See Williams Decl.* ¶¶ 9-10. Its accreditation process involves a multi-step process. First, a school completes a self-evaluation and then an ACICS staff member visits the school to preliminarily assess that school's resources. *See id.* ¶¶ 13-15. A team of volunteer evaluators who are affiliated with ACICS then conducts an on-site visit of the school and reviews that school's operations to author a report that an Intermediate Review Committee then reviews. *See id.* ¶ 16. That Intermediate Review Committee makes an accreditation recommendation to ACICS's Council, which ultimately decides on a school's status. *See id.* ¶¶ 17-18. ACICS's Council consists of Commissioners who represent non-degree and degree-granting ACICS-accredited institutions and also public members who are not affiliated with any ACICS-accredited institutions. *See id.* ¶ 11.

ACICS's Council also regularly takes actions against the schools that it accredits. These include actions to show cause as to why a school's accrediting status should not be revoked. ACICS's Council also orders that the Agency take other types of actions against out-of-compliance schools, including unannounced site visits. *See id.* ¶ 18.

The nonprofit Council for Higher Education Accreditation ("CHEA") also recognizes ACICS. *See id.* ¶¶ 19-21. CHEA identifies itself as "[a] primary national voice for accreditation and quality assurance to the U.S. Congress and U.S. Department of Education." *See CHEA At-a-Glance, available at [http://www.chea.org/pdf/chea-at-a-glance\\_2015.pdf](http://www.chea.org/pdf/chea-at-a-glance_2015.pdf).* CHEA recognizes ACICS as an accreditor just as the Department does; CHEA's recognition status, however,

confers different benefits than ED recognition. To this end, on December 2, 2016—a mere ten days before the Secretary’s decision—CHEA’s Committee on Recognition informed ACICS that the Committee would recommend to CHEA’s Board of Directors that ACICS “be given recognition for up to three years.” *See* Williams Decl. ¶ 21.

**B. The Department of Education’s Regulations Prescribe A Specific Process For How Petitions For Continued Recognition Are Considered**

The Code of Federal Regulations sets forth procedures relating to the Department’s recognition of accrediting agencies such as ACICS. *See* 34 C.F.R. §§ 602.30-602.38. The Department’s regulations establish a process for applying for recognition, review by the Department’s staff, review by an independent panel, further review by the SDO, and an appeal from the SDO’s recommended decision to the Secretary of Education. These regulations also prescribe Recognition Criteria that the Department and Secretary must apply to any Petition. *See id.* §§ 602.10-602.28.

To this end, the Department is charged with ensuring that: (1) a private accrediting agency (one that is not a state regulatory body) is comprised of voluntary members; (2) that the primary purpose and mission of the agency is accreditation of educational institutions and/or programs; (3) that the accrediting agency is “separate and independent” of “any affiliated, associated or related trade association thus clarifying and demonstrating the autonomy and integrity of the accreditation activity;” (4) that an accreditor must have and demonstrate “clear and effective controls against conflicts of interest, or the appearance of conflicts of interest;” (5) that an accrediting agency had the administrative and financial capability to carry out its functions; and (6) that the agency maintains policies that are consistent with federal standards. *See id.* §§ 602.14-28. The Department also ensures that institutional accreditors, such as ACICS, review postsecondary institutions for numerous criteria, including curricula, faculty,



quality of facilities, student support services, and recruiting and admissions practices. *See id.* § 602.16.

As part of the first step of the Petition process, Department Staff analyze an application for recognition “to determine whether the [accrediting] agency satisfies the criteria for recognition, taking into account all available relevant information concerning the compliance of the agency with those criteria and in the agency’s effectiveness applying the criteria.” *See id.* § 602.32(b). This includes observations of the accrediting agency’s activities, public and third-party comments about the agency, a review of complaints about the agency, and all other relevant materials. *Id.* The Department Staff then prepare a written draft analysis with a proposed recommendation as to recognition status (the draft report) to which the agency has an opportunity to respond. *See id.* § 602.32(f). The Department Staff then draft a final written analysis that “includes a recognition recommendation” to the SDO (“Final Staff Report”). *See id.* § 602.32(f)(4).

After the Department Staff completes a Final Staff Report, NACIQI then convenes to consider the Petition. The NACIQI Panel is the second stage in the Petition process. NACIQI is an independent panel comprised of individuals who work in the education field and who are appointed by the Congress. NACIQI provides recommendations to the SDO regarding agencies’ petitions for recognition. *See id.* § 602.34.

In advance of the NACIQI Panel meetings, which are public meetings, Department Staff provide the Panel with the Final Staff Report, the agency’s response to the draft staff report, and other related materials. *See id.* §§ 602.34(b). The NACIQI panel includes comments that the Department Staff and NACIQI Primary Readers provide to the panel about the Petition for

Recognition that is under review. *See id.* § 602.34(c). The NACIQI Panel also invites third-party commenters to participate in the hearing. *See id.* § 602.34(e).

The NACIQI Panel then makes a recommendation regarding a petition for recognition to the SDO. *See id.* § 602.35. Within ten days following the NACIQI Panel meeting, the accrediting agency and the Department Staff are allowed to submit comments to the SDO that respond to the NACIQI Panel's recommendation in advance of the SDO making a decision. *See id.* § 602.35(a). The SDO, in turn, then makes a decision regarding an agency's petition for recognition. *See id.* § 602.36. Specifically, the SDO is charged with making a decision "based on the record" that considers all materials provided to the NACIQI Panel, the transcript of the NACIQI meeting, NACIQI's recommendation, and any other comments and evidence that the SDO receives in connection with the Petition. *See id.* § 602.36(a) The SDO may: (1) approve, deny, limit, suspend, or terminate an agency's recognition; (2) grant or deny an application for expansion of scope of the accrediting agency; (3) revise or affirm the scope of the accrediting agency; or (4) continue recognition pending submission and review of a compliance report. *See id.* § 602.36(e). In addition, the SDO may continue an accrediting agency's recognition for up to 12 months if an agency fails to demonstrate compliance with the required recognition criteria but "will demonstrate or achieve compliance with the criteria for recognition and effective application of those criteria within 12 months or less." *See id.* § 602.36(e)(3).

The SDO's decision regarding recognition may be appealed to the Secretary of Education, and the Secretary's recognition decision must be based on specific criteria provided for in the Code of Federal Regulations. *See id.* §§ 602.10-602.28. The criteria are separated into: (1) basic eligibility requirements; (2) organizational and administrative requirements; (3)

required standards and their application; and (4) required operating procedures and policies. Any decision from the Secretary may only be stayed with an appeal in district court. *See id.* § 602.38.

**C. ACICS Petitioned For Continued Recognition And During The Initial Step, Department Staff Violated Their Own Rules**

After ACICS submitted its Petition on January 8, 2016, the Department's Staff sent ACICS an unprecedented number of supplemental requests for information. On March 3, 2016, Department Staff sent ACICS an onerous supplemental request that asked that the agency supplement or replace more than 30 narrative responses and more than 100 exhibits that were attached to the Petition that ACICS had submitted two months earlier. *See Baker Decl.* ¶ 8, Ex. 2c at 10-15. Notably, the Department Staff explained that this supplemental request was "a set of question[s]" that the Office of the Under Secretary "want[s] to ask ACICS during the recognition process," and explained that, notwithstanding the involvement of the Office of the Under Secretary, these questions were "tied . . . to the recognition process." *Id.*

The Department Rules that govern the Petition process do not provide that the Under Secretary of Education is permitted to insert himself into a process that is handled "by the Department's staff." *See* 34 C.F.R. § 602.32. Indeed, Steve Porcelli, who was the member of the Department Staff responsible for drafting the Final Staff Report relating to ACICS would later note during the NACIQI Panel meeting that although he has written "hundreds" of staff reports during his 30-year career, this Report drafting process relating to ACICS was different. *See Baker Decl.* ¶ 17, Ex.7 at 61:5-10. In particular, he explained that because of the substantial amount of information his Department staff team gathered, he "could not personally handle all of the material by myself," and that "in the past a staff person would be able to do that." *See id.* at 61:11-18. He also acknowledged that he "received advice from outside" the office of the Department staff that handles accreditation. *Id.* at 52:4-19. But then Mr. Porcelli, also during

the NACIQI Panel meeting, noted that he did not “want to comment on that” advice, suggesting that he had been uncomfortable with the nature or fact of that “advice from outside,” and that at the very least, it deviated from the standard process. *Id.*

Moreover, the Department staff asked that ACICS respond to these onerous supplemental requests for information on or before April 1, giving ACICS a mere three weeks to compile these materials. ACICS produced responses to many of the supplemental requests by that date but was able to secure an extension until May 16 for responding to the rest of these requests. *See Id.* ¶ 11, Ex 2c at 2. Crucially, in granting this partial extension, the Department staff stated that the May 16 submission date “would not allow Department staff the time to fully review and analyze” this additional information “in time for the June NACIQI meeting,” and that “ACICS should be prepared to return at the fall NACIQI meeting for further discussion and possible action as warranted.” *See Id.* ¶ 10, Ex. 2c at 7. ACICS expected that its Petition would be deferred until the fall NACIQI meeting, which would delay its consideration. And at the very least, it seemed unlikely that the Department staff would be able to assemble a Final Staff Report in time for the June 23 NACIQI Panel meeting at which ACICS had originally been scheduled for consideration.

Nevertheless, on May 4—two weeks *before* ACICS’s deadline for responding to the remainder of the supplemental request, which was described as being “tied” to the recognition process—the Department staff provided ACICS with a draft staff report and required that ACICS submit any response to the draft report by June 3. *See Id.* ¶ 11, Ex. 2c at 2. On May 16, ACICS submitted the remainder of its response to the March 3 supplemental request. *See id.* ¶ 14, Ex. 4. Two days later, on May 18, the Department informed ACICS that the May 16 response to the supplemental request *would not be considered* in the deliberations at the

upcoming NACIQI Panel meeting at which ACICS's Petition would be reviewed, even though this information was described as responding to requests that were "tied" to the recognition process. *See id.* ¶ 12, Ex. 2c at 3.

Subsequently on June 3, ACICS requested additional time to respond to the May 4 draft staff analysis, as the agency had been working tirelessly to respond to the onerous supplemental request. Nevertheless, the requested extension was denied. *See id.* ¶ 11, Ex. 2c at 2. ACICS then submitted its response to the draft staff report, even though the draft report was notably incomplete because it did not reflect all of the supplemental information "tied to recognition" that ACICS had been asked to provide. This, of course, violated Department Rules, which clearly require that the Department staff take "into account all available relevant information," when rendering an analysis that becomes the basis of the draft Staff Report. *See* 34 C.F.R. §§ 602.32(b), (f)(4). Nevertheless, on June 15, 2016—one week before the NACIQI meeting—the Department issued the Final Staff Report, which contained substantive errors and reflected rushed work product. *See* Baker Decl. ¶ 15, Ex. 5. That Final Staff Report was forwarded to the NACIQI Panel and the SDO. This rushed and incomplete Final Staff Report became part of the record in this case. It is the basis on which the SDO and then the Secretary rendered their decisions as to ACICS.

**D. The Final Department Staff Report Fails To Account For "All Available Relevant Information," Has Numerous Errors, And Misapplies The Recognition Criteria**

Pursuant to 34 C.F.R. § 602.32(b), the Staff must "take[] into account *all available relevant information* concerning the compliance of the agency with those criteria and in the agency's effectiveness in applying the criteria." (emphasis added). In addition, the Staff are

required to apply the actual and relevant Criteria for Recognition described in the Department Rules. *See id.* §§ 602.10-28.

**1. The Final Staff Report Includes Findings That Ignore “All Available Relevant Information”**

In evaluating ACICS’s compliance, the Final Staff Report draws numerous conclusions that ignore relevant facts in the record.

For example, *see id.* § 602.15(a)(1) requires that ACICS have the “administrative and fiscal capability to carry out its accreditation activities in light of its requested scope of recognition.” The Final Staff Report states that “no complaints have been received at the Department indicating that there have been staffing problems,” and that “when Department staff visited the agency’s offices in April 2016 several staff members were interviewed and the administrative processes were observed to be functioning efficiently.” *See Baker Decl.* ¶ 15, Ex. 5 at 6. The Final Staff Report notes that the Agency demonstrated that it “has adequate administrative staff and financial resources to carry out its accrediting responsibilities.” *Id.* In spite of this evidence, the Final Staff Report baselessly renders two conclusions: (1) that “the recent departure of the executive director, with no permanent replacement, seems to indicate that the agency has staffing concerns” (*id.*); and (2) Staff is “concerned that [ACICS’s] lack of effective monitoring approaches for its institutions reflects inadequate staffing.” *Id.* Neither of these conclusions is supported by evidence. Moreover, ACICS has long had a new director, a fact about which the Department has been apprised.

Regulation 34 C.F.R. § 602.15(a)(1) also requires that the Agency have “adequate . . . financial resources to carry out its accrediting responsibilities.” The Final Staff Report acknowledges that the audited financial statements ACICS provided “confirmed that the agency was maintaining sufficient resources to continue operating as it had been” and “demonstrates that

ACICS had the financial reserves capable of handling ‘unanticipated, short-term ebbs in budgeted revenue.’” *See* Baker Decl. ¶ 15, Ex. 5 at 7. Despite this demonstrated solvency, the Final Staff Report found ACICS noncompliant with this criterion because it had not yet submitted an audit that the Staff acknowledged was not available until October 2016 – four months after the Staff Report was issued – so that ACICS could demonstrate its ability to handle any potential future contraction of the private career college market. *Id.* In other words, the Staff ignored record evidence and instead rendered a conclusion based on the absence of information that the Staff conceded was not yet available through no fault of ACICS.

## **2. The Final Staff Report Misapplied The Recognition Criteria**

Throughout the Final Staff Report, the Staff misapplies the relevant criteria. Regulation 34 C.F.R. § 602.16(a)(1)(i) requires that an agency “address the quality of the institution or program” by looking to “[s]uccess with respect to student achievement in relation to the institution’s mission, . . . including, as appropriate, consideration of course completion, State licensing examination, and job placement rates.” The Final Staff Report ignores the clear evidence that ACICS complies with this criterion, including the Agency’s use of algorithms designed to further verify job placement data that is furnished by the schools it accredits. *See* Baker Decl. ¶ 15, Ex. 5 at 11-12. Even Mr. Porcelli, who assembled the Final Staff Report, acknowledged – during the NACIQI Panel -- that ACICS had “started using an algorithm to catch fraudulent representations from the schools and [that] . . . falsified placements just dropped dramatically”. *See id.* ¶ 17, Ex. 7 at 57:8-9; 16-20.

In spite of this, the Final Staff Report instead considers factors not relevant to this specific criterion by noting that “many investigations and lawsuits were brought against ACICS-accredited institutions for falsified placement rates in the last five years, resulting in many

judgments/high dollar settlements.” *See id.* ¶ 15, Ex. 5 at 12. The Final Staff Report references two settlements, two consent decrees and one default judgment, all of which involve non-adjudicated findings of facts. Nevertheless, the Report concludes that “[i]n response ACICS should explain what actions it took with respect to each pending or settled State or federal lawsuit initiated for the benefit of students against ACICS-accredited institutions in the last five years.” *Id.* There are no Recognition Criteria that require that an agency establish its compliance by noting how it has responded to a filed lawsuit or the pursuit of a confidential investigation about which an agency might only learn through media reports.

The Final Staff Report also misapplies the Recognition Criteria when it addresses ACICS’s compliance with 34 C.F.R. § 602.16(a)(1)(vii), which concerns the “[r]ecruiting and admissions practices, academic calendars, catalogs, publications, grading and advertising,” of a school. The Final Staff Report notes that the record revealed “that the agency’s visiting team evaluates” various aspects of the above practices and “that ACICS has applied a substantial number of sanctions to large multi-campus systems based on deficiencies in these categories.” *See Baker Decl.* ¶ 15, Ex. 5 at 15. Nevertheless, the Final Staff Report concludes that because “a significant number of State attorneys general and others have obtained sizeable recoveries against ACICS-accredited institutions based on misrepresentations to prospective students and abusive recruiting,” the Agency is “not effective in ensuring academic quality.” *Id.* Again, while citing facts that demonstrate compliance with the regulations, the Staff instead applies a standard that considers irrelevant factors. The Final Staff Report was incomplete, ignored relevant facts and misapplied the Recognition Criteria. Nevertheless, the Report became a main part of the record and, by the Secretary’s own admission, formed the basis for his decision to revoke ACICS’s recognition status.



**E. The NACIQI Panel Hearing Was Tainted By Politics And Improperly Relied On Immaterial Facts In Rendering A Decision**

The NACIQI Panel also relied on the flawed and incomplete Final Staff Report, and this reliance was compounded because the NACIQI Panel's deliberations were compromised by political messaging from elected and appointed officials and by third parties who introduced facts that are neither material nor relevant to the Recognition Criteria.

**1. Improper Political Messaging Compromised The Deliberations Of The NACIQI Panel Which Is Required To Be Independent**

On June 23, 2016, the NACIQI Panel convened to consider ACICS's Petition. The Panel meeting – which is, by design supposed to be independent and bi-partisan – was tainted by undue political influence. For example, two weeks before the NACIQI Meeting commenced, the office of Senator Elizabeth Warren (D-MA) issued a report condemning ACICS and exhorting the NACIQI Panel and Department to deny ACICS's recognition. The report announced that “[i]f NACIQI members and the Department of Education officials want to restore public confidence in their own review process, they must demonstrate that they understand the devastating consequences of ACICS's long record of failure.” *See Baker Decl.* ¶ 29, Ex. 19 at 2. This report was followed by a press conference, and received extensive media coverage, which made it difficult for ACICS to receive a fair consideration at the NACIQI Meeting, especially as Congress appoints the Panel members.

Moreover, on June 22, Ted Mitchell, the Under Secretary of Education made an unprecedented statement to the convened NACIQI Panel that singled out ACICS and broadcast to the independent advisory panel the outcome that he expected: “The majority of [accrediting] agencies work hard every day to evaluate the quality of their institutions, and they deserve our thanks. But the truth is that some agencies need to up their game, and occasionally, agencies

demonstrate such wide and deep failure that they simply cannot be entrusted with making the determinations we, you, and the public count on.” *See* Baker Decl. ¶ 16, Ex. 6 at 4:21-5:3.

Indeed, one NACIQI Panel member noted that “I think the elephant in the room is the question: is the Department doing this because it has something against for-profits.” *See id.* ¶17, Ex. 7 at 258:2-11, comment of NACIQI member Rick O’Donnell.

The public NACIQI Panel meeting clearly became more a highly and unfairly politicized forum designed to send a message. Indeed, even a member of the NACIQI Panel acknowledged, albeit tacitly, that the outcome of the Panel’s deliberations was, perhaps, pre-ordained and intended to satisfy a policy goal. NACIQI Panel member Frank Wu warned fellow Panel members and third party commenters alike that he “would not feel quite right saying or thinking . . . we need to make an example of” ACICS. *See* Baker Decl. ¶ 17, Ex. 17 at 166:15-16.

**2. The NACIQI Panel’s Deliberations Improperly Considered Irrelevant And Erroneous Facts In Rendering A Decision About ACICS**

The Panel considered extraneous, erroneous and immaterial facts that have no relationship to the Recognition Criteria, assuming the facts presented are even true. During that eleven hour NACIQI Meeting, ACICS was implicitly and explicitly held accountable for conduct concerning schools it never accredited and for broader concerns with the accreditation community at large. For example, one Panel Member incorrectly suggested that ACICS had accredited Trump University; it did not. *See* Baker Decl. ¶ 17, Ex. 7 at 13:12-15; 114:13-14. Another Panel Member stated falsely that ACICS had accredited Heald College, a part of the Corinthian Colleges system, which ultimately collapsed around allegations of fraudulent conduct. *Id.* at 128:11-22.

In addition, the NACIQI Meeting included comments from numerous third party commenters, many of whom offered testimony that had little or no connection to the Recognition Criteria; this exemplified the truly unfair and procedurally improper nature of the NACIQI Meeting proceedings. For example, one such commenter, an Assistant Attorney General from Maryland, addressed the meeting. He explained that “when a state files a case or a lawsuit against a school . . . vast amounts of resources have been expended in investigation, collection of complaints, analysis of documents and interviewing witnesses,” and that “[t]o even initiate an investigation beyond just bringing a complaint is not something that states take lightly.” *See id.* at 149:8-18. He continued by noting that even if the subject of a settlement neither admits nor denies liability, “there is still a problem” that accrediting agencies should know to address. *Id.* This commenter, who had the floor longer than most third-party commenters, was allowed to mention facts and standards wholly irrelevant to the question of whether ACICS had met Recognition Criteria. He commented as a representative of law enforcement, and his comments sought to impute to ACICS the same law enforcement obligations that the Maryland Attorney General (and all other State Attorneys General) have as a matter of law.

Furthermore, another third-party commenter, like other NACIQI Panel members and third-party commenters, also mentioned the fact of consumer complaints about schools. *See id.* at 149:8-18. But the referenced consumer complaints were from a third party query that did not relate to any facts that inform the Recognition Criteria or even to specific ACICS conduct. *Id.* Moreover, discussion of these consumer complaints were given unfair weight and unfairly prejudiced ACICIS in a public forum that was intended to deliberate about facts relating to the Recognition Criteria.

The final comment from a NACIQI Panel member best sized-up the Panel meeting and the sentiment toward ACICS:

*And I have always been a big proponent and pushing this Committee to take a bold step and to send a message to the accreditation community that enough is enough and so . . . I will support the Motion [to recommend that ACICS not be recognized] and I think it is time as a Committee we take these steps necessary to start putting accreditation . . . to make it more responsive for students and consumers.*

*See id.* at 293:10-17 (emphasis added). Indeed, the NACIQI Panel decision as to ACICS was pre-ordained, and the Panel decision arose from deliberations that strayed far from the independent purpose that NACIQI serves. *See* NACIQI welcome page, *available at*, <http://sites.ed.gov/naciqi/> (“Throughout its tenure, NACIQI has reached out to the accreditation and higher education communities; researchers and policy makers; and interested members of the public, to engage in informed deliberation.”) Ultimately the NACIQI Panel meeting became an agenda-driven political forum that was designed to “make an example” out of ACICS, to “send a message to the accreditation community.” These Panel meeting deliberations alone underscore how the Secretary rendered an arbitrary and capricious decision that was also the result of a defective process.

**F. The SDO’s Decision And The Secretary’s Decision Each Rely On Stale Information Derived From A Procedurally-Flawed Record And Process That Involved Numerous Violations Of Department Rules**

The SDO<sup>1</sup> and ultimately the Secretary each relied on an incomplete record, replete with procedural flaws that also reflected undue political influence. To this end, on September 22, 2016 in a two and a half page letter, the SDO summarily notes her “concurrence” with the Final

---

<sup>1</sup> The Department’s SDO review process has been marred by the fact that the SDO is a political appointee and Chief of Staff to the Secretary, a direct report to the Secretary, and the Secretary will review her decision. This evaluation and review process does not protect the independence of the SDO.

Staff Report and the NACIQI Panel recommendation to revoke ACICS's recognition status. *See* Baker Decl. ¶20, Ex. 10. The Department Rules are clear that if the SDO denies recognition, the SDO "specifies the reasons for this decision, including all criteria the agency fails to meet and all criteria the agency has failed to apply effectively." 34 C.F.R. § 602.36(e)(2)(ii).

The SDO's decision makes only conclusory assertions and states that the SDO reviewed the full record. *See id.* The SDO's decision does not explain what specific information the SDO reviewed or what specific information the SDO relied on for her decision. *See id.* Moreover, the SDO decision provides no citations to any record evidence; it lists 21 areas for which ACICS has been purportedly out of compliance with no explanation of how ACICS was supposedly out of compliance for each individual area. *See id.*

Most importantly, the SDO's decision fails to consider any of the facts that ACICS presented in its response to the NACIQI Panel's recommendation that was filed with the SDO on July 5. On July 25, ACICS also responded to the Department's submission to the SDO *See* Baker Decl. ¶19, Ex. 9. In each of those filings, ACICS outlined in great detail the efforts it had taken to come into further compliance with the Recognition Criteria. For example, as part of its July 5 submission, ACICS filed a 30 page Executive Summary that documents in granularity "that ACICS can demonstrate compliance with all accrediting agency criteria, and provide evidence of effective application of those criteria, by April 2017, well within the 12-month period the SDO is permitted to allow ACICS to come into compliance." *See* Baker Decl. ¶ 6, Ex. 2a.

Moreover, the Department Rules allow the SDO to have concluded that ACICS could "demonstrate or achieve compliance with the criteria for recognition and effective application within 12 months or less," thus, continuing ACICS's recognition. 34 C.F.R. § 602.36(e)(3)(i).

In fact, ACICS requested that the SDO consider this option when it filed its July 5 submission. Nevertheless, the SDO ignored all of this information, and recommended revocation of ACICS's accreditation status, relying entirely on stale and outdated information that was furnished in the incomplete and Final Staff Report and also discussed during the tainted proceedings of the NACIQI Panel meeting. The SDO's decision was not supported by the facts in the record and was the result of a procedurally defective process.

On October 21, 2016, ACICS appealed the SDO's decision to the Secretary of Education. *See Baker Decl.* ¶ 24, Ex. 14. On December 12, 2016, the Secretary of Education denied ACICS's appeal. *See id.* ¶ 28, Ex. 18. In that decision, among other things, the Secretary did little more than expand on the SDO's terse and cursory decision. The Secretary's decision also relied only on the stale facts furnished by ACICS nearly 12 months earlier and, at that, addressed in an incomplete and rushed Final Staff Report. The Secretary's decision also repeats the numerous vague and conclusory assertions that the Department Staff and SDO relied on without addressing the evidence put forth by ACICS in refuting these assertions, including the evidence that ACICS submitted to the SDO in July – nearly five months earlier -- or the additional information that ACICS provided to the Secretary in its appeal that was filed in October. *See Baker Decl.* ¶ 24, Ex. 14. Like the SDO, the Secretary inexplicably discounts ACICS's recently implemented changes such as its changes in leadership, revised accrediting standards and demonstrations of recent adverse actions against underperforming institutions. *See id.* The Secretary's decision is arbitrary and capricious, the result of a procedurally defective process and not supported by the evidence in the record.

**G. The Department Is Mandating That ACICS-Accredited Schools Immediately Take Steps To Move To An Alternate Accrediting Agency As A Condition For Their Students Continuing To Be Eligible To Receive Federal Funds**

Simultaneously with the Secretary's termination decision, the Department published a "Summary of Selected Requirements for Institutions Accredited by ACICS," which is a summary of the PPPA, referenced above. These requirements are onerous, unrealistic and fair to accommodate the actual time a school to obtain initial accreditation.

This Summary document, which is posted on the Department's website, announces to those schools accredited by ACICS that "the Department will continue the participation of schools accredited by ACICS in the federal student aid programs through provisional certification" that "may last up to 18 months." *See Swartzwelder Decl.* ¶ 30, Ex. 5. The Department further explains that several provisions "apply immediately to ACICS-accredited institutions" including that: (1) "Institutions will be restricted from making major changes (additional locations, increases in levels of academic offerings, new programs) without Department approval, and the approval will be granted only in limited circumstances"; (2) A school must allow its students "to take leave of absence" in the event "an institution's students (either past, current, or future) become ineligible to sit for any licensing or certification exam as a result of the loss of the institution's accrediting agency"; and (3) In the event "an institution loses its authorization/license from its governing State entity to operate and issue postsecondary certificates and/or degrees" because of the loss of the institution's recognized accrediting agency, "the institution will not be eligible to receive Title IV funds unless the State grants the institution authorization to continue operating." *Id.* at 1-2.

The Department's guidance also makes clear that all institutions accredited by ACICS must "meet certain milestones on the path toward recognized accreditation." *Id.* at 2. To this end, the Department establishes that these "milestones" include having an "in-process application" with another accrediting agency within 90 calendar days from December 12, 2016

which is March 13, 2017. Any school which does not have this in place must also (in addition to complying with other stated guidelines): (1) “submit a formal teach-out agreement to the Department;” and (2) “disclose the fact that it does not have an “in-process application” with another agency to its students, along with other required information.” *Id.* Moreover, if an ACICS-accredited school “does not have an In-Process Application with another accrediting agency within 180 calendar days” of December 12, or have an agency site visit “completed within 300 days, the institution will not be eligible to receive any funds through Title IV” for any students who enroll on a date after the 180 day or 300 day milestone. *Id.* And although the Department contends that it is providing an 18-month provisional certification period, in reality its milestone guidelines require that ACICS-accredited schools take substantial action immediately.

The process of obtaining initial accreditation from an accrediting agency is an involved process that routinely takes between 18-24 months. *See* Declaration of Steven C. Gunderson (“Gunderson Decl.”) ¶ 6. The “milestones” timeline that the Department has mandated functionally requires that ACICS-accredited schools immediately start the process of applying to an alternate federally recognized accrediting agency. As discussed below in more detail, this, will, of course cause and has already caused imminent and irreparable to ACICS; the Department’s PPPA will likely cause these schools to move to another agency as soon as they can do so, in the absence of an injunction staying the Secretary’s decision.

The December 12, 2016 denial of ACICS’s appeal by the Secretary of Education represents a final agency decision and may be appealed to this Court pursuant to 34 C.F.R. § 602.38. ACICS filed suit against Defendants on December 14, 2016 asserting three causes of action under the Administrative Procedure Act relating to Defendants’ termination of ACICS’s



recognition. *See generally* Compl. Specifically, ACICS claims that Defendants violated the Administrative Procedure Act when terminating ACICS's recognition by taking action that was: (1) arbitrary and capricious; (2) without observance of the procedure required by law; and (3) unsupported by substantial evidence.

### ARGUMENT

Preliminary injunctive relief pursuant to Federal Rule of Civil Procedure 65 is warranted because ACICS can demonstrate that: (1) it has a substantial likelihood of success on the merits; (2) it will suffer irreparable injury if the injunction is not granted; (3) an injunction will not substantially injure other interested parties; and (4) an injunction will further the public interest. *See Winter v. Nat'l Res. Defense Council*, 555 U.S. 7, 20 (2008) (identifying factors for preliminary injunctive relief); *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004) (listing preliminary injunction factors); *Nat'l Treasury Emps. Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991) (identifying preliminary injunction factors).<sup>2</sup>

Each factor to be considered in evaluating a motion for preliminary injunctive relief weighs in favor of granting ACICS's motion. ACICS has a substantial likelihood of prevailing on the merits of each of its causes of action under the APA. The Agency also will suffer irreparable injury if the Secretary's decision regarding recognition is allowed to take effect, resulting in termination of the Agency's recognition status. Additionally, granting an injunction

---

<sup>2</sup> Federal Rule of Civil Procedure 65(a) provides the Court with the power to issue a preliminary injunction. Federal Rule of Civil Procedure 65(b) authorizes the Court to enter a temporary restraining order. The only substantive difference between the standards for entering preliminary injunctions and temporary restraining orders relates to the notice given to adverse parties. *See Sterling-Commercial Credit-Michigan, LLC v. Phoenix Indus. I, LLC*, 762 F. Supp. 2d 8, 13 (D.D.C. 2011); *compare* Fed. R. Civ. Proc. 65(a)(1) (stating notice requirement for preliminary injunction) *with* Fed. R. Civ. Proc. 65(b)(1) (discussing when temporary restraining order may issue without notice). The procedural difference is irrelevant as ACICS's motion is made upon actual notice to Defendants.

here will injure neither the Department nor the Secretary. Nor will it injure the public interest. Indeed, it is in the public interest to grant ACICS's requested preliminary injunctive relief.

**I. ACICS HAS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE DEFENDANTS CLEARLY VIOLATED THE APA**

The Administrative Procedure Act (APA) requires the Court to “hold unlawful and set aside” any Department of Education “action, findings, and conclusions” that are: (1) “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;” (2) “in excess of statutory jurisdiction, authority, or limitations;” or (3) “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (C)-(E). These APA violations necessitate setting aside the Secretary's decision and the Department's PPPA directive to ACICS-accredited schools.

ACICS can demonstrate a *likelihood* of success on its APA claims. Indeed, ACICS “has raised substantial questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation.” *See id. Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). The “arbitrary and capricious” standard requires an agency to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 27, 43 (1983) (internal citation omitted). Neither the Department nor the Secretary has done so here.

Each step of the Recognition Process was procedurally flawed, failed to rely on material and relevant facts, misapplied Recognition Criteria, or was unfairly influenced by political considerations. The Final Staff Report was assembled in accordance with a flawed procedure that rendered it incomplete. The Report also failed to consider relevant and material facts, and misapplied Recognition Criteria, resulting in a recommendation that was unsupported by substantial evidence. The NACIQI Panel meeting was similarly procedurally flawed, especially

as it was infected by undue political influence. The Final Staff Report and the NACIQI Panel meeting recommendation were the two primary sources in the record on which the SDO and, ultimately, the Secretary ostensibly relied. The Secretary's decision is arbitrary and capricious, the result of a procedurally defective process and not supported by the evidence in the record.

**II. IRREPARABLE INJURY WILL OCCUR IF PRELIMINARY EQUITABLE RELIEF IS NOT GRANTED**

The Secretary's decision causes ongoing irreparable and imminent injury to ACICS.

This is especially true because the Secretary also issued a PPPA (summarized in the Summary of Selected Requirements for Institutions Accredited by ACICS) that requires that all ACICS-accredited schools take immediate action to locate an alternate federally-recognized accreditor. Specifically: (1) ACICS will be irreparably injured through a decision that strikes at the core of ACICS's business (accreditation) and restricts ACICS's revenue streams (through the loss of members and membership fees); and (2) ACICS will suffer enormous reputational damage.<sup>3</sup> These constitute or are analogous to recognized irreparable injury supporting the granting of preliminary injunctive relief. *See, e.g., Nalco Co. v. United States Env'tl. Prot. Agency*, 786 F. Supp. 2d 177, 188 (D.D.C. 2011) (finding irreparable injury based on loss of "longstanding clients" and difficulty in attracting new customers because there was no legitimate means of growth in the industry); *Smoking Everywhere, Inc. v. Food & Drug Admin.*, 680 F. Supp. 2d 62,

---

<sup>3</sup> The Department argued (and the Secretary agreed) that ACICS does not have standing to assert harms suffered by its member institutions and students at those institutions during the agency review process. *See Baker Decl.* ¶ 25, Ex. 15; ¶ 28, Ex. 18. But, to be clear, ACICS's standing is predicated on direct, immediate, and substantial injury to ACICS as a result of the Secretary's violations of the APA—not injury to students or institutions. As discussed *infra* in Sections III and IV, injury to students and institutions is nonetheless relevant in the public interest and equity balancing prongs of the preliminary injunction analysis. The reality is that these schools and students are going to suffer substantial harm because of the Secretary's decision and the Department's PPPA, in the absence of preliminary injunctive relief.

76-77 (D.D.C. 2010) (finding irreparable harm when agency action threatened the continued viability of plaintiff's business and the product affected by the agency action earned nearly all of plaintiff's revenue); *Subscription Television of Greater Wash. v. Kaufmann*, 606 F. Supp. 1540 (D.D.C. 1985) (finding that an irretrievable loss of subscribers resulting in the loss of subscription fees that made up nearly all of plaintiff's revenue constituted irreparable injury); *Patriot, Inc. v. U.S. Dept. of Housing and Urban Dev't*, 963 F.Supp.1, 5 (D.D.C. 1997) (holding that "economic harm rises to the level of irreparable harm where it threatens the 'very existence of plaintiff's business,'" and finding irreparable injury "plaintiffs will be barred from the reverse mortgage market"); *Wash. Metro. Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("The harm to Holiday Tours in the absence of a stay would be its destruction in its current form as a provider of bus tours."). This injury to ACICS is not merely likely, but certain, and its impact is immediate.

**A. ACICS's Business Operations And Revenue Streams Will Diminish Quickly**

ACICS will suffer irreparable harm absent injunctive relief. Indeed, ACICS will suffer very substantial damage to its ongoing operations before the underlying case here is resolved, if the Court declines to grant the requested injunctive relief immediately. Indeed, ACICS's injuries will be: (1) "certain and great;" (2) "actual and not theoretical;" and (3) of a nature "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *See Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 242 (D.D.C. 2014) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C.Cir.1985)).

First, the Department, in tandem with the Secretary's decision, has directed that all ACICS-accredited schools must immediately seek an alternate federally-recognized accrediting agency, if schools wish to maintain Title IV funding for their students. *See Swartzwelder Decl.* ¶ 30, Ex. 5. The Department's directive to ACICS-accredited schools expressly states that

“although ACICS is no longer a federally recognized accrediting agency, the Department will continue the participation of schools accredited by ACICS in the federal student aid programs through provisional certification. Provisional certification may last up to 18 months from the date of the Secretary’s decision, a period set by statute to allow institutions to seek institutional accreditation from another federally recognized accrediting agency.” *See id.* at 1. This provisional certification, however, also requires that all ACICS-accredited schools immediately begin the process of seeking an alternate accreditor. It usually takes between 18-24 months for a school to complete accreditation with a new agency, and it can cost between \$50,000 and \$100,000 for a school to obtain initial accreditation from an agency. *See* Gunderson Decl. ¶¶ 6-7. This means that all ACICS-accredited schools must have a new application in process immediately. And further to this point, one condition for an ACICS-accredited school to be provisionally certified is that the school have “an in-process” application with an alternate federally recognized accrediting agency on or before March 13, 2017. If this requirement is not met, then, a school is required to establish a “teach-out” program, which is a contingency plan for the school in the event its programs are required to shut down. *See* Swartzwelder Decl. ¶ 3, Ex. 5 at 2.

As a result of the provisional certification requirements described in the PPPA (and summarized in the Summary noted above), it seems probable that many, if not most, ACICS-accredited schools will seek an alternate accrediting agency immediately, as they must. This means that these schools will no longer “seek ACICS accreditation” for new programs or “seek to renew their current ACICS accreditation.” *See* Williams Decl. ¶ 38. To the extent there are schools that are scheduled to go through ACICS’s April accreditation review cycle, this means that these schools are also scheduled to have January and February site visits from ACICS

evaluators. *See id.* ¶ 35. To this end, these schools must pay a site visit fee very soon. *See id.* ¶ 34. More to the point, these schools also must make a decision about whether they are going to renew their accreditation status with ACICS and pay application fees, and they must decide whether their 2017 budgets will allocate sustaining fees for ongoing ACICS membership. *See id.* Given the Department's provisional certification timeline and requirements, it seems almost certain that many of these schools will immediately begin to shed their ACICS membership and accreditation status. *See id.* ¶ 38.

ACICS will lose its current members. *See id.* ¶¶ 37-41. Immediately after the Secretary's decision, the Department contacted ACICS-accredited schools and began the process of placing schools into provisional accreditation status so they can maintain eligibility for Title IV funding. *Id.* ¶ 37. Continuing eligibility is conditioned upon the schools beginning the process of obtaining accreditation from an alternate accrediting agency. *Id.* As a result, many schools that would otherwise seek ACICS's accreditation or seek to renew their current ACICS accreditation will no longer be filing applications to do so. *Id.* ¶ 38.

It also seems unlikely that in the absence of a temporary restraining order that stays the Secretary's decision and enjoins the Department from implementing its provisional certification plan, pending disposition of the underlying case, all or nearly all ACICS schools that rely on federal funding for their students (which is nearly all schools) will cease to be ACICS members.

Second, the Secretary's decision prevents ACICS from taking on new members given that it cannot accredit any additional institutions that require accreditation by a nationally-recognized accreditor. *See id.* ¶¶ 29-41. Likewise, ACICS will no longer be able to perform its primary service of accrediting institutions to its current members that require accreditation by a nationally-recognized accrediting agency for a variety of core purposes including compliance

with state licensing requirements and requirements of programmatic accreditors. *See id.* ¶¶ 35, 38-41.

Third, ACICS's operating revenue will be immediately and adversely affected as a result of the Secretary's decision and the Department's related directives to ACICS-accredited schools. *Id.* ¶ 33. For example, ACICS-accredited schools must now determine whether they are going to use resources to pay outstanding or upcoming fees to ACICS or if they are going to forego those fees and use those resources to pay the substantial costs associated with seeking alternate accreditation from another agency. *Id.* ¶ 34. This is not some hypothetical hyperbole – a number of ACICS-accredited schools have refused and are continuing to refuse their outstanding fees for 2016 (which were due November 1, 2016) given the cloud cast by the Secretary's decision, other ACICS-accredited schools have requested refunds of fees paid for 2016 and 2017, and still other ACICS-accredited schools have indicated that they intend to allow their membership expire and not pay further fees. *See id.* ¶ 36. These problems are already occurring but will accelerate as more time elapses. *See id.* ¶¶ 35, 38, 40-41.

Fourth, ACICS's potential revenue from site-visit fees will collapse. *See id.* ¶ 35. A number of schools have cancelled ACICS site visits and will not be paying the fees that ACICS charges for site visits as there is no practical benefit for these schools in going forward with a site visit under the auspices of an accrediting agency that is no longer recognized by the Department of Education. *See id.*

Lastly, ACICS's potential revenue from application fees also will be cutoff—a common sense point generally but also something that the Department is actively making happen through its actions subsequent to the Secretary's decision. *See id.* ¶ 39. Specifically, the Department of Education's accelerated directives concerning provisional accreditation status in order to

maintain eligibility for Title IV funding precludes the schools presently accredited by ACICS from undertaking “major changes.” *See id.* But, it is “major changes” which require ACICS’s member institutions to pay additional application fees in seeking accreditation for the product of “major changes” (such as additional locations, increases in level of academic offerings, new programs). *See id.*

In the absence of immediate injunctive relief, the net effect of the Secretary’s decision is that ACICS’s day-to-day operations will be substantially curtailed well before the merits of its underlying case can be heard.

**B. ACICS Will Suffer Substantial And Imminent Reputational Damage That Will Have Lasting Effects On The Agency’s Operations**

ACICS’s reputation and goodwill continue to diminish substantially with each passing day, as ACICS loses more schools and as the impact from the Secretary’s decision continues to reverberate throughout the educational community – with schools, students, state licensing entities, and private programmatic accreditors. *See infra* at Section II. This significant damage to ACICS’s reputation and goodwill in the absence of an injunction is imminent and irreparable.

Reputational damage is well-recognized as constituting irreparable injury. *See, e.g. Patriot, Inc.*, 963 F. Supp. at 5 (holding that “plaintiffs have demonstrated irreparable harm in damage to their business reputation”); *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 77 (D.D.C. 2001) (finding that a loss of “customer trust and goodwill” constituted irreparable harm); *Malarkey-Taylor Assocs., Inc. v. Cellular Telecomm. Indus. Ass’n*, 929 F. Supp. 473, 478 (D.D.C. 1996) (finding defendant’s arguments that plaintiff would not suffer irreparable injury “unpersuasive” where, *inter alia*, plaintiff would suffer “loss of control over its reputation,” which is a “harm not compensable in money damages.”); *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (explaining that “irreparable injury to Armour from the enforcement of



the regulation is apparent without demonstration” as implementation of the administrative action “could not fail to damage its good name”); *Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 520 (9th Cir. 1984) (affirming a preliminary injunction where plaintiffs would suffer some palpable diminution in national reputation and finding such reputational harm was irreparable); *Honeywell, Inc. v. Consumer Prod. Safety Comm’n*, 582 F. Supp. 1072, 1078 (D.D.C. 1984) (holding that injury to plaintiff’s “corporate goodwill and reputation and its competitive position” constituted irreparable injury).

Further, the loss of accreditation itself can result in a loss of goodwill that constitutes irreparable damage to schools. In *Professional Massage Training Center Inc. v Accreditation Alliance of Career Schools and Colleges*, 951 F.Supp.2d 851, 854 (E.D. Va. 2012) a professional school moved for a preliminary injunction restoring its accreditation so that it could continue operating pending the outcome of an action against an accrediting agency seeking to revoke it. There, the court expressly acknowledged that “it is obvious that losing accreditation would cause [the school] to lose customers to competitors and also cause them a loss of goodwill. These things are considered irreparable harm in the Fourth Circuit.” *Id.* The Court further held that “it would be patently unfair for them to endure that sort of damage – from which recovery would be difficult, if not impossible – if it were ultimately determined that the revocation was improper.” ACICS’s loss of recognitions tarnishes ACICS’s goodwill with the schools it accredits and ultimately with their students. This goodwill will be irreparably tarnished with each passing day, even after ACICS ultimately prevails on the merits of its underlying claims. Here, too, the harm is imminent and ongoing.

ACICS’s longstanding and hard earned reputation as an accrediting agency will be irreparably damaged if its recognition is revoked in the interim. *See Williams Decl.* ¶¶ 42-45.

That damage is not speculative and its impact will be immediate. *See id.* Until now, the Department of Education has, since 1956, recognized ACICS as a reliable authority as to the quality of education offered by the institutions that ACICS accredits. *See id.* ¶ 7. Revoking ACICS’s status now, after six decades, would prove a substantial blow to ACICS’s reputation among the community of institutions that it accredits and the students who attend those schools. *See id.* ¶ 42. The additional hurdles through which institutions formerly accredited by ACICIS (and the students who attend them) will have to jump as a result of ACICS’s revoked accreditation will damage ACICS’s reputation irreparably, even if ACICS is ultimately successful on the merits of its claim. *See id.* ¶¶ 42-47. Thus, even in the event that ACICS’s accrediting status is reinstated it will be impossible – particularly in light of the politicized nature of these proceedings to date – to rectify the reputational damage that ACICS would have suffered in the interim if the Secretary’s decision is not stayed immediately, pending disposition of the underlying case. *See id.* ¶ 45. As the Court in *Professional Massage Training Center* held, forcing ACICS to endure such damage if the agency ultimately prevails on the merits, “would be patently unfair.” 951 F. Supp. 2d at 854.

### **III. THE PUBLIC INTEREST FAVORS GRANTING PRELIMINARY EQUITABLE RELIEF**

The public interest favors entry of the injunction ACICS seeks. Defendants’ termination decision will reverberate throughout the education sector causing substantial immediate and ongoing harm to: (1) ACICS-accredited institutions, which will be forced to undertake a resource-intensive process of obtaining accreditation from another accrediting agency; and (2) students attending ACICS-accredited institutions, because potential funding sources for their educational pursuits might be curtailed or more limited, as result of the Secretary’s decision.

Meanwhile, no legitimate public interest is served through immediate termination of ACICS's recognition prior to reasoned judicial consideration of ACICS's APA challenges.

**A. Immediate Harm to ACICS-Accredited Schools**

ACICS-accredited institutions will be subject to substantial and ongoing harm should an injunction not issue immediately. While the Department of Education issued a letter (the "December 12 Letter,") to member institutions in the wake of the Secretary's Decision stating that there will be an 18-month grace period for federal loan funding for affected students, (*see* Swartzwelder Decl. ¶ 6, Ex. 1) many schools accredited by ACICS are unlikely to obtain accreditation from another school within 18 months. *Id.* ¶ 17. Initial accreditation often takes at least 18 months and can take two years or longer and requires that a school conform to the agency's mission and scope, which may require certain schools to cease operations or discontinue certain programs. *Id.*; *see also* Gunderson Decl. ¶ 6 (noting that a typical accreditation review requires 18-24 months.)

Indeed, the Department's Summary of Selected Requirements warned ACICS-accredited institutions that they "will be placed on provisional certification [for Title IV eligibility] until such time as they gain accreditation by another federally-recognized accreditor, or the expiration of the 18-month period. Institutions that fail to meet the statutory deadline will lose Title IV eligibility." *See* Swartzwelder Decl. ¶ 7. Institutions must further comply with "additional conditions for continued Title IV eligibility." *Id.* ¶ 8.

Furthermore, many ACICS-accredited schools hold state licenses and/or degree-granting authority tied to accreditation by a nationally recognized accrediting agency and the loss of recognition will have an immediate and substantial impact on them. *Id.* ¶ 10. Notwithstanding the Department's efforts to allay concerns of schools that have state licenses and to inform state licensing entities that the Department is granting ACICS-accredited schools provisional

certification, the Department has no actual control over the conduct of these state entities. For example, in advance of the Secretary's Decision, ACICS-accredited schools in California received notices from the California Bureau for Private Postsecondary Education ("BPPE") stating that "ACICS's loss of recognition by the Department will remove the basis for the institution's accreditation status, and the Bureau may have to initiate proceedings to revoke your school's [Approved By Means of Accreditation]." *Id.* ¶ 11-12.

Similarly, the Maryland Higher Education Commission ("MHEC") also requires accreditation from an Department-recognized accreditor. *Id.* ¶ 13. For example, ACICS-accredited schools operated by Education Corporation of America ("ECA"), in Maryland are, thus, without accreditation and are subject to closure. *Id.* ¶ 14. While the state *may* allow for ACICS-accredited schools 18 months to obtain alternate accreditation, there are no guarantees. *Id.*

Several programmatic accrediting agencies anticipate putting the programs they accredit at ACICS-accredited schools on probation. *Id.* ¶ 15. Here, too, programmatic accrediting agencies are private actors, and the Department cannot require that programmatic accrediting agencies accept the Department's provisional certification designation. For example, the Nevada Commission on Postsecondary Education ("CPE") has informed an ECA institution that its degree programs may be shut down if they are not programmatically accredited. *Id.* ¶ 16. It is unclear if closure would be immediate. *Id.*

The process of seeking accreditation by another recognized agency is complex and expensive. *See id.* ¶ 18; *see also* Gunderson Decl. ¶ 7. For most ACICS-accredited institutions, only a few other agencies are reasonable alternatives. *See* Swartzwelder Decl. ¶ 18. Regional accreditors are largely not an option, as they often have requirements that schools have certain

governance structures in place for at least two years, before a school can seek accreditation from a regional accreditor. *Id.*; *see also* Gunderson Decl. ¶ 11.

Accordingly, for most ACICS-accredited schools, accreditation may prove problematic, as remaining national accreditors often have a more limited scope of recognition than ACICS. *See* Swartzwelder Decl. ¶¶ 19-22. Many of these schools will be required to discontinue existing educational programs in order to fit within the mission and scope of an alternate accrediting agency; this will have a direct impact on students as programs are discontinued and teach-outs are implemented. *See* Swartzwelder Decl. ¶¶ 19-22. Further, the handful of national accrediting agencies with recognition scope that can accommodate many ACICS-accredited schools also have limited resources. *See id.* These accrediting agencies will be overwhelmed and likely will not be able to extend accreditation to all eligible school applicants in less than two years, well outside the Department's requirements. *See Id.* ¶ 25; *see also* Gunderson Decl. ¶ 11. In fact, it seems likely that because of the resource constraints associated with on-boarding so many new schools, it will likely take accrediting agencies even more time than normal to accredit ACICS-accredited schools going forward. *See* Gunderson Decl. ¶ 11.

For example, Accrediting Commission of Career Schools and Colleges ("ACCSC") is the only national accrediting agency with a scope of recognition that is similar in breadth to that of ACICS, but it does not have the capacity to absorb all of the ACICS-accredited institutions that satisfy its eligibility standards and offer programs at the bachelor's degree level or above, within 18 months. *See* Swartzwelder Decl. ¶¶ 23-24. Indeed, ACCSC estimates that the accreditation process will take 18 months to two years. *Id.* ¶ 26. Accordingly, some ACICS-accredited schools may be forced to close because they cannot complete the process of obtaining alternate accreditation in time to secure Title IV access or Veterans Affairs funding for their students

following the loss of ACICS's recognition. *Id.* ¶ 27. The Department has made it clear that this provisional certification that provides continued access to Title IV funds “*may last up to 18 months* from the date of the Secretary's decision.” *Id.* ¶ 30, Ex. 5 at 1.

**B. Immediate Harm to Students at ACICS-Accredited Schools**

Absent an injunction, withdrawal of ACICS's recognition would result in profound, irreparable, imminent and substantial harm to the estimated 320,000 students enrolled in ACICS-accredited schools right now. *See Williams Decl.* ¶ 4. First, the Secretary's Decision and the Department's accompanying guidance to schools, which sets up unrealistic timelines and provisions, as noted above, will have the effect of leaving students at ACICS-accredited institutions burdened by the notion that their school is closing, leaving them uncertain about their ability to complete their program and graduate. *See Swartzwelder Decl.* ¶ 34. State agencies exacerbate those feelings by leaving the impression that a school could be closed at any time because it lacks accreditation. *Id.* And, in fact, some state licensing entities have declined to commit with certainty to any next steps in this regard. *See infra* at 35-36.

In the wake of the Secretary's Decision, the U.S. Department of Veterans Affairs, for example, warned recipients of GI benefits at ACICS-accredited schools, that they must “decide whether your current school and program will meet your need for the next 18 months or if you should consider other options, courses, and/or schools.” *Id.* ¶ 9. The missive further warns that the loss of accreditation “may affect your ability to transfer credits to another institution, or sit for state licensing exams, as well as other potential impacts.” *Id.*

Indeed, state-based agencies are not bound by the Department of Education's 18-month grace period. *Id.* ¶ 14. Existing students in California, for example, may not receive the state financial aid to which they are entitled from the California Student Aid Commission (“CSAC”)

because BPPE no longer recognizes ACICS-accredited schools as having the authority to operate in California. *Id.* ¶¶ 35-36. CSAC has not stated that it will continue to award aid for such students during the 18-month period while ACICS-accredited institutions obtain new accreditation. *Id.* ¶ 36.

Further, students in many programs at ACICS-accredited schools must graduate from programs accredited by a recognized agency in order to sit for registration, certification, or licensure that is required to work in their chosen field. *Id.* ¶ 37. For example, graduates of ACICS-accredited schools who are in nursing programs may no longer be eligible to sit for nurse licensure exams that are administered by state entities. *Id.* ¶¶ 37-38.

Similarly, students who remain enrolled at ACICS-accredited schools after the loss of ACICS's recognition will face even greater challenges if they seek to transfer their credits or have their credentials accepted to fulfill requirements for more advanced degrees. *Id.* ¶ 39. Few institutions will accept credits or credentials earned at schools that are not accredited by a recognized agency. *Id.* Thus, students currently enrolled in multi-year degree programs will be forced to decide whether to stay in their existing programs and hope that a new agency accredits them, or seek out entirely new programs without knowing whether a new agency will accept credits already earned. *Id.* ¶ 40.

Furthermore, as the Department's own data reveals, ACICS serves a population of more at-risk students than regionally accredited schools. *See* Gunderson Decl. ¶¶ 8-9. Accordingly, the Secretary's Decision will have a disproportionate impact on at-risk student populations. *Id.*

**C. Additional Aspects Of The Public Interest Favor An Injunction**

The public also has a vested interest in a predictable federal higher education system in which the federal agency charged with oversight adheres to its own procedures. The public's

interest weighs heavily in favor of granting the relief ACICS seeks. *See Bayer HealthCare, LLC, v. U.S. Food & Drug Admin.*, 942 F. Supp. 2d 17, 24-25 (D.D.C. 2013) (stating that “[t]he public has an interest in federal agency compliance with its governing statute,” and finding the public interest favored entry of a temporary restraining order where the FDA “did not address the full record or make a reasoned decision” based on the factual record); *Hospira, Inc. v. Burwell*, 2014 WL 4182398, at \*5 (D. Md. Aug. 19, 2014) (stating that those “who are required to follow the process established by the [federal agency] could lose faith in the process if it becomes unpredictable,” and granting a temporary restraining order in part because “the public has an interest in an agency’s compliance with its governing statute”); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26-27 (D.D.C. 2009) (finding that public interest favored entry of the injunction, and defendants failed to “set forth any reason as to why the [final agency action] must be implemented at this time, as opposed to after a resolution on the merits of Plaintiffs’ claims”).

The Secretary’s unsupported decision to terminate ACICS’s recognition unnecessarily upends the system of nationally-recognized accreditation agencies and substantially harms faultless schools and students. A significant number of the schools accredited by ACICS are unlikely to obtain accreditation from another agency during any 18-month grace period, as the process of gaining initial accreditation can, and often does, take longer than two years. *See Gunderson Decl.* ¶ 6; *see also Swartzwelder Decl.* ¶ 17. Many of these schools will be required to discontinue existing programs in order to fit within the mission and scope of an alternate accrediting agency; this will have a direct impact on students as programs are discontinued. *See Swartzwelder Decl.* ¶ 17. Many students currently enrolled in 2- or 4-year degree programs will be immediately impacted and placed between a rock and a hard place: do I remain in my



program and gamble that my institution finds a new accreditor by the time I graduate, or do I forgo the time, expense, and resources that I've expended in my current program and restart the process of finding a new school (which may or may not accept any credits I've earned so far)? Students should not be forced to make that decision, particularly while this litigation is pending.

**IV. THE BALANCING OF THE EQUITIES TIPS IN FAVOR OF GRANTING PRELIMINARY EQUITABLE RELIEF**

The balance of the equities analysis here consists of three factors: (1) injury to ACICS absent an injunction; (2) injury, if any, to the Department of Education if injunctive relief is granted; and (3) injury to third-parties and the public generally if injunctive relief is granted or denied. An injunction here would best comport with equitable principles because, on balance, the harm to ACICS coupled with the harm to the public outweighs any potential harm to the Department and warrants entry of an injunction. Further, a preliminary injunction is necessary and appropriate to maintain the status quo pending resolution of the underlying case on the merits. The requested injunction would be preliminary in nature and, thus, the Department would be entitled to enforce its decision if the Court were ultimately to decline to grant final injunctive relief (notwithstanding the flawed process leading to the Department's unsupported decision to terminate recognition). Additionally, the public will suffer as a result of the loss of the valuable and integral accrediting function that ACICS provides to schools that currently enroll an estimated 320,000 students. Thus, the "balance of equities" in this case tips decidedly in favor of an injunction. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

First, ACICS will suffer irreparable injury absent the injunctive relief it seeks. Without the relief it seeks, ACICS will suffer: (1) cessation of its core function as an accrediting body; and (2) reputational harm. *See, supra*, Section II.A.

Second, the Department of Education will not suffer any harm if the Court grants ACICS's request. The Department has not, in nearly a year of administrative proceedings, pointed to any evidence that would support an argument that it would suffer as a regulator if the status quo is maintained while ACICS's APA challenges are resolved.<sup>4</sup> Indeed, the Department has repeatedly acknowledged that ACICS had already come into compliance with many regulatory criteria, and instead postulated that ACICS would not be able to fully comply with all criteria within 12 months. *See, e.g.*, Baker Decl. ¶ 20, Ex. 10.<sup>5</sup> There is plainly no harm to the Department of Education if the court enters an injunction.

Third, ACICS-accredited institutions and students enrolled in those institutions will be harmed without an injunction. As described in Section III.A above, there is a panoply of immediate harms to schools as a result of the revocation of ACICS's recognition, ranging from being forced to close or discontinue certain programs, to incurring substantial costs to attempt to obtain alternate accreditation, to losing state licenses or other programmatic accreditation that necessarily require accreditation by a nationally-recognized accreditor. *See, supra*, Section III.A. Similarly, the harm to students is certain and imminent, as many students will be unable to

---

<sup>4</sup> It is also well-settled that the Court can enter a preliminary injunction to maintain the status quo during the pendency of litigation. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *United Mine Workers of Am. v. Int'l Union, United Mine Workers*, 412 F.2d 165, 168 (D.C. Cir. 1969).

<sup>5</sup> Similarly, the permanent injunctive relief ACICS seeks cannot harm the Department in any real sense because ACICS only seeks to have the Department properly comply with its obligations under its own recognition procedures and engage in an appropriate review of all relevant information pertinent to ACICS's petition. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)); *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("The orderly function of the process of review requires that the grounds upon which the administrative agency acted are clearly disclosed and adequately sustained.").

graduate, transfer credits, obtain state-based student financial aid, sit for many state licensure exams or other programmatic exams or certifications. *See, supra*, Section III.B.

By contrast, students and schools will not be harmed by the entry of an injunction. The Department's policy goal of purging non-compliant institutions from the for-profit educational sector, while laudable, cannot justify the imposition of substantial and immediate harm to the roughly 320,000 students who attend ACICS-accredited schools. The overwhelming majority of the schools that ACICS has accredited and currently accredits are compliant schools that offer secondary educational programs to students who are working to improve their lives.

### CONCLUSION

For the foregoing reasons, ACICS respectfully requests that the Court immediately (1) stay the Secretary of Education's decision revoking ACICS's recognition; (2) return ACICS to the status quo and continue its recognition status; and (3) enjoin the Department from implementing and enforcing the Provisional Program Participation Agreement and any other provisions that the Department has immediately applied to ACICS-accredited institutions.

Dated: December 15, 2016

Respectfully submitted,

By: /s/ Allyson B. Baker

Allyson B. Baker (#478073)

Meredith L. Boylan (#978088)

Andrew T. Hernacki (# 1024442)

Hillary S. Profita (*pro hac vice* motion to be filed)

Venable LLP

575 7th Street, NW

Washington, DC 20004

202-344-4073 Telephone

202-344-8300 Facsimile

abbaker@venable.com

mlboylan@venable.com

athernacki@venable.com

hsprofita@venable.com

*Counsel for Accrediting Council for  
Independent Colleges and Schools*

**CERTIFICATION OF COUNSEL PURSUANT TO LCvR 65.1(a)**

Pursuant to LCvR 65.1(a), I hereby certify that Plaintiff, by counsel, has provided notice via email to attorneys Donna Mangold and Sarah W. Morgan of the Department of Education's Office of General Counsel and attorney Charles Yordy of the Department of Education's Office of Hearings and Appeals, of Plaintiff's intent to file Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, and provided notice that Plaintiff is requesting a hearing, at the Court's earliest convenience, on Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. Plaintiff also provided to the foregoing attorneys for the Department of Education true and correct copies of the following documents:

- (1) Plaintiff's Complaint
- (2) Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, and Proposed Order
- (3) Memorandum of Points and Authorities In Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction
- (4) All other documents filed with the Court

Further, Plaintiff will hand-deliver on December 16, 2016 true and correct copies all papers filed with the Court to the following:

Attorney General of the United States  
Loretta E. Lynch  
Department of Justice Room B103950  
Pennsylvania Avenue, N.W., Washington, D.C. 20530

United States Attorney for the District of Columbia  
Channing D. Phillips  
C/O Civil Process Clerk  
555 4th Street, N.W., Washington, D.C. 20530

United States Department of Education  
C/O General Counsel James Cole, Jr.  
400 Maryland Avenue SW., Washington, DC 20202

Respectfully submitted,

Dated: December 15, 2016

By: /s/ Allyson B. Baker

Allyson B. Baker (# 478073)

Meredith L. Boylan (#978088)

Andrew T. Hernacki (#1024442)

Hillary S. Profita (*pro hac vice* motion to be filed)

Venable LLP

575 7th Street, NW

Washington, DC 20004

202-344-4000 Telephone

202-344-8300 Facsimile

abbaker@venable.com

mlboylan@venable.com

athernacki@venable.com

hsprofita@venable.com

*Counsel for Accrediting Council for  
Independent Colleges and Schools*