



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

**ACCREDITING COUNCIL FOR
INDEPENDENT COLLEGES AND SCHOOLS**

Complainant.

Docket No. 21-28-AC

Accreditor Recognition

DECISION OF THE DEPUTY SECRETARY

The question presented in this case is whether to grant renewal of recognition to the Accrediting Council for Independent Colleges and Schools (ACICS) as an accrediting agency for certain private postsecondary institutions offering degrees for professional, technical, or occupational careers. In making a final decision for the U.S. Department of Education (the Department), I review the record and arguments of the parties *de novo*.¹ Based on the following analysis, I find that ACICS is not in compliance with the applicable recognition criteria as discussed herein. Therefore, I deny ACICS' petition for renewal of recognition.²

I. LEGAL FRAMEWORK

The Department does not directly accredit institutions of higher education, but instead recognizes accrediting agencies. Agencies seeking initial or renewed recognition are first evaluated by the Department's staff in the Office of Postsecondary Education (OPE). OPE considers an agency's petition along with site visit reports, public comments, and complaints against the agency. OPE looks for the agency's compliance with recognition criteria established at 34 C.F.R. Part 602 Subpart B, which are derived from section 496 of the Higher Education Act of 1965 (HEA), *as amended*, 20 U.S.C. § 1099b (2012).³

¹ 34 C.F.R. § 602.37(e) ("On appeal, the Secretary makes a recognition decision, as described in § 602.36(e)."); *Nw. Comm'n on Coll. and Univ.*, Dkt. No. 14-07-O, U.S. Dep't of Educ. (Decision of the Secretary) (Dec. 11, 2014) at 5 ("I review Northwest's appeal *de novo*") and n.39 ("While I recognize the expertise of the individuals who have reviewed Northwest's application, the regulations require that I thoughtfully consider the entire record before me [*de novo*].").

² On June 1, 2021, the Secretary issued a memorandum delegating to me his authority under 34 C.F.R. § 602.37 to adjudicate this appeal and render a final decision for the Department.

³ When reauthorizing the HEA, Congress passed the Higher Education Amendments of 1992, Pub. L. No. 102-325 (July 23, 1992), 106 Stat. 448, which, among other things, added § 496 to the HEA within Part H – Program Integrity.

OPE then forwards the petition, all relevant documentation, and its recommendation to the National Advisory Committee on Institutional Quality and Integrity (NACIQI). NACIQI is an independent body made up of 18 appointed members with a knowledge of accreditation and higher education generally.⁴ NACIQI conducts several open meetings each year during which it considers agency petitions. These meetings permit the agency, OPE, and members of the public to present commentary and relevant evidence for NACIQI's consideration.⁵ Ultimately, NACIQI votes on what kind of recommendation to make to the Senior Department Official (SDO).

Next, NACIQI forwards its recommendation along with all previously assembled evidence to the SDO.⁶ At that point, the SDO considers comments from the agency and OPE.⁷ Finally, the SDO issues a recognition decision taking into account all of the recommendations and submissions in the record.⁸

If its petition is denied or otherwise limited, the agency may appeal the SDO's decision to the Secretary.⁹ The Secretary makes a recognition decision *de novo*, i.e. without deference to the SDO's decision and as though the Secretary's is the first decision in the process.¹⁰ The Secretary reaches a decision by applying the recognition criteria to the facts of the case found in the record before the SDO.¹¹

Approval of recognition requires the agency to show that it both complies with, and effectively applies, the criteria for recognition. Whether an agency demonstrates compliance is a fact-intensive determination that depends on the circumstances of the agency. "Recognition is an individualized and discretionary process. . . . The differing sizes, policies and missions of accrediting agencies make apples-to-apples comparisons of them, and therefore comparisons of their recognition proceedings, very difficult and of limited value."¹²

If the agency is noncompliant, or fails to effectively apply the criteria, the Secretary will deny, limit, suspend, or terminate recognition.¹³ Alternatively, where there is a finding of noncompliance, the Secretary may, in their discretion, continue recognition of an agency pending submission of a compliance report, but only if the Secretary "concludes that the agency will demonstrate compliance with, and effective application of, the criteria for recognition within 12 months from the date of the . . . decision."¹⁴ If the record already contains a compliance report required by a previous decision, and the agency remains noncompliant, the Secretary "denies,

⁴ 20 U.S.C. § 1011c (2016).

⁵ 34 C.F.R. § 602.34(e) (providing that NACIQI should "invite[] Department staff, the agency, and other interested parties to make oral presentations during the meeting").

⁶ *Id.* § 602.34(g).

⁷ *Id.* § 602.35.

⁸ *Id.* § 602.36.

⁹ *Id.* § 602.37.

¹⁰ *Id.* § 602.37(e).

¹¹ *Id.*

¹² *Accrediting Comm'n for Cmty and Junior Coll., W. Ass'n of Sch. and Coll.*, Dkt. No. 14-10-O, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 4, 2016) at 10.

¹³ 34 C.F.R. § 602.37(e) (citing § 602.36(e)).

¹⁴ *Id.* § 602.36(e)(3)(i).

limits, suspends, or terminates recognition, except, in extraordinary circumstances, upon a showing of good cause.”¹⁵

II. PROCEDURAL BACKGROUND

A. 2016 Review and Decision

ACICS was founded in 1912 and, prior to the lengthy case at hand, had its last review for recognition in 2011.¹⁶ During that round of review, NACIQI recommended the Department continue ACICS’ recognition, but require a compliance report in 12 months to address certain issues. NACIQI accepted the agency’s compliance report at its meeting in June 2013 and the agency’s recognition continued for the subsequent 3 years.

The timeline relevant to this case began in January 2016 when ACICS petitioned the Department for a standard 5-year renewal of its recognition status. During the course of its review, OPE requested that ACICS submit supplemental answers to questions about its accreditation activities. ACICS’ answers were divided in two parts: the Part I submission and the Part II submission. The Part II submission was particularly voluminous, including a great deal of supplemental information in addition to answers to OPE’s questions. Notably, OPE did not adequately review the Part II submission before creating a staff report finding that ACICS was noncompliant with the recognition criteria.

OPE submitted its recommendation to NACIQI. At a biannual meeting in June 2016, after considering presentations by OPE and ACICS, NACIQI recommended that the Secretary deny ACICS’ petition for renewed recognition. Thereafter, the SDO also recommended denial. Finally, then-Secretary John King, Jr. issued a decision on December 12, 2016, denying ACICS’ petition and terminating ACICS’ recognition. At each stage of review, the decisions deferred to the analysis and conclusions OPE had reached. OPE relied on extensive data and evidence, but admittedly never reviewed ACICS’ Part II submission.

On December 15, 2016, ACICS filed a petition for review in the U.S. District Court for the District of Columbia. On March 23, 2018, the Court remanded Secretary King’s decision to the U.S. Department of Education.¹⁷ The Court held that the Secretary violated the Administrative Procedure Act by failing to consider ACICS’ Part II submission and supplemental evidence when making his final agency decision. The Court found that the Part II submission contained information relevant to ACICS’ “track record” and compliance with the recognition criteria, so the Department had a duty to consider it before making a decision.¹⁸ Other than the failure to review the Part II submission, the Court rejected ACICS’ allegations of other procedural errors made by the Secretary and in the intermediate actions preceding the decision.¹⁹

¹⁵ *Id.* § 602.36(e)(3)(iii).

¹⁶ See March 4, 2021, NACIQI Transcript (March 4 Transcript) at 15.

¹⁷ *Accrediting Council for Indep. Coll. and Sch. v. DeVos*, 303 F. Supp. 3d 77 (D.D.C. Mar. 23, 2018).

¹⁸ *Id.* at 107–108.

¹⁹ *Id.* at 115–121.

B. 2018 Remand

Upon receiving the case remanded by the Court, then-Secretary Betsy DeVos ordered the SDO to review the Part II submission and make a new recommendation, taking into consideration the Part II submission along with the rest of the record. Secretary DeVos also allowed ACICS to submit comments in the case.

During the course of this review, the Office of the Inspector General (OIG) issued a report in June 2018 finding that OPE needed to improve its processes.²⁰ First, OIG found that OPE did not have adequate controls over the school information that agencies use as evidence of their compliance with the recognition criteria. Further, OIG noted that OPE did not provide sufficient guidance to its staff for how to apply the criteria to agencies' petitions.²¹ OIG also found that OPE inadequately monitored recognized agencies for ongoing compliance during their periods of recognition.²² OIG recommended that OPE "use risk-based procedures and readily available information" to both determine the sample sizes of schools which petitioners for accreditation should use in their petitions and to identify high-risk agencies for prioritization of oversight.²³ OIG also recommended that OPE "adopt written policies and procedures for reviewing agency petitions for recognition."²⁴

Ultimately, both the SDO and ACICS recommended that Secretary DeVos renew ACICS' recognition. The SDO's recommendation was qualified, stating that ACICS was compliant or substantially compliant with most criteria except for those dealing with "competency of representatives" and "conflicts of interest."²⁵ Because Secretary DeVos found it likely ACICS could achieve full compliance within 12 months, on November 21, 2018, she gave ACICS renewed recognition for 12 months and ordered ACICS to submit a compliance report after that period demonstrating full compliance.²⁶ Secretary DeVos also ordered ACICS to submit monitoring reports to demonstrate ongoing compliance with four other criteria: administrative and financial resources,²⁷ accreditation and pre-accreditation standards related to student achievement,²⁸ "recruiting and admissions practices,"²⁹ and "monitoring."³⁰

C. 2019 and Beyond

ACICS submitted its reports in 2019 as required by Secretary DeVos' decision. On December 19, 2019, ACICS submitted the 12-month agency compliance report to OPE.³¹ On

²⁰ U.S. Department of Education's Recognition and Oversight of Accrediting Agencies, ED-OIG/A09R0003, U.S. Department of Education Office of Inspector General (June 27, 2018) (2018 OIG Report).

²¹ 2018 OIG Report at 2.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 3.

²⁵ *Accrediting Council for Indep. Coll. and Sch.*, Dkt. No. 16-44-O, U.S. Dep't of Educ. (Decision of the Secretary) (Nov. 21, 2018) (ACICS 2018 Decision) at 3-4.

²⁶ *Id.* at 8.

²⁷ 34 C.F.R. § 602.15(a)(1).

²⁸ *Id.* § 602.16(a)(1)(i).

²⁹ *Id.* § 602.16(a)(1)(vii).

³⁰ *Id.* § 602.19(b).

³¹ March 4 Transcript at 15.

December 20, 2019, ACICS submitted its monitoring report.³² While reviewing these reports, OPE opened two additional reviews based on credible information suggesting additional issues of noncompliance. OPE opened a “Capacity Inquiry” based on ACICS’ public testimony that raised concerns about its financial stability and review of two institutions: “Virginia International University (VIU, now known as Fairfax University of America) and San Diego University for Integrative Studies (SDUIS).”³³ OPE opened an “RNU Inquiry” on February 24, 2020, in response to a February 15, 2020, news article alleging that Reagan National University (RNU), an ACICS-accredited institution, was not in operation and did not have students, faculty, or a physical presence.³⁴

OPE provided draft narratives of reports from all four inquiries to ACICS, inviting responses and any additional responsive information or documentation. Thereafter, on January 22, 2021, OPE issued four final reports: the Compliance Final Staff Report, the Monitoring Final Staff Report, the Capacity Final Staff Report, and the RNU Final Staff Report, all of which OPE forwarded to NACIQI for consideration.³⁵ Across the four reports, OPE found ACICS out of compliance with seven recognition criteria, as described below.

