

U.S.Department of Education Staff Report

to the

Senior Department Official on Recognition Compliance Issues

Recommendation Page

1. **Agency:** North Central Association Of Colleges and Schools, The Higher Learning Commission (1952 / 2018)
(The dates provided are the date of initial listing as a recognized agency and the date of the agency's last grant of recognition.)
2. **Action Item:** Other Report
3. **Current Scope of Recognition:** The accreditation and preaccreditation ("Candidate for Accreditation") of degree-granting institutions of higher education in Arizona, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, West Virginia, Wisconsin, and Wyoming, including the tribal institutions and the accreditation of programs offered via distance education and correspondence education within these institutions. This recognition extends to the Institutional Actions Council jointly with the Board of Trustees of the Commission for decisions on cases for continued accreditation or reaffirmation, and continued candidacy, and to the Appeals Body jointly with the Board of Trustees of the Commission for decisions related to initial candidacy or accreditation or reaffirmation of accreditation.
4. **Requested Scope of Recognition:** Same as above.
5. **Date of Advisory Committee Meeting:** 07/29/2020
6. **Staff Recommendation:** Department staff recommend limiting HLC's current recognition such that it may not accredit additional institutions of higher education that do not currently hold accreditation or preaccreditation status with the agency for the duration of the 12 month period pending a compliance determination by the Senior Department Official.

The staff also proposes to recommend that the compliance report include details on HLC's efforts to mitigate the negative effects of HLC's procedurally erroneous decision to withdraw accreditation from Institutions on students, especially with regard to the status of academic credits earned at the Institutions during calendar year 2018.

7. **Issues or Problems:** Additional information is requested for the following questions. These issues are summarized below and discussed in detail under the Staff Analysis section.

[602.18(c)]--The agency has not demonstrated compliance for this section.

[602.25(a-e)]--The agency has not demonstrated compliance for this section.

[602.25(f)]--The agency has not demonstrated compliance for this section.

Executive Summary

PART I: GENERAL INFORMATION ABOUT THE AGENCY

The Higher Learning Commission (HLC or the agency) is a institutional accrediting agency that accredits (or preaccredits) around 1,000 degree granting institutions in 19 states, tribal institutions and including those programs offered via distance education and correspondence education within these institutions.

The Secretary's recognition of the agency enables its accredited institutions to seek eligibility to participate in student financial aid programs administered by the Department of Education under Title IV of the Higher Education Act of 1965, as amended. Consequently, the agency must meet the separate and independent requirements established in the regulations.

The current recognition of HLC extends to the Institutional Action Council (IAC) jointly with the Board of Trustees for decision on cases for continued accreditation or reaffirmation, and continued candidacy. The Secretary's recognition also extends to the Appeals Panel jointly with the Board of Trustees of the Commission for decisions related to initial candidacy or accreditation or reaffirmation of accreditation.

Recognition History

The Higher Learning Commission (HLC or the agency) received initial recognition in 1952 and has received periodic renewal of recognition since that time. HLC was reviewed for renewal of recognition at the Winter 2018 meeting of the National Advisory Committee on Institutional Quality and Integrity (NACIQI). Both Department staff and the NACIQI recommended to the senior Department official to renew the agency's recognition for five years. The senior Department official, Senior Policy Advisor Diane Auer Jones, concurred with the recommendations.

The current review is conducted in accordance with the procedures for review of agencies during the period of recognition, as described in Section 602.33.

PART II: SUMMARY OF FINDINGS

602.18 Ensuring consistency in decision-making

The agency must consistently apply and enforce standards that respect the stated mission of the institution, including religious mission, and that ensure that the education or training offered by an institution or program, including any offered through distance education or correspondence education, is of sufficient quality to achieve its stated objective for the duration of any accreditation or preaccreditation period granted by the agency. The agency meets this requirement if the agency--

(c) Bases decisions regarding accreditation and preaccreditation on the agency's published standards;

See the attached documentation for the initial report request and draft staff analysis.

Analyst Remarks to Response:

See the attached documentation for the final staff analysis.

602.25 Due process

The agency must demonstrate that the procedures it uses throughout the accrediting process satisfy due process. The agency meets this requirement if the agency does the following:

(a) Provides adequate written specification of its requirements, including clear standards, for an institution or program to be accredited or preaccredited.

(b) Uses procedures that afford an institution or program a reasonable period of time to comply with the agency's requests for information and documents.

(c) Provides written specification of any deficiencies identified at the institution or program examined.

(d) Provides sufficient opportunity for a written response by an institution or program regarding any deficiencies identified by the agency, to be considered by the agency within a timeframe determined by the agency, and before any adverse action is taken.

(e) Notifies the institution or program in writing of any adverse accrediting action or an action to place the institution or program on probation or show cause. The notice describes the basis.

See the attached documentation for the initial report request and draft staff analysis.

Analyst Remarks to Response:

See the attached documentation for the final staff analysis.

(f) Provides an opportunity, upon written request of an institution or program, for the institution or program to appeal any adverse action prior to the action becoming final.

(1) The appeal must take place at a hearing before an appeals panel that--

(i) May not include current members of the agency's decision-making body that took the initial adverse action;

(ii) Is subject to a conflict of interest policy;

(iii) Does not serve only an advisory or procedural role, and has and uses the authority to make the following decisions: to affirm, amend, or reverse adverse actions of the original decision-making body; and

(iv) Affirms, amends, reverses, or remands the adverse action. A decision to affirm, amend, or reverse the adverse action is implemented by the appeals panel or by the original decision-making body, at the agency's option. In a decision to remand the adverse action to the original decision-making body for further consideration, the appeals panel must identify specific issues that the original decision-making body must address. In a decision that is implemented by or remanded to the original decision-making body, that body must act in a manner consistent with the appeals panel's decisions or instructions.

(2) The agency must recognize the right of the institution or program to employ counsel to represent the institution or program during its appeal, including to make any presentation that the agency permits the institution or program to make on its own during the appeal.

See the attached documentation for the initial report request and draft staff analysis.

Analyst Remarks to Response:

See the attached documentation for the final staff analysis.

PART III: THIRD PARTY COMMENTS

The Department did not receive any written third - party comments regarding this agency.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF POSTSECONDARY EDUCATION

June 30, 2020

VIA EMAIL

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Higher Learning Commission
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Dr. Gellman-Danley:

The U.S. Department of Education (Department) is in receipt of the Higher Learning Commission (herein referred to as “HLC” or “the Agency”) response to the Department’s draft staff analysis, as authorized under 34 C.F.R. § 602.33(c), pertaining to the HLC Board’s decision to move the Art Institute of Colorado (OPEID: 02078900)¹ and the Illinois Institute of Art (OPEID: 01258400)² (collectively the “Institutions”) to “Change of Control Candidate for Accreditation” status.

On October 24, 2019, and pursuant to its authority under 34 C.F.R. § 602.33, the Department sent HLC a letter requiring it to submit information and documentation regarding its review of the change of control application from the Institutions. HLC provided its response to the letter on November 13, 2019, which included a narrative as well as exhibits. The Department requested additional information and documentation on December 19, 2019, and HLC submitted its response on January 13, 2020.

The Department sent HLC two letters dated January 31, 2020,³ and May 1, 2020,⁴ which collectively constitute the draft staff analysis. HLC responded to the draft staff analysis with two letters dated March 20, 2020,⁵ and June 1, 2020,⁶ which collectively constitute its response. On June 17, 2020, the Department notified HLC in a letter that the draft staff analysis will be finalized for presentation to the National Advisory Committee on Institutional Quality and Integrity (NACIQI), pursuant to 34 C.F.R. § 602.33(e)(1).⁷

The regulation at 34 C.F.R. § 602.33(e)(2) requires the Department to publish a notice in the Federal Register that the Department staff have concluded that HLC has not demonstrated compliance, and if practicable, an invitation to the public to comment on the agency's

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compliance with the criteria in question. The Department published this notice in the Federal Register on June 25, 2020.⁸ Because the Department has provided HLC with several extensions to respond to our analysis, the Department has concluded that it is no longer practicable to provide for public comment.⁹ The Department will, of course, allow for members of the public to comment during the NACIQI meeting.

During our review, the Department conducted interviews with individuals involved in the transaction and reviewed documents provided by HLC, other documents pertaining to the inquiry, and HLC's responses to our draft analysis. Based on our review of the facts and pursuant to 34 C.F.R. § 602.33(e), the Department finds that HLC was not compliant with its own policy under INST.E.50.010;¹⁰ 34 C.F.R. § 602.18(c) (pertaining to consistency in decision making);¹¹ and 34 C.F.R. §§ 602.25(a), 602.25(d), 602.25(e), and 602.25(f) (due process)¹² in moving the Institutions to Change of Control Candidate for accreditation status. This letter constitutes the Department's final staff analysis pursuant to 34 C.F.R. § 602.33(e).

I. Noncompliance with the HLC Policy INST.E.50.010 and Department Regulations Pertaining to Consistency in Decision-Making under 34 C.F.R. § 602.18(c)

On May 1, 2017, the Institutions, through the purchasing entity, Dream Center Educational Holdings (DCEH), submitted an Application for Change of Control, Structure, or Organization to HLC under INST.B.20.040¹³ and INST.F.20.070.¹⁴ After conducting an extensive review of the application, including several site visits, HLC sent a letter to the Presidents of the Institutions and the CEO of DCEH on November 16, 2017 ("the November 16, 2017 letter").¹⁵ The November 16, 2017 letter states that the HLC Board "voted to approve the application for Change of Control, Structure, or Organization ... however, this approval is subject to change of control candidacy status."¹⁶

The letter does not explicitly provide notice that, rather than approving or denying the application under INST.B.20.040 as the applicant expected, the Board decided to invoke its authority under INST.E.50.010 to move the Institutions to "candidacy" status.¹⁷ Additionally, the letter does not explicitly state that the Institutions must give up their accredited status as a condition of the HLC approving the sale of the Institutions.¹⁸

The policy described in INST.E.50.010 provided the Board with the authority to move an institution from an accredited status to candidacy status "subsequent to the close of a Change of Control, Structure or Organization," if certain conditions are met, and the Board finds that "all of the Criteria for Accreditation and Federal Compliance Requirements" are no longer met without issue.¹⁹ However, INST.E.50.010 clearly states that "moving an institution from accredited to candidate status is an adverse action and thus is not a final action and is subject to appeal."²⁰

The November 16, 2017 letter does not provide any notice to the Institutions of its right to appeal the requirement that accreditation be forfeited. As set forth in greater detail below, this failure to provide timely notice of the right to appeal provided evidence to support Institutions' assumption

that accreditation was not being withdrawn as a condition of the sale being approved at the time the transaction closed.

HLC now contends that the Board did not need to advise the Institutions of the right to appeal because it did not “act” in approving the Institutions’ application. HLC also contends that the Institutions voluntarily consummated the transaction, and therefore INST.B.20.040 and not INST.E.50.010 governed the transaction, thus absolving HLC of its duty to allow for an appeal as required by INST.E.50.010. The Department disagrees.

First, Department regulations require accreditors to approve or disapprove substantive changes by an accredited institution, including changes in ownership.²¹ The Institutions were, at the time of the transaction, fully accredited by HLC. The Agency’s approval of the sale, subject to certain conditions including loss of accreditation, clearly was an “action” within the meaning of the regulations. Second, conditioning the sale transaction upon the withdrawal of accreditation is clearly an “adverse action” as defined within the context of INST.E.50.010. Although INST.B.20.040 permits the Board to approve a transaction with conditions, it does not contemplate the idea of conditioning the approval of a transaction with conditions that would otherwise constitute an adverse action. As a result, the timely provision of a notice of a right to appeal was required.²²

HLC also contends that the “then-applicable HLC policy INST.F.20.070, ‘Processes for Seeking Approval of a Change of Control,’ articulated the precise evaluative framework the Board would apply in considering a change of control application.”²³ However, HLC does not provide analysis on how this policy was followed in this situation. Rather, INST.F.20.070 provides that “the Board may approve the change, thereby authorizing accreditation for the institution subsequent to the close of the transaction, or it may deny approval for the change” and that “the Board may approve the change subject to certain conditions. Such conditions may include, but *are not limited to*, limitations on new educational programs, student enrollment growth, development of new campuses or sites, etc.”²⁴

HLC’s argument, apparently, is that it exercised its authority to use conditions not enumerated in INST.F.20.070, as it conditioned the transaction with a requirement that the Institutions’ accreditation be converted into candidacy status. However, INST.F.20.070 does not contemplate such a condition, as it explicitly states “If the Board votes to approve the change with or without conditions, *thereby authorizing accreditation for the institution subsequent to the close of the transaction*, the Commission will conduct a focused or other evaluation to the institution within six months of the consummation of the transaction.”²⁵

INST.F.20.070 also provides that the Board could find that if the Change of Control, Structure or Organization constitutes “the creation of a new institution such that it should be required to go through a period of time in candidacy or an initial status evaluation.”²⁶ However, the November 16, 2017 letter does not advise the Institutions that the change of control that they were undertaking would be deemed to have created a “new institution,” and HLC has affirmatively stated that this did not occur in this situation.²⁷ Therefore, HLC’s own policy under

INST.F.20.070 seemingly prohibits the imposition of candidacy status, unless the Board finds that the transaction has created a new institution, which they did not.

The Department does not understand HLC's justification of its actions under INST.B.20.040 or, alternatively, INST.F.20.070 in creating the conditional criteria in the November 17, 2016 letter. INST.E.50.010 is the only policy that explicitly provides for the Board to move a fully accredited institution to candidacy status subsequent to the close of a Change of Control, Structure or Organization transaction. That policy clearly states that such an action is an adverse action. As per 34 C.F.R. § 602.25(f), accrediting agencies must provide institutions with notice of the opportunity to appeal an adverse action prior to it becoming final. The November 17, 2016 letter and all subsequent communication sent by HLC prior to the effective date of the candidacy to the Institutions failed to provide such notice.

HLC also continues to argue that it was not required to provide the Institutions the opportunity to appeal, because the Institutions consented to imposition of candidacy status. The Department is not persuaded by this assertion. The imposition of the condition to withdraw accreditation as part of the sale transaction was not openly discussed with the applicant, nor was it required in any of the other transactions involving four other accreditors that had to approve the sale of the over 30 other institutions that were part of the overall transaction. The Agency chose not to advise the Institutions of the opportunity to appeal, which plainly violates INST.E.50.010. Therefore, the Department concludes that HLC did not follow its published policy under INST.E.50.010 when it acted to place the Institutions into candidacy status without providing for an opportunity to appeal. This, in turn, means that HLC's actions were not in compliance with 34 C.F.R. § 602.18(c), as it failed to base its decision on HLC's published standards.

The Agency also proffers the idea that the Department finding regarding compliance under 34 C.F.R. § 602.18(c) is unjustified because HLC previously applied this status to another transaction without objection by the Department. Specifically, it claims that the Department must have reviewed and acquiesced to HLC's prior use of Change of Control Candidacy status with Everest College Phoenix in 2014, because that transaction should have been part of the Department review of its recognition during its previous recognition cycle.²⁸ However, as HLC acknowledges, the proposed transaction in that case was abandoned and "the change of control candidacy status never became effective."²⁹ The Department could have reviewed that transaction, but it did not have reason to specifically question the legitimacy of HLC's actions in the specific incident given that it never became effective, was not appealed, and was not subject to a complaint submitted by the institution or an outside party. The Department, like all federal agencies, must prioritize its oversight and compliance activities; we cannot scrutinize every accreditation action. Arguing here that the Department's lack of intervention in an unrelated matter constitutes some precedent applicable to this matter is specious.

HLC has since repealed INST.E.50.010 and "has removed from its policies the option of approving a change of control where the Board "determines that the transaction forms a new institution requiring a period of time in Candidacy" (which did not occur here)."³⁰ HLC notes that this change was also made because Department regulations that become effective on July 1,

2020, do not allow accreditors to engage in such behavior.³¹ While the Department is pleased that HLC corrected its deficient policies, such actions do not materially cure past non-compliance, nor is the Department required to presume future compliance.

HLC also contends that it is required to receive deference in interpreting its own policies and that the Department's inquiry and finding of noncompliance offends its autonomy as an accreditation agency.³² At no point has the Department indicated that HLC lacked the authority to decide how to address the Institutions' application for Change of Control, Structure or Organization. However, when an accreditation agency takes an action that is the equivariant of an adverse action, the Department has a vested interest in ensuring that each agency follows its own rules and the Department's due process regulations. This ensures that institutions are able to contest and appeal an adverse action before it is finalized. Here, HLC "approved" the Institutions' change of control application with conditions, with one of the conditions being a classification that its own policies deem to be an adverse action.³³

HLC also argues, in the alternative, that even if it did not follow its own policies, its actions would have resulted in nonmaterial technical noncompliance, as the Institutions were ultimately afforded the right to appeal.³⁴ The proper procedure would have required the Institutions be advised of the right to an appeal BEFORE having to announce the loss of accreditation. Instead, the Agency compelled the Institutions to post on its websites a notice announcing the immediate loss of accreditation, creating understandable distress among students and faculty, all of whom had begun a new semester believing accreditation was intact. Months later, following harm to the Institutions and their students, the Agency grudgingly agreed to offer an appeal opportunity. As stated earlier, revoking accreditation has an immediate and material impact on institutions of higher education, which is why Department regulations do not allow such an action to be final without prior opportunity to appeal. The Institutions suffered immediate and irrevocable harm at the hand of HLC that may have contributed, in part, to their ultimate demise.

Lastly, the Department is unclear as to why HLC's response to our inquiry has spent considerable time and attention focused on the merits of the Institution's application for Change of Control, Structure or Organization.³⁵ Indeed, HLC lays out a significant argument as to why it should not have allowed the Change of Control, Structure or Organization transaction to proceed.³⁶ The Department's inquiry has not focused on the merits of the application, because accreditation agencies (not the Department) have this exclusive authority to weigh these factors when making accreditation decisions. Rather, the Department's entire inquiry has focused on procedural deficiencies in the Board's actions. If the Institutions were as troubled as HLC contends, it could have, and perhaps should have, simply denied the request.

II. Failure to Provide Due Process under 34 C.F.R. §§ 602.25(a), 602.25(d), 602.25(e), and 602.25(f)

The Institutions have asserted in documents provided to the Department by HLC that HLC misled them regarding the true nature of Change of Control Candidacy status. To assess the legitimacy of these assertions, the Department conducted an extensive review of the

communications between HLC and the Institutions regarding this status and considered HLC's response to our draft staff analysis. The Department finds that HLC's communication with the Institutions, at best, obfuscated the true nature of change of control candidacy status—namely that such status required an institution to give up or otherwise lose accreditation. The excerpts and analysis detailed below regarding the communications between HLC and the Institutions illustrate this obfuscation.

On October 3, 2017, HLC sent the presidents of the Institutions and the Executive Chairman of DCEH a letter with the Staff Summary Report and Fact-finding Visit Report for the Change of Control Structure, or Organization. In the letter, HLC described the following options the Board may take in response to the Institutions' applications for Change of Control Candidacy status: "(1) to approve the extension of accreditation following the consummation of the transaction; (2) to approve the extension of accreditation subject to certain conditions, as determined necessary by the Board; (3) to deny the extension of accreditation following the transaction; or (4) to approve the extension of accreditation following the transaction subject to a period of candidacy."³⁷

The fourth item in the list above is the option that HLC ultimately decided to use when processing the Institutions' applications; however, the letter describes that option as an "[approval of] the extension of accreditation," which suggests that using that option would keep accreditation intact, rather than withdrawing accreditation, while HLC evaluated the actual performance of the new owners following the closing of the proposed transaction.³⁸

The Board met November 2 - 3, 2017, and then sent the November 16, 2017 letter to the Institutions. HLC contends that this letter describes the terms and conditions for the Institutions' voluntary forfeiture of accreditation. Relevant excerpts from the letter are listed below to provide context:³⁹

During its meeting on November 2 - 3, 2017, the Board voted to approve the application [emphasis added] for Change of Control, Structure, or Organization wherein the Dream Center Foundation, through Dream Center Education Holdings LLC and related intermediaries, acquires certain assets currently held by Education Management Corporation, including the assets of the Institutes; however, this approval is subject to the requirement of Change of Control Candidacy Status. The requirements of Change of Control Candidacy Status are outlined below . . .

The Board found that the Institutes did not demonstrate that the five approval factors were met without issue, as outlined in its findings below, but found that the Institutes demonstrated sufficient compliance [emphasis added] with the Eligibility Requirements to be considered for pre-accreditation status identified as "Change of Control Candidate for Accreditation," during which time each Institute can rebuild its full compliance [emphasis added] with all the Eligibility Requirements and Criteria for Accreditation and can develop evidence that each

Institute is likely to be operationally and academically successful in the future . . .

The institutions undergo a period of candidacy [emphasis added] known as a Change of Control Candidacy that is effective as of the date of the close of the transaction; the period of candidacy may be as short as six months [emphasis added] but shall not exceed the maximum period of four years.

If at the time of the second focused evaluation, the institutions are able to demonstrate to the satisfaction of the Board that they meet the Eligibility Requirements, Criteria for Accreditation and Assumed Practices without concerns, the Board shall reinstate accreditation and place the institutions on the Standard Pathway [emphasis added] and identify the date of the next comprehensive evaluation, which shall be no more than five years from the date of this action.

In the course of the review, Assistant Secretary for Postsecondary Education, Robert King, and Department staff conducted an interview with Mr. Ron Holt, Esq., outside council for DCEH, on December 9, 2019, and with Dr. Karen Peterson Solinski, former Executive Vice President at HLC, who oversaw the Education Management Corporation (EDMC) and DCEH transaction for HLC during her employment, on December 23, 2019. Mr. Holt advised the Department that while representing DCEH in the larger transaction involving over 40 schools and five separate accreditors, his experience with HLC was remarkably unique. Mr. Holt told the Department that until HLC published the public disclosure on January 20, 2018, advising students that accreditation had been lost, he did not believe that the approval of the sale transaction required giving up accreditation of the two institutions involved. