



UNITED STATES DEPARTMENT OF EDUCATION

June 2, 2021

Michelle Edwards
President and CEO
Accrediting Council for Independent Colleges and Schools

Dear Ms. Edwards:

I am writing to inform you of my decision on the accreditation recognition of the Accrediting Council for Independent Colleges and Schools (ACICS) with respect to the compliance report under 34 C.F.R. § 602.32 and three separate inquiries conducted under 34 C.F.R. § 602.33. U.S. Department of Education, Office of Postsecondary Education (Department) staff and the National Advisory Committee on Institutional Quality and Integrity (NACIQI) have each made recommendations to me under sections 114 and 496 of the Higher Education Act of 1965, as amended, and pursuant to relevant statutory and regulatory provisions. As the Senior Department Official (SDO), it is my careful duty to decide whether to continue the accreditation recognition of ACICS. Following years of review involving four different compliance inquiries and reports, and after considering the entire lengthy and complex record before me, ACICS's significant and systemic noncompliance with multiple regulatory recognition criteria leaves me no reasonable option but to terminate its recognition, effective immediately.

I. Introduction and Summary of Decisions.

The purpose of this letter is to render a decision about whether to continue or terminate the accreditation recognition of ACICS under 34 C.F.R. Part 602, Subpart C. The matter stems from four separate, but concurrent and related inquiries that examine numerous instances of noncompliance with the Secretary of Education's (Secretary) recognition criteria of 34 C.F.R.

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Part 602, Subpart B. The Final Staff Compliance Report, Final Staff Monitoring Report, Final Staff Capacity Report, and Final Staff Reagan National University Report (Final Staff RNU Report) found twelve areas of noncompliance with seven of the recognition criteria. Department staff recommended terminating ACICS's recognition.

At the March NACIQI meeting, the Advisory Committee considered the Department staff findings of noncompliance, and testimony from ACICS, Department staff, and third parties, and recommended that the SDO find ACICS noncompliant with the seven recognition criteria and terminate their recognition.

After reviewing the Final Staff Compliance Report, Final Staff Monitoring Report, Final Staff Capacity Report, and Final Staff RNU Report, and all materials constituting the record under 34 C.F.R. § 602.36(a), and for reasons discussed in detail below, I find ACICS out of compliance in twelve distinct instances with seven recognition criteria. When considered separately, under the Secretary's regulations, each report's findings of noncompliance constitute grounds for termination under 34 C.F.R. § 602.36(2); when considered cumulatively in the context of each of the four inquiries, or as part of a comprehensive review of ACICS's capacity, as is proper in this unique circumstance, each finding of noncompliance illustrates part of an overwhelming picture of an agency unable to comply now, or come into compliance within 12 months, with the recognition criteria and its own standards.

Thus, pursuant to 34 C.F.R. § 602.36, I terminate ACICS's recognition, effective immediately.

II. Background.

Accreditation is a process meant to ensure that institutions of higher education meet acceptable levels of quality. In order for institutions to participate in the Higher Education Act of 1965's Title IV federal financial aid programs, they must be accredited by a "nationally recognized" accrediting agency. The process for institutional accreditation involves the accrediting agency development of accreditation standards and evaluation to determine whether those criteria have been met.

In order to receive "national recognition" as an accreditor, an agency must meet the Department's regulatory criteria for the recognition of agencies found under 34 C.F.R. Part 602.

Under a typical recognition review process, an agency submits an application to the Department, demonstrating compliance with the Secretary's recognition criteria. The application and any public comments or other relevant information is reviewed by Department staff, who assess the agency's compliance and produce a preliminary report. The agency has 30 days to review and respond to the preliminary report and provide any additional documentation or information to supplement its application. Department staff review the responses and compile a final report with accreditation recommendations.

The agency's application and Department staff recommendations are considered at a twice-yearly NACIQI meeting, along with testimony from the agency, Department staff, and public commenters. NACIQI makes their own recognition recommendations.

Both sets of recommendations, along with all materials constituting the record under 34 C.F.R. § 602.36(a), then go to the SDO for a final accreditation determination within 90 days of the NACIQI meeting.

Recognition periods last for no more than five years; petitions for continued recognition follow the same process.

In January 2016, ACICS submitted a petition to the Department for continued recognition. The Department informed ACICS that its petition would be considered at the NACIQI meeting scheduled for June 2016. In March, the Director of the Department's Accreditation Group returned ACICS's petition, asking for ACICS to respond to Department staff's questions related to a number of recognition criteria within 30 days, by April 1. Staff questions were broken into two categories: Part I, or "overall questions" related to ACICS-accredited institutions that had been the subject of major investigations and lawsuits, including Corinthian, ITT Tech, and Michigan Jewish Institute; Part II, or "questions related to specific standards," related to ACICS's performance as to particular recognition criteria.

ACICS requested a 45-day extension for response, which Department staff denied with respect to Part I and granted with respect to Part II, at the same time notifying ACICS that they should be prepared to return to the fall NACIQI meeting for further discussion and action, given the short

period of time between receipt of information and the June meeting, given the importance of the requested information to the Department's responsibility to monitor and review the agency.

ACICS submitted its Part I response on April 1, 2016, and Department staff provided ACICS with a draft analysis and report on May 4, finding ACICS noncompliant with multiple recognition criteria and recommending that its petition for continued recognition be denied.

On May 16, 2016, ACICS uploaded its Part II response, but, because of outstanding questions about the proper submission method for additional information, ACICS did not technically "submit" the response. On May 18, Department staff responded with instructions that ACICS submit their Part II response by uploading it, and send supplemental information on a flash drive, so as to keep the information separate. Department staff indicated that the supplemental information would be reviewed outside of the cycle of review, due to the NACIQI meeting schedule. ACICS submitted its Part II response, and delivered a thumb drive with the Part II responses and supplemental information to Department staff on May 19.

ACICS requested an extension for response to Department staff's draft analysis and report on June 3, 2016, but Department staff denied the request, noting that the draft included numerous findings of non-compliance, that a deferral would violate HEA requirements, and that they did not have the authority to grant one. Department staff informed ACICS that they would not be compelled to respond at the June NACIQI meeting to any analysis of the Part II submission. ACICS filed its timely response, detailing various actions to address compliance issues identified in the Department staff draft analysis and reporting, including fiscal and administrative criteria.

Department staff issued its final report on June 15, 2016, in which it found ACICS noncompliant with 21 recognition criteria, citing various government investigations and lawsuits. The final report, concluding that ACICS was aware of misconduct at its accredited institutions in many cases, but failed to appropriately address or report it, failed to effectively apply its own standards, and failed to enforce and monitor its own standards. Department staff recommended denial of ACICS's petition for renewal and withdrawal of ACICS's recognition.

At the June 23, 2016, NACIQI meeting, the Advisory Committee reviewed ACICS's petition, heard testimony from ACICS, Department staff, and third parties, before voting 10-3 to support

Department staff's recommendation to revoke ACICS's recognition. ACICS and Department staff both submitted timely comments to the SDO. ACICS argued that it was in compliance with all recognition criteria, would be able to provide evidence of their effective application by April 2017, and that most issues were on track to be remedied by August 2017.

The SDO issued a decision on September 22, 2016, terminating ACICS's recognition. The SDO found non-compliance with the same 21 criteria identified by Department staff in its final report, and agreed with Department staff and the Advisory Committee that a compliance review was not appropriate because ACICS could not come into full compliance within 12 months due to fundamental problems with its functions. ACICS filed a request for reconsideration, which the SDO denied.

On October 23, ACICS appealed to Secretary John King, indicating their intent to continue to implement their recent changes, and that they expected to be able to demonstrate full compliance within 12 months. On December 12, the Secretary issued a final decision, finding ACICS to be out of compliance with at least five separate recognition criteria relating to their standards, application of standards, monitoring, enforcement, and review of those standards, and that ACICS was unlikely to come into compliance within 12 months. The Secretary denied ACICS's petition for renewal and withdrew ACICS's recognition.

On December 15, 2016, ACICS filed a petition for review in the U.S. District Court for the District of Columbia. One year later, ACICS also filed an application for initial recognition with the Department, and was placed on the agenda of the May 2018 NACIQI meeting.

In his March 23, 2018, District Court opinion, Judge Walton held that the Secretary violated the Administrative Procedure Act, 5 U.S.C. § 551 et seq., by failing to consider ACICS's Part II submission and supplemental evidence of its placement verification and data integrity programs and procedures when making the final decision to terminate recognition.¹ The court held that especially given the Department's reliance on ACICS's "past track record" in finding it out of compliance with multiple recognition criteria, they had a duty to look at all available relevant data prior to making a decision; because the Part II submission contained information relevant to

¹ *Accrediting Council for Independent Colleges and Schools v. DeVos*, 303 F.Supp.3d 77 (D.C.D.C. 2018)

ACICS's compliance with the recognition criteria at issue, the Department should have considered it.² Judge Walton remanded the decision to the Secretary for review.

On April 3, 2018, Secretary Betsy DeVos, in response to Judge Walton's decision, ordered a review of the Department's handling of ACICS's 2016 recognition petition. The Secretary's order acknowledge that, per the District Court's decision, there was not a final agency decision to terminate recognition, and restored ACICS status as a recognized accrediting agency.³ The Secretary, per the District Court's decision, requested a written submission of new evidence for consideration from ACICS, and a response with a decision recommendation that considered the original petition, the Part II submission, and new evidence from ACICS from the SDO. Pending resolution of the further review ordered by the District Court, the Secretary announced that, because ACICS's prior recognition had been restored, the Department would not conduct further review of ACICS's December 2017 pending petition for initial recognition, and that ACICS would be removed from the NACIQI agenda.

Following ACICS's submission, the former SDO delivered a response memorandum (2018 SDO Response) to the Secretary on September 28, 2018, finding that ACICS evidenced it had policies in place that comply with the Secretary's recognition criteria, and had demonstrated sufficient application of those criteria. The SDO recommended that the Secretary find ACICS substantially in compliance with all but two recognition criteria, but recommended conditioning continued recognition with the requirement that ACICS submit to a 12-month compliance report and a monitoring report.

In her November 21, 2018, final decision (2018 Decision), Secretary DeVos accepted the SDO's recommendation and found ACICS compliant with all but two recognition criteria: (1) 34 C.F.R. § 602.15(a)(2), competency of representatives; and (2) 34 C.F.R. § 602.15(a)(6), conflict of interest. She granted ACICS continued recognition, while requiring it to demonstrate full compliance with the two recognition criteria within 12 months. In addition, while the Secretary

² *Id.*, 104-105.

³ Secretary DeVos restored ACICS's recognition status as of December 12, 2016. She also put a hold on ACICS's December 2017 petition for initial recognition, and removed ACICS's application from the agenda for the May 2018 NACIQI meeting. *See*, ORDER *In the Matter of: Accrediting Council for Independent Colleges and Schools*, Docket No. 16-44-O (Apr. 3, 2018) (2018 Order).

found ACICS compliant with the remaining recognition criteria, she agreed with the SDO's finding that additional monitoring was needed for four criteria to ensure continued compliance: (1) 34 C.F.R. § 602.15(a)(1), administrative and financial resources; (2) 34 C.F.R. § 602.16(a)(1)(i), accreditation and pre-accreditation standards related to student achievement; (3) 35 C.F.R. § 602.16(a)(1)(vii), recruiting and admissions practices, academic calendars, catalogs, publications, grading, and advertising; and (4) 34 C.F.R. § 602.19(b), monitoring. In response to the 2018 Order, ACICS submitted its agency Compliance Report on December 19, 2019, and its agency Monitoring Report on December 20, 2019. In its review of the agency Monitoring Report, Department staff found that one or more deficiencies may exist in ACICS's compliance with recognition criteria, and began processing the review in accordance with 34 C.F.R. § 602.33(a)(1).

While Department staff were conducting reviews of the agency Compliance and Monitoring Reports, credible information prompted Department staff to initiate an additional two separate reviews under 34 C.F.R. § 602.33(a)(2) of ACICS's compliance during the recognition period. First, the "Capacity Inquiry" stemmed from ACICS public testimony on June 2, 2019, before the Council on Higher Education Accreditation, and related news articles that raised concerns about ACICS's financial stability and its review of two institutions. Second, the "RNU Inquiry" was initiated on February 24, 2020, in response to a February 15, 2020, news article that alleged that an ACICS-accredited institution was not in operation, and did not have students, faculty, or a physical presence.⁴ In the course of reviewing ACICS's responses to both the Capacity Inquiry and RNU Inquiry, ED staff concluded that ACICS was out of compliance with a number of other recognition criteria.

Draft narratives of each report were provided to ACICS, and the agency was given the opportunity to respond and provide additional responsive information and supporting documents.

⁴ Quintana, C. and S. Conlon. "This college was accredited by a DeVos-sanctioned group. We couldn't find evidence of students or faculty." *USA Today*, Feb. 15, 2020; See RNU Draft Staff Analysis, Agency Narrative, Section 602.15(a)(1), Documents Uploaded by Analyst, 200215 USA Today Article.

On January 22, 2021⁵, Department staff provided four final reports to ACICS: the Compliance Final Staff Report, the Monitoring Final Staff Report, the Capacity Final Staff Report, and the RNU Final Staff Report. In total, the four reports found twelve instances where ACICS was out of compliance with seven recognition criteria.

1. Section 602.15(a)(1) – The accrediting agency must have adequate administrative staff and financial resources to carry out its accrediting responsibilities. The inquiries resulted in findings of noncompliance in the Monitoring Report Review, Capacity Inquiry, and RNU Inquiry.
2. Section 602.15(a)(2) – The accrediting agency must have competent, knowledgeable, and trained representatives. The inquiries resulted in findings of noncompliance in the Compliance Report Review and RNU Inquiry.
3. Section 602.16(d) – The accrediting agency must have effective standards for distance education. The inquiries resulted in a finding of noncompliance in the Capacity Inquiry.
4. Section 603.17(c) – The information obtained during on-site reviews must be sufficient to determine an institution’s compliance with the accrediting agency’s standards. The inquiries resulted in findings of noncompliance in the Capacity Inquiry and RNU Inquiry.
5. Section 602.17(e) – The accrediting agency must conduct an independent analysis of an institution’s compliance with the agency’s standards. The inquiries resulted in a finding of noncompliance in the Capacity Inquiry.
6. Section 602.18(b)(3) – The accrediting agency must ensure consistency in its decision-making by basing their accreditation decisions on published standards. The inquiries resulted in a finding of noncompliance in the RNU Inquiry.
7. Section 602.19(b) – The accrediting agency must have, and effectively apply, monitoring and evaluation approaches that enable it to identify problems with an institution’s

⁵ Recognizing the unique procedural complications presented by four contemporaneous reviews of the same agency, Department staff, following a decision by Department leadership under Secretary DeVos, maintained separate considerations of each of the recognition criteria identified for review, but temporally combined the review process for consideration of the issues in their entirety before NACIQI because the administration “felt like it was not appropriate to have one report at one time when other reports were in process.” *See*, NACIQI Meeting Transcript, Friday, March 5, 2021, p. 81, lines 4-9.

continued compliance with agency standards. The inquiries resulted in findings of noncompliance in the Monitoring Report Review and the RNU Inquiry.

Each of the four final staff reports recommended that the SDO terminate ACICS's recognition, based either on the individual report's findings, or when considering the cumulative effects of ACICS's noncompliance.

On March 2, 2021, the day before the March NACIQI meetings began, the Department of Education Office of Inspector General (OIG) released a report (OIG Report) examining the Department's 2016 and 2018 recognition reviews of ACICS.⁶

During the March 4, 2021, NACIQI meeting, the Advisory Committee considered the four final reports, testimony from ACICS representatives, testimony from Department staff, and third party comments. The final decision on ACICS was delayed by a day, until March 5, to give Advisory Committee members an opportunity to review the OIG Report and determine its relevance on the current recognition consideration. The Advisory Committee deliberated over the Department staff recommendations, and ultimately concurred with all but one recommendation of noncompliance. The Advisory Committee recommended that the SDO terminate ACICS's recognition for each of the four reports.

On March 8, 2021, ACICS counsel wrote to the SDO with three procedural requests, including for an extension of time to file written comments pursuant to 34 C.F.R. 602.35(a) until 10 business days from the date of availability of the official written NACIQI meeting transcripts. Counsel for Department staff responded on March 11, indicating that, despite ACICS's full opportunity to take notes and participate in the NACIQI meeting, they did not object to an extension of the comment period. On March 17, the SDO responded, granting the extension of time to submit comments, and confirming ACICS's full access to the record.

⁶ U.S. Department of Education Office of Inspector General, "The Department's Recognition of the Accrediting Council for Independent Colleges and Schools as an Accrediting Agency." Mar. 2, 2021. *Available at:* <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2021/s19t0003.pdf> (OIG Report).

The official transcripts from the March 4 and 5 NACIQI meeting were made available on March 25. ACICS submitted their written comments to the SDO on April 8, 2021, and Department staff filed their responsive comments on April 23, 2021.⁷

My discussion and findings below are based on careful consideration of the full record under 34 C.F.R. § 602.36, including the full record considered by Department staff and the Advisory Committee in making their recommendations, the four Final Staff Reports, NACIQI meeting transcripts, 2021 OIG Report, and written comments submitted to me by ACICS and Department staff.

III. Determination of Scope of the Record and Consideration of New Evidence.

a. Scope of the Record

When making a recognition decision, the SDO is limited to the record compiled under the limitations described in 34 C.F.R. § 602.36(a). In this case, the SDO may consider:

- The materials provided to the Advisory Committee under section 602.34(c), including: ACICS's Compliance Report and Monitoring Report and supporting documentation submitted by the agency; the final Department staff analyses and reports and supporting documentation; ACICS's response to the draft staff analyses and reports; third-party written comments and any agency response; and any other information Department staff relied upon in developing its analysis.
- The transcript of the Advisory Committee meeting, received on March 25.
- The recommendation of the Advisory Committee.
- Written comments and responses submitted under section 602.35(c), which were submitted by ACICS and Department staff on April 8 and April 23, respectively.
- New documentation properly submitted in accordance with section 602.35(c)(1).

⁷Department staff filed their comments in the early morning hours of April 23, 2021, rather than on April 22, 2021. They provided timely communication about technical difficulties, and, given that they were received before the business day began on April 23, and noting the extension in time given – without objection by Department staff – to ACICS, I consider their comments timely filed. .

b. New Information Contained in ACICS Comments

When ACICS submitted its comments pursuant to section 602.35(c) on April 8, it included a total of 29 Exhibits, six of which had not previously been included in the record⁸:

1. Exhibit 7, the *Curriculum Vitae* of D. Teneyuca
2. Exhibit 8, screenshots of a Webinar Registration Report, generated on January 28, 2021, and a Webinar attendee report generated on January 29, 2021
3. Exhibit 9, the *Curriculum Vitae* of G. Randall
4. Exhibit 11, the attestation of G. Randall, dated March 16, 2021
5. Exhibit 13, the *Curriculum Vitae* of M. Bleacher

The regulations at 34 C.F.R. § 602.35(c)(1) clearly state that “[n]either the Department staff nor the agency may submit additional documentation with its comments” except in the limited situation where the Advisory Committee proposes finding the agency noncompliant with a recognition criterion that was not already identified and analyzed by Department staff. That is not the case here. In its April 8 comments, ACICS argue that 34 C.F.R. § 602.35(c)(2) allows them to submit new evidence. This is a misreading of the regulation, which only applies to the Department staff’s opportunity to respond to the agency’s comments to the SDO, including an opportunity to respond to any new evidence properly submitted under the limited circumstance described in section 602.35(c)(1).

The regulations at 34 C.F.R. 602.36(h) allow the SDO to consider “relevant and material information pertaining to an agency’s compliance with recognition criteria” that comes to the SDO’s attention outside of the record, but it is up to the SDO to determine whether such new information is relevant and material to the agency’s compliance with the recognition criteria at issue, and whether the new information should be considered when reaching a determination. Section 602.36(i) specifically prohibits the agency from submitting information to the SDO for the purpose of invoking section 602.36(h).

⁸ Like Department staff, I have also been unable to locate these five documents in the record.

Even if the five exhibits were incorporated into the record, they would not alter the evaluation, because they are not relevant and material to ACICS's compliance with the recognition criteria at issue.

ACICS relies on Exhibits 7 and 9, the *Curriculum Vitae* of Dr. David Teneyuca and Dr. G. Randall, to demonstrate compliance with the requirement that the agency has an effective evaluator training program in section 602.15(a)(2). As the former SDO noted in her 2018 Response⁹ to the Secretary, evaluators must complete refresher training in order to be considered qualified: "At a minimum, it would seem like ACICS should require its existing evaluators to undertake supplemental or refresher training that reflects its improvements in this area rather than to assume, just because they are qualified on paper, they are also properly trained." Dr. Teneyuca and Dr. Randall's CVs do not demonstrate that either has completed the required refresher or supplemental training, and are therefore not relevant or material to determining ACICS's compliance with section 602.15(a)(2).

ACICS submitted Exhibit 8, screenshots of a Webinar Registration Report for the refresher training, generated on January 28, 2021, and a Webinar attendee report for specialized training that was generated on January 29, 2021, in an effort to demonstrate that Dr. Teneyuca and Dr. Minore completed their evaluator trainings as required by ACICS standards and 34 C.F.R. § 602.15(a)(2). First, a printout of webinar registration for the required refresher training attendance does not demonstrate that Dr. Teneyuca and Dr. Minore completed the training in question. The attendee report for the specialized training indicates that training was completed on January 29, 2021, after the Final Staff Compliance Report had been concluded and sent to ACICS, and cannot properly be considered part of the record. Even if it could, this struggle to fulfill what should constitute a simple filing is not relevant to show timely compliance with Secretary DeVos's 2018 Order, but appears as evidence of serious delinquencies in ACICS's ability to comply with a straightforward regulatory requirement. Exhibit 11, the attestation of Dr. Randall, dated March 16, 2021, over a week after the NACIQI meeting, claims to show that Dr. Randall received "just-in-time" training prior to a site visit that occurred on June 12, 2019, over a

⁹ Senior Department Official's Response to ACICS *In the Matter of: Accrediting Council for Independent Colleges and Schools*, Docket No. 16-44-O (Sept. 28, 2018) (SDO Response), page 32.

year and half earlier, again, to demonstrate compliance with section 602.15(a)(2). The attestation may itself not have existed prior to the NACIQI meeting, but it does not constitute “new evidence” for purposes of 34 C.F.R. § 602.36(h); it purports to provide proof that a compliance requirement was met much earlier. The temporal distance between the date of the supposed just-in-time training and ACICS’s production of an attestation raises questions about, rather than demonstrates the agency’s ability to comply with, their own standards and the recognition criteria.

Finally, Exhibit 13, the *Curriculum Vitae* of Mr. Michael Bleacher was submitted to show Mr. Bleacher’s qualifications to serve as a distance education evaluator. ACICS failed to submit this document in a timely manner and it cannot be considered part of the record.

c. Department of Education Office of the Inspector General Report Is Not Relevant to the Current Review.

During the Thursday, March 4, 2021, NACIQI meeting, ACICS representatives asked that the Advisory Committee consider the OIG Report to the Secretary, dated March 2, 2021, regarding the Department of Education’s handling of ACICS’s petition for re-recognition in 2016 and the Department’s subsequent reinstatement and review of ACICS’s recognition.¹⁰ During the March 4 session, ACICS representatives and Department staff summarized the finding of the 2021 OIG Report, and the Advisory Committee members, who had not had an opportunity to review the OIG Report, agreed to postpone a final decision on ACICS reaccreditation until Friday, March 5.¹¹ ACICS representatives asked the Advisory Committee to include the OIG Report in the record.¹² Although Committee Members discussed the report at length, no motion was made to include it in the record.

On March 8, 2021, ACICS counsel made a series of procedural requests to the SDO, in part seeking clarification as to whether the SDO considers the March 2021 OIG Report part of the official record for purposes of the current ACICS recognition decision. Counsel for Department staff responded on March 11, indicating that Department staff did not object to the submission of

¹⁰ NACIQI Meeting Transcript (Mar. 4, 2021).

¹¹ *Id.*

¹² *Id.*, pp. 201-202.

the OIG Report with ACICS's comments, but reserved their right to object to the SDO's consideration of the report. On March 17, the SDO responded, confirming that the OIG Report would be considered part of the official record. While acknowledging Department staff's statement that the OIG Report may be of limited relevance, the near-contemporaneous timing of the OIG Report release and the NACIQI meeting created an unusual circumstance not specifically contemplated in the regulations and that in this limited circumstance, the benefit of being broadly inclusive in the record outweighs any potential harm. In addition, ACICS, Department staff, and the Advisory Committee discussed the OIG Report at the NACIQI meeting at such length and in such detail that in order to review the full record and render a well-considered decision, it was necessary for me to read and consider the relevance and implications of the OIG Report.

As I noted in my March 17 response to ACICS, the regulations do not contemplate this situation. Under 34 C.F.R. § 602.36(h), if relevant and material information pertaining to an agency's compliance with recognition criteria, but not contained in the record, comes to the SDO's attention while a recognition decision is pending, and if the SDO concludes that the recognition decision should not be made without consideration of the information, the SDO must either refer the matter to Department staff and the Advisory Committee for consideration, or provide the new information to the agency and Department staff and provide them with an opportunity for written review.

Looking first to process, I note that ACICS, Department staff, and the Advisory Committee had the opportunity to review the OIG Report. The Advisory Committee delayed their decision in order to give members a day to review the report and consider its relevance to their review of the four reports and accreditation recommendation. ACICS and Department staff had – and made use of – the opportunity to provide their written responses to the OIG Report for my consideration in the accreditation decision. While the situation does not fit neatly into the regulatory framework, the spirit of the regulations, and especially the procedural notice and opportunity to provide written comment, have been met.

I turn next to the substance and relevance of the OIG Report. The OIG found that the Department's 2016 recognition review of ACICS did not comply with all regulatory

requirements because it did not consider all relevant information during its review. Specifically, the OIG found that the decision by Department officials to move ahead with the recognition process in 2016, despite being told by Department staff that the timeline would not allow for review of the Part II submission was improper. The OIG found that the 2018 review did meet regulatory requirements, because all available information appeared to have been considered. The OIG Report noted that the review was limited to Department staff, SDO, and Secretarial consideration of recognition requirements in the 2016 and 2018 recognition review and reconsideration pursuant to the District Court order.

In its testimony at the NACIQI meeting, ACICS President and CEO Michelle Edwards highlighted the OIG Report's findings regarding the OUS's level of involvement in the 2016 review, and with respect to the Department's failure to consider "all available and relevant evidence when making a recommendation decision".¹³ Ms. Edwards next argued the because the OIG Report's conclusion that the 2018 SDO Response was supported by the evidence, it should extend that the evidence supports a compliance finding for the recognition criteria before us now.¹⁴ Finally, Ms. Edwards noted the OIG Report's finding that the Department's recognition procedures rely on subjectivity, leading to inconsistencies across agency reviews regarding the documentation that is deemed sufficient to demonstrate compliance with the recognition requirements.¹⁵

In response to a question from a member of the Advisory Committee, counsel for Department staff countered by noting that the OIG Report is "focused on 2016 and 2018, what happened in the prior reviews", and noted that the OIG Report contains language clarifying that it does not apply to this review.¹⁶ Indeed, the OIG Report found that any compliance reviews conducted after the November 2018 Order occurred outside the timeframe of the OIG review, may involve different recognition criteria, were based on different facts and information, and were specifically excluded from the scope of the OIG inspection.¹⁷

¹³ NACIQI Meeting Transcript (Mar. 4, 2021), pp 42-43

¹⁴ *Id.*, pp. 45-46

¹⁵ *Id.*, pp. 46-47.

¹⁶ *Id.*, pp. 199-200.

¹⁷ OIG Report, p. 26.

Public testimony at the NACIQI meeting also discussed the OIG Report, arguing that it is not relevant to this review, and that the heightened level of involvement by Department officials was not surprising given the complex and significant nature of the 2016 Review.¹⁸

Advisory Committee members discussed the OIG Report and its relevance at length, with some members finding the report relevant and others relying on the OIG’s specific indication that “the decisions being made today are not impacted or weren’t included in the report analysis” and finding that the OIG Report is not relevant.¹⁹ The Advisory Committee did not take any formal motion to include the OIG Report in the record, but there was acknowledgment from both ACICS counsel and the Committee that “it will be up to the senior department official [sic] to assess what the weight and value of the report is”²⁰ and that “the SDO [would] make a determination of its relevancy with respect to the evidence”.²¹

After reviewing Advisory Committee discussion and testimony from the NACIQI meeting, ACICS and Department staff written comments, and the OIG Report itself, I conclude that the 2021 OIG Report, while informative in reviewing the 2016 and 2018 ACICS accrediting decisions, is not relevant to the matters before us. The four reports under review here are temporally removed from the scope of the 2021 OIG Report. To the extent that the same recognition criteria are at issue, the facts and agency actions under review are different.

In fact, the 2021 OIG Report clearly and compellingly differentiates its review of the 2016 and 2018 ACICS accrediting decisions from the four reports here, which the OIG clearly states were “not included in the scope of our inspection”.²² I concur with the OIG’s reasoned review of

¹⁸ See, e.g., NACIQI Meeting Transcript (Mar. 4, 2021), pp. 262-263. (Testimony of Ms. Viviann Anguiano from the Center for American Progress).

¹⁹ Dr. Pressnell, NACIQI Meeting Transcript (Mar. 5, 2021), pp. 60-61

²⁰ Ms. Neal, NACIQI Meeting Transcript (Mar. 5, 2021), p. 63.

²¹ Katherine Brodie, ACICS counsel, NACIQI Meeting Transcript (Mar. 4, 2021), p. 202

²² OIG Report, pp. 25-27. The 2021 OIG Report contemplates all four of the current reports in a section titled “Events Subsequent to Draft Report Issuance”:

On January 22, 2021, subsequent to the issuance of our draft report, the Accreditation Group publicly released the first of four reports recommending that the Department terminate ACICS’ recognition as an accrediting agency. The recommendation was based on the Accreditation Group’s review of a compliance report and a monitoring report that ACICS was required to submit as a result of the 2018 review by the SDO (DeVos), as well as ACICS’ responses to a June 19, 2019, inquiry, and a February 24, 2020, inquiry that the Accreditation Group initiated based on concerning information in media coverage.

...

applicability, and find that the difference in substantive scope and the three to five-year difference in facts under review distinguish the 2021 OIG Report from the issues before me today and render it irrelevant to my current decision.

IV. Allegations of Disparate Treatment and Procedural Inconsistencies.

ACICS raised issues of disparate treatment and procedural irregularities relating to their recognition review by Department staff and in the NACIQI meeting.²³ After a careful review of the record before me, I find no compelling evidence to support ACICS's claims.

In the 2018 review, the SDO (DeVos) found ACICS to be noncompliant with 2 of the 21 recognition criteria reviewed – sections 602.15(a)(2) and 602.15(a)(6) ... Our inspection did not include section 602.15(a)(2) as part of our review of the evidence the SDO (DeVos) considered in the 2018 review of selected recognition criteria and whether the conclusions were supported by evidence because the SDO's (DeVos) 2018 review had determined ACICS to be noncompliant with this criterion. As a result of this determination, this criterion was slated to be subject to further review by the Department in conjunction with additional information, covering a timeframe outside of that covered by our review, that was to be submitted by ACICS via the compliance report.

The SDO's (DeVos) 2018 review also identified four criteria for which ACICS was deemed compliant but for which additional monitoring was recommended via annual reporting (sections 602.15(a)(1), 602.16(a)(1)(i), 602.16(a)(1)(vii), and 602.19(b)) ... We did not select section 602.15(a)(1) for review due to an Accreditation Group review that had been initiated on this criterion shortly after the start of our inspection. Although we did select section 602.19(b) for review, the monitoring report covered a timeframe that was after the timeframe covered by the SDO's (DeVos) review of ACICS in 2018. Therefore, the information in the monitoring report was not included in the scope of our inspection.

On June 19, 2019, the Accreditation Group initiated an inquiry based on information concerning ACICS' financial situation and its review of two institutions, Virginia International University and San Diego University for Integrative Studies, that came to its attention in media coverage and appeared credible and raised concerns relevant to certain recognition criteria ... The inquiry covered a timeframe that was after the timeframe covered by the SDO's (DeVos) review of ACICS in 2018, as well as criteria that were not part of the SDO's (DeVos) review, and was therefore not included in the scope of our inspection.

The Accreditation Group initiated another inquiry on February 24, 2020, concerning ACICS' accreditation of Reagan National University based on information that came to its attention in media coverage and that appeared credible and raised concerns relevant to certain recognition criteria ... The inquiry covered a timeframe that was after the timeframe covered by the SDO's (DeVos) review of ACICS in 2018, as well as criteria that were not part of the SDO's (DeVos) review, and was therefore not included in the scope of our inspection.

The Accreditation Group's subsequent review of these criteria and resulting recommendation does not impact the conclusions presented in our report.

²³ ACICS Comments to SDO in Opposition to NACIQI Termination Recommendations (Apr. 8, 2021), pp 59-68 (ACICS April 2021 Comments).

a. Procedural Irregularities

ACICS claims in their April 8 comments that there were procedural missteps at the March NACIQI meeting that “denied ACICS, among other things, the opportunity to be heard and respond to numerous questions and mischaracterizations made on the record by the Advisory Committee.”²⁴ ACICS claimed that because they were not logged as panelists on Friday, March 5, they were not given the opportunity to be heard and fully participate. Specifically, ACICS claims that Ms. Edwards, who was given the opportunity to present testimony on March 4, was denied the opportunity to be heard and to respond to questions on March 5 because Ms. Edwards “was prevented – whether intentionally or intentionally [sic] – from participating or speaking at the meeting in any capacity”, although ED staff were able to participate.²⁵ ACICS characterized this as a due process violation, and labeled the technical issue as evidence of “not only the Department’s inconsistent and unfair treatment of ACICS, but also the improper curtailment of ACICS’s interests – especially the right to be heard, generally, and to respond to on-the-record questions and allegations lodged by Advisory Committee members that would ultimately inform the decision of whether to recommend termination of ACICS as an accreditor.”²⁶

After considering the normal process followed at NACIQI meetings, as well as ACICS’s opportunity to participate and provide responses on the record, I find that there were no significant procedural irregularities, and nothing that supports a due process claim.

At the outset of the meeting, NACIQI Chair Keiser summarized the Advisory Committee procedures that are used for the consideration of all agency accrediting decisions, including ACICS²⁷: (1) primary readers introduce an agency’s application; (2) Department staff brief the Committee; (3) Committee members question Department staff; (4) Agency representatives provide comments about their applications; (5) Committee members question Agency representatives; (6) presentation of third party comments; (7) Agency response to third party comments; (8) Department staff response to the Agency; (9) Committee members discuss; and (10) the Committee makes motions and votes. Chairman Keiser noted that because there were

²⁴ *Id.*, p. 60.

²⁵ *Id.*, p. 61.

²⁶ *Id.*, p. 60.

²⁷ NACIQI Meeting Transcript (Mar. 4, 2021), p. 13.

four individual reviews, procedures would be adjusted to accommodate each individual review, including separate motions and votes on the agency's compliance, and then a final motion and vote on the recognition recommendation.²⁸

The transcript demonstrates that the order of business laid out by Chairman Keiser was followed during the ACICS review. ACICS was given ample opportunity to present their testimony on the record and without time limitations, state their concerns about the 2021 OIG Report, and respond to Advisory Committee member questions and third party testimony throughout the meeting on Thursday, March 4.²⁹

ACICS notes that on the morning of the March 5 meeting, they let meeting organizers know they were present, but were not called on or able to unmute themselves to participate, and that as such, there was a denial of due process. Department staff responded that “[d]espite ACICS’s assertions to the contrary”, ED staff were not aware that ACICS representatives were present or wished to speak.³⁰ After reviewing the transcript, I find that ACICS did not make a reasonable effort to participate, and after reviewing the entirety of ACICS’s opportunity to meaningfully and substantively respond prior to the recognition decision, I do not have any due process concerns.

While I recognize the frustration inherent in the virtual meeting space, being placed on mute is not a due process violation. At the beginning of the session on Friday, attendees were instructed on how to participate in the meeting chat function and how to reach out for technical assistance.³¹ Per ACICS’s April 8 comments, Ms. Edwards typed into the webinar platform “I am here if needed to address these questions”³², but did not inform the host of any difficulties or barriers to participation, despite apparently not being able to unmute. While there is not an expectation that a party make an extraordinary effort to participate, it is not unreasonable to expect that, prior to claiming a due process violation, the party will follow offered instructions

²⁸ *Id.*, p. 13.

²⁹ *Id.*, pp. 35-134, 140-197, 201-251.

³⁰ The Department Staff Response to the April 8, 2021 Comments to the Senior Department Official by the Accrediting Council for Independent Colleges and Schools (Apr. 23, 2021), p. 65. (Department staff April 2021 Comments).

³¹ NACIQI Meeting Transcript(Mar. 5, 2021), p. 3, lines 7-13.

³² ACICS April 2021 Comments, Ex. 14.

for technical assistance, or reach out to any of the number of Department staff with whom they had been in regular contact, to alert them of their difficulty.

In later communications, ACICS informed me and Department staff of its technical difficulties at the March 5 meeting, and requested an extension so as to have additional time to respond to the full official NACIQI transcript prior to submitting their comments. In my March 17 response, I granted an extension from the original comment deadline of March 19, to 10 business days after receipt of the official NACIQI transcript. ACICS dedicated much of their April 8 comments to responding, in writing and as part of the record, to NACIQI's discussion of the OIG Report and other issues. In their comments, ACICS cites the 2009 D.C. District Court holding in *Atherton v. D.C. Office of Mayor* that a "procedural due process violation occurs when an official deprives an individual of a liberty or property interest without providing appropriate procedural protections."³³ Per the holding of the case they cite, ACICS has not suffered a due process violation. They experienced technical difficulties in fully participating in a meeting, although they did not indicate that they took any affirmative steps to make these challenges known until after the fact. During the meeting, NACIQI did vote on recommendations, but neither Department staff, nor NACIQI recommendations constitute a decision by which a party may be deprived of a liberty or property interest. With the intent of providing unquestioned opportunity to be heard, I granted ACICS additional time to provide comments. The full record considered by both Department staff and NACIQI, recommendations from both, comments from third parties, and responsive comments from ACICS and Department staff are now before me for decision.

b. Disparate and Inconsistent Treatment

ACICS next claims that Department staff and Advisory Committee members appear to have predetermined the agency's outcome, rather than relying on a fair and unbiased consideration of the evidence.

³³ *Id.*, p. 60; citing *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 689 (D.C.Cir. 2009).

ACICS relies on the 2018 Order and the former SDO’s response critiquing the 2016 review to both argue that ACICS is in compliance, and that the current review process has been biased.

Department staff responded that any consideration of the 2018 Order would not have been “reasonable or appropriate”, because “the findings in that order were not based on the evidence in the record for the Compliance Report Review, the Monitoring Report Review, the Capacity Inquiry, or the RNU Inquiry.”³⁴ ACICS’s reliance on the 2018 Order to show compliance is misplaced. In fact, the 2018 Order is half of the reason for this current review. While the former Secretary and SDO were persuaded that ACICS was treated unfairly during the 2016 review, they did not find ACICS without fault, and the former Secretary subsequently ordered the Compliance Report and Monitoring Report. Both of those reviews resulted in Department staff and NACIQI recommending multiple findings of noncompliance.

ACICS also turns to the 2021 OIG Report as evidence that the review process has been “tainted by bias”³⁵. For the reasons listed above, I do not find the 2021 OIG Report relevant to the reviews currently before me. In response to ACICS arguments that the review is overly politicized, I only note that at this point, this series of ACICS reviews has extended over the course of three administrations, with SDO findings of noncompliance made under both Secretary King and Secretary DeVos. The level of Department attention on ACICS is not reflective of political bias, but instead reflective of significant and systemic areas of noncompliance, including those now under review.

Finally, ACICS argues that the recognition criteria have been disparately and inconsistently applied.³⁶ In its April 8 comments, ACICS submitted Appendix C, which purports to show inconsistent application of recognition criteria to different agencies seeking recognition or rerecognition.³⁷ While I recognize that predictability is an important factor for the regulated – and regulating – community, ACICS’s attempt to demonstrate unacceptable levels of inconsistency by comparing the application of the regulatory criteria to different accrediting agencies is flawed. ACICS is an institutional accreditor, rather than a programmatic accreditor,

³⁴ Department staff April 2021 Comments, p. 65.

³⁵ ACICS April 2021 Comments, p. 67.

³⁶ *Id.*, p. 10.

³⁷ *Id.*, Appendix C.

meaning that reviews will necessarily and appropriately have different focuses. One agency may be found to be in compliance with the criteria for administrative capacity, while another with the same number of staff may be found out of compliance, based on the types of accreditation that they purport to do, and the level of complexity and diversity of reviews that they conduct.

At the March NACIQI meeting, the Advisory Committee asked Herman Bounds, Director of the Department's Accreditation Group, about differences in the application of standards and the use of adjectives and descriptors to describe agency qualifications, rather than just data. Director Bounds confirmed that while Department staff strive to be objective, the application of the same regulatory framework to a broad array of accrediting agencies does require some differences in review: "So I will say in a Staff analysis, with the differences in accrediting agencies, there are 64 accrediting organizations right now that the Secretary recognizes. They are of all different sizes and they have different missions. We conduct a fact-based, what we would call objective review of when we can but you aren't going to be able to root out all of the subjectivity out of a recognition review."³⁸ Director Bounds argued that some subjectivity would remain, but that it was cured by the two-step process: Department staff strive to conduct a fact-based review that minimizes subjectivity, followed by the opinion of the 18 members of NACIQI, culminating in the objective view of the full record, including the Department staff and NACIQI two-step accrediting recommendations, by the SDO.³⁹

While it is imperative that agencies be granted a review that is free of personal or political bias, in which Department staff apply the recognition criteria as objectively as possible, it is fair to expect a certain level of variation in how those criteria are looked at, and what types of documentation and facts are needed to satisfy the requirement vis a vis different agencies. Additionally, when determining compliance and remedy, as Department staff note, the "review of agencies and their compliance with the Recognition Criteria is not based solely on the number of areas of non-compliance, but on which area and the severity of noncompliance in those areas."⁴⁰

³⁸ NACIQI Meeting Transcript (Mar. 5, 2021), p. 72.

³⁹ *Id.*, pp. 72-73.

⁴⁰ Department staff April 2021 Comments, p. 41.

The recognition review process necessarily involves room for carefully considered deference, and requires Department staff to make informed subjective judgments. I recognize the expertise of the Department Accreditation Group and the operational importance of granting deference in cases of reasonable disparities. After a careful review of Department staff's treatment of ACICS in the current four reports, as well as a review of the Department staff's treatment of other agencies under review, I do not find any difference in treatment that goes beyond necessary flexibility to accommodate the type of agency and review being conducted, any discussion or outcome that indicates negative bias, and reference the robust discussion between Advisory Committee members as evidence of the thorough two-step process described by Director Bounds.

V. Compliance Report.

In her 2018 Response to ACICS, the former SDO evaluated ACICS's training procedures, and found that while ACICS had demonstrated through the Part II submission and 2018 Supplement that it had improved its training regimen, it had "not yet documented that its volunteers had the benefit of the improved training processes".⁴¹

The former SDO found that ACICS was out of compliance with section 602.15(a)(2), but recommended that Secretary DeVos renew recognition and give ACICS time to come into compliance.⁴² As the former SDO noted in her 2018 Response⁴³ to the Secretary, evaluators must complete refresher training in order to be considered qualified: "At a minimum, it would seem like ACICS should require its existing evaluators to undertake supplemental or refresher training that reflects its improvements in this area rather than to assume, just because they are qualified on paper, they are also properly trained."

When Secretary DeVos issued her November 2018 decision to reinstate ACICS's recognition, she adopted the former SDO's recommendation, and directed the agency to submit a Compliance

⁴¹ 2018 Order, p. 3; SDO Response, pp. 31-32.

⁴² *Id.*, p. 34.

⁴³ *Id.*, p. 32.

Report on section 602.15(a)(2) of the Secretary’s Criteria for Recognition, including whether existing evaluators had received improved training.⁴⁴

ACICS submitted its Compliance Report on December 19, 2019.⁴⁵ Following an initial review, Department staff found that potential deficiencies existed in ACICS compliance with, or affected application of, the Secretary’s criteria for recognition, and processed the report in accordance with review procedures at 34 C.F.R. § 602.32.

a. 34 C.F.R. 602.15(a)(2) – Competency of Representatives

The Recognition Criteria at 34 C.F.R. 602.15(a)(2) provide that the agency:

[m]ust have the administrative and fiscal capability to carry out its accreditation activities in light of its requested scope of recognition. The agency meets this requirement if the agency demonstrates that.. [it has] ... [c]ompetent and knowledgeable individuals, qualified by education or experience in their own right and trained by the agency on their responsibilities, as appropriate for their roles, regarding the agency’s standards, policies, and procedures, to conduct its on-site evaluations, apply or establish its policies, and make its accrediting and preaccrediting decisions, including, if applicable to the agency’s scope, their responsibilities regarding distance education and correspondence courses.⁴⁶

In broad terms, this standard requires an agency to use qualified and competent individuals while performing the activities leading up to an accreditation decision.

1. Background

After reviewing ACICS’s response to the draft Department staff report, Department staff issued the Final Staff Compliance Report, finding ACICS out of compliance with section 602.15(a)(2). In reviewing the December 2019 ACICS Compliance Report submission and responses to the draft staff analysis, Department staff reported in the Final Staff Compliance Report that “ACICS has failed to demonstrate that it consistently trains its representatives for their roles and follows its own policies and procedures, as required by regulation.⁴⁷ Specifically, Department staff

⁴⁴ 2018 Order, p. 3.

⁴⁵ ACICS Compliance Report (Dec. 19, 2019).

⁴⁶ 34 C.F.R. 602.15(a)(2), Administrative and Fiscal Responsibilities.

⁴⁷ Final Staff Compliance Report.

raised concerns about ACICS’s failure to document that training had occurred for all evaluators, and the lack of an assessment of the effectiveness of their training, and that recognized agencies are required by regulation “not only to comply with the criteria for recognition but to be effective in their application of those criteria.”⁴⁸ Department staff found that by relying on conclusory statements “that ‘it is undisputed that ACICS’ has ‘competent individuals who have been trained for their roles,’ ACICS has failed to address the Department staff’s concern about the effectiveness of the training – it has not submitted any information or documentation that it has evaluated whether the training provided to site visitors is effective for their roles and responsibilities.”⁴⁹ During the NACIQI meeting, Department staff further clarified that their concerns about the training extended to whether training actually occurred, given ACICS’s apparent reliance on *Curriculum Vitae* and paper qualifications to demonstrate compliance, rather than the providing actual training as required by their own standards and regulations, and the former Secretary’s 2018 Order.⁵⁰

ACICS sought to frame the noncompliance finding as a minor paperwork issue, claiming that the only aspect of the 2018 Order remaining at issue relates to the training of three of the agency’s site visitors, and that “[a]t the very least, the Agency is in ‘substantial compliance’ with section 602.15(a)(2)”.⁵¹

Department staff and NACIQI made concurring recommendations for a finding of noncompliance and termination of recognition based on 34 C.F.R. 602.15(a)(2). “Significantly, the Department Staff and NACIQI determined that ACICS still had not come into compliance with 34 C.F.R. § 602.15(a)(2) more than *four years* after the September 2016 SDO Order first found the agency noncompliant with this criterion.”⁵²

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ NACIQI Meeting Transcript (Mar. 5, 2021), pp. 82-86.

⁵¹ ACICS April 2021 Comments, p. 19.

⁵² Department staff April 2021 Comments, p. 17.

Department staff contend that ACICS's submission of evaluator *Curriculum Vitae* is not sufficient to demonstrate that training requirements had been met, turning to the former SDO's October 2018 response, in which she noted:

ACICS has clearly made strides in its training efforts; however, it is unclear whether its existing evaluators have undergone the training and ACICS's narrative indicates they have not. The Final Staff Report specifically requested this be done in order to provide application of the criterion: [T]he agency needs to document that each volunteer has undergone the improved training process before being permitted to fulfill the tasks assigned to them." 2016 Final Staff Report at 9. At a minimum, it would seem like ACICS should require its existing evaluators to undertake supplemental or refresher training that reflects its improvements in this area rather than to assume, just because they are qualified on paper, they are also properly trained. Accordingly, I would recommend that you find ACICS out of compliance with this criterion for not having demonstrated its evaluators have undergone the improved training.⁵³

ACICS take issue with an interpretation of section 602.15(a)(2) that applies an "effectiveness" standard to training. Instead, ACICS states that because they have a written policy in place, compliance with that policy is proof of effectiveness unless the Secretary can point to specific evidence that proves the Agency's policy was ineffective.⁵⁴ Department staff responded that while the regulations do not specifically require measures of effective training, when read in the context of the HEA and the 34 Part 602 regulations as a whole, they do. Section 496 of the HEA, 20 USC §1099b(l)(1)(A)-(B) provides that the Secretary shall limit, suspend, terminate, or require to come into compliance, an accrediting agency that has "failed to apply *effectively* the criteria in this section. In addition, the very meaning of "recognition," as defined in 34 C.F.R. § 602.3, is "an unappealed determination by the senior Department official under § 602.36, or a determination by the Secretary on appeal under § 602.37, that an accrediting agency complies with the criteria for recognition listed in subpart B of this part *and that the agency is effective* in its application of those criteria."⁵⁵

⁵³ Department staff April 2021 Comments, pp. 17-18.

⁵⁴ ACICS April 2021 Comments, p. 25.

⁵⁵ Department staff April 2021 Comments, p. 26.

2. SDO Determination with Respect to Section 602.15(a)(1), Compliance Report

After reviewing the regulations and the fact before me in the record, I am persuaded that ACICS is not in compliance with section 602.15(a)(2). Section 602.15(a)(2) requires an agency seeking recognition to demonstrate the competency and knowledge of its representatives in connection with the agency's accrediting and preaccrediting activities and decisions.⁵⁶ ACICS's own standards require different types of training, including an improved supplemental or refresher training, prior to performing on-site evaluations. Even with multiple years and opportunities to come into compliance, ACICS failed to provide documentation that three of their evaluators had received the required training. The agency's post-hoc submission of evaluator *Curriculum Vitae* and a print-out purporting to show registration for some of the required trainings, none of which, as discussed above, are part of the record, are not adequate to show that all of the required trainings have been completed. Echoing the former SDO, I note that qualifications on paper that demonstrate education and familiarity with higher education are not indicative of an individual's ability to perform as an accreditation evaluator.

Section 496 of the Higher Education Act of 1965, 20 U.S.C. § 1099b(I)(1)(A)-(B) requires the agency to *effectively* apply the recognition criteria in 34 C.F.R. Part 602. ACICS did not provide any evidence in response to Department staff's questions about the effectiveness of the training. It is not just reasonable, but well within the scope of Department staff's evaluative duties to expect some evidence or demonstration of the effectiveness of the new training program that was central to the 2018 noncompliance finding.

b. SDO Determination with Respect to the Compliance Report

While the findings particular to the Final Staff Compliance Report review are sufficient for me to determine that ACICS is out of compliance with section 602.15(a)(2), I note that when considered in the context of all four reports that are before me, it is clear that the agency cannot demonstrate its substantive ability to adequately train its evaluators and lacks the administrative capacity to complete what should be straightforward administrative training requirements.

⁵⁶ *Id.*, p. 17.

Because this review is in response to a required Compliance Report, ACICS was required to come into full compliance. They did not, and termination is not only appropriate, but, as discussed below, necessary under 34 C.F.R. 602.36(e).

VI. Monitoring Report.

When Secretary DeVos issued her decision to reinstate ACICS’s recognition on November 21, 2018, “[t]o ensure ACICS continues to demonstrate administrative and fiscal capability”, she ordered the agency to submit a Monitoring Report demonstrating continued compliance with four of the Secretary’s Criteria for Recognition⁵⁷:

- (1) the administrative and fiscal capability requirements of section 602.15(a)(1) that an agency must demonstrate it has adequate administrative staff and financial resources to carry out its accrediting responsibilities;
- (2) the requirement of section 602.16(a)(1)(i) that an agency has accreditation standards that effectively address success with respect to student achievement;
- (3) the requirement of section 602.16(a)(1)(vii) that an agency has accreditation standards that effectively address recruiting and admission practices, academic calendars, catalogs, publications, grading, and advertising; and
- (4) the requirements of section 602.19(b) that an agency has, and effectively applies, monitoring and evaluation approaches that enable it to identify problems with an institution’s continued compliance with agency standards.

ACICS submitted its Monitoring Report on December 20, 2019.⁵⁸ Following an initial review, Department staff found that potential deficiencies existed in ACICS compliance with, or affected application of, the four recognition criteria, and processed the report in accordance with review procedures at 34 C.F.R. 602.33.⁵⁹

⁵⁷ 2018 Order, p. 4.

⁵⁸ ACICIS Monitoring Report (Dec. 20, 2019).

⁵⁹ 34 C.F.R. 602.33 dictates the process for review of monitoring reports:

(c) If, in the course of the review, and after providing the agency the documentation concerning the inquiry and consulting with the agency, the Department staff notes that one or more

a. 34 C.F.R. 602.15(a)(1) – Administrative and Staff Resources

The recognition criteria at 34 C.F.R. 602.15(a)(1) provides that the agency “[m]ust have the administrative and fiscal capability to carry out its accreditation activities in light of its requested scope of recognition. The agency meets this requirement if the agency demonstrates that.. [it has] ...[a]dequate administrative staff and financial resources to carry out its accrediting responsibilities.”⁶⁰

1. Background

The 2018 SDO Response raised questions about ACICS’s financial capacity, and ordered ACICS to provide its audited financial records on a yearly basis over the following three years, and a report demonstrating the adequacy of its staffing in the context of its institutional and program membership.

deficiencies may exist in the agency’s compliance with the criteria for recognition or in the agency’s effective application of those criteria, Department staff –

- (1) Prepares a written draft analysis of the agency’s compliance with the criteria of concern;*
- (2) Sends to the agency the draft analysis including any identified areas of noncompliance and all supporting documentation;*
- (3) Invites the agency to provide a written response to the draft analysis within 90 days; and*
- (4) Reviews any response provided by the agency, including any monitoring report submitted, and either –*
 - (i) Concludes the review;*
 - (ii) Continues monitoring the agency’s areas of deficiencies; or*
 - (iii) (A) Notifies the agency, in the event that the agency’s response or monitoring report does not satisfy the staff, that the draft analysis will be finalized for presentation to the Advisory Committee;*
 - (B) Publishes a notice in the Federal Register with an invitation for the public to comment on the agency’s compliance with the criteria in question and establishing a deadline for receipt of public comment;*
 - (C) Provides the agency with a copy of all public comments received and invites a written response from the agency;*
 - (D) Finalizes the staff analysis as necessary to reflect its review of any agency response and any public comment received;*
 - (E) Provides to the agency, no later than 30 days before the Advisory Committee meeting, the final staff analysis and a recognition recommendation and any other information provided to the Advisory Committee under § 602.34(c); and*
 - (F) Submits the matter for review by the Advisory Committee in accordance with § 602.34.*

⁶⁰ 34 C.F.R. § 602.15(a)(1).

ACICS's December 2019 Monitoring Report included its audited financial statements for 2017-2018, which served as the only available information Department staff had available at the time it prepared the Monitoring Draft Staff Analysis in June 2020, with a proposed finding of compliance with section 602.15(a)(1). Department staff's position changed "based on the Department staff's review of the agency's 2019 and 2020 financial statements once received, and a comparison to the 2016 financial statements."⁶¹ ACICS's financial statements indicated negative trends in key financial results, including an 88% decrease in revenue with only a 72% decrease in expenses, a 44% decrease in net assets, a 33% decrease in their investment portfolio, and annual operating losses of over \$1 million.⁶²

In the Final Staff Monitoring Report, Department staff found that the agency's consistent downward trend in net assets from June 2016 through June 2020, combined with its "significant reliance" on withdrawals from its reserves, did not indicate an ability to continue to perform its necessary functions.

Specifically, Department staff pointed to ACICS's inability to proportionately lower its administrative expenses as compared to lowered income, and expressed concern that even if ACICS were to do so, it would exacerbate the issue of the agency not being able to fulfil its existing administrative and monitoring duties. Department staff also cited ACICS's drawdown of \$2.2 million in net assets over the course of a single year as proof that ACICS lacked the administrative and fiscal capacity required for compliance with section 602.15(a)(1). In the Final Staff Monitoring Report, Department staff concluded that ACICS's financial situation is "precarious" and recommended a finding of noncompliance with this recognition criterion and termination of recognition.

ACICS points to their own financial forecast, which estimates decreasing net losses in the coming years before breaking even in fiscal year 2024, at which point the agency anticipates having nearly \$6 million in reserves.⁶³ The agency argued that third party comments characterizing ACICS's accreditation actions as a doomsday scenario by an agency "so desperate

⁶¹ Department staff April 2021 Comments, p. 29, *see* ER-Exh. 21 and Documents Uploaded by Analyst Section, Exh. 2, and Exh. 55 to Monitoring Report Record.

⁶² *Id.*, p. 29 (citing multiple documents in Monitoring Report).

⁶³ ACICS April 2021 Comments, p. 27.

for funds that it will provide accreditation to any institution willing to pay its fees”⁶⁴ were misguided, and that it has extended accreditation to three new institutions since lifting its “self-imposed moratorium”⁶⁵ on initial applications in 2018.⁶⁶ During the March NACIQI meeting, ACICS blamed their financial situation on prior accrediting actions of the Department.⁶⁷ The agency also noted that “ACICS has reserves comparable to those of other similarly sized accrediting agencies that were sufficient to cover its operating deficits until its realistic plan allowed it to eliminate the operating deficits.”⁶⁸

Analyzing projected expenses and continued drawdowns, Department staff concluded that “ACICS cannot remedy its weak financial position by simply controlling expenses without compromising its administrative capability and may have already done so” and that “[c]oupled with the oversight failures noted in 34 C.F.R. § 603.19(b) of the Monitoring Final Staff Report and the institutional review and monitoring process and procedure failures identified in the Capacity Inquiry and the RNU Inquiry, ACICS’s downward financial trends and reliance on reserve and investment drawdowns to sustain operations support a finding of a lack of sufficient financial resources to carry out the agency’s accrediting activities.”⁶⁹

At the NACIQI meeting, Advisory Committee members were split. One expressed concern that the auditors charged with producing the annual reports for the Final Staff Monitoring Report did not expressly state that ACICS could not meet their future requirements, and that forecasting the agency’s financial position four years down the line would be too speculative.⁷⁰ Another found that “they were clearly...out of compliance on the monitoring fees... -- they don’t have the capacity to do effective monitoring”, and that attempts to separate out fiscal health and monitoring capacity were impossible.⁷¹

⁶⁴ *Id.*, p. 28.

⁶⁵ I note here that ACICS’s characterization of its hold on initial applications until its accreditation was restored in 2018 as a “self-imposed moratorium” is misleading. While the 2018 Order restored their recognition, ACICS was without legal authority to accredit institutions between the 2016 Decision and November 2018.

⁶⁶ ACICS April 2021 Comments, p. 28.

⁶⁷ NACIQI Meeting Transcript (Mar. 4, 2021), p 93, lines 10-16.

⁶⁸ *Id.*, p. 95, lines 6-12.

⁶⁹ Department staff April 2021 Comments, p. 30.

⁷⁰ NACIQI Meeting Transcript (Mar. 5, 2021), , p. 88-89.

⁷¹ *Id.*, p. 143, lines 2-7, 16 – p. 144 line 10. “I think they are in a fiscal spiral, downward spiral that is unsustainable.”

NACIQI declined to adopt Department staff's final recommendation with respect to administrative resources by a vote of 7-6, with 3 recusals.⁷²

2. SDO Determination with Respect to Section 602.15(a)(1), Monitoring Report

I have reviewed all the evidence presented by Department staff in the Final Staff Monitoring Report, ACICS's response, and the discussion at the NACIQI meeting. I considered the financial statements and independent audits prepared by, and on behalf of, ACICS, as well as narrative statements and analysis from both ACICS and Department staff. I recognize that financial forecasting is a highly nuanced and imperfect analysis, and I rely on expert evaluations to inform my opinion.

I do not question the most recent reports⁷³ prepared by ACICS's investment portfolio manager, BMO Private Bank's Wealth Management,⁷⁴ and the Independent Auditor's Report,⁷⁵ and find them informative in reviewing the details and trends of ACICS's finances. However, forecasting the future financial viability of an agency operating in an evolving higher education environment requires certain expertise that has been developed by Department staff over collective years of evaluating, accrediting, and monitoring a broad range of agencies. Department staff have the expertise to review ACICS's investment portfolio and the unaudited working copy of its four-year budget projection and provide an interpretation of what those numbers and projections mean in the context of this particular segment of the market. As detailed above, Department staff's concern for the agency's financial viability in the accreditation industry centered on ACICS's downward trend in net assets and significant drawdown from its investment portfolio. I am

⁷² Interestingly, the first tallied vote was 6-6, with Chair Keiser voting "no" after the tie was discovered. *See, Id.*, p. 155, lines 4-8.

⁷³ Final Staff Monitoring Report, Agency Narrative, Exhibit 19 (Actual Operating Results, 7.1.2019-6.30.2019) and Exhibit 20 (FY2021-2024 Budget Preliminary).

⁷⁴ While certainly respected and well-qualified to manage investment portfolios, BMO Bank's Private Wealth Management group does not represent itself to be an expert in the arena of higher education or accreditation financing.

⁷⁵ Final Staff Monitoring Report, Staff Analysis, Exhibit 2 (ACICS Independent Auditor Report, 6-30-2020). As above, I note that CBM is a fully certified auditor, and I do not doubt their qualifications to audit business accounts. However, I again note that they do not specialize in the arena of higher education or accreditation financing.

persuaded that Department staff's careful analysis, reflecting significant expertise in the realm of higher education financing, deserves substantial weight. I defer to Department staff.⁷⁶

I also note that, when considered in the context of the cumulative evidence of ACICS's significant administrative and monitoring failures, it is impossible not to see those as clear indications of the impacts of the agency's lack of adequate financial resources, and thus failure to comply with 602.15(a)(1). For these reasons, I find that ACICS is not in compliance with 34 C.F.R. § 602.15(a)(1).

b. 34 C.F.R. 602.19(b) – Monitoring and Evaluation

The Recognition Criteria at 34 C.F.R. 602.19(b) provides that the agency:

must demonstrate it has, and effectively applies, monitoring and evaluation approaches that enable the agency to identify problems with an institution's or program's continued compliance with agency standards and that take into account institutional or program strengths and stability. These approaches must include periodic reports, and collection and analysis of key data and indicators, identified by the agency, including, but not limited to, fiscal information and measures of student achievement, consistent with the provisions of § 602.16(g). This provision does not require institutions or programs to provide annual reports on each specific accreditation issue.⁷⁷

1. Background

The Secretary DeVos, following the recommendation of the former SDO, found that, considering evidence in ACICS's Part II submission regarding its monitoring and evaluation of deficient institutions, and the establishment of a new At-Risk Working Group (ARIG) to monitor troubled institutions, ACICS was in compliance with section 602.19(b).⁷⁸ "ACICS has provided sufficient evidence that it was conducting heightened monitoring of institutions that had either self-reported or had been accused of misrepresenting student achievement outcomes, that it has developed new policies to increase its ability to identify and conduct heightened oversight of at-

⁷⁶ I note that the NACIQI meeting transcript reflects that committee members engaged in a robust discussion of the various financial statements in the record, ACICS's explanation of those figures, and Department staff's financial analysis, but did not – nor were they expected to – present any stand-alone analysis for review and consideration. My decision was, however, informed by the Advisory Committee members' comments and their questions to ACICS and Department staff.

⁷⁷ 34 C.F.R. 602.19(b).

⁷⁸ 2018 Order, p. 7.

risk institutions and that it has processes in place to hold institutions accountable.”⁷⁹ Secretary DeVos, at the recommendation of the former SDO, ordered ACICS to submit annual reports of the actions and activities of the ARIG, including any actions the agency took as a result of the ARIG’s work.

In response to the 2018 Order, ACICS submitted its Monitoring Report on December 20, 2019, including an annual report on the activities of the ARIG. The ARIG annual report contains recommendations, and ACICS’s actions, for seven ACICS-accredited institutions from May 2018 through December 2019.⁸⁰ When reviewing the report, Department staff found that the ARIG’s identification of areas of concern and compliance actions appeared to be responsive to issues identified by other accrediting or approval entities, rather than compliance issues identified by any monitoring or evaluation performed by ACICS itself on its accredited institutions.⁸¹ The ARIG annual report lists only “external” areas of concern, including: three institutions being placed on Heightened Cash Monitoring 2⁸² status by the Department; an adverse action against one institution by another accrediting agency; a complaint against one institution’s academic integrity; media reports of campus closures at one institution; and, for Virginia International University (VIU), an action taken by the State Council of Higher Education for Virginia (SCHEV).⁸³ Department staff focused on VIU as one example of ACICS’s oversight failure in the Monitoring Draft Staff Analysis.

With respect to VIU, Department staff noted that ACICS conducted a routine 2-day reaccreditation visit to VIU in January 2018 with a team of six evaluators and two ACICS staff members. ACICS made 10 findings of non-compliance, including findings about VIU’s distance education program, faculty preparation and qualifications, recordkeeping, and curriculum. VIU responded to the report and purported to take remedial steps per an ACICS decision to defer

⁷⁹ SDO Response, p. 67.

⁸⁰ Department staff April 2021 Comments, p. 31.

⁸¹ Draft Staff Monitoring Analysis, section 602.19(b), staff analysis.

⁸² A school placed on Heightened Cash Monitoring 2 (HCM2) status no longer receives funds under the Advance Payment Method. After a school on HCM2 makes disbursements to students from its own institutional funds, a Reimbursement Payment Request must be submitted for those funds to the Department. *See*, [https://studentaid.gov/data-center/school/hcm#:~:text=Heightened%20Cash%20Monitoring%20%20\(HCM2,those%20funds%20to%20the%20Department.](https://studentaid.gov/data-center/school/hcm#:~:text=Heightened%20Cash%20Monitoring%20%20(HCM2,those%20funds%20to%20the%20Department.)

⁸³ Department staff April 2021 Comments, p. 32; citing ER-Exh. 13 to Monitoring Report Record.

action on the reaccreditation application at its April 2018 meeting. Following these communications with the institution, ACICS awarded VIU a new grant of accreditation in August 2018.⁸⁴ That same month, SCHEV conducted its own site visit of VIU, and made six significant findings of noncompliance in areas where Department staff found there should have been overlap with the ACICS review, including issues with recordkeeping, faculty, and the distance education program, which it shared with ACICS in February 2019. SCHEV noted that two of the findings were repeats from its evaluations in prior years. SCHEV staff advised ACICS that they would recommend the SCHEV board begin steps to revoke VIU's license, which the board did in March 2019.⁸⁵

Following this consultation, ACICS issued a show-cause order to VIU, requiring VIU to respond in-person to SCHEV's allegations and to demonstrate its compliance with ACICS standards. ACICS heard live testimony from VIU in May 2019, and continued its show-cause order until August 2019, when VIU provided more compliance information.⁸⁶

VIU and SCHEV reached a resolution that involved the suspension of the distance education program, but VIU retained its SCHEV license to operate. Following the August 2019 meeting, ACICS vacated its show-cause directive.⁸⁷

In the Final Staff Monitoring Report, Department staff noted that ACICS's oversight activities related to VIU were not the only basis for the noncompliance recommendation, but one example of concern with respect to the ARIG Annual Report.⁸⁸

At the NACIQI meeting, Advisory Committee staff voted to concur with the Department staff recommendation of a finding of noncompliance by a vote of 9 yes, 2 no, and 3 recusals.

ACICS argued that they conducted a thorough review of VIU under its policies and procedures, fulfilling its responsibilities under the recognition criteria,⁸⁹ and that the Department's finding of

⁸⁴ ACICS April 2021 Comments, p. 29.

Id., p. 29-30

⁸⁶ *Id.*, p. 30.

⁸⁷ *Ibid.*

⁸⁸ Final Staff Monitoring Report, analyst response, section 602.19(b).

⁸⁹ ACICS April 8 Comments, p. 28; citing ACICS Site Visit Report to VIU in the Final Staff Capacity Report Record at Exhibit 11.

noncompliance was based solely on the fact that because ACICS did not identify the same areas of concerns that the state approving agency identified in a separate review under its regulations months after ACICS’s review.⁹⁰ The agency claimed it was unreasonable to expect there to be a correlation between the ACICS and SCHEV reports, given that the two assessments were conducted nearly 9 months apart by different teams applying different agency standards.⁹¹

Department staff state that ACICS failed to uncover significant areas of noncompliance with their standards at VIU that were found soon after by the SCHEV audit in areas where there was expected to be significant overlap in review, and where VIU’s noncompliance should have been discovered by ACICS.⁹²

Department staff argued that the differences between the ACICS and SCHEV reports can be attributed to ACICS’s failure to conduct a thorough review. It stated that the site visit report included a distance education evaluation that was mostly a checklist, and narrative descriptions of the faculty and staff involved in distance education and administrative concerns, including login procedures, student verification, and technical support,⁹³ and did not include the substantive areas of concern identified by SHEV eight months later, that were related to educational quality, including faculty and peer interaction, academic rigor at the graduate level, and comparability of distance and residential educational offerings.⁹⁴ “The only distance education-related concern in the ACICS site visit report was that VIU lacked a distance education plan, which they needed to incorporate into their Campus Effectiveness Plan.”⁹⁵

More broadly, in addition to concerns with ACICS’s review of VIU, Department staff found that the list of 14 monitoring and evaluation efforts provided by ACICS in its response to the Monitoring Draft Staff Analysis “were unsuccessful in revealing compliance concerns with ACICS’s standards and policies, because the ARIG Annual Report primarily included institutional concerns based on information provided by or actions taken by other accrediting or

⁹⁰ *Id.*, p. 28; citing Final Staff Monitoring Report, Recommendation Page, Part II, Analyst Remarks to Response.

⁹¹ *Id.*, p. 30-31.

⁹² Department staff April 2021 Comments, p. 33.

⁹³ *Id.*, p. 33-34; citing Ex. J to Final Staff Capacity Report Record, pp. 69-75.

⁹⁴ *Id.*, p. 34.

⁹⁵ *Id.*, p. 34; citing Ex. J to Final Staff Capacity Report Record, p. 76.

approval actions.⁹⁶ Department staff found that ACICS’s “recitations of information and documentation in the record do not demonstrate that [the agency] has a set of effective monitoring and evaluation approaches that enables the agency to identify problems with an institution’s continued compliance with agency standards.”⁹⁷

ACICS asserted that it “exceeds the monitoring requirements in the recognition criteria”⁹⁸ but did not provide details or documentation to demonstrate their assertion. Department staff noted that the portion of the regulation quoted by ACICS describes only the minimum requirements that an accrediting agency’s monitoring and evaluation approaches must include, and in fact, 34 C.F.R. § 602.19(b) “specifically requires that an accrediting agency must demonstrate that it effectively applies its monitoring and evaluation approaches and that those approaches enable the agency to identify problems with an institution’s or program’s continued compliance with the agency’s standards.”⁹⁹ Even if the standards were adequate, Department staff argued that ACICS failed to effectively apply its monitoring and evaluation approaches to identify not only compliance deficiencies by VIU, but those of six other institutions listed on the ARIG Annual Report.¹⁰⁰

2. SDO Determination with Respect to Section 602.19(b), Monitoring Report

Section 602.19(b) requires an agency to show that it has – and *effectively applies* – monitoring and evaluation processes that enable it to identify institution problems or potential issues with continued compliance with the agency’s standards.¹⁰¹

In conducting my review of the record with respect to ACICS’s compliance with the requirements of the regulation, I focused on whether ACICS’s monitoring and evaluation processes were *effective*. Specifically, were the monitoring and evaluation processes effective at providing meaningful information to the agency about an institution’s compliance with the

⁹⁶ *Id.*, p. 34; citing Monitoring Final Staff Report, Section 602.19(b), Agency Response; ER-Exh. 13 to Monitoring Report Record.

⁹⁷ *Id.*, p. 35

⁹⁸ *Id.*, p. 35.

⁹⁹ *Id.*, p. 35, internal quotations omitted.

¹⁰⁰ *Id.*, p. 35.

¹⁰¹ 34 C.F.R. § 602.19(b).

agency's standards, taking into account different factors that could indicate the strength of an institution's academic programs and the institution's stability.

I adopt Department staff and NACIQI's recommendation of a finding of noncompliance for 34 C.F.R. § 602.19(b). This noncompliance determination is not made solely because of ACICS's clear failure with respect to the agency's monitoring and evaluation of VIU, as evidenced by SCHEV's subsequent review; rather, the failure to identify clear and ongoing issues at VIU during review is evidence of ACICS's overall lack of effective monitoring and evaluation processes, making it impossible for the agency to ensure compliance with their own standards by all of the institutions and programs that they accredit. My finding of noncompliance is also based on ACICS's reliance on information from third-parties, rather than ensuring its own standards are being met by conducting its own more rigorous reviews and meaningful analysis.

I find Department staff's findings in the Final Staff Monitoring Report and statements during the NACIQI meeting compelling. I am also troubled by ACICS's failure to give meaningful attention to the distance education-related issues at VIU identified by SCHEV.

ACICS failed to adequately respond to the concerns identified by Department staff, and has been unable to demonstrate that its monitoring and evaluation standards are sufficient and effective enough to allow it to identify problems with an institution's compliance with agency standards overall. The list from ARIG of 14 monitoring and evaluation efforts provided by ACICS in its response to the Monitoring Draft Staff Analysis do not demonstrate compliance with the agency's regulatory duty to conduct independent monitoring activities, or with ACICS's standards and policies, because the information and documentation that ACICS relies on primarily comes from third parties, rather than their own audits or inquiries.

c. SDO Determination With Respect to the Monitoring Report

With respect to the Final Staff Monitoring Report, I find ACICS noncompliant. The enhanced monitoring and evaluation programs that the agency pledged to implement in 2018 to come into compliance with the regulatory criteria have failed to improve their outcomes. ACICS has not only failed to show that it has effective monitoring and evaluation processes, but has not indicated that it has any intention of changing its current methods to adopt a more rigorous and

thorough approach, as required by the regulations. Because of the significance of the financial concerns surrounding the agency’s ability to provide administrative functions under section 602.15(a)(1) and the agency’s failure to demonstrate that it has – or is attempting to implement – effective and meaningful processes for monitoring and evaluation under section 602.19(b), I find that the only appropriate remedy is termination of recognition under 34 C.F.R. §602.36.

VII. Capacity Inquiry.

The Final Staff Capacity Report presents the findings of a 34 C.F.R. § 602.33 inquiry initiated by Department staff on June 19, 2019, that stems from ACICS’s June 2019 public testimony before the Council on Higher Education Accreditation and related news articles¹⁰² related to ACICS’s financial stability and its review of two institutions, Virginia International University (VIU) and San Diego University for Integrative Studies (SDUIS).¹⁰³ The two news reports, published in early June 2019, alleged that ACICS was facing serious financial difficulty, and that significant failures had been identified by other nationally recognized accrediting or approval agencies about both VIU¹⁰⁴ and SDUIS.

During the Capacity Inquiry, Department staff determined that the reports raised “credible concerns relevant to ACICS’s compliance with the Recognition Criteria.”¹⁰⁵ In the Final Staff Capacity Report, Department staff found that ACICS had institutional oversight failures, demonstrated by its failure to identify serious issues with the distance education program that were identified by SCHEV eight months later, and the agency’s failure to review and respond to comments and information from the public and applicant institution to determine compliance with ACICS’s standards.¹⁰⁶

¹⁰² Kelderman, E. “How a Trouble Accreditor’s Search for Members Is Raising New Questions About Its Integrity” *The Chronical of Higher Education*, June 5, 2019, included in Draft Capacity Staff Inquiry, documents uploaded by analyst (Chronical article).; Kreighbaum, A. “Embattled Accreditor Projects Losses After Closure of Member Colleges” *Inside Higher ED*, June 4, 2019, included in Draft Capacity Inquiry, documents uploaded by analyst (Inside Higher Ed article).

¹⁰³ Draft Capacity Staff Inquiry, documents uploaded by analyst, Letter to ACICS inquiry (June 19, 2019).

¹⁰⁴ The issues relating to VIU identified here also gave rise to the finding of noncompliance for section 602.19(b) under the Monitoring Report.

¹⁰⁵ Department staff April 2021 Comments, p. 37, citing Draft Capacity Staff Analysis, Agency Narrative, Section 602.15(a)(1), Documents Uploaded by Analyst, 2020 02 ACICS Inquiry and 200215 USA Today Article.

¹⁰⁶ *See*, Final Staff Capacity Report.

As discussed above, in January 2018, ACICS completed a site visit at VIU, an institution approved to provide more than half of its educational offerings through distance education.¹⁰⁷ ACICS's site visit report reviewed 17 of VIU's online courses and found "sufficient and appropriate" opportunities for interaction between faculty and students, and made only one compliance finding, related to VIU's failure to integrate a distance education plan into their Campus Effectiveness Plan. After communications between VIU and ACICS, the agency granted VIU's reaccreditation in August 2018. That same month, SCHEV conducted its site visit of VIU. When SCHEV released the Audit Report findings, it noted a number of concerns with VIU's distance education program, finding it to be "patently deficient", and noted six specific areas of concern where the lack of educational quality affected all of VIU's programs of study at both the undergraduate and graduate levels: (1) limited peer-to-peer and student-faculty interaction; (2) failure of instructors to adhere to standards in the syllabi; (3) rampant plagiarism; (4) lack of academic rigor; (5) lack of comparability between online and residential courses; and (6) grade inflation.¹⁰⁸ The Final Staff Capacity Report found that ACICS should have uncovered these issues during their site visit in January 2018, especially since VIU is an accredited institution approved to offer 50 percent or more of its educational content through distance education.¹⁰⁹

In the Final Staff Capacity Report, Department staff found that in their consideration of SDUIS's February 2016 application for accreditation, ACICS failed to demonstrate that it conducted its own analysis of SDUIS's self-study and supporting documentation furnished by the institution, the report of the on-site review, the institution's response to the report, and any other information substantiated by the agency from other sources to determine whether SDUIS complies with ACICS's standards.¹¹⁰ Department staff specifically found that ACICS's evaluation failure adversely affected the agency's ability to determine whether SDUIS, the institution seeking accreditation, was a separate entity from the USA English Language Center (USAELC), an

¹⁰⁷ *Id.* p. 37, citing ER-Exh. J, p. 3, Section 602.17(e) of Capacity Inquiry Report.

¹⁰⁸ *Id.*, p. 38, citing Ex. A, pg. 27 of pdf, section 602.17(e) of Capacity Inquiry Record.

¹⁰⁹ Final Staff Capacity Report, analyst discussion of section 602.16(a)(1).

¹¹⁰ *Id.*, p. 38, citing Capacity Final Staff Report, sections 602.15(a)(1) and 602.17(e), Analyst Remarks to Response, and Ex. H, pg. 17 of pdf, section 602.17(e) of Capacity Inquiry Record and Capacity Final Staff Report, sections 602.15(a)(1) and 602.17(e).

entity under a show-cause action by another nationally recognized agency, the Accrediting Council for Continuing Education and Training.¹¹¹

The Final Staff Capacity Report included noncompliance findings related to ACICS's failure to demonstrate it had adequate administrative and financial capabilities, that its standards effectively address the quality of an institution's distance education, that it obtains enough information during an on-site review to determine an institution's compliance with its standards, and that it conducts its own analysis of the institution's information and documentation to determine an institution's compliance with its standards.

a. 34 C.F.R. 602.15(a)(1) – Administrative and Staff Resources

The Recognition Criteria at 34 C.F.R. § 602.15(a)(1) provides that the agency:

[m]ust have the administrative and fiscal capability to carry out its accreditation activities in light of its requested scope of recognition. The agency meets this requirement if the agency demonstrates that.. [it has] ...[a]dequate administrative staff and financial resources to carry out its accrediting responsibilities.¹¹²

1. Background

The Draft Staff Capacity Report pointed to ACICS's monitoring and evaluation issues at SDUIS and VIU in finding the agency noncompliant, noting "the Department is concerned that the lack of effective evaluation and monitoring approaches related to the two institutions discussed in this letter, VIU and SDUIS, reflects inadequate staffing and other resources."¹¹³ After considering ACICS's response, in the Final Staff Capacity Report, Department staff found the agency noncompliant: "Notwithstanding [ACICS's] unsupported contention [that oversight failures

¹¹¹ *Id.*, p. 39, citing Ex. H, pg. 17 of pdf, Section 602.17(e) of Capacity Inquiry Record and Capacity Final Staff Report, Sections 602.15(a)(1) and 602.17(e), Analyst Remarks to Response. The Department Staff's conclusion that ACICS should have reviewed the public comments and response from SDUIS, as required by ACICS's policies and procedures, to determine compliance with the agency's standards is strongly supported by the evidence in the Capacity Inquiry.

¹¹² 34 C.F.R. 602.15(a)(1).

¹¹³ Draft Capacity Staff Report, discussion of section 602.15(a)(1).

cannot demonstrate lack of administrative capacity], it appears that adequate staffing and other resources are likely the reason for ineffective evaluation mechanisms.”¹¹⁴

Looking to all three institutions involved in the current inquiries, Department staff found that “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. These institutional cases do not support the agency’s assertion that examples of ‘alleged inadequate oversight’ are not a proxy for inadequate administrative or other capabilities, but do indicate that ACICS does not have the administrative capability to carry out its accreditation activities in light of its requested scope of recognition”.¹¹⁵

ACICS responded that “Department staff engage[d] in conjecture about what ‘could be’ an issue and that other possible concerns ‘appear...likely’¹¹⁶, and that when compared to treatment of other agencies seeking reaccreditation, including the Commission on Massage Therapy Accreditation (COMTA), Department staff’s review of ACICS was “a blatant example of inconsistent application of the recognition standards and clear evidence of arbitrary and capricious decision making as to ACICS”.¹¹⁷ Stating that the Final Staff Capacity Report ignored evidence of compliance, ACICS also took issue with Department staff’s treatment of its accreditation review of SDUIS, noting that SDUIS was only ever in the application status, and never proceeded beyond the preliminary application phase.¹¹⁸

Department staff responded to concerns of speculation, noting that despite the opportunity to fully respond, “ACICS did not provide any support to its contention that failures in the oversight of VIU and SDUIS cannot demonstrate lack of administrative capability, especially in the context of the numerous, simultaneous compliance failures...related to the administrative and fiscal capability requirements of 34 C.F.R. § 602.15(a)(1).”¹¹⁹ Department staff also responded to ACICS’s claim of unfair treatment, noting the differences in accrediting activities as between

¹¹⁴ Final Capacity Staff Report, discussion of 602.15(a)(1) (analyst response).

¹¹⁵ *Id.*, discussion of 602.15(a)(1).

¹¹⁶ ACICS April 2021 Comments p. 32.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Department staff April 2021 Comments, p. 40.

ACICS and COMTA, and reiterating that Department staff “reviews each agency based on the Recognition Criteria, the evidentiary record applicable to that agency’s petition or review, the scope of the agency’s recognition, consideration of whether the agency...is primarily a Title IV gatekeeper, and consideration of the agency’s ability to come into compliance with the Recognition Criteria at issue within a period of one year.”¹²⁰ Department staff drew a distinction between ACICS and COMTA, noting that the former is an institutional accrediting agency, while COMTA functions primarily as a programmatic agency with limited, single-purpose institutional accreditation functions, and that Department staff review is not just based on the number of areas of noncompliance, but in *which* areas and to what extent the agencies are noncompliant, and how likely they are to achieve compliance within one year.¹²¹

At the NACIQI meeting, Advisory Committee staff adopted Department staff’s recommendation for a finding of noncompliance by a vote of 8 yes, 4 no, and 3 recusal.

2. SDO Determination with Respect to Section 602.15(a)(1), Capacity Inquiry

After a full review of the facts in the record before me, I find that ACICS’s oversight failures in its reviews of VIU and SDUIS, when combined with the administrative and fiscal shortcomings shown as part of the Monitoring Report and RNU Inquiries, evidence that ACICS does not have the administrative capability to carry out its accreditation duties, and the agency is thus not in compliance with section 602.15(a)(1).

ACICS has failed to demonstrate that its own accreditation standards address the quality of distance education, as evidenced by its review of VIU. As discussed above, ACICS’s on-site review of the distance education program at VIU should have had areas of overlap and findings consistent with the review conducted just eight months later by SCHEV. The agency should have also followed up on issues identified by SCHEV’s prior review, issues that SCHEV’s August 2018 review found had not been adequately addressed. ACICS did not obtain sufficient information during its VIU on-site visit to adequately evaluate the institution’s compliance with ACICS’s standards, and its failure to demonstrate that it conducted its own analysis of the

¹²⁰ *Id.*, p. 41.

¹²¹ *Id.*, pp. 41-42.

available information and documentation to determine SDUIS’s compliance with its standards showed a lack of administrative capability.

Taken separately, each of ACICS’s administrative failures is evidence of noncompliance; however, when taken together, as is appropriate in the unique context of the review of these four contemporaneous reports¹²², there is compelling evidence of ACICS’s systemic and overwhelming administrative noncompliance. As noted by Department staff, “[f]or all the institutional examples in the ... current inquiries, ACICS was either unaware of the 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 with its policies and procedures,” indicating that “ACICS does not have the administrative capability to carry out its accreditation activities in light of its requested scope of recognition.”¹²³

With respect to the SDUIS review, I find ACICS’s argument throughout its filings that the agency never considered, let alone awarded, SDUIS accreditation to be a weak defense to clear administrative shortcomings. Their inability to continue with the accreditation process appears to stem from the fact that ACICS lost accreditation in 2016, rather than because of an accreditation review in which ACICS gathered and evaluated information about SDUIS and developed their own findings. Furthermore, ACICS’s own conflicting statements undermine the argument that they would have performed their own sufficient, independent inquiry. In their April 8 comments, ACICS stated it was reviewing SDUIS in accordance with its preliminary status in the accreditation process, and that ACICS would have verified and confirmed eligibility with ACCET prior to proceeding.¹²⁴ Department staff responded, calling this a post-hoc argument,¹²⁵ and I agree. In their response to the Capacity Inquiry, ACICS claims that SDUIS provided documents that purported to show the separation between the two entities, and indicated its reliance on those documents, without need to conduct further review or evaluation.¹²⁶

¹²² See “Cumulative Effects” discussion, section IX(b) below.

¹²³ Department staff April 2021 Comments, p. 41, citing Capacity Final Staff Report, Section 602.15(a)(1), Analyst Remarks to Response.

¹²⁴ ACICS April 2021 Comments, p. 34.

¹²⁵ Department staff April 2021 Comments, pp. 42-43.

¹²⁶ Final Staff Capacity Report, Ex. 2 (SDUIS Initial Resource Visit Report).

b. 34 C.F.R. 602.16(d)¹²⁷ – Accreditation and Preaccreditation Standards; Distance Education

Under the Recognition Criteria at 34 C.F.R. § 602.16(d):

(1) If the agency has or seeks to include within its within its scope of recognition the evaluation of the quality of institutions or programs offering distance education, correspondence courses, or direct assessment 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 paragraph (a)(1) of this section.

(2) The agency is not required to have separate standards, procedures, or policies for the evaluation of distance education or correspondence courses.

1. Background

The Final Capacity Staff Report concluded that ACICS failed to demonstrate that its standards “effectively address the quality of an institution’s distance education in the areas identified in Section 602.16(a)(1).”¹²⁸

Department staff’s finding of noncompliance with section 602.16(d) focused on ACICS’s on-site visit and subsequent reaccreditation of VIU, while a review by another accrediting agency uncovered significant shortcomings in VIU’s distance education program and other institutional concerns. Department staff found that while there was no requirement for ACICS and SCHEV to have the same standards for the review of distance education program, “there is an expectation that there would be at least some overlap of review, particularly in the areas of faculty-student interaction, peer-to-peer interaction, academic rigor at the graduate level and the comparability of the distance education to residential offerings, which were significant areas of concern noted in the SCHEV audit.”¹²⁹ The Final Capacity Staff Report also dismissed ACICS’s claim that the two on-site reviews could not be compared because of the difference in time, finding that most of

¹²⁷ Effective July 1, 2020, the regulations governing the Recognition Criteria were revised, and the regulation regarding distance education review was changed from 34 C.F.R. § 602.16(c) to §602.16(d). In order to consistently refer to current authority, we will refer only to section 602.16(d), and all such references should be read to be in response to original references to section 602.16(c) of the prior regulations, as referenced in the Final Capacity Staff Report.

¹²⁸ Final Capacity Staff Report; discussion of section 602.16(c)

¹²⁹ *Ibid.*

the distance education areas of review, especially with respect to distance education infrastructure, would not have been impacted by the amount of time between the ACICS and SCHEV visits.¹³⁰

The Final Capacity Staff Report also found ACICS noncompliant because of the agency's decision to wait to take its own compliance actions until review of SCHEV's audit findings, and did not provide any documentation to show that a review by its ARIG had occurred.¹³¹

Department staff also expressed confusion at ACICS's seemingly contradictory arguments that while the agency is not required – and does not have – the same review standards as SCHEV, it acted appropriately in waiting for SCHEV to make a final compliance determination under SCHEV's standards, because SCHEV's findings may make a separate ACICS review moot.¹³²

ACICS defended its distance education evaluation process, noting that they assign a distance education evaluator to each team, and the team report template includes an entire section focused on the assessment of distance education programs.¹³³ Department staff disagreed with the agency's characterization of its report, instead finding the distance education section to be “mostly a checklist”, with narrative sections focused on administrative considerations, rather than substantive reviews of the programs offered.¹³⁴

The agency also took issue with Department staff's reliance on a single statement from a VIU site visit team as indication that its distance education review was not sufficient, while ignoring material documentation in the record that it purports demonstrated the substantiveness and thoroughness of the review, as well as ignoring the quality and comprehensiveness of ACICS standards, policies, and procedures in conducting its distance education accrediting reviews.¹³⁵

ACICS finally noted that in mid-2020, it finalized enhanced distance education standards and policies, assisted by an advisory committee and third party distance education expert, and while it had not had the opportunity to implement the new standards, the agency could not be held out

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ ACICS April 2021 Comments, p. 35.

¹³⁴ Department staff April 2021 Comments, p. 43.

¹³⁵ ACICS April 2021 Comments, p. 35.

of compliance.¹³⁶ Department staff responded that ACICS did not did not inform Department staff of the review of its distance education standards at any point during the Capacity Inquiry or Monitoring Report Review, and that its recommendations were made on the basis of all evidence available to it at the time.¹³⁷ ACICS should not now be able to rely on updated distance education policies that may have been prompted by the SCHEV audit of VIU or the Capacity Inquiry itself.¹³⁸

At the NACIQI meeting, Advisory Committee members, by a vote of 12 to 0, with 3 recusals, supported Department staff's recommendation of a finding of noncompliance.

2. SDO Determination with Respect to Section 602.16(d), Capacity Inquiry

After considering the full record before me, I find that ACICS failed to demonstrate that its standards effectively address the quality of the distance education programs it reviews for accreditation, and adopt the recommendation of Department staff and the Advisory Committee and find ACICS not in compliance with section 602.16(d).

ACICS repeatedly argued that VIU site visit provided a comprehensive review of the institution's distance education program. I find this argument to be without merit. The record shows that ACICS's review was mostly a checklist without substance, and that narrative sections of the report were limited to administrative areas of concern, such as platforms used, login procedures, and technical support, rather than a meaningful review of the quality of the education programs offered.

The ACICS site visit report failed to include the significant issues identified by the SCHEV audit, even though the visits were conducted a mere eight months apart. SCHEV's identification of shortcomings related to educational quality, including faculty and student interaction, academic rigor, or the comparability of the distance education program to residential offerings, are issues that should have been discovered by ACICS; the fact that they were not explored demonstrates that ACICS's standards do not meet the requirements of section 602.16(d).

¹³⁶ *Id.*, p. 36.

¹³⁷ Department staff April 2021 Comments, p. 44.

¹³⁸ *Ibid.*

Under section 602.16(a), Department staff have the authority and duty to evaluate whether a recognized agency’s accreditation standards are “sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the institutions or programs it accredits.”¹³⁹ There is not just the authority for this type of evaluation by Department staff during an agency’s recognition review; it is an expectation.¹⁴⁰

ACICS may not now rely on an unevaluated, and potentially post-hoc set of revised distance education standards, because they failed to raise them during the review period for the Capacity Inquiry or Monitoring Report Review. Instead, ACICS mentioned them for the first time in its testimony at the NACIQI meeting¹⁴¹, at which point ACICS gave a narrative description, but did not provide revised standards to Advisory Committee members for consideration in their decision. Any revised standards that ACICS may have developed cannot be considered at this point, because they were not presented to Department staff during the pendency of their reviews, and as discussed above, ACICS may not introduce new information once the Department staff and NACIQI recommendations are sent to the SDO for a decision.

c. 34 C.F.R. 602.17(c) – Application of Standards in Reaching Accreditation Decisions, On-Site Review

Under the Recognition Criteria at 34 C.F.R. § 602.17(c), “[t]he agency must have effective mechanisms for evaluating an institution’s or program’s compliance with the agency’s standards before reaching a decision to accredit or preaccredit the institution or program. The agency meets this requirement if the agency demonstrates that it ... [c]onducts at least one on-site review of the

¹³⁹ 34 C.F.R. § 602.16(a).

¹⁴⁰ ACICS attempted to argue that it put a hold on an ARIG review of VIU, pending the final outcome of SCHEV’s review, which may render it “moot”. *See* Final Staff Capacity Report, discussion of section 602.16(c). ACICS is mistaken in its attempts to sidestep responsibility for conducting its own reviews. Under sections 495 and 496 of the Higher Education Act of 1965, as amended, States and accrediting agencies have distinct responsibilities to conduct oversight of institutions, with States providing authorization of degrees and accrediting agencies gatekeeping the quality of education or training provided by the institutions and programs they accredit. In their arguments, Department staff indicate the overlapping standards under which States and accrediting agencies may reach their respective conclusions, and the conclusions of one entity may support or inform the conclusions of the other. However, the outcome of a review conducted by the State does not obviate the review of the accrediting agency. Rather, both inform the Federal government’s oversight of the quality of postsecondary education in the United States.

¹⁴¹ NACIQI Meeting Transcript (Mar. 4, 2021), pp. 91-92.

institution or program during which it obtains sufficient information to determine if the institution or program complies with the agency’s standards.”¹⁴²

1. Background

The Final Staff Capacity Report found that ACICS failed to demonstrate that it conducted at least one on-site review of VIU during which it obtained sufficient information to determine if it complied with the agency’s standards, as required by 34 C.F.R. § 602.17(c). Specifically, Department staff found that ACICS’s on-site review of VIU in January 2018 did not uncover the significant deficiencies found by SCHEV just eight months later.¹⁴³ In addition, while the agency provided a general description of its agenda and intent, as well as recognition that on-site visits are one of its primary ways of collecting empirical data, “ACICS did not provide a response to the Department’s concerns that the agency does not appear able to obtain sufficient information to determine if an institution complies with the agency’s standards during an on-site review of the institution.”¹⁴⁴ Department staff also noted ACICS’s failure to comply with the requirements of section 602.17(c) with respect to the RNU Inquiry, as discussed below.

ACICS countered that “[t]he record demonstrates that ACICS conducted a thorough review of VIU under its policies and procedures, which fulfilled its responsibilities”, and that “abundant information in the record” demonstrates that ACICS teams conducted thorough evaluations of their applicant institutions, including VIU.¹⁴⁵ ACICS notes that it made ten findings of noncompliance as a result of their on-site review of VIU, and argues that they properly followed through with VIU to obtain sufficient evidence demonstrating VIU’s compliance with ACICS standards before awarding it a new grant of accreditation in August 2018.¹⁴⁶ ACICS notes that SCHEV’s later review found VIU out of compliance with SCHEV’s regulations, and that ACICS subsequently issued a show-cause directive to VIU requiring VIU to demonstrate continued compliance with ACICS’s standards.¹⁴⁷

¹⁴² 34 C.F.R. 602.17(c).

¹⁴³ Final Capacity Staff Report, discussion of 602.17(c).

¹⁴⁴ *Ibid.*

¹⁴⁵ ACICS April 2021 Comments, pp. 37-38.

¹⁴⁶ ACICS April 2021 Comments, p. 38.

¹⁴⁷ Final Monitoring Report, Exhibit 23 (VIU Chronology Updated).

Department staff responded that in failing to obtain sufficient information to confirm that VIU provided a quality education via a distance method of delivery, ACICS did not obtain sufficient information to determine if VIU complied with its standards, as required by section 602.17(c).¹⁴⁸

At the NACIQI Meeting, Advisory Committee Members adopted Department staff's recommendation of a finding of noncompliance for section 602.17(c) by a vote of 11 yes, 1 no, and 3 recusals.

2. SDO Determination with Respect to Section 602.17(c), Capacity Inquiry

After considering the full record before me, I find that ACICS failed to demonstrate that its obtained sufficient information during its onsite review of VIU to determine if the institution complied with the agency's standards, and adopt the recommendation of Department staff and the Advisory Committee and find ACICS not in compliance with section 602.17(c).

While I concur with ACICS's statement that it is not legally required to have the same standards as another accrediting agency, I am troubled by the agency's insistence that two on-site reviews of VIU that purported to evaluate some overlapping areas, including VIU's distance education program, resulted in such disparate findings. After evaluating ACICS' standards and the findings from SCHEV's August 2018 visit, it is clear to me that there is sufficient overlap between the two agencies' standards, such that that some of the significant issues uncovered by SCHEV should have been discovered by ACICS during their own on-site review process. To the extent that ACICS did not discover the problems with the academic offerings at VIU, it is evidence that their standards and requirements surrounding on-site reviews are not sufficient.

I also note that because of its failure to obtain adequate information during the course of its on-site review of VIU, ACICS instead improperly relied on SCHEV's review and analysis in conducting its own oversight. As previously noted, ACICS, upon learning the results of the SCHEV audit, considered different actions, but opted to wait for SCHEV's final report, rather than initiating action by its own At-Risk Working Group. At best, this can be interpreted as the

¹⁴⁸ Department staff April 2021 Comments, p. 45.

agency's understanding that SCHEV's review was, in fact, substantively relevant to their review; at worst, it is clear proof of ACICS's abdication of their accrediting and review duties.

d. 34 C.F.R. 602.17(e) – Application of Standards in Reaching Accreditation Decisions, Conduct Own Analysis

Under the Recognition Criteria at 34 C.F.R. § 602.17(e), “[t]he agency must have effective mechanisms for evaluating an institution’s or program’s compliance with the agency’s standards before reaching a decision to accredit or preaccredit the institution or program. The agency meets this requirement if the agency demonstrates that it ... [c]onducts its own analysis of the self-study and supporting documentation furnished by the institution or program, the report of the on-site review, the institution’s or program’s response to the report, and any other information substantiated by the agency from other sources to determine whether the institution or program complies with the agency’s standards.”¹⁴⁹

The Final Staff Capacity Report concluded that ACICS failed to demonstrate that it conducted its own analysis of the self-study and supporting documentation furnished by SDUIS, the report of the on-site review, SDUIS’s response to the report, and any other information substantiated by the agency from other sources to determine whether SDUIS complied with the agency’s standards, as required by 34 C.F.R. § 602.17(e).¹⁵⁰ The Report’s finding was based on ACICS’s failure to provide evidence of any substantive review of extensive public comments submitted to ACICS in connection with its potential accreditation of SDUIS and the voluminous response to those comments from SDUIS.¹⁵¹ This failure violated the agency’s policies and procedures, specifically section 2-1-200 of ACICS’s Accreditation Criteria.¹⁵²

ACICS responded to Department staff’s claim that it had not shown proof of substantive review of comments it solicited in connection with the SDUIS application by noting that ACICS had forwarded the public comments it received to SDUIS in June 2016 for their review and response,

¹⁴⁹ 34 C.F.R. 602.17(e).

¹⁵⁰ Final Capacity Staff Report, discussion of section 602.17(e); Department staff April 2021 Comments, p. 45.

¹⁵¹ Final Capacity Staff Report, discussion of section 602.17(e); ED Staff April Response, p. 45.

¹⁵² Department staff April 2021 Comments, p. 45; citing Capacity Final Staff Report, Section 602.17(e), Analyst Remarks to Response.

and that SDUIS had responded later that month.¹⁵³ The agency alleged that the Final Staff Capacity Report focuses on ACICS Accreditation Criteria section 2-1-200, but failed to take note of the sections that follow, which detail the different phases in the application process prior to a site team visit.¹⁵⁴ The agency noted that there is no “public comment step” in the application phase, but rather “consideration of public comments informs each phase of the process, including the preliminary review, the resource visit, the team evaluation visit, and consideration by Council.”¹⁵⁵ Reiterating ACICS’s claim that “public comments received (and responses from SDUIS) inform each phase of the accreditation review process”, Department staff noted they were not made aware of any evidence that the agency had conducted its own review of the public comments and SDUIS response, other than an emailed acknowledgement of the submission.¹⁵⁶

The Final Staff Capacity Report found that ACICS violated section 2-1-200 of its Accreditation Criteria, which requires the agency to take into consideration the actions of other agencies that have denied accreditation to, or taken adverse action against, an institution.¹⁵⁷ ACICS argued that SDUIS never completed the ACICS application process and never hosted a site team visit, and was never considered for accreditation by ACICS, and was thus not in violation of its own standard.¹⁵⁸ Department staff responded that ACICS “did not provide any additional information or documentation about the concern noted in the draft staff analysis that ACICS did not take into account the denial of accreditation by the Accrediting Council for Continuing Education and Training of USAELC, a subcomponent of SDUIS, in its review of SDUIS.

ACICS objected broadly to the finding of noncompliance with section 602.17(e), noting that the finding focused entirely on SDUIS, even though ACICS never accredited SDUIS, or processed their application beyond the preliminary application stage.¹⁵⁹

¹⁵³ ACICS April 2021 Comments, p. 39.

¹⁵⁴ *Id.*, p. 40-41.

¹⁵⁵ *Id.*, pp. 40-41.

¹⁵⁶ Department staff April 2021 Comments, pp. 45-46.

¹⁵⁷ Final Capacity Staff Report, discussion of 607.17(e)

¹⁵⁸ ACICS April 2021 Comments, p. 41.

¹⁵⁹ *Id.*, p. 39

At the NACIQI Meeting, Advisory Committee Members adopted Department staff's recommendation of a finding of noncompliance for section 602.17(e) by a vote of 11 yes, 1 no, and 3 recusals.

2. SDO Determination with Respect to Section 602.17(e), Capacity Inquiry

Having reviewed the record before me, I find that ACICS failed to demonstrate that it completed its own analysis of the information before it, and adopt the recommendation of Department staff and the Advisory Committee and find ACICS not in compliance with section 602.17(c).

The agency stated that “consideration of public comments informs each phase of the process, including the preliminary review, the resource visit, the team evaluation visit, and consideration by Council.”¹⁶⁰ If that is the case, and given that ACICS solicited public comments during the very preliminary stage of the accreditation application, it is reasonable to expect some evidence that the voluminous comments received, as well as SDUIS's response to those comments, had been reviewed and considered. Instead, ACICS provided an emailed confirmation of their receipt of SDUIS's response. ACICS had a duty to conduct its own analysis, as required by the regulatory criteria and their own standards; however, its de facto delegation of that duty to SDUIS – the party seeking accreditation – undermined the value of those public comments in its own review. There is nothing in the record to indicate that ACICS staff or evaluators independently reviewed those comments as part of their accreditation review.

ACICS also failed to conduct its own determination of the relationship between SDUIS and USAELC, and the impact of ACCET's show-cause order against USAELC, while conducting its review of SDUIS's application. I am not convinced by ACICS's argument that it was not required to investigate the relationship between SDUIS and USAELC at this point during the accreditation application. The consideration of such basic issues of eligibility or potential conflict are appropriately considered at the outset of an accreditation application, and ACICS has not provided a meaningful explanation for its failure to do so.

¹⁶⁰ *Id.*, pp. 40-41.

Finally, I am not persuaded by ACICS's argument that its review of SDUIS's application never proceeded beyond the preliminary phase is evidence of the agency's competency and ability to conduct its own analysis of the information before it. The fact that SDUIS's application was ultimately ended by ACICS's loss of recognition does not alter the requirements that the agency had, under its own standards, at each step of the process, to collect and review the available evidence and conduct its own analysis.

c. SDO Determination with Respect to the Capacity Report

With respect to the Final Capacity Staff Report, I find ACICS noncompliant. Based on the significant areas of noncompliance identified in the Report, and taking into consideration the recommendations of Department Staff and NACIQI, I find that the appropriate remedy is termination of recognition under 34 C.F.R. §602.36. My termination decision is based on the significant and systemic administrative and evaluative shortcomings of ACICS's accreditation capacity, and my finding that, based on the record, the agency is not likely to come into full compliance with the four criteria at issue within one year.

VIII. RNU Report.

On February 24, 2020, the Department of Education initiated an inquiry under 34 C.F.R. 602.33, related to a news report published on February 15, 2020, alleging that ACICS continued to accredit RNU, a nonoperational institution in Sioux Falls, South Dakota, with no faculty, students, or physical presence.¹⁶¹ RNU was a small school offering bachelor's and master's degree programs. It was founded in 2010 and applied to ACICS for accreditation in 2016. At the time of its application, it was authorized to operate in South Dakota, without accreditation, with a population of approximately 50 students.¹⁶² After establishing its eligibility to seek accreditation and completing the application materials, RNU hosted an ACICS initial grant visit team in February 2017.¹⁶³

¹⁶¹ *Id.*, p. 42.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

A team of five ACICS evaluators conducted a two-day site visit to RNU.¹⁶⁴ In its application materials, RNU reported that it offered its programs via distance education, however the team determined that RNU’s delivery model was closer to independent study.¹⁶⁵ RNU’s overreliance on independent study was cited as one of the findings of non-compliance by the initial visit team. In all, the ACICS team made 16 findings of non-compliance.¹⁶⁶ RNU responded in March 2017, but did not address all of the issues, resulting in ACICS deferring the application at its April 2017 and August 2017 meetings, and requiring additional evidence that RNU had come into compliance.¹⁶⁷ After addressing three substantive responses with supporting documentation from RNU, but acknowledging areas of continuing noncompliance, ACICS gave RNU an initial grant of accreditation in December 2017.¹⁶⁸

ACICS expressed concern that NACIQI members criticized it for providing RNU with several opportunities to demonstrate compliance, noting that, like many other recognized agencies, it allows initial applicants to demonstrate that they are making progress toward full compliance to earn initial accreditation, but will terminate applications if ACICS determines that they are unwilling or unable to make sufficient progress toward compliance.¹⁶⁹ ACICS standards gave RNU up to two years to demonstrate compliance.¹⁷⁰ ACICS policies allowed the initial grant of accreditation to extend for up to three years for an institution not previously accredited by a recognized agency.¹⁷¹

ACICS granted a two year initial grant of accreditation, to extend through December 31, 2019, given that RNU had not yet demonstrated compliance, and in order to “require the agency to exercise a heightened level of review of RNU”.¹⁷² The timing of this grant meant that RNU had to begin the reaccreditation process to renew its accreditation in mid-2018, just months after receiving its initial accreditation.¹⁷³ In its initial months of accreditation, ACICS required RNU

¹⁶⁴ *Ibid.*

¹⁶⁵ ACICS April 2021 Comments, p. 43.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*; NACIQI Meeting Transcripts (Mar. 4, 2021), pp. 211-214.

¹⁷⁰ ACICS April 2021 Comments, p. 44; citing Introduction to Title II, Chapter 3 of ACICS’s *Accreditation Criteria*.

¹⁷¹ *Id.*, p. 44.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

to participate in a half-day orientation program called *ACICS Fundamentals for New Members – A Guide for New Members on the Requirements for Maintaining Accreditation*.¹⁷⁴ The program, which was attended by RNU’s president and academic dean, covered topics such as annual and periodic reporting, the ACICS Placement Verification Program (PVP), institutional planning centered on the Campus Effectiveness Plan, and substantive changes.¹⁷⁵

In October 2019, ACICS sent a five-person team to conduct RNU’s reaccreditation evaluation. During their two-day visit, the team observed classes in session, talked to faculty, staff, and students, and reviewed administrative records and student and personnel files.¹⁷⁶ In its report, the team identified 28 findings of noncompliance in the small now-70-student school.¹⁷⁷

In response to these findings, ACICS issued a show-cause directive in December 2019, which is the first step in removing RNU’s accreditation.¹⁷⁸ Under ACICS procedures, RNU was scheduled to respond to the directive at ACICS’s April 2020 meeting.

In February 2020, a reporter from USA Today wrote an article in which he reported visiting the school twice, and finding it closed.¹⁷⁹ After being contacted by the reporter, ACIC sent a representative on an unannounced visit to RNU on February 8, and determined that the campus appeared to be abandoned.¹⁸⁰ The representative spoke with an RNU administrator, and later that day, RNU notified ACICS that it was voluntarily relinquishing its accreditation, effective immediately.¹⁸¹

¹⁷⁴ ACICS April 2021 Comments, p. 45.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*; citing RNU Report record, at Exhibit 17 – Oct. 2019 team report.

¹⁷⁸ ACICS April 2021 Comments, pp. 45-46.

¹⁷⁹ ACICS took issue with the report, claiming that it implied that RNU did not exist and perhaps never existed, and “it made a host of other false and misleading assertions and innuendos regarding ACICS’s accreditation of RNU”. ACICS April 8 Comments, p. 46. ACICS also notes in a footnote that “The USA Today reporter, Chris Quintana, does not appear to have any expertise in evaluating an agency’s compliance with federal recognition criteria. At USA Today, Mr. Quintana covers ‘stories about the cost of college, campus culture and student debt.’”

¹⁸⁰ Final Staff RNU Report, Exhibit 22, ARIC Request for a Response and RNU Visit Report (Feb. 10, 2020).

¹⁸¹ ACICS April 2021 Comments, p. 46.; ACICIS notes in its comments that RNU was authorized throughout the period in question by the Secretary of State of the State of South Dakota, and never participated in Title IV, Higher Education Act financial aid program, and was never approved to issue student visas. RNU did not give ACICS notice that it was ceasing operations, and no ACICS standard or recognition criteria requires accreditors to actively monitor whether an institution has closed between times of regular touch points.

In the Final Staff RNU Report, Department staff found that ACICS was noncompliant with five recognition criteria, including: (1) section 602.15(a)(1), which requires an accrediting agency to demonstrate that it has adequate administrative staff and financial resources to carry out its accrediting responsibilities; (2) section 602.16(a)(2), which requires an accrediting agency to demonstrate the competency and knowledge of its representatives in connection with the agency's accrediting and preaccrediting activities and decision; (3) section 602.17(c), which requires that, before reaching a decision to accredit or preaccredit an institution, an accrediting agency conducts at least one on-site review of the institution during which it obtains sufficient information to determine if the institution complies with the agency's standards; (4) section 602.18(b)(3)¹⁸², which requires an accrediting agency to base decisions regarding accreditation and preaccreditation on the agency's published standards; and (5) section 602.19(b), which requires an accrediting agency to demonstrate that it has, and effectively applies, monitoring and evaluation approaches that enable it to identify problems with an institution's continued compliance with agency standards.

At the NACIQI meeting, the Advisory Committee, evaluating the Final Staff RNU Report, accepted the Department staff finding of noncompliance and recommendation of termination by a vote of 11 yes, 1 no, and 3 recusals.

a. 34 C.F.R. 602.15(a)(1) – Administrative and Fiscal Responsibilities

The Recognition Criteria at 34 C.F.R. § 602.15(a)(1) provides that the agency: [m]ust have the administrative and fiscal capability to carry out its accreditation activities in light of its requested scope of recognition. The agency meets this requirement if the agency demonstrates that.. [it has] ...[a]dequate administrative staff and financial resources to carry out its accrediting responsibilities.¹⁸³

¹⁸² The Final Staff RNU Report identifies section 602.18(c) as the recognition criterion at issue. Effective July 1, 2020, the regulations governing the Recognition Criteria were revised, and the regulation regarding distance education review was changed from 34 C.F.R. § 602.18(c) to § 602.18(b)(3). The content of the regulation was not substantially changed in a manner that affects this review, because RNU was not an institution with a religious mission. In order to consistently refer to current authority, we will refer only to section 602.18(b)(3), and all such references should be read to be in response to original references to section 602.18(c) of the prior regulations, as referenced in the Final Staff Capacity Report.

¹⁸³ 34 C.F.R. § 602.15(a)(1).

1. Background

In the Final Staff RNU Report, Department staff identified a number of administrative failings, and concluded that, based on its failure to comply with two other recognition criteria in granting initial accreditation, combined with its failure to demonstrate administrative and fiscal capacity in connection with either the Monitoring Report or the Capacity Inquiries, ACICS had not demonstrated that it has the administrative capability to carry out its accreditation activities as required by 34 C.F.R. § 602.15(a)(1).¹⁸⁴ Specifically, Department staff found that ACICS’s “outstanding issues in Sections 602.18(b)(3) and 602.19(b) do not demonstrate administrative capability” because ACICS staff “did not confirm RNU met the workshop attendance requirement in the review of the application for accreditation nor verify the answers provided on RNU’s pre-application self-assessment.”¹⁸⁵

Department staff noted that ACICS “provided no discussion or documentation on the failure of the Agency to enforce its current policies and procedures related to this requirement.”¹⁸⁶

Department staff also raised concerns about ACICS’s failure to verify whether RNU was, as RNU incorrectly stated in its initial self-assessment, currently accredited.

ACICS argued that the Final Staff RNU Report termination recommendation based on section 602.15(a)(1) is not supported by the record. While it acknowledges that RNU sent a representative other than its CEO to the ACICS accreditation workshop, as is required in the *ACICS Accreditation Criteria*,¹⁸⁷ “[t]he Department’s conclusion that this one-off instance...evidences ACICS’s lack of administrative capability is a disproportionate conclusion.”¹⁸⁸ Department staff rejected ACICS’s attempt to minimize the evidence of its failure to comply with section 602.18(b)(3) as “minor and isolated incidents”, noting that the examples of noncompliance with this criterion cited in the Final Staff RNU Report are significant, “especially in the context of the numerous, simultaneous compliance failures identified by the Department staff related to the administrative and fiscal capability requirements

¹⁸⁴ Department staff April 2021 Comments, p. 49.

¹⁸⁵ Final Staff RNU Report, Analyst Response, section 602.15(a)(1).

¹⁸⁶ Final Staff RNU Report, Analyst Response, section 602.18(c).

¹⁸⁷ ACICS April 2021 Comments, p. 47.

¹⁸⁸ *Ibid.*

of 34 C.F.R. § 602.15(a)(1).”¹⁸⁹ Department staff noted that ACICS comments “acknowledge that RNU sent someone other than its [required] CEO to the workshop, in violation of ACICS’s *Accreditation Criteria*, but dismiss the Department staff’s concern that ACICS failed to provide any discussion or documentation on the agency’s failure to enforce its own policies and procedures related to this requirement.”¹⁹⁰

ACICS also dismissed the Final Staff RNU Report’s finding that ACICS did not verify information provided by RNU in its pre-application self-assessment for initial accreditation, and argued that it is not evidence of administrative failure. ACICS explained in response to the Draft Staff Analysis that it was unable to determine whether RNU’s affirmative selection in a dropdown menu on the electronic application in response to the question “Is the institution currently accredited” was in error, or whether the institution was confused about the terminology.¹⁹¹ ACICS stated that it was easy to determine that RNU was not accredited by another agency through conversations with the institution and by checking other agencies’ directory information. ACICS emphasized that these so-called “self-assessment claims” made by institutions seeking to pursue accreditation by ACICS are limited to basic eligibility information that ACICS verifies in subsequent conversations with the applicant, through the initial resource visit, in the self-evaluation process, by the evaluation team during an initial accreditation visit, and by the Council when considering whether to grant initial accreditation.¹⁹² Department staff found that ACICS had a duty to take action to promptly verify and document RNU’s assertion that it was accredited.¹⁹³

Department staff pointed to the Final Staff RNU Report finding that ACICS’s failure to demonstrate compliance with 34 C.F.R. § 602.19(b) “evidenced a lack of adequate administrative capability to carry out the agency’s accrediting activities”.¹⁹⁴ “ACICS did not effectively monitor RNU in between accreditation reviews to ensure continued compliance with

¹⁸⁹ Department staff April 2021 Comments, pp. 49-50.

¹⁹⁰ *Id.*, p. 50.

¹⁹¹ ACICS April 2021 Comments, p. 48.

¹⁹² *Id.*, pp. 48-49.

¹⁹³ Department staff April 2021 Comments, pp. 50-51.

¹⁹⁴ *Id.*, p. 51.

ACICS’s standards and policies.”¹⁹⁵ Noting that ACICS’s October 2019 site visit to RNU “revealed repeated and even higher instances of compliance failures by RNU than ACICS identified in its initial grant site visit to the school in February 2017”, Department staff found that “ACICS did not effectively monitor RNU in between accreditation reviews to ensure continued compliance with ACICS’s standards and policies.”¹⁹⁶

Department staff concluded that in evaluating whether an agency has the required administrative capability to fulfil its accrediting duties, it must look at an agency’s ability to comply with other recognition criteria surrounding accrediting activities, and that here, the Final Staff RNU Report properly considered that ACICS’s failure to base its accreditation of RNU on their own published standards, as required by section 602.18(b)(3), and failure to effectively monitor RNU, as required by section 602.19(b), did not demonstrate administrative capability.¹⁹⁷ Department staff cautioned against ACICS’s attempts to minimize any failures to comply with section 602.18(b)(3) as “minor and isolated incidents”; noting that the examples of noncompliance with this criterion were significant, “especially in the context of the numerous, simultaneous compliance failures identified by the Department staff related to the administrative and fiscal capability requirements of 34 C.F.R. § 602.15(a)(1).”¹⁹⁸

2. SDO Determination with Respect to Section 602.15(a)(1), RNU Inquiry

After considering the full record before me, I find that ACICS’s issues with respect to sections 602.18(c) and 602.19(b) do not demonstrate administrative capability, and find that ACICS is not in compliance with section 602.15(a)(1).

ACICS demonstrated continuous shortcomings during its accreditation of RNU, by failing to follow its own accreditation standards as required by section 602.18(b)(3), and failing to effectively monitor and evaluate RNU during the period between accreditation reviews.

¹⁹⁵ *Ibid*, p. 51.

¹⁹⁶ *Ibid*, p. 51.

¹⁹⁷ Department staff April 2021 Comments, p. 49.

¹⁹⁸ *Id.*, pp. 49-50.

I find the cumulatively significant individual violations to be compelling evidence of ACICS's larger administrative failure. In particular, ACICS's failure to effectively monitor RNU between the two accreditation reviews, and in the period following its October 2019 site visit and the school's ultimate closing necessitate a finding of noncompliance. When RNU was given preliminary accreditation in 2017, ACICS was aware that the institution had issues of noncompliance, and yet failed to adequately and effectively monitor the institution, resulting in a 2019 site visit that found that far from coming into compliance, the institution was now in more distress. After this finding, ACICS still neglected to take immediate action, instead allowing the school to close without notice. There was evidence of the school's impending failure that ACICS, in its role as an accreditor with a duty to monitor, knew or should have known. ACICS should have taken additional action to monitor the school and take immediate corrective action once it was clear that compliance issues were worsening.

While there is no expectation that every institution that an agency accredits will remain solvent and operational, there is an expectation that the agency will conduct sufficient monitoring – especially when the institution is newly accredited and the agency has knowledge of ongoing compliance failures – to take necessary corrective action in a timely manner.

b. 34 C.F.R. 602.15(a)(2) – Administrative Capability; Trained Staff.

The Recognition Criteria at 34 C.F.R. § 602.15(a)(2) provide that the agency:

[m]ust have the administrative and fiscal capability to carry out its accreditation activities in light of its requested scope of recognition. The agency meets this requirement if the agency demonstrates that.. [it has] ... [c]ompetent and knowledgeable individuals, qualified by education or experience in their own right and trained by the agency on their responsibilities, as appropriate for their roles, regarding the agency's standards, policies, and procedures, to conduct its on-site evaluations, apply or establish its policies, and make its accrediting and

preaccrediting decisions, including, if applicable to the agency's scope, their responsibilities regarding distance education and correspondence courses.¹⁹⁹

1. Background

The Final Staff RNU Report concluded that ACICS failed to demonstrate that it has “competent and knowledgeable individuals, qualified by education and experience in their own right and trained by the agency on their responsibilities, as appropriate for their roles regarding the agency's standards, policies, and procedures, as required by 34 C.F.R. § 602.15(a)(2).”²⁰⁰ The Final Staff RNU Report found that ACICS did not provide requested documents related to the training of staff and agency deficiencies, including documentation that a site visitor RNU sent in anticipation of a review of distance education programs was qualified and trained to evaluate distance education programs.²⁰¹

ACICS argued that the Final Staff RNU Report failed to note that ACICS has provided documentation of training materials and activities, as well as evaluator training attendance records in response to the Final Staff Compliance Report.²⁰² ACICS argues that since the discussion focuses almost entirely on RNU's efforts to obtain initial accreditation in 2016 and 2017, the former SDO's October 2018 finding that ACICS had appropriate training materials and procedures in place, and had provided evidence of the training its Commissioners and Directors receive, coupled with the former Secretary's 2018 Order, should be compelling evidence resolving any issues related to the adequacy of ACICS training arising in 2016 and 2017.²⁰³ Department staff disagreed, noting that the 2018 Order still found ACICS out of compliance with the requirements of 34 C.F.R. § 602.15(a)(2) with respect to the agency's failure to demonstrate that its evaluators had received improved training.²⁰⁴ Neither the former SDO or the former Secretary reviewed any materials related to the RNU Inquiry, which, because it had not yet been triggered, was outside the scope of their review, in their decisions.

¹⁹⁹ 34 C.F.R. 602.15(a)(2), Administrative and Fiscal Responsibilities.

²⁰⁰ Department staff April 2021 Comments, pp. 51-52; internal citations omitted.

²⁰¹ Final Staff RNU Report, Analyst Response, section 602.15(a)(2).

²⁰² ACICS April 2021 Comments, p. 49; citing Final Staff Compliance Report record, at Exhibit 3.

²⁰³ *Id.*, p. 50.

²⁰⁴ Department staff April 2021 Comments, p. 54; citing November 2018 Order at p. 3.

In the Draft Staff Analysis on RNU, the Department noted that while RNU’s application sought review for distance education programs, no distance education specialist was assigned to the site visit team to conduct the review.²⁰⁵ ACICS responded, explaining that once on site, team members determined that the instructional delivery methodology was not distance education as defined by ACICS, so no distance education assessment was necessary or appropriate. One of the members of the team, however, was qualified to perform a distance education review, had it been appropriate to do so.²⁰⁶ Department staff responded that ACICS, when asked for evidence of a distance education reviewer, provided receipts showing that he had traveled to RNU’s location”,²⁰⁷ and attempted to improperly submit new evidence in an attempt to establish the site evaluator’s qualifications after the fact,²⁰⁸ giving Department staff no other option than to find ACICS failed to demonstrate this evaluator’s qualifications in the RNU Final Staff Report.

Department staff also noted that ACICS failed to respond to its concern that the RNU site visit team wrote that they were unable to “retrieve, view, or access any instructional materials” and that students “did not have access to or possess course textbooks”,²⁰⁹ but did not list these basic learning material issues as deficiencies in the team report. Department staff found this to be evidence of a lack of training for evaluators on the agency’s standards, and a lack of administrative capability, and that ACICS’s continued attempts to minimize it as unrepresentative of the adequacy and effectiveness of the agency’s training of representatives should be dismissed.²¹⁰

2. SDO Determination with Respect to Section 602.15(a)(2), RNU Inquiry

After reviewing the full record before me, I find that ACICS is not in compliance with section 602.16(a)(2) because the agency has failed to demonstrate that it has “competent and knowledgeable individuals, qualified by education and experience in their own right and trained

²⁰⁵ ACICS April 8 Comments, p. 51, citing Draft Staff Analysis on RNU.

²⁰⁶ *Ibid.*, citing ACICS response to Draft Staff Analysis.; ACICS attempted to introduce Mr. Bleacher’s *Curriculum Vitae* (Ex. 13 to the April 8 comments) as evidence of his qualifications, but because it is not part of the record, and because it is not persuasive evidence of qualification, it is not considered here.

²⁰⁷ Department staff April 2021 Comments, p. 52; citing Ex. 29, pp. 3, 6-18 to RNU Report Record, Section 602.17(c).

²⁰⁸ *Id.*, p. 52.

²⁰⁹ *Id.*, p. 53; citing ER-Exh. 5, pp. 39, 46 to RNU Inquiry Record, Section 602.15(a)(2).

²¹⁰ *Id.*, pp. 51-54.

by the agency on their responsibilities, as appropriate for their roles regarding the agency’s standards, policies, and procedures”.

ACICS’s own standards require it to send a qualified and trained distance education evaluator when the site review team anticipates a review of any distance education program, as it did in its visit to RNU. Whether or not a distance education evaluation took place is not at issue here; the question is whether, in anticipation of conducting a distance education evaluation, ACICS properly adhered to their own standards and sent a qualified and trained distance education specialist. Here, ACICS attempts to submit the supposed evaluator’s *Curriculum Vitae* as a post hoc demonstration of his qualification. I note, however, as discussed above in section III(b), such documents cannot be considered part of the record, and even if they were, are not relevant to show that the individual received the requisite specialized training required by the regulations and ACICS’s own standards.

I am also concerned by the instance where ACICS’s evaluator failed to include basic learning material concerns from the RNU site visit in the team report. Failing to include a fundamental observation that students were unable to access instructional materials and did not have access to textbooks demonstrates a lack of training of their site evaluators and an overall lack of administrative capability for the agency.

Finally, I agree with Department staff that ACICS may not rely on the 2018 Order as proof that its training program is in compliance, because RNU’s initial accreditation efforts, while temporally consistent with the review of the 2018 Order, were not within the Order’s scope of consideration. While the 2018 Order largely approved of ACICS’s new training plan, the agency was still found to be out of compliance with the training requirements in section 602.16(a)(2), because the agency had not yet demonstrated that its program had been successfully and effectively implemented. I find here that it has not.

**c. 34 C.F.R. 602.17(c) – Application of Standards in Reaching Accreditation Decisions;
On-Site Review**

The Recognition Criteria at 34 C.F.R. § 602.17(c) provides that the agency “must have effective mechanisms for evaluating an institution’s or program’s compliance with the agency’s standards

before reaching a decision to accredit or preaccredit the institution or program. The agency meets this requirement if the agency demonstrates that it... [c]onducts 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."²¹¹

1. Background

The Final Staff RNU Report found that ACICS failed to demonstrate that, prior to reaching a decision to accredit RNU, it conducted at least one on-site review of the institution during which it obtained sufficient information to determine if it complied with the agency's standards, as required by 34 C.F.R. § 602.17(c).²¹² Department staff based this finding on ACICS's failure to obtain information sufficient to substantiate the existence of a legitimate student population at RNU through required student surveys or other methods.²¹³

ACICS argued that its site visits were in compliance with section 602.17(c), focusing specifically on its policy with respect to student surveys.²¹⁴ ACICS informed RNU's Academic Dean shortly before the site visit that RNU would be required to proctor a student survey during the first day of the visit, and that at least 10 percent of students, across all disciplines and schedules, would be surveyed, in compliance with ACICS standards.²¹⁵ ACICS claims that this policy should be interpreted to set the number of students who would be surveyed, rather than the number of students from whom the agency receives a response, because ACICS has no control over how many students return their survey instruments.²¹⁶ ACICS took issue with the Final Staff RNU Report, which recommended a finding of noncompliance because only 3 out of 70 students returned their survey instruments.²¹⁷ Noting that the noncompliance finding was based on a difference of four student returns, ACICS argued that any finding that should be deemed a minor administrative error under the "substantial compliance" definition.²¹⁸

²¹¹ 34 C.F.R. § 602.17(c).

²¹² Department staff April 2021 Comments, p. 54

²¹³ *Id.*, p. 55

²¹⁴ ACICS April 2021 Comments, pp. 52-54.

²¹⁵ Final Staff RNU Report, Ex. 16 (Renewal of Accreditation Application), p. 9.

²¹⁶ ACICS April 2021 Comments, p. 53.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

Department staff rejected ACICS’s argument, finding that the ACICS site team did not collect a sufficient number of student surveys during the October 2019 reaccreditation evaluation site visit to RNU to establish the existence of a legitimate student population.²¹⁹ Department staff noted that if ACICS’s purported interpretation of their standard is correct, then its 10% survey requirement is meaningless, since the collection of no completed surveys during the site visit would technically satisfy the requirement.²²⁰ Department staff also rejected ACICS’s assertion that even if ED staff are correct in their interpretation that 10% of enrolled students must complete the survey is correct, a finding that “only” four students didn’t complete the survey would mean that ACICS was in substantial compliance is incorrect.²²¹ “In a school with only 70 enrolled students, four students would represent more than half the number of students required to complete the survey and almost 6% of the total student population.”²²²

ACICS next argued that there was no regulatory violation, because Department staff conclusions that the agency had not demonstrated that it obtained sufficient information regarding students during on-site visits because of its survey collection is based on internal ACICS policy that is not required by the recognition regulations.²²³ Department staff responded, noting that the “fact that the Department does not set benchmarks on this type of monitoring is irrelevant, because the Department expects an accrediting agency to meet its own benchmarks unless there is a compelling reason for not adhering to those benchmarks in a particular circumstance...To make any effort to collect student surveys meaningful, ACICS would have to either collect a sufficient percentage of surveys or continue to try to do so”, which there is no evidence they did here.²²⁴

Finally, ACICS argued that Department staff ignored at least five other statements in the RNU team report indicating the ACICS site evaluation team’s interactions with students.²²⁵ ACICS asserted that there was no evidence to doubt the presence of a “legitimate student population” at

²¹⁹ Department staff April 2021 Comments, p. 54.

²²⁰ *Id.*, pp. 55-56.

²²¹ *Ibid.*

²²² *Ibid.*

²²³ ACICS April 2021 Comments, p. 53.

²²⁴ Department staff April 2021 Comments, p. 56.

²²⁵ ACICS April 2021 Comments, p. 53; citing Final Staff RNU Report, Ex. 17 (Oct. 2019 RNU Team Visit Report).

RNU.²²⁶ Department staff disagreed, finding that ACICS's attempts to rely on the five other statements in the site team report as examples of meaningful interactions were without merit.²²⁷

Department staff found that there were numerous red flags during the RNU site review that should have triggered a global review of the legitimacy of RNU's student population, which does not appear to have happened.²²⁸ For example, the site team report for the initial grant found that no students were in violation of the satisfactory academic progress policy, and none had withdrawn for the time period reviewed by ACICS's evaluation team; this alone should have been sufficient to trigger concern and further review.²²⁹ Department staff were also troubled by the lack of documentation of prior education and lack of graduate involvement in the design or oversight of graduate programs, as required by ACICS's standards.²³⁰

2. SDO Determination with Respect to Section 602.17(c), RNU Inquiry

After a review of the full record, I find that ACICS failed to obtain sufficient information during its on-site review of RNU to determine compliance with its own standards, rendering the agency noncompliant with section 602.17(c).

I find ACICS's interpretation of its student survey standards to be practically untenable. The argument that so long as 10 percent of students *receive* surveys, the agency is in compliance with their standard, renders the standard itself meaningless. If I were to accept ACICS's interpretation of its standard, the 10 percent survey requirement is meaningless, since the collection of exactly zero surveys, and thus no associated student information, would satisfy the technical terms of the requirement. The goal of the standard, under section 602.17(c), which requires that the agency obtain sufficient and meaningful information is to gather student responses and feedback. ACICS's argument is that the standard only requires the agency to hand out surveys, without any attachment to receiving and reviewing student responses.

²²⁶ ACICS April 2021 Comments, p. 54.

²²⁷ Department staff April 2021 Comments, p. 56; citing Final Staff RNU Report, Exh. 17 (Oct. 2019 RNU Team Visit Report), pp. 40, 47, and 49.

²²⁸ Final Staff RNU Report, Analyst Response, section 602.17(c).

²²⁹ *Id.*, p. 57; citing Final Staff RNU Report, Ex. 5 Initial Grant Team Report), pp. 19 and 21.

²³⁰ *Id.*, p. 57; citing Final Staff RNU Report, Ex. 5 (Initial Grant Team Report), pp. 13-14, 23, 41, and 48.

I also reject ACICS’s argument that, even if Department staff’s interpretation of their standard is correct and they should have ensured receipt of 7 student survey responses, the three received were sufficient to satisfy the “substantially compliant” requirement, and the difference of four responses is a “minor administrative error” and not significant. The agency is arguing that lowering the already minimal response rate by more than half will not impact the quality and nature of the responses and the agency’s overall review. ACICS’s failure to manage to obtain these minimal responses is clear evidence of its noncompliance with section 602.17(c).

Finally, I note that ACICS did not respond to concerning findings in the on-site review report that should have informed evaluators of the need to substantiate a legitimate student population. The agency’s finding with respect to the academic progress policy and withdrawal rates were atypical, and the agency had a duty to conduct further investigation and gather the information necessary to evaluate RNU’s compliance with ACICS’s standards.

d. 34 C.F.R. 602.18(b)(3)²³¹ – Accrediting Decisions Based on Published Standards; Ensuring Consistency in Decision-Making

Agencies must consistently apply and enforce standards that respect the stated mission of the institution and that ensure that the education or training offered by an institution or program, including those offered through distance education, correspondence courses, or direct assessment education, is of sufficient quality to achieve its objective for the duration of any accreditation or preaccreditation period.²³² The Recognition Criteria at 34 C.F.R. 602.18(b)(3) provide that the agency meets the requirement that it “[b]ases decisions regarding accreditation and preaccreditation on the agency’s published standards”, among other requirements.²³³

²³¹ The Final Staff RNU Report identifies section 602.18(c) as the recognition criterion at issue. Effective July 1, 2020, the regulations governing the Recognition Criteria were revised, and the regulation regarding distance education review was changed from 34 C.F.R. § 602.18(c) to § 602.18(b)(3). The content of the regulation was not substantially changed in a manner that affects this review, because RNU was not an institution with a religious mission. In order to consistently refer to current authority, we will refer only to section 602.18(b)(3), and all such references should be read to be in response to original references to section 602.18(c) of the prior regulations, as referenced in the Final Staff Capacity Report.

²³² 34 C.F.R. § 602.18(a).

²³³ 34 C.F.R. § 602.18(b)(3).

1. Background

The Final Staff RNU Report found that ACICS does not base its accreditation decisions on the agency's published standards, as required by 34 C.F.R. § 602.18(b)(3), because of the following compliance failures: (1) failure of an RNU on-site administrator to attend a required workshop; (2) ACICS's failure to document that it had verified RNU's indication on its initial self-assessment questionnaire that it was accredited; and (3) application of an unwritten "small population exemption" for the review of placement rates of programs with ten or fewer students.²³⁴ The Final Staff RNU Report also found that AICS lacked sufficient documentation to prevent future occurrences.

The Final Staff RNU Report noted that ACICS admitted that the RNU on-site administrator did not attend the workshop and that was a "failure to comply with procedural standards".²³⁵ ACICS stated that RNU's consequence for failing to meet this requirement was a delay in the institution's initial accreditation; however, the agency did not provide additional documentation or discussion about its own failure to enforce current policies and procedures related to this requirement, or how it would prevent the same issue from occurring in the future.²³⁶

With respect to RNU's indication on the self-assessment questionnaire that it was accredited, the Final Staff RNU Report found that ACICS did not provide any documentation that it followed up with RNU, but did provide examples of agency follow-up with other initial applicants who said they were accredited.²³⁷

The final area of concern with respect to section 602.18(b)(3) was the placement rate exception used by the agency for programs with ten or fewer students. The Final Staff RNU Report found that ACICS had not taken action against two bachelor degree programs that reported a placement rate of 50%, even though the program placement rates failed to meet ACICS's standards.²³⁸ ACICS stated that the agency applied a "small population exemption" for small programs;

²³⁴ Department staff April 2021 Comments, p. 58; citing RNU Final Staff Report, Section 602.18(c), Analyst Remarks to Response.

²³⁵ Final Staff RNU Report, discussion of 602.18.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

however, the exception is not included in Appendix L of the agency’s Accreditation Criteria, was not discussed by agency staff in its recommendation to the agency’s decision-making body, and was not discussed in the accreditation action letter as ACICS’s justification for its acceptance of the low placement rates.²³⁹ The Final Staff RNU Report found that “the use of this unwritten exemption does not demonstrate that ACICS bases its accreditation decisions on published standards.”²⁴⁰

ACICS argued that the Final Staff RNU Report termination recommendation under section 602.18(b)(3) is unsupported by the record and disregards the discretion of agencies to enforce their own standards.²⁴¹ ACICS also noted that it revised its policies in 2020 to require institutions to justify why use of this small-population exemption should be granted.²⁴²

Department staff’s response noted that ACICS’s reliance on its revised policy does not address other areas of noncompliance with section 602.18(b)(3) in connection with the RNU Inquiry²⁴³, nor does it cure the agency’s failure to respond to concerns regarding their consistency of review in other areas.

2. SDO Determination with Respect to Section 602.18(b)(3), RNU Inquiry

After reviewing the full record before me, I find that ACICS failed to base its accreditation decisions based on its published standards, and is thus not in compliance with section 602.18(b)(3).

RNU received accreditation, even though the on-site administrator failed to attend a workshop, as is required by ACICS’s Accreditation Standards. ACICS failed to document that it verified RNU’s self-assessment selection indicating that it was accredited, as is required by ACICS’s Accreditation Standards. The unwritten “small population exemption”, because it was unwritten, was improperly applied by ACICS. While the agency has significant discretion in developing its accreditation standards, it must consistently apply those written and published standards to

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ ACICS April 2021 Comments, p. 54.

²⁴² *Ibid.*

²⁴³ Department staff April 2021 Comments, p. 58.

institutions it accredits or that are seeking accreditation. I also note that post-hoc changes to written standards do not justify failure to apply the standards that existed at the time a review was conducted. While it is certainly appropriate for ACICS to update their written standards using appropriate processes, evidence of those update can only be used to demonstrate compliance with future review actions, not prior reviews.

e. 34 C.F.R. 602.19(b) – Monitoring and Reevaluation of Accredited Institutions and Programs

The Recognition Criteria at 34 C.F.R. § 602.19(b) provide that:

The agency must demonstrate it has, and effectively applies, monitoring and evaluation approaches that enable the agency to identify problems with an institution’s or program’s continued compliance with agency standards and that take into account institutional or program strengths and stability. These approaches must include periodic reports, and collection and analysis of key data and indicators, identified by the agency, including, but not limited to, fiscal information and measures of student achievement, consistent with the provisions of § 602.16(g). This provision does not require institutions or programs to provide annual reports on each specific accreditation criterion.²⁴⁴

1. Background

The Final Staff RNU Report found that ACICS failed to have, and to effectively apply, a set of monitoring and evaluation approaches sufficient to enable it to identify significant failures with RNU’s compliance with the agency’s Accreditation Standards, and that took into account RNU’s institutional strengths and stabilities.²⁴⁵

ACICS claimed that Department staff impermissibly read section 602.19(b) to impose a non-existent requirement that ACICS provide proof of having “uncovered” institutional non-compliance, inventing a self-policing requirement not included in the regulations.²⁴⁶ Department staff countered that, from the time of the initial grant site team visit of RNU, ACICS identified numerous compliance deficiencies, prompting it to grant only a two-year period of accreditation

²⁴⁴ 34 C.F.R. § 602.19(b).

²⁴⁵ Department staff April 2021 Comments, pp. 58-59.

²⁴⁶ ACICS April 2021 Comments, p. 55.

with heightened monitoring.²⁴⁷ Department staff dismissed ACICS’s claim of a new requirement, stating that it “expects that an agency, including ACICS, will effectively monitor and evaluate an accredited institution for continued compliance with the agency’s standards, as required by 34 C.F.R. § 602.19(b).”²⁴⁸

Department staff found that “any such heightened monitoring, including the shorter period of recognition and ACICS’s list of 14 additional oversight activities...did not enable the agency to identify continuing and repeated compliance problems by RNU.”²⁴⁹ ACICS responded that Department staff’s review of the agency’s monitoring and evaluation efforts failed to take into account new tools, such as revised Campus Accountability Report processes, and the Placement Verification Program database with student outcome information, implemented or altered after the initial review, that presented data in new ways and uncovered additional areas of concern.²⁵⁰ Department staff pointed to the Final Staff RNU Report, which found that the 2017 and 2019 initial and renewal site visits of RNU show that compliance failures, pronounced to begin with, increased significantly over time, with the 2017 site visit showing 16 findings of non-compliance with ACICS standards, and the visit two and a half years later showing 28 findings, including a number of repeated identical findings in 2019.²⁵¹ As noted in the Final Staff RNU Report, “given the serious compliance concerns about RNU in 2017, ACICS should have applied “immediate and robust monitoring activities” to ensure that the concerns did not reoccur or become worse over time.”²⁵²

2. SDO Determination with Respect to Section 602.19(b), RNU Inquiry

After reviewing the record, with careful attention to the scope of monitoring conducted at each stage, I find that ACICS failed to have, and effectively apply, a set of monitoring and evaluation strategies sufficient to enable it to identify issues with RNU’s compliance with the agency’s standards and that took into account RNU’s institutional strengths and stabilities. I find that the

²⁴⁷ Department staff April 2021 Comments, p. 59, citing ER -Exh. 5 to RNU Inquiry Record, section 602.17(c).

²⁴⁸ Department staff April 2021 Comments, pp. 59-60.

²⁴⁹ *Id.*, p. 59, citing ER_ Exh. 36 to RNU Inquiry Record, section 602.19(b).

²⁵⁰ ACICS April 8 comments, pp 55-57.

²⁵¹ Department staff April 2021 Comments, p. 60; citing ER-Exh. 5, p. 48, and ER-Exh. 17, pp. 53-54 to RNU Inquiry Record, section 602.19(b).

²⁵² *Id.*, p. 60; citing RNU Final Staff Report, section 602.19(b), Analyst Remarks to Response.

Final RNU Staff Report and the associated record support a finding of noncompliance with section 602.19(b).

As a preliminary matter, I want to clarify that this finding of noncompliance is not based on RNU's closure; it is based on the monitoring and evaluation measures ACICS used, and whether they were effective. ACICS is accountable for implementing processes and procedures sufficient to enable it to identify issues with an institution's compliance, and ACICS must also apply its own processes and procedures to the monitoring and evaluation of the individual institutions it accredits. Here, ACICS's monitoring and evaluation standards failed to enable it to identify serious issues at an institution it had already accredited under a heightened review standard.

From the time of its first review, there was evidence of RNU's failure to comply with ACICS's standards, and its institutional challenges. ACICS should have taken additional action to effectively monitor the school and take immediate corrective action once it was clear that compliance issues were worsening. That this did not happen is evidence of the agency's administrative failure.

Expecting that the agency will effectively monitor and evaluate their accredited institutions for continued compliance with the agency's standards, as required by 34 C.F.R. § 602.19(b) does not impose a new requirement of "uncovering" compliance concerns. Consistent and effective monitoring are all that is required, and more than was applied by ACICS.

I am also troubled by ACICS's actions following the October 2019 on-site review. Once evaluators identified the significant number of findings of non-compliance, ACICS waited until December 2019 to issue a show-cause order. It then waited until notified of RNU's closure by a reporter in February to take any further action. While ACICS argues that this waiting period was necessary to afford RNU due process, Department staff at the NACIQI meeting clarified that there is not a regulatory due process requirement, or a regulatory requirement that an agency issue a show-cause order; rather, the agency may terminate recognition immediately when serious violations are found.²⁵³ I find ACICS's concern with RNU's due process misguided. The purpose of accreditation of an institution by a federally recognized accrediting agency is not to

²⁵³ NACIQI Meeting Transcripts (Mar. 5, 2021), pp. 91-95.

protect the business interests of a floundering institution. The purposes of accreditation are to ensure that accredited institutions are offering a high quality educational program to the benefit of students, and to protect the interests of American taxpayers from the failures of institutions participating in Title IV programs. By not taking immediate affirmative action, ACICS neglected its duty to the RNU students who would have benefited from remediating measures, and did a disservice in their duty as an accreditor to the American public.

c. SDO Determination with Respect to the Final Staff RNU Report

With respect to the Final Staff RNU Report, I find ACICS noncompliant. Based on the significant areas of noncompliance identified in the Report, and taking into consideration the recommendations of Department staff and NACIQI, I find that the appropriate remedy is termination of recognition. My termination decision is based on ACICS's significant and systematic failures to comply with critical regulatory criteria and their own standards, as well as my finding that, based on the record, the agency is unable to come into full compliance with the five criteria at issue within one year.

IX. Conclusion.

a. Determinations

After reviewing the Final Staff Compliance Report, Final Staff Monitoring Report, Final Staff Capacity Report, and Final Staff RNU Report, and all materials constituting the record under 34 C.F.R. § 602.36(a), and for reasons discussed in detail above, I find ACICS out of compliance in twelve distinct instances with seven recognition criteria. When considered separately, under the Secretary's regulations, each report's findings of noncompliance constitute grounds under 34 C.F.R. § 602.36(e) for termination; when considered cumulatively in the context of each of the four inquiries, or as part of a comprehensive review of ACICS's capacity, as is proper in this unique circumstance, it is clear that ACICS is unable to comply now, or come into compliance within 12 months, with the recognition criteria and its own standards.

Thus, pursuant to 34 C.F.R. § 602.36, I terminate ACICS's recognition, effective immediately.

b. Recognition Decision and the Cumulative Effects Standard

Department staff included a “cumulative effects” notation²⁵⁴ that appears on the recommendation page of each of the four Final Staff Reports. ACICS claims that this is an improper new standard of review that is unfairly and solely imposed on ACICS.²⁵⁵ Department staff responded that the “cumulative effect” approach “was applied here because there has never before been a situation in which the Department Staff and NACIQI simultaneously conducted and considered four compliance reviews of a single agency.”²⁵⁶

The facts here cannot and should not be viewed in isolation. In an unprecedented convergence of compliance failures by a single accrediting agency during the same period of recognition, ACICS was required by the November 2018 Order to submit a Compliance Report and a Monitoring Report, both of which identified compliance deficiencies, and the Department staff also received credible information within the same timeframe requiring the initiation of two mid-cycle reviews of ACICS’s compliance under 34 C.F.R. § 602.33(a)(2), again revealing multiple compliance failures. It would not have been appropriate for either the Department staff or NACIQI to make recommendations to the SDO concerning twelve compliance findings with respect to seven recognition criteria without taking into consideration whether the cumulative effect of the compliance failures warranted a recommendation of termination.²⁵⁷

ACICS asked for an explanation of the Department’s legal authority for permitting consideration of the cumulative effects of information contained in separate pending inquiries, and on February 19, 2021, George Alan Smith, the Department’s Designated Federal Official (DFO) for NACIQI responded, stating that while the compliance deficiencies identified in each report provide a stand-alone basis for termination, there is nothing to preclude the consideration of the cumulative effect of other simultaneous inquiries and reports as supports for a recommendation.²⁵⁸ Mr.

²⁵⁴ The statement on the Recommendation Page of each of the four Final Staff reports states that the report: provides a stand-alone basis for termination even if the agency were found to be in compliance [or substantial compliance] with the other criteria under review at this time... However, the cumulative effect of the noncompliance in those other reports and inquiry [sic] provides additional support for the sanction of termination and for the Department staff’s conclusion that any further extension to demonstrate compliance is not warranted.

²⁵⁵ Department staff April 2021 Comments, p. 60; citing ACICS April 8 Comments, p. 12.

²⁵⁶ *Id.*, p. 60.

²⁵⁷ Department staff April 2021 Comments, p. 61.

²⁵⁸ Letter from Smith, G.A., Executive Director, NACIQI, to M. Edwards, President and CEO, ACICS (Feb. 19, 2021); included in the record as Exhibit 5 to ACICS Comments (Apr. 8, 2021).

Smith reasoned that while the consideration of multiple simultaneous reviews of a single agency, as is the case here, is rare, and while the relevant statutory and regulatory authority do not specifically address this situation, the Higher Education Act of 1965 and the regulations at 34 C.F.R. Part 602 do not preclude the consideration of all cumulative compliance deficiencies in reaching recommendations.²⁵⁹ Department staff justified this approach in practical terms, noting

²⁵⁹ *Id.*; “Because this area is novel, and because it informs my decision here, the full legal analysis in the letter with respect to cumulative effects is included below:

The Department staff's position, as clearly noted in each Final Staff Report, is that the compliance deficiencies identified in each report provide a stand-alone basis for the recognition recommendation of termination. However, there is nothing in the statutory or regulatory framework that would preclude consideration by Department staff or NACIQI of the cumulative effect of other simultaneous inquiries and reports as support for a recommendation of termination (or some other recommendation) and the conclusion that any further extension of time to demonstrate compliance with the recognition criteria is not warranted. As you noted, the consideration of multiple simultaneous reviews of a single agency is rare, and the relevant statutory and regulatory authority do not specifically address this situation. However, the relevant provisions of the Higher Education Act of 1965, as amended, ("HEA") and 34 C.F.R. Part 602 certainly do not preclude either the Department staff or NACIQI from considering all cumulative compliance deficiencies in reaching their recognition recommendations.

Section 496 of the HEA broadly provides that the Secretary may terminate an accrediting agency's recognition if the Secretary determines that the agency "has failed to apply effectively the criteria in this section, or is otherwise not in compliance with the requirements of this section..." 20 U.S.C. § 1099b(l)(1). This provision places no limitation on the consideration of compliance with all criteria as the basis for a termination action. Moreover, there is nothing in the HEA or the applicable regulations that precludes the Senior Department Official or the Secretary from considering the cumulative effect of noncompliance identified in simultaneous reviews when rendering a recognition decision.

*Further, 34 C.F.R. § 602.33(b) provides that reviews under this section "may include, **but need not be limited to**, any of the activities described in §§ 602.32(d) and (f)." (emphasis added).¹ Through the Department staff's careful compliance with the requirements of 34 C.F.R. §§ 602.32 and 602.33, ACICS has been provided the opportunity to fully and completely respond to each compliance deficiency identified in the reviews of the Compliance Report, the Monitoring Report, the Capacity Inquiry, and the RNU Inquiry.*

Similarly, there is no limitation in the applicable statutory or regulatory provisions regarding NACIQI's ability to consider the cumulative impact of all compliance deficiencies in reaching a recognition recommendation based on the four individual but simultaneous reviews of ACICS it will consider at the March 2021 meeting. Section 114 of the HEA broadly provides that NACIQI "shall advise the Secretary with respect to the recognition of a specific accrediting agency or association." See 20 U.S.C. § 1011c(c)(2). Further, nothing in 34 C.F.R. § 602.34 precludes NACIQI's consideration of cumulative compliance deficiencies identified in concurrent reviews in reaching a recognition recommendation. In accordance with 34 C.F.R. § 602.34(c), NACIQI will have access to all materials relevant to each of the four ACICS reviews it will consider. Likewise, in accordance with 34 C.F.R. § 602.34(e), ACICS will have an opportunity to respond orally to each compliance deficiency identified by Department staff, or any questions from NACIQI."

that “[i]n reality, there is only one recognition recommendation to the SDO, either by the Department Staff or NACIQI, and the SDO can make only one recognition decision.”²⁶⁰

I am persuaded by the Department staff and NACIQI DFO arguments that it is legally permissible and necessary as a practical matter to consider the cumulative effects of the results in the four contemporaneous reports. While the findings of each report show serious issues of noncompliance by ACICS sufficient to support termination, when those findings are considered together it more than illustrates the broad scope of the agency’s foundational inability to achieve full compliance within 12 months.

ACICS attempts to claim that they should be found in “substantial compliance” with the regulatory criteria. The agency cites 34 C.F.R. § 602.36(e), which lists the decisions and compliance remedies available to the SDO, including submission of a compliance report if the agency is found substantially compliant with the criteria in question. Department staff responded, noting that “if the SDO or the Secretary order an agency to come into compliance with recognition criteria or criterion and to submit a compliance report, as the Secretary did with ACICS in the November 2018 Order, the agency must come into *full* compliance with the criteria, and ‘substantial compliance’ is not sufficient.”²⁶¹ For purposes of the Final Staff Compliance Report, full, rather than substantial, compliance is required because ACICS was already under compliance review.

While a finding of substantial compliance could, if the facts warranted it, be made with respect to criteria under the Final Staff Monitoring Report, Final Staff Capacity Report, and Final Staff RNU Report,²⁶² the Department staff and NACIQI instead recommended findings of termination for each report, based on findings that ACICS was out of compliance, and was not likely to demonstrate full compliance with, and effective application of, the criteria within 12 months.²⁶³

²⁶⁰ Department staff April 2021 Comments, p. 63.

²⁶¹ Department staff April 2021 Comments, p. 20.

²⁶² Department staff did make findings of substantial compliance in the four reports currently at issue: In the Final Staff Monitoring Report, Department staff found ACICS substantially compliant with section 602.16(a)(1)(i); in the Final Staff RNU Report, Department staff found ACICS substantially compliant with section 602.16(a)(1)(ii) and section 602.16(a)(1)(v). In the context of their respective reports, those regulatory criteria are not considered further in this decision.

²⁶³ 34 C.F.R. § 602.36(e)(3)(i)(A).

After conducting a full review of each report, I concur with Department staff and NACIQI recommendations that the areas of noncompliance in each report support termination. I also find that when considering the cumulative effects of all of ACICS's areas of noncompliance, the failures of administrative capability, and other systemic issues that the cumulative reports make obvious, I do not believe it would be possible for the agency to demonstrate full compliance within a 12 month period.

c. Notice of opportunity to appeal

Under 34 C.F.R. § 602.37(a), ACICS may appeal this determination of noncompliance and decision to terminate the agency's recognition to the Secretary of the U.S. Department of Education. ACICS must notify both the Secretary and the SDO no later than 10 business days after receipt of this decision, or by June 16, 2021. The agency appeal must be filed with the Secretary and concurrently provided to the SDO no later than 30 days after receipt of this decision, or by July 2, 2021.

Sincerely,

Jordan Matsudaira
Deputy Under Secretary

Cc:

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