D. OPE’s Findings of Noncompliance

Section 602.15(a)(1) – Staffing/Financial Resources

To comply with this criterion, an agency must have “adequate administrative staff and financial resources to carry out its accrediting responsibilities.”³⁶

In the Monitoring Report, OPE first described the posture of ACICS upon the issuance of the Secretary’s November 21, 2018, decision. In that decision, then-Secretary DeVos agreed with the SDO that ACICS was compliant with Section 602.15(a)(1), but ordered ACICS to provide “audited financial records on a yearly basis over the next three years” and “provide a report demonstrating the adequacy of its staffing in the context of its institutional and program membership.”³⁷ ACICS submitted evidence in support of its continued compliance with this criterion, including specific responses to concerns raised by OPE in 2020.³⁸ However, with the benefit of ACICS’ responses, OPE found ACICS noncompliant.

OPE found that “ACICS’ financial statements show a consistent downward trend in net assets and change in net assets for operations during the last five years.”³⁹ This trend included a drop of “more than 88%” in revenues from June 30, 2016, to June 30, 2020, with only a 72%

³² *Id.*

³³ Capacity Report at unpag. 5.

³⁴ SDO Decision at 7; *See* RNU Report.

³⁵ Hereinafter these report titles are shortened to Compliance Report, Monitoring Report, Capacity Report, and RNU Report, respectively.

³⁶ 34 C.F.R. § 602.15(a)(1).

³⁷ Monitoring Report at unpag. 1.

³⁸ *Id.* at unpag. 5–7.

³⁹ *Id.* at unpag. 7.

drop in expenses over that period.⁴⁰ ACICS' net assets decreased by 44% over that period.⁴¹ OPE further concluded that it "has no basis to believe that ACICS will be able to turn around its precarious financial situation" because controlling expenses would compromise ACICS' administrative capability.⁴²

In the Capacity Report, OPE found that ACICS conducted inadequate reviews of VIU and SDUIS.⁴³ Specifically, OPE found that "inadequate staffing and other resources are likely the reason for" the inadequate reviews of these institutions.⁴⁴ The reviews were inadequate because "ACICS either was unaware of compliance issues and took no action, or took action after another approval entity or accrediting agency took action, or took an action that did not appear consistent with its policies and procedures."⁴⁵

In the RNU Report, OPE found that ACICS failed to confirm that "RNU met the workshop attendance requirement" and did not "verify the answers provided on RNU's pre-application self-assessment."⁴⁶ Despite only granting RNU a short-term accreditation, ACICS still "did not effectively monitor RNU in between accreditation reviews to ensure continued compliance with agency standards and policies."⁴⁷

Section 602.15(a)(2) – Competency of Representatives

To meet this criterion, an agency must have "competent and knowledgeable individuals" to perform accreditation tasks, including performing site visits, establishing and applying policies, and making accreditation decisions.⁴⁸ The competence of these individuals is demonstrated both through their education and experience and through the agency's training to take on specific responsibilities on the agency's behalf.⁴⁹

In the Compliance Report, OPE considered ACICS' compliance in the context of ACICS' own training policy. ACICS' training policy required mandatory training for site visitors "in every role that they are qualified to serve in," including "General Evaluator Refresher Training (all); Chair Training; Student Relations; Educational Activities; Distance Education."⁵⁰ The "Educational Activities" role is a specialist role subject to additional training activities created by ACICS.⁵¹ OPE found that ACICS allowed two site evaluators, D. Teneyuca and D. Minore, to act in the Educational Activities specialist role without completing the requisite training.⁵² OPE also found that ACICS failed to provide documentation that an

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Capacity Report at unpag. 5.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ RNU Report at unpag. 5.

⁴⁷ *Id.*

⁴⁸ 34 C.F.R. § 602.15(a)(2).

⁴⁹ *Id.*

⁵⁰ Compliance Report at unpag. 9.

⁵¹ *Id.* at unpag. 2.

⁵² *Id.* at unpag. 9.

emergency replacement, G. Randall, “completed her training on-site with a staff member.”⁵³ OPE found ACICS noncompliant for these failures to follow its own training policy to ensure competence of staff.⁵⁴

In the RNU Report, OPE found ACICS noncompliant because it did not demonstrate that its site visitors, members of the decision-making body, and other agency representatives had adequate training.⁵⁵ OPE noted that ACICS’ site visit team at RNU did not include a representative qualified and trained to evaluate distance education programs despite anticipating the need for such a representative.⁵⁶ OPE also noted that the site visit team at RNU reported that it was unable to obtain any instructional materials to review, and that students ““did not have access to or possess course textbooks,”” but did not list these issues as deficiencies in the team’s report.⁵⁷ OPE also concluded that ACICS failed to provide suitable records showing the training and qualification of various personnel requested during the Department’s staff review.⁵⁸

Section 602.16(d) – Distance/Correspondence Education

In general, an “agency’s accreditation standards must set forth clear expectations for the institutions or programs it accredits” in a list of prescribed areas.⁵⁹ To meet this specific criterion, if the agency wishes to accredit institutions or programs offering distance education, “the agency’s standards must effectively address the quality of an institution’s distance education, correspondence courses, or direct assessment education in the areas identified in” 34 C.F.R. § 602.16(a)(1).⁶⁰

In the Capacity Report, OPE found that ACICS failed to establish standards that would address several problems in VIU’s distance education programs. These problems involved “faculty-student interaction, peer-to-peer interaction, academic rigor at the graduate level and the comparability of the distance education to residential offerings.”⁶¹ OPE concluded that ACICS failed to uncover “egregious issues” with VIU’s distance education programs, learning of them only after the State Council for Higher Education in Virginia (SCHEV) uncovered serious problems.⁶²

ACICS sought to demonstrate its compliance by showing it received the SCHEV audit report on February 11, 2019, contacted SCHEV the next day and again on March 15, 2019, and then discussed the matter with SCHEV staff on March 18 and 21, 2019.⁶³ Thereafter, the ACICS

⁵³ *Id.*

⁵⁴ *Id.* at 9–10.

⁵⁵ RNU Report at unpag. 10.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 34 C.F.R. § 602.16(a)(1).

⁶⁰ *Id.* § 602.16(d)(1). In the Capacity Report, the Department staff noted that the regulation providing the distance education criterion at issue here was renumbered from § 602.16(c) to § 602.16(d). For ease of reference, this criterion is described hereafter under the new number, § 602.16(d).

⁶¹ Capacity Report at unpag. 9.

⁶² *Id.* at unpag. 10.

⁶³ *Id.* at unpag. 9–10.

At-Risk Institutions Group (ARIG) held a briefing and made a recommendation to the executive committee, after which ACICS sent a show cause directive to VIU on March 22, 2019.⁶⁴

OPE acknowledged the documentation submitted by ACICS, but nevertheless concluded that ACICS failed to comply with the criterion. First, ACICS failed to uncover the “egregious issues” in VIU’s distance education programs during its January 17–18, 2018, site visit despite these issues being apparent to SCHEV during its August 14–16, 2018, audit.⁶⁵ Second, ACICS made the decision to forgo conducting a review of VIU’s programs, and instead waited to see what SCHEV uncovered during the process of its audit and decision.⁶⁶ ACICS further failed to demonstrate that it followed its own policy, which should have compelled a review by ARIG, because ARIG did not conduct a review.⁶⁷

Section 602.17(c) – On-Site Review

To meet this criterion, an agency must “have effective mechanisms for evaluating an institution’s or program’s compliance with the agency’s standards” including conducting “at least one on-site review of the institution or program during which it obtains sufficient information to determine if the institution or program complies with the agency’s standards.”⁶⁸

In the Capacity Report, OPE found ACICS noncompliant with Section 602.17(c) because it failed to demonstrate it employed effective on-site review mechanisms in its evaluation of VIU.⁶⁹ Although ACICS conducted an on-site review at VIU in January 2018, that review failed to uncover deficiencies later uncovered by SCHEV in August 2018.⁷⁰ Furthermore, ACICS’ response to OPE’s initial finding only provided information about its compliance regarding SDUIS, failing to address OPE’s concerns regarding VIU.⁷¹ OPE concluded “that the agency does not appear to be able to obtain sufficient information to determine if an institution complies with the agency’s standards during an on-site review of the institution.”⁷²

In the RNU Report, OPE found that ACICS did not adhere to its own benchmarks for gathering institutional data using student surveys.⁷³ ACICS informed RNU that it intended to survey “[a]t least 10 percent of the students, across all disciplines and day/evening schedules.”⁷⁴ During the 2019 site visit, “only 3 out of 70 enrolled students (4%) complet[ed] the survey.”⁷⁵ According to OPE, ACICS took no further action despite the institution’s failure to proffer a sufficient sample of student surveys.⁷⁶

⁶⁴ *Id.* at unpag. 10.

⁶⁵ Capacity Report at unpag. 8.

⁶⁶ *Id.* at unpag. 10.

⁶⁷ *Id.*

⁶⁸ 34 C.F.R. § 602.17(c).

⁶⁹ Capacity Report at unpag. 14.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ RNU Report at unpag. 31.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 31–32.

OPE also found lacking ACICS' failure to explore certain "red flags" uncovered during the 2019 site visit.⁷⁷ These included: lack of documentation of prior education in RNU's student files; no documentation of student or graduate involvement in program design or oversight as required by ACICS standards; and no documentation of a single instance of a student withdrawing or failing to demonstrate satisfactory academic progress.⁷⁸

Section 602.17(e) – Agency Analysis of Information

To meet this criterion, an agency must conduct its own analysis of an institution's or program's "self-study and supporting documentation" along with other relevant information, such as the on-site review team's report, "to determine whether the institution or program complies with the agency's standards."⁷⁹

In the Capacity Report, OPE found ACICS noncompliant with this criterion regarding its review of materials relevant to SDUIS' application for accreditation.⁸⁰ Although ACICS received public comments and "over 400 pages from the institution in response to the public comments," it did not submit "any evidence to demonstrate that it has engaged in any substantive review of either the comments or SDUIS's documentation."⁸¹ OPE concluded that ACICS failed to follow its own accrediting process by not completing the public comment step.⁸² OPE also found that ACICS failed to follow its own process by not taking into account that USA English Language Center (USAELC), a subcomponent of SDUIS, was denied accreditation by the Accrediting Council for Continuing Education and Training (ACCET).⁸³

Section 602.18(b)(3) – Decisions Based on Published Standards

To meet this criterion, an agency must base its accreditation decisions on the agency's published standards.⁸⁴ In the RNU Report, OPE found that ACICS had a requirement that institutional administrators were required to attend an in-person workshop. RNU failed to meet that requirement and ACICS "delayed" RNU's initial accreditation as a result, but nevertheless granted accreditation without documenting its decision-making process. For example, ACICS did not explain why RNU was granted accreditation without meeting this requirement or "how it

⁷⁷ *Id.* at 32.

⁷⁸ *Id.*

⁷⁹ 34 C.F.R. § 602.17(e).

⁸⁰ Capacity Report at unp. 19–20.

⁸¹ *Id.* at 20.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 34 C.F.R. § 602.18(b)(3). OPE noted in the RNU Report that this requirement was originally located at 34 C.F.R. § 602.18(c), but the regulations were revised and renumbered effective July 1, 2020. RNU Report at unp. 38. OPE also noted that the revisions did not affect the substance of the regulations as they relate to ACICS. I use the current citation for ease of reference, but herein quote the relevant language from the previously in effect regulation: "The agency must consistently apply and enforce standards that respect the stated mission of the institution, including religious mission, and that ensure that the education or training offered by an institution or program, including any offered through distance education or correspondence education, is of sufficient quality to achieve its stated objective for the duration of any accreditation or preaccreditation period granted by the agency. The agency meets this requirement if the agency—

(c) Bases decisions regarding accreditation and preaccreditation on the agency's published standards." 34 C.F.R. § 602.18(c) (2010).

would prevent the failure to meet this requirement from happening in the future.”⁸⁵ OPE also noted that RNU originally “checked that it was accredited on the self-assessment,” an erroneous representation.⁸⁶ Although ACICS asserted that it “could easily verify that claim,” it did not document that it actually verified that claim or any other part of the self-assessment.⁸⁷

Finally, OPE found that ACICS failed to abide by its placement rate standards. RNU had “two bachelor degree programs that reported a placement rate of 50%.”⁸⁸ ACICS asserted that it used a “small population exemption” for programs with 10 or fewer students, but did not establish or document the policy of granting such an exemption to its standards.⁸⁹

Section 602.19(b) – Monitoring

To meet this criterion, an agency must effectively apply “monitoring and evaluation approaches that enable the agency to identify problems with an institution’s or program’s continued compliance with agency standards.”⁹⁰ The regulation enumerates a variety of monitoring approaches that agencies must apply.

In the Monitoring Report, OPE determined that ACICS failed to employ effective monitoring at VIU to uncover “significant areas of concern” regarding VIU’s compliance that were uncovered by SCHEV.⁹¹ OPE specifically noted that ACICS’ ARIG, designed to enhance monitoring and evaluation of at-risk institutions, failed to “uncover the serious areas of noncompliance with financial capability or educational quality standards identified by other accrediting or approval agencies.”⁹² In fact, ACICS provided no examples of ARIG or any other monitoring effort uncovering institutional noncompliance.⁹³

In the RNU Report, OPE found that ACICS failed to effectively monitor RNU after accreditation.⁹⁴ ACICS had granted a shortened period (two years rather than three years) of initial accreditation specifically to ensure close monitoring of RNU for compliance with the agency’s standards.⁹⁵ From 2017 until the next site visit in 2019, ACICS found that RNU had “fallen so far out of compliance” that it warranted issuing a show cause order.⁹⁶ Some points of noncompliance in 2019 were identical to points of noncompliance found in 2017.⁹⁷ OPE found ACICS’ supposedly heightened monitoring efforts inadequate because they failed to uncover these deficiencies during the two-year accreditation period.

E. 2021 NACIQI Meeting

⁸⁵ RNU Report at unpag. 37.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at unpag. 38.

⁸⁹ *Id.*

⁹⁰ RNU Report at unpag. 42; 34 C.F.R. § 602.19(b).

⁹¹ Monitoring Report at unpag. 18–19.

⁹² *Id.* at 19.

⁹³ *Id.*

⁹⁴ RNU Report at unpag. 43.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at unpag. 43–44.

Based on the findings of noncompliance described above, OPE recommended to NACIQI that ACICS not be granted renewal of its recognition. NACIQI considered the four final reports, along with presentations from ACICS, OPE, and third parties at its March 4, 2021, virtual meeting conducted via Webex.⁹⁸ NACIQI also considered a new report issued by the OIG on March 2, 2021, examining the Department’s 2016 and 2018 recognition reviews of ACICS.⁹⁹ The 2021 OIG Report found the Department’s 2016 review lacking for failure to take into account all available evidence, but found the 2018 review to be adequate.¹⁰⁰

At the outset of the March 4th meeting, the NACIQI chair explained the process by which the meeting would proceed.¹⁰¹ First, NACIQI members designated “primary readers who are assigned by the staff” would introduce the matter.¹⁰² Then, OPE would make a presentation and answer questions from NACIQI, after which ACICS would make a presentation and answer questions from NACIQI. Finally, NACIQI would hear third party comments, after which ACICS would respond to those comments, then OPE staff would respond to ACICS and the third-party comments.¹⁰³ Finally, the members of NACIQI would have a discussion, a motion, and a vote on what kind of recommendation to send to the SDO.¹⁰⁴

The readers provided the other NACIQI members with a summary of the above-discussed reports, including the Department staff’s recommendation that ACICS be found out of compliance with the recognition criteria.¹⁰⁵ After that, NACIQI allowed the ACICS representatives to make their presentation. First, ACICS highlighted the Department’s release of the 2021 OIG Report two days prior to the NACIQI meeting.¹⁰⁶ ACICS asserted that the 2021 OIG Report “corroborates many of the assertions” ACICS would make “regarding the inconsistent application of the recognition standards” by the Department.¹⁰⁷ ACICS highlighted the inconsistency between the 2016 denial of recognition and the 2018 conditional grant of recognition, asserting that ACICS had been the subject of a flawed process in 2016.¹⁰⁸ ACICS further asserted that the findings of noncompliance discussed at the 2021 NACIQI meeting “are based from 2016, 2017, and 2018, prior to the determination of ACICS’ compliance by both the SDO and the Secretary in the fall of 2018 that has now been reviewed favorably by the OIG.”¹⁰⁹ As such, ACICS asserted that “much of the basis for ACICS’ appearance here today [has] been

⁹⁸ March 4 Transcript at 5.

⁹⁹ The Department’s Recognition of the Accrediting Council for Independent Colleges and Schools as an Accrediting Agency, ED-OIG/S19T0003, U.S Department of Education Office of Inspector General (Mar. 2, 2021) (2021 OIG Report).

¹⁰⁰ *Id.* at 1–2.

¹⁰¹ March 4 Transcript at 12–13.

¹⁰² *Id.* at 12.

¹⁰³ *Id.* at 12–13.

¹⁰⁴ *Id.* at 13.

¹⁰⁵ *Id.* at 16–35.

¹⁰⁶ *Id.* at 40.

¹⁰⁷ *Id.* at 40–41.

¹⁰⁸ *Id.* at 45.

¹⁰⁹ *Id.* at 46.

undercut by the findings of the non-partisan independent OIG.”¹¹⁰ ACICS asked NACIQI to accept the 2021 OIG Report into the record.¹¹¹

Next, ACICS asserted that it was in compliance with the recognition requirements.¹¹² The Executive Director of ACICS went on to admit that, in 2016, “ACICS needed to implement significant changes to live up to its mandate of advancing educational excellence” at its accredited institutions.¹¹³ When she became Executive Director in July 2017, she knew “full well what [she] was getting [herself] into. [Her] mandate was to be a change agent.”¹¹⁴ As a result of her effort, “ACICS is a fundamentally different organization than it was five years ago.”¹¹⁵ These changes included “nine changes to our bylaws,” a “comprehensive review of our policies and procedures,” and “86 changes to our accreditation criteria.”¹¹⁶ ACICS staff went on to describe a broad array of changes it has made since 2016.¹¹⁷

Based on its actions, ACICS staff asserted with specificity that it complied with the criteria cited by the former Secretary in the ACICS 2018 Decision as needing to be addressed in future compliance reports.¹¹⁸ ACICS then made an extensive presentation, arguing that it complied with the additional recognition criteria cited in the other reports prepared by Department staff for the NACIQI meeting.¹¹⁹ After its presentation, ACICS began fielding questions from NACIQI.

Topics discussed during the hearing included: RNU’s small programs and the 50% graduation rate benchmark,¹²⁰ keeping tabs on other accrediting agencies’ actions such as in the SDUIS case,¹²¹ actions taken by ARIG in the VIU case,¹²² the quality of site visit reports,¹²³ RNU noncompliance in the 2019 and 2017 reviews,¹²⁴ evaluating the effectiveness of site visitors,¹²⁵ the quality of training for site visitors and ACICS self-mandated training requirement,¹²⁶ and ACICS’ financial situation.¹²⁷ In response to ACICS claiming its financial situation was the fault of the Department, a NACIQI member stated, “In fact, the financial situation that you’re in today is that you gave accreditation a bad name. ACICS gave accreditation as an industry a bad name. It was not caused by the [Department] or the vote of this body, now speaking in 2016. It was caused because of the standards around ITT Technical, Corinthian Colleges, the Dream Center,

¹¹⁰ *Id.* at 47.

¹¹¹ *Id.* at 48.

¹¹² March 4 Transcript at 48–49.

¹¹³ *Id.* at 50.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 50–51.

¹¹⁶ *Id.* at 51.

¹¹⁷ *Id.* at 51–59.

¹¹⁸ *Id.* at 60–72.

¹¹⁹ *Id.* at 72–134.

¹²⁰ *Id.* at 157–161.

¹²¹ *Id.* at 161–165.

¹²² *Id.* at 169–172, 192–197, 214–217.

¹²³ *Id.* at 172–176.

¹²⁴ *Id.* at 176–180, 182–188, 224–228, 233–237.

¹²⁵ *Id.* at 180–181.

¹²⁶ *Id.* at 188–192.

¹²⁷ *Id.* at 222, 237–243, 246–247

the ECA collapse, and Vatterot[t] College. And last year we had these other incidents with Reagan and it seems to me a pattern.”¹²⁸

Mid-way through the NACIQI meeting, a NACIQI member proposed delaying final discussion and questioning to the next day to allow NACIQI to review the 2021 OIG Report. Counsel for ACICS clarified that ACICS was not overly concerned with “[w]hether or not the committee members have their own opinions about what is relevant in the report,” but specifically wished NACIQI to enter the 2021 OIG Report “into the record.”¹²⁹ ACICS’ express goal in entering the 2021 OIG Report into the record was to “allow the SDO to determine its relevancy.”¹³⁰

Thereafter, numerous third parties provided statements, the vast majority of which opposed continued recognition for ACICS. The volume of statements and their firm tone cannot be easily summarized, so I provide many direct quotes below:

- *New American Higher Education Program* – “[I]t is critical to consider the second, third, and fourth chance that the agency has been given to demonstrate compliance, and its continued failure to do so.”¹³¹
- *Generation Progress* – “The longer [ACICS] maintain[s] their recognized status the more students enroll in potentially low-quality institutions it accredits given its poor record of oversight. It’s important to note that this is not the first time in recent years that ED has determined that ACICS is unable to adequately monitor low-quality or poorly performing institutions.”¹³²
- *California Attorney General’s Office* – “Over the last five years ACICS itself has repeatedly conceded non-compliance... Every time it says it needs just 12 more months to come into compliance. ACICS has repeatedly misled the department, this committee, the public, and at least one federal court in an attempt to maintain its recognition for its own benefit.”¹³³
- *Center for American Progress* – “[T]he OIG report does not affect the consideration of these four reports... the OIG lists numerous areas of non-compliance identified by the department staff since [the 2016 and 2018 recognition reviews].”¹³⁴
- *An attorney from Washington, D.C.* – “ACICS has continued to be asleep at the switch and out of compliance” even since its conditional re-recognition in 2018.¹³⁵

¹²⁸ *Id.* at 223.

¹²⁹ March 4 Transcript at 202.

¹³⁰ *Id.*

¹³¹ *Id.* at 253.

¹³² *Id.* at 256.

¹³³ *Id.* at 261–262.

¹³⁴ *Id.* at 262–63.

¹³⁵ *Id.* at 266.

- *Student Veterans of America* – “We are firmly opposed to ACICS’ continued recognition as an accreditor.”¹³⁶
- *Veterans for Education Success* – “[T]oo many veterans have been harmed under ACICS’ watch.”¹³⁷
- *Third Way* – “I and no one else on this call would want to send their children to an ACICS school, period. That should be a huge red flag.”¹³⁸
- *Office of the Attorney General of Maryland, Consumer Protection Division* – Five years ago testified that giving ACICS more time to reach compliance “was akin to rearranging the deck chairs on the Titanic. The changes ACICS has made have not stopped the sinking ship, and have not stopped students from being harmed now five years later.”¹³⁹
- *New America* – “ACICS’ onsite reviews are not sufficient, and . . . ACICS’ standards with respect to faculty, and especially its enforcement of those standards are inadequate.”¹⁴⁰
- *Institute for College Access and Success* – “[I]n the years since [2016] multiple investigations of institutions accredited by ACICS have been undertaken and the agency has continued to accumulate evidence of non-compliance.”¹⁴¹

Third-party statements in support of ACICS were not as substantial. One such statement, from Minore Educational Strategies, was that “ACICS has made significant improvements to evaluator training and oversight of the evaluator pool.”¹⁴² Notably this statement came from Dr. Minore, an ACICS site visitor whose failure to take required training before serving as a site visitor formed part of the basis of OPE’s finding that ACICS did not comply with § 602.15(a)(2).

After third-party statements, ACICS provided its response. ACICS asserted that the third parties were activists and opponents of non-public career education.¹⁴³ ACICS described their statements as “false or exaggerate[d] narratives”¹⁴⁴ made by those who “repeat the misinformed allegations they’ve made before.”¹⁴⁵ ACICS reiterated its core assertion that “the evidence before you overwhelmingly demonstrates that ACICS is in compliance.”¹⁴⁶

¹³⁶ *Id.* at 269.

¹³⁷ *Id.* at 272.

¹³⁸ March 4 Transcript at 275.

¹³⁹ *Id.* at 278–79.

¹⁴⁰ *Id.* at 283.

¹⁴¹ *Id.* at 288.

¹⁴² *Id.* at 286–87.

¹⁴³ *Id.* at 291.

¹⁴⁴ *Id.* at 292.

¹⁴⁵ *Id.* at 293.

¹⁴⁶ *Id.* at 296.

Department staff then weighed in on the issues of contention discussed during the meeting, generally defending the recommendations in the four reports.¹⁴⁷ OPE defended the decision to prepare four separate reports, stating that such a showing was necessary because there were four separate reviews. OPE noted that all of these reviews were commenced during the time then-Secretary Betsy DeVos helmed the Department, two directly initiated because of the 2018 decision by DeVos.¹⁴⁸ OPE also reiterated that ACICS had every opportunity to provide documentation of its compliance with the regulations during the lengthy, multi-step review process.¹⁴⁹

Eventually, NACIQI suspended consideration of ACICS' petition to complete its review of one additional agency, then adjourned for the day. NACIQI resumed consideration of ACICS the next day, March 5, 2021.¹⁵⁰ By the next day, NACIQI members discussed the 2021 OIG Report and incorporated it into their consideration of ACICS' compliance.¹⁵¹ Dr. Petrisko and Dr. Pressnell noted that the 2021 OIG Report did not directly impact consideration of ACICS' compliance and the four reports presented at the meeting.¹⁵² Dr. Pressnell went on to say "the decisions we're making based on these four reports are consistent with what the IG report found as legitimate inquiries."¹⁵³ Ms. Neal wanted the 2021 OIG Report to be in the record so the SDO could "assess what the weight and value of the report is."¹⁵⁴ Ms. Blum considered the 2021 OIG Report "absolutely relevant to the compliance report, because the compliance report is a follow-on from all of this from 2016."¹⁵⁵

Ultimately, NACIQI discussed each report and subsequently voted on whether to accept or reject each report's recommendation. Several NACIQI members agreed that, even without the name and history of ACICS, they were unconvinced in a vacuum that the evidence showed ACICS to be in compliance.¹⁵⁶ One NACIQI member noted that "checkbox compliance" or "perfunctory" review processes were insufficient. The "signature of an agency that wants to prevent disasters is self-reflection and transparency about what went wrong and how to prevent it next time. That's what I was looking for yesterday in the testimony, and I didn't see it."¹⁵⁷ One NACIQI member noted that ACICS' initial accreditation of an institution as troubled as RNU "gives the perception that the process for a new school up front is not very loaded, not very rigorous or thorough."¹⁵⁸

In statements made before adjourning on the previous day, some NACIQI members expressed that they did not think ACICS was in a particularly weak financial position that

¹⁴⁷ *Id.* at 296–305.

¹⁴⁸ *Id.* at 297.

¹⁴⁹ March 4 Transcript at 298.

¹⁵⁰ March 5, 2021, NACIQI Transcript (March 5 Transcript) at 1, 58.

¹⁵¹ March 5 Transcript at 58-64.

¹⁵² *Id.* at 59–60.

¹⁵³ *Id.* at 61.

¹⁵⁴ *Id.* at 63.

¹⁵⁵ *Id.* at 110.

¹⁵⁶ *Id.* at 65.

¹⁵⁷ *Id.* at 115.

¹⁵⁸ March 4 Transcript at 211.

constituted noncompliance with the recognition criteria, despite the appearance of a downward trend in its financial circumstances.¹⁵⁹

Besides discussing the merits of the Department staff's recommendation, NACIQI also discussed the range of options available besides simply recommending re-recognition or termination of recognition.¹⁶⁰ NACIQI members noted that its recommendation with regard to the Compliance Report would potentially result in termination of ACICS' recognition, because the Compliance Report resulted from then-Secretary DeVos' previous decision requiring ACICS to come into full compliance with the criteria it still did not meet in 2018.¹⁶¹ Nevertheless, NACIQI intended to vote on recommendations based on the findings in the four reports then vote on a recommendation to the SDO "based on the totality" of ACICS' circumstances.¹⁶² NACIQI also chose to ensure any members who did not participate in the robust discussion and presentations on March 4th would abstain from voting on recommendations.¹⁶³

Finally, NACIQI voted, with the following results:¹⁶⁴

- On the Compliance Report, NACIQI voted 11-1 (with 3 recusals) to accept the Department staff's recommendation that ACICS be found out of compliance with the criteria cited in that report.
- On the Monitoring Report, NACIQI split its voting to consider each criterion cited in the report separately.
 - NACIQI voted 6-7 (with 3 recusals) to reject the Department staff's recommendation that ACICS be found out of compliance with the administrative and fiscal capacity criterion at 34 C.F.R. § 602.15(a)(1).¹⁶⁵
 - NACIQI voted 9-3 (with 3 recusals) to accept the Department staff's recommendation that ACICS be found out of compliance with the monitoring criterion at 34 C.F.R. § 602.19(b).¹⁶⁶
- On the Capacity Report, NACIQI split its voting to consider each criterion cited in the report separately.

¹⁵⁹ *Id.* at 315–16.

¹⁶⁰ March 5 Transcript at 126 ("Ms. Blum: . . . There are other things you can do other than removal if you find an agency out of compliance, is that correct?" . . . Chair Keiser: Yeah, that is correct, yeah, that is correct.").

¹⁶¹ *Id.* at 130.

¹⁶² *Id.*

¹⁶³ *Id.* at 138.

¹⁶⁴ NACIQI Report of the Meeting, March 3–5, 2021, at 8–9.

¹⁶⁵ The vote on this motion was tied 6-6, and Chair Keiser broke the tie with a seventh no vote. March 5 Transcript at 155.

¹⁶⁶ The NACIQI Report of the Meeting records this vote passed 9-2 with 3 recusals. However, the transcript indicates that three NACIQI members (Ms. Blum, Mr. Mayes, and Dr. Boston) voted No. Therefore, the final vote was actually 9-3 with 3 recusals. March 5 Transcript at 155–156.

- NACIQI voted 8-4 (with 3 recusals) to accept the Department staff's recommendation that ACICS be found out of compliance with the administrative and fiscal capacity criterion at 34 C.F.R. § 602.15(a)(1).
- NACIQI voted 12-0 (with 3 recusals) to accept the Department staff's recommendation that ACICS be found out of compliance with the distance education criterion at 34 C.F.R. § 602.16(d).¹⁶⁷
- NACIQI voted 11-1 (with 3 recusals) to accept the Department staff's recommendation that ACICS be found out of compliance with the onsite review criterion at 34 C.F.R. § 602.17(c).
- NACIQI voted 11-1 (with 3 recusals) to accept the Department staff's recommendation that ACICS be found out of compliance with the agency analysis of information criterion at 34 C.F.R. § 602.17(e).
- On the RNU Report, NACIQI voted 12-0 (with 3 recusals) to accept the Department staff's recommendation that ACICS be found out of compliance with the criteria cited in that report.
- Finally, NACIQI took an "overall recognition" vote. NACIQI voted 11-1 (with 3 recusals) to recommend that ACICS' recognition be terminated "on the grounds that ACICS does not comply with the Criteria for Recognition identified in the Compliance Report, 602.19(b) Monitoring, Capacity; and RNU and there is insufficient evidence that the agency can reasonably be expected to bring itself into compliance in a timely manner."¹⁶⁸

NACIQI forwarded its recommendations to the SDO for consideration.

F. 2021 SDO Decision and Appeal to the Secretary

Following the NACIQI meeting, the SDO provided ACICS and counsel for OPE with additional time to review the NACIQI transcript and consider the full administrative record. Eventually, ACICS and counsel for OPE submitted comments to the SDO on the question of whether to renew ACICS' recognition. On June 2, 2021, the SDO issued a 78-page decision, taking into account the complete administrative record, and denying ACICS' petition for recognition. The SDO found ACICS noncompliant with all seven criteria cited by OPE in its four reports.

Thereafter, counsel for ACICS appealed the SDO Decision to the Secretary. In broad terms, ACICS asks that I reject the recommendations of OPE and NACIQI by re-recognizing the

¹⁶⁷ As described earlier in this decision, the distance education criterion was renumbered from § 602.16(c) to § 602.16(d) effectively July 1, 2020. NACIQI referred to this criterion as § 602.16(c) in its final report. For ease of reference, that criterion is described here as appearing at § 602.16(d).

¹⁶⁸ NACIQI Report of the Meeting, March 3–5, 2021 at 9.

agency. The SDO has filed a brief in support of adopting the SDO Decision. Now with the benefit of the briefs submitted by the parties, I turn to my legal analysis.

III. ANALYSIS

Acting with the delegated authority of the Secretary, I am charged with making a *de novo* decision on the merits of ACICS' recognition status. Therefore, in the context of all of the evidence in the record, I will separately consider each of the seven recognition criteria for which the SDO found ACICS out of compliance.¹⁶⁹ After that, I will consider several peripheral arguments that ACICS raises outside the scope of the seven criteria.

A. Compliance with the Recognition Criteria

Section 602.15(a)(2) – Competency of Representatives – Compliance Report

As described above, this criterion requires an agency to have competent, knowledgeable, and trained representatives. I start with this criterion because the last final decision of the Department, the ACICS 2018 Decision, found ACICS out of compliance with this criterion.¹⁷⁰ Former Secretary DeVos agreed with the SDO at that time that ACICS, though out of compliance, could come into compliance with this criterion within 12 months. Therefore, pursuant to 34 C.F.R. § 602.36(e)(3)(i) (2010), former Secretary DeVos granted conditional renewal of ACICS' recognition for 12 months and ordered ACICS to submit a compliance report at the end of that period demonstrating that it had come into full compliance.¹⁷¹ Among other things, former Secretary DeVos ordered ACICS to specifically “provide additional evidence responding to whether existing evaluators have received the improved training.”¹⁷²

When an agency is provided a conditional renewal of recognition and is ordered to submit a compliance report, as is the case here, the regulations provide less latitude to the SDO under 34 C.F.R. § 602.36(e)(3)(ii) when making a recognition decision. In such circumstances, if the agency “has not complied with the criteria for recognition, or has not effectively applied those criteria, during the time period specified . . . the senior Department official denies, limits, suspends, or terminates recognition, except, in extraordinary circumstances, upon a showing of good cause for an extension of time.”¹⁷³

ACICS submitted the required Compliance Report in 2019. In its analysis of that report, OPE found ACICS noncompliant because two site visitors were permitted to act in the specialist “Educational Activities” role without training required by ACICS' own policy. OPE and

¹⁶⁹ Because the bases of OPE's findings on each criterion are often conflated in the four reports, I consider the criteria in an order designed to allow internal references and to avoid repetition to the greatest extent possible.

¹⁷⁰ ACICS 2018 Decision at 3, 8.

¹⁷¹ *Id.* at 8. The regulations in effect at the time of the ACICS 2018 Decision were revised effective July 1, 2020. They remain substantively similar, allowing continued recognition pending submission of a compliance report (34 C.F.R. § 602.36(e)(i)) and providing less latitude for such continued recognition after submission of a compliance report that does not demonstrate compliance (34 C.F.R. § 602.36(e)(iii)).

¹⁷² *Id.* at 3.

¹⁷³ 34 C.F.R. § 602.36(e)(2)(iii).

NACIQI rejected ACICS' assertion that the two site visitors were sufficiently qualified, based on their resumes, to act in their roles without the training required by ACICS' policy.¹⁷⁴ OPE also found that a third site visitor, G. Randall, was an emergency replacement who supposedly completed the required training on-site, but ACICS provided no evidence that the training required by ACICS' policy was completed.¹⁷⁵

ACICS argues that the SDO erred in finding it noncompliant with this criterion. It argues the Department staff made "conclusory assertions, which ignore record evidence" in recommending a finding of noncompliance.¹⁷⁶ In support of this argument, ACICS cites to testimony in the NACIQI transcript and comments ACICS made to the SDO after the NACIQI meeting.¹⁷⁷

I disagree with ACICS' assertion that it was in full compliance with this criterion. Evidence of these site visitors' general qualifications, in the form of their resumes and current jobs, is not sufficient to demonstrate compliance because the issue is not whether these individuals were qualified *candidates*. The issue is whether ACICS followed its own training policy and ensured all site visitors received all applicable training under ACICS' training policy prior to acting in their roles for the agency. I evaluate this issue in the context of the ACICS 2018 Decision, finding ACICS noncompliant with this criterion and requiring that ACICS demonstrate it implemented "improved training" for its site visitors.

ACICS' assertion that the Educational Activities training was "voluntary" contradicts its communication sent to site visitors stating that the training was required. Furthermore, making this specialized training "voluntary" would do nothing to convince me that ACICS succeeded in implementing improved training as required by the former Secretary's ACICS 2018 Decision.

In the case of G. Randall, an attestation dated March 19, 2021, to demonstrate proper training took place on June 12, 2019, is the barest effort to provide timely evidence of compliance to the Department, especially where the agency has sought to prove its full compliance since the ACICS 2018 Decision was issued.¹⁷⁸ Even if I accepted the Randall attestation in place of contemporaneous evidence, ACICS still has not provided convincing evidence that all of these site visitors took their required training prior to acting in their roles. ACICS' failure to demonstrate it applied its training policy, despite receiving an extension of its recognition to do so, is an incontrovertible basis for terminating ACICS' recognition.

ACICS alternatively argues that the matter of training the three visitors in question is a *de minimis* issue of noncompliance. ACICS asserts that the "purported deficiency in ACICS' training of three site visitors from among a pool of more than 200 evaluators, or **1.5% of the**

¹⁷⁴ See Compliance Report at unpag. 5, 9–10.

¹⁷⁵ *Id.* at unpag. 9.

¹⁷⁶ Accrediting Council for Independent Colleges and Schools' Appeal to the Secretary of Education of the Senior Department Official's June 2, 2021, Decision (July 2, 2021) (ACICS Brief) at 33.

¹⁷⁷ *Id.* at 34, n.75 and n.76.

¹⁷⁸ ACICS Comments to the SDO in Opposition to NACIQI Termination Recommendations (April 8, 2021) (ACICS Comments to SDO), Exhibit 11.

total pool of evaluators” should result in a finding that ACICS is in material compliance with this criterion.¹⁷⁹

I disagree. ACICS argues that its failure to reach full compliance with the recognition criteria is a minor matter and effectively suggests I deem its efforts to constitute “substantial compliance.” Recognition by the Department must be reserved for agencies that adhere to high standards, just as accreditation by agencies must be reserved for institutions and programs that adhere to high standards. The regulations provide for conditional recognition for up to 12 months, the kind of latitude ACICS seeks on this matter, when an agency will remedy an instance of noncompliance in that time period. However, ACICS has already had multiple opportunities to achieve full compliance. ACICS was found noncompliant with 34 C.F.R. § 602.15(a)(2) as far back as 2016. Despite its professed improvements, the agency remained out of compliance in 2018, at which time it was given another opportunity to reach full compliance. Its continuing failure to reach full compliance with this criterion alone is a sufficient basis to terminate ACICS’ recognition.

Based on the evidence in the record, I find NACIQI’s 11-1 vote to recommend noncompliance to be well-founded, and I accept the recommendation in finding ACICS noncompliant with this criterion.

Section 602.15(a)(2) – Competency of Representatives – RNU Report

I separately address ACICS’ noncompliance with § 602.15(a)(2) based on OPE’s findings in the RNU Report. Although the criterion is the same, the standard is different because the ACICS 2018 Decision did not previously adjudicate these underlying facts.

OPE found ACICS noncompliant because, “For example . . . ACICS sent a site visitor to RNU in anticipation of a review of distance education programs, yet has failed to demonstrate to the Department that the site visitor was qualified and trained to evaluate distance education programs.”¹⁸⁰ ACICS does not specifically challenge OPE’s or NACIQI’s recommendation in its brief, limiting its discussion of § 602.15(a)(2) to the Compliance Report. In the absence of argument or evidence to contradict the RNU Report on this issue, I find that the RNU Report establishes that ACICS did not substantiate that its site visitors to RNU had the necessary specialized training to conduct the anticipated evaluation of RNU’s distance education programs.

Based on the evidence in the record, I find NACIQI’s 12-0 vote to recommend noncompliance to be well-founded, and I accept the recommendation in finding ACICS noncompliant with this criterion.

Section 602.19(b) – Monitoring

As described above, this criterion requires an agency to effectively apply monitoring and evaluation approaches to identify institutional noncompliance with agency standards. OPE found ACICS noncompliant because its ARIG actions “appear to be primarily in response to

¹⁷⁹ ACICS Brief at 33 (emphasis in original).

¹⁸⁰ RNU Report at unp. 10.

information provided or actions taken by other accrediting or approval entities and not as a result of compliance issues identified by the agency’s monitoring and evaluation approaches.”¹⁸¹ As an example of this noncompliance, OPE pointed to ARIG’s failure to identify or take action regarding VIU’s compliance problems until after SCHEV began an investigation.¹⁸²

ACICS asserts that OPE erred in finding it noncompliant based on its handling of the VIU situation. ACICS argues that OPE should not compare its review processes with those used by SCHEV, because those reviews are separate, unrelated, and apply independent standards.¹⁸³ According to ACICS, “[a]ny number of factors could have contributed to the disparate results” between the reviews conducted by ACICS and SCHEV.¹⁸⁴ Furthermore, ACICS argues that its review was thorough and appropriate.¹⁸⁵

The relevant issue is whether ACICS’ monitoring actions in the VIU case demonstrate the effectiveness of its policies and its application of those policies. ACICS need not apply the same standards or reach the same conclusions as SCHEV, but SCHEV’s activity is clarifying of ACICS’ noncompliance with this criterion. SCHEV uncovered significant and fundamental compliance issues with VIU’s distance education programs in late 2018.¹⁸⁶ These issues pervaded the fundamental infrastructure of its distance education programs, including its online platform, faculty and curricula, and specifically involving “faculty-student interaction, peer-to-peer interaction, academic rigor at the graduate level and the comparability of the distance education to residential offerings.”¹⁸⁷ These areas are too broad in scope to explain away a substantial difference in ACICS’ and SCHEV’s monitoring activities by any technical differences between the two entities’ standards.

In this case, ACICS conducted its evaluation of VIU in January of 2018. Although it identified areas of noncompliance, ACICS granted VIU a renewal of accreditation at its August 2018 meeting. In mid-August 2018, SCHEV completed its own review and uncovered significant areas of concern.¹⁸⁸ SCHEV provided its audit and recommendation to revoke VIU’s certificate to operate on February 8, 2019.¹⁸⁹ SCHEV’s findings included two “repeat violations from the October 2014 audit” and one item “of special significance because it adversely affects the quality of education at VIU.”¹⁹⁰ On February 4, 2020, SCHEV released its audit of VIU. As of that date, the unresolved items of non-compliance included “instructors not qualified to teach assigned courses” and “institution does not collect all items justifying admission.”¹⁹¹ At the NACIQI meeting, ACICS admitted that it received this information in February but took no action until its March 21, 2019, meeting.¹⁹² ACICS explained its lack of independent action as

¹⁸¹ Monitoring Report at 16.

¹⁸² *Id.* at 17–18.

¹⁸³ ACICS Brief at 38.

¹⁸⁴ *Id.* at 39.

¹⁸⁵ *Id.* at 38–39.

¹⁸⁶ Monitoring Report at 18–19.

¹⁸⁷ *Id.*

¹⁸⁸ Letter Dated Nov. 21, 2019, from OPE to ACICS (rev. Jan. 29, 2020) at 3–4.

¹⁸⁹ *Id.* at 4; Letter Dated Feb. 8, 2019, from SCHEV to ACICS.

¹⁹⁰ Letter Dated Feb. 8, 2019, from SCHEV to ACICS at 1.

¹⁹¹ Report of Audit, Fairfax University of Virginia (FXUA), SCHEV (Feb. 4, 2020) at 1–2.

¹⁹² March 4 Transcript at 170.

demonstrating confidence in its “thorough evaluation visit at VIU,” though it thereafter issued a show cause order based on SCHEV’s findings.¹⁹³

Despite its enumeration of ways in which it is attempting to reach compliance, the VIU situation demonstrates that ACICS’ best efforts continually result in failures to meet recognition criteria. Its assertion in 2018 that the ARIG would ensure effective monitoring of institutions has likewise proven false. Even after learning of SCHEV’s actions at VIU, the ARIG took no investigative action. ACICS continues to be reactive rather than proactive in monitoring its institutions.

Based on the evidence in the record, I find NACIQI’s 9-3 vote to recommend noncompliance to be well-founded, and I accept the recommendation in finding ACICS noncompliant with this criterion.

Section 602.16(d) – Distance/Correspondence Education

As described above, this criterion requires an agency which accredits distance education programs to establish effective standards for those programs.¹⁹⁴ OPE found ACICS noncompliant with this criterion because of the problems discussed earlier in failing to uncover issues later identified by SCHEV, and because of ACICS’ failure to conduct an independent review of VIU’s distance education programs in compliance with ACICS’ own policy. NACIQI voted unanimously to recommend finding ACICS out of compliance with this criterion.

In the instant case, ACICS broadly asserts that it is in substantial compliance with § 602.16(d).¹⁹⁵ ACICS connects its assertion to its arguments related to compliance with § 602.19(b), discussed above, stating OPE’s evaluation uses “the same methodology and reasoning . . . in connection with ACICS’s evaluation of VIU” and “ED Staff’s position and underlying reasoning fail for the same reasons.”¹⁹⁶

I previously held that the issues uncovered by SCHEV were too fundamental and pervasive to be explained away by differences between ACICS’ and SCHEV’s standards. ACICS’ ineffectiveness in conducting an independent review of VIU’s distance learning programs is, itself, sufficient evidence to find ACICS noncompliant with this criterion. I also note that the SDO found ACICS’ evaluation regimen for distance learning to be “a checklist without substance . . . rather than a meaningful review of the quality of the education programs offered.”¹⁹⁷

Based on the evidence in the record, I find NACIQI’s 12-0 vote to recommend noncompliance to be well-founded, and I accept the recommendation in finding ACICS noncompliant with this criterion.

¹⁹³ *Id.* at 171.

¹⁹⁴ 34 C.F.R. § 602.16(d)(1).

¹⁹⁵ ACICS Brief at 40.

¹⁹⁶ *Id.*

¹⁹⁷ SDO Decision at 47.

Section 602.17(c) – On-Site Review

As described above, this criterion requires an agency to conduct effective on-site reviews to ensure compliance with the agency’s accreditation standards. OPE’s recommendation of noncompliance with this criterion is based on three core conclusions: ACICS’ site visit to VIU failed to uncover problems with its distance education programs; ACICS’ site visit to RNU failed to gather survey data as required by ACICS’ policy; and ACICS failed to follow up on the “red flags” uncovered during its site visit to RNU.

ACICS asserts it is already in substantial compliance with this criterion and connects this assertion to its arguments related to compliance with § 602.19(b) in the VIU matter.¹⁹⁸ As already discussed in this decision, I disagree with ACICS’ arguments and find its evaluation of VIU inadequate and demonstrative of the ineffectiveness of its site visits.

ACICS’ brief does not specifically address this finding of noncompliance as it relates to the RNU matter. Lacking any new argument from ACICS regarding the RNU matter, I refer to the RNU Report and SDO Decision for discussion of ACICS’ position.

Regarding survey data, ACICS argued that its intention to survey 10% of RNU students constituted only an intention to *offer* surveys to 10% of students, because ACICS could not compel return of the surveys.¹⁹⁹ ACICS also asserted to OPE that “ACICS does not specify a minimum number of surveys that must be returned.”²⁰⁰ A NACIQI member described these surveys as “checkbox compliance . . . merely having the appearance of standards.”²⁰¹ I reach the same conclusion as OPE and the SDO: this theory of compliance is insufficient on its face. Using ACICS’ theory, an institution with a return rate of 0% would satisfy ACICS’ student survey policy.²⁰² To the extent ACICS cannot compel student cooperation, ACICS may also refuse to accredit an institution for which it has insufficient data. ACICS does not explain why it would employ a student survey at all if it would be willing to accredit an institution for which it received 0% of the survey data.

Furthermore, I reject ACICS’ assertion that the return of only 3 surveys out of 70 students is a “minor” issue and the return rate qualifies as substantial compliance.²⁰³ With such a small student body, the representative value of each individual survey is magnified, not diminished. The fact that ACICS fell short by “only” four surveys does not support a finding of substantial compliance when ACICS obtained fewer than half the number of surveys necessary to reach its 10% minimum target. I find that ACICS’ failure to obtain surveys at the minimum numbers it set in its own policies demonstrative of the ineffectiveness of its site visits.

Regarding follow ups on “red flags,” ACICS asserted to OPE that a lack of problems identified by the site visitors was indicative that “there may not have been a problem to find.”²⁰⁴

¹⁹⁸ ACICS Brief at 40.

¹⁹⁹ SDO Decision at 65.

²⁰⁰ RNU Report at unp. 29.

²⁰¹ March 5 Transcript at 117.

²⁰² SDO Decision at 66.

²⁰³ *See id.* at 66.

²⁰⁴ RNU Report at unp. 30.

OPE rejected this theory, specifically noting that the site visit team found “RNU’s student files failed to include documentation of prior education (as all the files included international diplomas that had not been evaluated for validity).”²⁰⁵ A lack of documentation of prior education is not merely a potential problem that may not exist, but an existent issue that OPE found should compel follow up evaluation. I find that ACICS’ failure to follow up on student records showing the entire student body had international diplomas with no institutional effort to ensure their validity demonstrative of the ineffectiveness of its site visits.

Based on the evidence in the record, I find NACIQI’s 11-1 vote to recommend noncompliance based on the Capacity Report and 12-0 vote to recommend noncompliance based on the RNU Report to be well-founded, and I accept these recommendations in finding ACICS noncompliant with this criterion.

Section 602.17(e) – Agency Analysis of Information

As described above, this criterion requires that an agency must analyze relevant information about an institution to apply the agency’s standards to, for example, make a decision on whether to accredit an applicant institution. OPE’s recommendation of noncompliance with this criterion is based on ACICS’ review of an initial application for accreditation submitted by SDUIS. Specifically, OPE found that ACICS did not consider extensive public comments relevant to the application and did not uncover that a subcomponent of SDUIS was subject to an adverse action from a different accrediting agency.

ACICS asserts it is already in substantial compliance with this criterion.²⁰⁶ ACICS indicates that, during its evaluation of SDUIS, the institution “had only been in application status” and “had never proceeded past preliminary evaluation,” meaning that SDUIS was never accredited by ACICS.²⁰⁷ Furthermore, ACICS was awaiting further information from SDUIS when ACICS lost its recognition in December 2016. SDUIS’ application was subject to a moratorium until ACICS regained recognition and, in March 2019, the agency reached out to SDUIS to invite it to proceed with the application process.²⁰⁸ When SDUIS failed to provide any additional information, ACICS closed its application.²⁰⁹

In its final analysis, OPE concludes that ACICS acted contrary to its accreditation criteria because it was obligated to complete reviews of the cited issues in a specific order before proceeding to another “distinct phase” of the accreditation process.²¹⁰ I do not find OPE’s conclusion unreasonable. However, after reviewing the evidence, I decline to accept OPE’s and NACIQI’s recommendation on this criterion.

The issue is whether ACICS’ actions or inactions constituted a failure to conduct an analysis of required information during its review of SDUIS’ initial application. Unlike other instances of noncompliance considered in this decision, ACICS’ purported failure to conduct this

²⁰⁵ *Id.* at unpag. 32.

²⁰⁶ ACICS Brief at 40–41.

²⁰⁷ *Id.* at 42.

²⁰⁸ *Id.* at 43.

²⁰⁹ *Id.*

²¹⁰ Capacity Report at unpag. 20.

analysis is only speculative because ACICS never made a determination either granting or denying accreditation. Therefore, ACICS had not taken any action fatal to completing a proper review. Even if ACICS failed to complete discrete steps of its own review process in the proper order, I do not find such failure to be a conclusive barrier to its compliance with the recognition criteria. ACICS faced the extraordinary circumstance of losing its recognition in December 2016 and, in March 2019, attempted to resume its analysis of SDUIS' application. In these circumstances, if ACICS ultimately analyzed all the information and documentation prior to making an accreditation decision, it may have substantially complied with the criteria despite deviating from its written procedures.

ACICS may, as the Department surmises, have been on its way to making an accreditation decision without analyzing all the required information. Nevertheless, I am unconvinced ACICS' incomplete review of SDUIS' application establishes a failure to comply with § 602.17(e). In the absence of any additional showing of noncompliance with this criterion, I find ACICS in substantial compliance with § 602.17(e).

Section 602.18(b)(3) – Decisions Based on Published Standards

As described above, this criterion requires that an agency must base its accreditation decisions on the agency's published standards. OPE found ACICS out of compliance because it ignored several of its published standards while granting accreditation to RNU. Specifically, ACICS granted RNU an ad hoc "small population exemption" not found in ACICS' published standards, failed to follow up on RNU's erroneous statement that it was already accredited, and apparently waived, without comment, its requirement that institutional administrators attend a workshop prior to becoming eligible for accreditation.

In its brief, ACICS makes no specific arguments to refute these findings. However, I will evaluate the arguments ACICS previously advanced in its comments to the SDO while considering its compliance with this criterion.

ACICS asserts that agencies should have "discretion . . . regarding the enforcement of their standards," characterizing the small population exemption as such an act of discretion.²¹¹ ACICS notes that, in 2020, it revised its policies to allow such small population exemptions and to require institutions to provide justification for receiving one. ACICS admits it did not follow its standards in this instance, but suggests it should be allowed discretion to ignore those standards on an ad hoc basis while evaluating a given institution. I disagree. In light of the Department's active monitoring of ACICS and the agency's ongoing efforts to come into compliance with the criteria, I do not find ACICS' loose application of its standards to be a minor, immaterial factor. Revising its standards after the fact does not justify failure to apply the existing standards while evaluating RNU for accreditation.

ACICS also admits that "RNU sent someone to the ACICS accreditation workshop other than the CEO as stipulated in the ACICS *Accreditation Criteria*." However, ACICS asserts that finding it noncompliant with the regulations because of "this one-off instance . . . is a

²¹¹ ACICS Comments to SDO at 54.

disproportionate conclusion.”²¹² ACICS makes no attempt to deny that it failed to enforce its own standards in this instance. This “one-off instance” is not the sole factor in the Department’s evaluation of ACICS’ compliance, but it is yet another example of ACICS’ overall noncompliance with § 602.18(b)(3).

ACICS states that it determined from conversations with RNU, and by checking other agencies’ directories, that RNU was not previously accredited by another agency, despite RNU erroneously selecting “yes” from a dropdown menu on its electronic application.²¹³ ACICS “is not clear why the Department would expect ACICS to maintain documentation of such a routine and simple step as confirming . . . that an applicant institution was not accredited by another agency, or what sort of documentation Department staff in 2021 would find persuasive.”²¹⁴ Again, considering the Department’s active monitoring of ACICS’ compliance, I find it reasonable for the Department to expect ACICS to make some record of verifying the accreditation status of an applicant institution which indicated it was already accredited by another agency. ACICS’ failure to proffer such evidence to the Department’s satisfaction demonstrates its failure to apply its own standards during evaluation of an institution.

Based on the evidence in the record, I find NACIQI’s 12-0 vote to recommend noncompliance based on the RNU Report to be well-founded, and I accept this recommendation in finding ACICS noncompliant with this criterion.

Section 602.15(a)(1) – Staffing/Financial Resources – Monitoring Report

As described above, this criterion requires that an agency must have “adequate administrative staff and financial resources to carry out its accrediting responsibilities.”²¹⁵ In the Monitoring Report, OPE found ACICS noncompliant based on the downward trend in its revenues and net assets.²¹⁶

ACICS argues that it is already in compliance with this criterion. Regarding its financial stature, ACICS asserts that reports created by its investment portfolio manager and independent auditor provide an analysis of these “technical issues” superior to OPE’s analysis.²¹⁷ ACICS cites to its budget forecasts which indicate it “will be operating on a break-even basis” with substantial cash reserves by Fiscal Year 2024.²¹⁸

Evaluation of a petition for recognition requires significant qualitative analysis, even with regard to a criterion as quantitative as assessment of financial resources. ACICS puts forth persuasive evidence in support of its argument that it has sufficient financial resources to demonstrate compliance with this criterion. Whether ACICS would have better or worse financial prospects in future years is speculative, especially if ACICS obtained Department recognition. The strength of ACICS’ evidence in support of its argument contrary to OPE’s

²¹² *Id.* at 47.

²¹³ *Id.* at 47–48.

²¹⁴ *Id.* at 48.

²¹⁵ 34 C.F.R. § 602.15(a)(1).

²¹⁶ Monitoring Report at unp. 7.

²¹⁷ ACICS Brief at 35–36.

²¹⁸ *Id.* at 36–37.

findings is recognized in NACIQI's narrow vote not to recommend a finding of noncompliance based on the Monitoring Report. I accept NACIQI's recommendation and do not find ACICS noncompliant with this criterion based on the Monitoring Report.

Nevertheless, based on my analysis in the next section of this decision, I find sufficient evidence to accept NACIQI's recommendations related to the Capacity Report and RNU Report to find ACICS noncompliant with this criterion.

Section 602.15(a)(1) – Staffing/Financial Resources – Capacity and RNU Reports

In the Capacity Report, OPE found ACICS noncompliant based on its inadequate reviews of VIU and SDUIS.²¹⁹ In the RNU Report, OPE found ACICS noncompliant based on cited inadequacies of its accreditation process for RNU and ineffectiveness of its subsequent monitoring.²²⁰ In both Reports, OPE found that ACICS' failures are attributable at least in part to a lack of staffing and resources necessary to uncover relevant information while evaluating and monitoring institutions. On appeal, ACICS asserts that “[t]he SDO's finding of non-compliance with Section [602].15(a)(1) relies entirely on the ED Staff's” findings regarding the state of ACICS' finances. ACICS does not address the separate, qualitative findings in the Capacity and RNU Reports other than to disagree with the conclusions of those reports.

Absent a presentation of argument or evidence to the contrary, I find the Capacity and RNU Reports sufficient to establish ACICS' noncompliance with this criterion. In both the VIU and RNU matters, the record shows incomplete evaluation processes that failed to obtain all information relevant in each review, demonstrative of insufficient staffing capacity to complete each institutional review.

Based on the evidence in the record, I find NACIQI's 11-1 vote to recommend noncompliance based on the Capacity Report and 12-0 vote to recommend noncompliance based on the RNU Report to be well-founded, and I accept these recommendations in finding ACICS noncompliant with this criterion.

Having evaluated ACICS' compliance with each of the recognition criteria, I now turn to its peripheral arguments.

B. Peripheral Arguments

1. Whether the SDO Decision Was Arbitrary and Capricious

ACICS argues that the SDO Decision “is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law.”²²¹ In support of this assertion, ACICS makes several claims. First, ACICS claims the SDO and OPE did not review all available information, but instead chose “facts to support their predetermined decision to terminate ACICS' recognition status.”²²²

²¹⁹ Capacity Report at unpag. 4–5.

²²⁰ RNU Report at unpag. 5.

²²¹ ACICS Brief at 15.

²²² *Id.* at 16.

Second, ACICS asserts that the SDO improperly failed to consider the 2021 OIG Report to be relevant to the SDO Decision.²²³ Third, ACICS argues that the SDO Decision “relies on the application of an unprecedented and inconsistent recognition review standard.”²²⁴ I consider each of these arguments below.

a. Whether the Department Provided a Complete Review of the Relevant Evidence

ACICS broadly asserts that the OPE reports “do not reflect a complete review . . . let alone a reasoned consideration of ‘all available information.’”²²⁵ ACICS cites several specific instances in which it claims that OPE failed to consider relevant evidence prior to creating its recommendations. I will consider each instance in turn.

First, ACICS asserts that it proved via submission of evidence that it is in compliance with § 602.15(a)(2) because “record evidence by ACICS and third party testimony” prove that “all members of ACICS’ visiting teams have received the required training.”²²⁶ ACICS does not cite to any documentary evidence, but only to a third-party comment at the NACIQI meeting made by D. Minore, one of three individuals who failed to take all required training prior to serving in a site visitor role. The testimony states that “ACICS has made significant improvements to evaluator training and oversight of the evaluator pool. I attended the team chair debrief and refresher training on November 20, 2018 ACICS has added additional training courses in the last four years that focus on educational activities and distance education. All team members are required to be trained prior to a site visit.”²²⁷ As discussed earlier in this decision, D. Minore served as an Educational Activities specialist on a site visit team, meaning ACICS’ improved training policy required D. Minore to take a specific Educational Activities training course. Despite requiring ACICS to provide evidence that this individual completed the required training prior to acting in that role, ACICS failed to provide such evidence. The transcript page cited by ACICS does not contradict OPE’s conclusion regarding D. Minore, nor does it prove that the other two individuals completed the required trainings prior to serving in their roles. I find that OPE’s and NACIQI’s recommendations on this criterion were made after weighing all relevant evidence.

Next, ACICS asserts that OPE failed to consider “an abundance of evidence, including but not limited to a ACICS team report template” proving that ACICS complied with § 602.16(d).

In relevant part, OPE made the following determination regarding § 602.16(d):

[F]or ACICS to demonstrate that its standards effectively address the quality of distance education . . . there is an expectation that there would be at least some overlap in review [between ACICS and SCHEV], particularly in the areas of faculty-student interaction, peer-to-peer interaction, academic rigor at the

²²³ *Id.* at 19.

²²⁴ *Id.* at 22.

²²⁵ *Id.* at 16.

²²⁶ *Id.* at 17.

²²⁷ March 4 Transcript at 286.

graduate level and the comparability of the distance education to residential offerings . . . The agency provided the site team report of VIU, which stated that the team reviewed 17 of the online courses in the Spring 2018 term . . . Simply verifying the online courses provide “opportunities for interaction” does not demonstrate that ACICS conducted a comprehensive review of the quality of distance education at VIU

As far as the sequence of events and the documentation demonstrate, ACICS never independently investigated the issues raised in the SCHEV audit, but instead, all of the actions taken by ACICS were preceded by and predicated on actions by SCHEV.

Besides the specific discussion of the review of VIU, the agency did not provide any additional information or documentation to demonstrate that its standards effectively address the quality of an institution’s distance education²²⁸

The exhibit cited by ACICS is the ACICS team report for the January 17–18, 2018, renewal of accreditation site visit at VIU, and the cover letter transmitting the report to VIU on February 7, 2018. The report is a 77-page document combining charts, yes-no check boxes, and narrative responses to comprehensive prompts. Responses on the subject of distance education are included throughout the report. The site visit team indicated that VIU needed to provide explanatory responses regarding its distance education programs. Specifically, the site visit team concluded: “A distance education plan is not appropriate[ly] integrated into the Campus Effectiveness Plan” and “[t]he institution does not have a distance education plan that includes the rationale, resources, course program objectives, content, or student assessment.”²²⁹ Furthermore, the site visit team “recommends that a representative from the school of online education be added to the campus effectiveness committee.”²³⁰

As discussed earlier in this decision, OPE found that ACICS did not uncover significant areas of concern in VIU’s distance education programs during the January 2018 site visit. After SCHEV made such findings in August 2018 and passed them along to ACICS, ACICS did not commence an independent investigation. As a result, OPE found that “the agency’s standards” did not “effectively address the quality of an institution’s distance education” as required by the recognition criteria. After reviewing the site visit report, I am only more convinced that OPE made the correct recommendation. The site visit report uncovered certain issues with distance education but not the “egregious issues” found by SCHEV. More importantly, the site visit report has no bearing on whether ACICS took appropriate action, i.e. initiated an investigation by ARIG, once SCHEV forwarded its findings. To the extent the VIU site visit report is relevant to its recommendations, I find that OPE properly reviewed it and gave it adequate weight. In any event, I have since reviewed and considered the team report in making this decision.

Next, ACICS argues OPE failed to give sufficient weight to ACICS’ investment portfolio manager and independent auditor in concluding that the evidence showed ACICS out of

²²⁸ Capacity Report at unp. 9–10.

²²⁹ VIU Team Report, Exhibit J to Capacity Report at 74.

²³⁰ *Id.* at 75.

compliance with § 602.15(a)(1).²³¹ ACICS asserts that the SDO’s reliance on OPE’s conclusions was “arbitrary and capricious” solely because its portfolio manager and auditor are more qualified experts than Department staff.²³² Inherent in ACICS’ argument is that OPE and the SDO are effectively bound to defer to the conclusions reached by professional financial advisors and auditors as to whether an agency complies with § 602.15(a)(1). While the Department must review relevant evidence, I find that OPE did so here despite its disagreement on the question of whether ACICS was compliant. I am unpersuaded by ACICS’ assertion that the Department must abdicate its role in evaluating an agency’s compliance with this specific criterion merely because it involves management of finances. In any event, I have adopted NACIQI’s recommendation on this specific matter rather than OPE’s, rendering OPE’s analysis and ACICS’ related argument moot.

Next, ACICS avers that the Department failed to consider evidence that it reworked its distance education standards and policies in mid-2020, even though “the evidence was discussed during the 2021 NACIQI meeting.”²³³ As an initial matter, ACICS does not indicate how evidence of reworking its standards in 2020 would weigh against finding that ACICS was noncompliant with § 602.16(d) in 2018 and 2019. More importantly, as ACICS notes, it had an opportunity to provide its best arguments and responses at the March 2021 NACIQI meeting. I have considered the entirety of that transcript and all assertions of compliance by ACICS made within it. At the conclusion of that meeting, NACIQI voted 12-0 (with 3 recusals) to recommend finding NACIQI out of compliance with § 602.16(d). I am unpersuaded that ACICS was prejudiced by the weight OPE gave to the policy revisions made in 2020. Moreover, the policy revisions do not persuade me to reject NACIQI’s unanimous recommendation to find ACICS out of compliance with § 602.16(d).

Finally, ACICS asserts the Department failed to give adequate weight to evidence of ACICS considering public comments related to the SDUIS application for accreditation.²³⁴ In my earlier analysis, I held that ACICS was in substantial compliance with § 602.17(e), rendering this line of argument moot.

Having concluded that the Department properly considered all relevant evidence, I now turn to the evaluation of the 2021 OIG Report.

b. Whether the 2021 OIG Report is Relevant to the Recognition Decision

ACICS takes issue with the SDO’s conclusion that the 2021 OIG Report “is not relevant to the current review.”²³⁵ In weighing the evidentiary value of the 2021 OIG Report, the SDO noted that NACIQI “discussed the report at length” but did not purport to include it in the record of the meeting.²³⁶ The SDO specifically “read and consider[ed] the relevance and implications of the OIG Report.”²³⁷ Nevertheless, the SDO concluded that the 2021 OIG Report “is not relevant

²³¹ ACICS Brief at 17–18.

²³² *Id.* at 18.

²³³ *Id.*

²³⁴ *Id.* at 18–19.

²³⁵ SDO Decision at 13.

²³⁶ *Id.*

²³⁷ *Id.* at 14.

to the matters before us. The four reports under review here are temporally removed from the scope of the 2021 OIG Report.”²³⁸ In other words, the 2021 OIG Report does not reach any conclusions specific to the OPE review process subsequent to the ACICS 2018 Decision, including the four reports at issue, the recommendations therein, and NACIQI’s recommendations based on those reports and the 2021 NACIQI meeting.

ACICS argues that the 2021 OIG Report “is *highly relevant*, particularly given its findings that . . . the 2016 Decision was marred with procedural irregularities.”²³⁹ ACICS argues that, in the instant review process, the Department has “repeatedly failed to properly consider all relevant evidence in the record before recommending or deciding to terminate ACICS’s recognition status,” the Department has not “completed corrective action measures” to avoid subjectivity in reviewing agencies, and the 2021 OIG Report “all but confirmed . . . that the agency recognition review process has been tainted by politicization and prejudice, resulting in disparate treatment of ACICS.”²⁴⁰

I have considered the totality of the 2021 OIG Report and I disagree with ACICS’ characterization of the 2021 OIG Report’s findings. First, I disagree that the OIG Reports collectively indicate that the Department has failed to properly consider all relevant evidence in the current review process. The 2018 OIG Report covers “January 2013 through June 2017” and makes no findings with regard to the ACICS 2018 Decision or the OPE reviews resulting in the four reports relevant to the instant decision.²⁴¹ The 2021 OIG Report directly contradicts ACICS’ argument, finding that “the Department’s process for assessing ACICS’ compliance with Federal regulatory criteria for recognition followed applicable policies and regulations except during the 2016 recognition review.”²⁴²

The 2021 OIG Report recommends OPE and any other Department staff “ensure that all available relevant evidence is considered and reviewed” in agency recognition reviews.²⁴³ However, the 2021 OIG Report concludes that the process in 2018 did just that, and it makes no finding that the Department failed to likewise review all relevant evidence in the four separate reviews that resulted in the four reports now under consideration. The 2021 OIG Report also notes that, even in 2016, “the Department had formal processes in place for assessing ACICS’ compliance with recognition criteria and that procedural requirements for the accreditation recognition process are clearly defined.”²⁴⁴ The issue was not a lack of appropriate procedures, but a unique failure to follow those procedures regarding ACICS’ supplemental evidentiary submission during the 2016 review. I find no evidence in the current case that OPE or NACIQI failed to adequately consider evidence submitted by ACICS throughout the extensive review process.

Second, I disagree that corrective action measures are necessary to complete the current review of ACICS’ petition. OIG concluded that relying on the 2012 OPE Guidelines rather than

²³⁸ *Id.* at 16.

²³⁹ ACICS Brief at 19 (emphasis in original).

²⁴⁰ *Id.* at 20–21.

²⁴¹ 2018 OIG Report at 1.

²⁴² 2021 OIG Report at 1, 12.

²⁴³ *Id.* at 2.

²⁴⁴ *Id.* at 15.

the regulations at 34 C.F.R. Part 602 may lead to subjectivity.²⁴⁵ The guidelines were updated in June 2019 and “include some additional detail . . . [but] still allow for areas of reviewer subjectivity.”²⁴⁶ The multiple levels of agency review alleviate some of the subjectivity of the regulatory criteria.²⁴⁷ Therefore, OIG noted that a review like the one conducted by then-Secretary DeVos in 2018 is more prone to subjective judgments than the usual full review process, because only one recommendation or decision is produced.²⁴⁸ Nevertheless, even in 2018, OIG found the Department’s review process to be fully compliant with the law and appropriately based on all the relevant evidence.²⁴⁹ While ACICS argues that the Department’s review processes are insufficient to render a fair decision, I find the opposite. In the instant case, ACICS’ petition has been subject to the complete ground-up review process, with each level of review and recommendation culminating in this decision. I find that all relevant evidence has been considered including the OIG Reports. Nothing in the OIG Reports weighs against accepting the recommendations from OPE and NACIQI with which I have agreed in this decision.

Finally, ACICS asserts that the 2021 OIG Report effectively confirms it is unfairly subject to politicization, prejudice, and disparate treatment. ACICS does not specifically point to any portion of the 2021 OIG Report as a basis for this assertion. The 2021 OIG Report largely considers whether the ACICS 2018 Decision was created with an appropriate process and supported by appropriate evidence. ACICS seems to agree with the 2021 OIG Report’s conclusion that the ACICS 2018 Decision, finding ACICS noncompliant with some criteria but providing conditional recognition, was made fairly. The 2021 OIG Report found the 2016 review insufficient, but did not conclude the insufficiency was evidence of politicization and prejudice. Furthermore, the insufficiency of the 2016 review has been remedied by a federal court remand, the ACICS 2018 Decision, and the complete review process conducted since. I find nothing in the 2021 OIG Report to support a finding that any part of the instant review process was prejudicial to ACICS.

Having weighed the content of the 2021 OIG Report, I now turn to ACICS’ assertion that the Department relied on an improper standard.

c. Whether the Department Relied on an Improper Standard

This argument by ACICS is subdivided into three prongs. First, ACICS argues that both OPE and NACIQI “applied incorrect or inapplicable recognition criteria.”²⁵⁰ Second, ACICS claims that OPE applied the wrong standard when determining whether ACICS complied with the criteria.²⁵¹ Finally, ACICS asserts OPE erred by applying a “cumulative effect” standard that is not grounded in the regulations.²⁵²

²⁴⁵ *Id.* at 18–19.

²⁴⁶ *Id.* at 20.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 21.

²⁴⁹ *Id.* at 18.

²⁵⁰ ACICS Brief at 22.

²⁵¹ *Id.*

²⁵² *Id.*

Regarding its first argument, ACICS broadly asserts that OPE engaged in “inconsistent application of the recognition criteria, lack of fair notice about new standards of review not seen elsewhere . . . and, more generally, the repeated efforts by the Department to ‘move the goal posts’, to all but ensure a finding of non-compliance in order to terminate ACICS’s recognition status.”²⁵³ Here ACICS does not cite to any specific example or supporting evidence not advanced elsewhere in its brief. Accordingly, I address the substance of this argument – whether I agree with OPE’s recommendations and underlying analysis – elsewhere in this decision and will not further consider it here.

Regarding its second argument, ACICS claims that OPE employed “a non-existent ‘cumulative effect’ standard to support the recommendation or termination.”²⁵⁴ ACICS characterizes OPE’s action as a “*post hoc* rulemaking.”²⁵⁵ In reply, the SDO asserts that the language of both the OPE reports and SDO decision made clear in every instance that the findings of noncompliance in each OPE report “considered separately, warrant termination.”²⁵⁶

I find no evidence that either OPE, NACIQI, or the SDO erroneously relied on a novel standard to find ACICS noncompliant with the recognition criteria. In any event, the nature of these proceedings places upon me the responsibility of making a recognition decision *de novo*. Therefore, regardless of how ACICS characterizes the verbiage used by OPE and the SDO, the only recognition standards applied to its petition are those applied in this decision. I apply the standards enumerated in the regulations.

In the four reports, OPE makes distinct recommendations based on ACICS’ compliance or noncompliance with each applicable criterion. NACIQI likewise took separate votes to forward distinct recommendations to the SDO based on each criterion and tied to each of the four reports. NACIQI also voted on an “overall” recommendation which took into account all the recommendations in all four reports. Considering all instances of an agency’s noncompliance cumulatively is not application of a novel standard, but an inherent element of applying the regulations at 34 C.F.R. § 602.36(e). After determining whether an agency is noncompliant with any criteria, the regulations require the SDO to decide whether to deny, limit, suspend, or terminate recognition, or provisionally grant recognition pending submission of a compliance report. A plain reading of the regulations is sufficient to acknowledge that the SDO must consider the number and severity of an agency’s instances of noncompliance. The SDO must choose a remedy, in part, based on the cumulative burden an agency faces in trying to reach compliance within 12 months. Therefore, I conclude any references in the record to the “cumulative effects” of ACICS’ noncompliance are an appropriate application of the existing regulations.

Regarding its third argument, ACICS claims that OPE “developed an unprecedented, non-standard, and *ad hoc* review process for ACICS, and has done so without regard for administrative agency rulemaking authority or process.”²⁵⁷ This argument is conflated with the

²⁵³ *Id.* at 22–23.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Senior Department Official Response to Accrediting Council for Independent Colleges and Schools’ Appeal to the Secretary of Education of the Senior Department Official’s June 2, 2021, Decision (July 27, 2021) at 14.

²⁵⁷ ACICS Brief at 24.

previous one, which asserts the purported creation of a novel standard of review applied only to ACICS. Other than the purported “rulemaking” addressed above, ACICS does not provide any example of how OPE erred in this segment of its brief. Accordingly, I reject this argument.

Based on the foregoing analysis, I reject ACICS’ assertion that the Department erred by relying on an improper standard. Next, I turn to ACICS’ argument that the Department’s review was procedurally deficient.

2. *Whether the Department’s Review was Procedurally Deficient*

ACICS generally argues that its petition for recognition is the subject of “undue and unfair politicization” and “could not and, indeed, did not receive fair and full consideration from the SDO, ED Staff, or any member of Department leadership.”²⁵⁸ ACICS also claims that it was prejudiced by procedural irregularities because 1) NACIQI held substantive discussions about ACICS’ petition before reviewing the 2021 OIG Report, and 2) ACICS representatives were unable to submit statements during the second day of the NACIQI hearing.

Regarding politicization, ACICS is not the first accreditation agency whose recognition became a matter of controversy or public interest. The multi-tiered recognition process is structurally designed to ensure that a chorus of opinions contribute to the Department’s final recognition decision. Furthermore, the administrative record supporting any such decision includes evidence and narratives contributed by OPE, the agency under review, and third-parties. The record in this case contains not one but four reports created by OPE, supported by extensive documentary evidence. The NACIQI recommendation is based on the presentations made over two days and the entire record assembled prior to the meeting. With one exception, the bipartisan members of NACIQI voted by a majority (if not unanimously) to oppose recognition of ACICS. The SDO Decision contains firm conclusions, but I find no evidence that it was swayed by bias or prejudgment of the matters under consideration. Notwithstanding, this final decision made with the delegated authority of the Secretary is based solely on the contents of the administrative record and the applicable law. With this final decision, ACICS has received a full and fair hearing on its petition for recognition, and I reject its assertions to the contrary.

Regarding procedural irregularities, the core question is whether ACICS had the benefit of due process prior to the Department’s final decision. Due process in an administrative proceeding is not necessarily the same as due process in a judicial proceeding. A party is afforded whatever procedural protections are called for in the circumstances of a particular situation.²⁵⁹ “The key provision is some form of hearing that allows the individual a meaningful opportunity to be heard.”²⁶⁰

In this case, ACICS has had the benefit of an extensive administrative process. Some of the issues addressed in this decision involve compliance efforts as early as the 2016 OPE review. All issues considered in this decision were the subject of four separate OPE reports created over

²⁵⁸ *Id.* at 26.

²⁵⁹ *Lincoln Univ.*, Dkt. No. 13-68-SF, U.S. Dep’t of Educ. (Decision of the Secretary) (Jan. 14, 2021) at 4, n.20 (citing *State of S.C.*, Dkt. No. 13-43-O, U.S. Dep’t of Educ. (Decision of the Secretary) (Feb. 26, 2016) at 5–6).

²⁶⁰ *Navient Corp.*, Dkt. No. 16-42-SA, U.S. Dep’t of Educ. (Decision of the Secretary) (Jan. 15, 2021) at 16.

a period of years. ACICS had an opportunity to respond to OPE's findings in each review by presenting both documentary evidence and its own narratives. ACICS also had an opportunity make a presentation before NACIQI knowing the contents of OPE's four final reports. Though ACICS began discussing the merits of the petition prior to reviewing the 2021 OIG Report, and though ACICS was unable to make comments on the second day of the NACIQI meeting, ACICS has since had the opportunity to provide whatever additional comments it wished to both the SDO and now to me. Taken as a whole, ACICS has made an exhaustive presentation of its arguments and evidence throughout the entirety of the recognition process. No circumstances present at the NACIQI meeting are a fatal defect of the review process. NACIQI ultimately voted with the benefit of ACICS' presentation and after reviewing the 2021 OIG Report before the second day of the meeting. ACICS has had the benefit of due process. Accordingly, I reject ACICS' argument that procedural irregularities prevent me from making a fair, final recognition decision.

Finally, I turn to ACICS' argument in favor of imposing an alternative remedy other than termination of recognition.

3. Whether to Apply an Alternative Remedy to ACICS Other Than Termination of Recognition

ACICS argues that, despite what has been previously discussed in this decision, I should refrain from denying its petition for recognition in the interest of students at ACICS-accredited institutions.²⁶¹ ACICS cites the potential difficulty that accredited institutions would have seeking a new accreditation agency.²⁶² Therefore, ACICS asks that I impose virtually any alternative to denial of recognition, such as "approving with a monitoring report" or limiting the scope of its recognition.²⁶³

Inherent in the question of whether to impose a remedy less than denial of recognition is whether ACICS' noncompliance is such that it is likely to reach full compliance within 12 months. ACICS has argued vehemently since it was reviewed in 2016 that it can and will reach full compliance in the near future. It made the same arguments in 2018 at which time it was still not in full compliance. Now, faced with four separate reports finding it noncompliant with the recognition criteria, ACICS again asserts it should not be denied recognition if, for no other reason, than that its accreditation is too important to students and institutions, regardless of what the law requires from a recognized accreditor. I disagree.

ACICS' failure to reach full compliance with § 602.15(a)(2), despite a finding of noncompliance in 2018, is reason enough to deny the petition because ACICS has not shown good cause as to why it should receive a further extension.²⁶⁴ Based on the record showing years of noncompliance with additional criteria, despite its best efforts to improve its operations, I also do not find that ACICS would, if given 12 additional months, reach full compliance with the other criteria discussed in this decision. Based on the findings of noncompliance discussed in

²⁶¹ ACICS Brief at 45.

²⁶² *Id.*

²⁶³ *Id.* at 46.

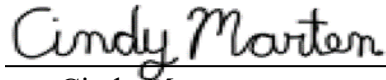
²⁶⁴ 34 C.F.R. § 602.36(e)(3)(iii).

this decision and considering the totality of circumstances present in the administrative record, I deny ACICS' petition for recognition.

ORDER

For the foregoing reasons, I deny ACICS' petition for recognition.

So ordered this 19th day of August 2022.



Cindy Marten
U.S. Deputy Secretary of Education

Washington, DC

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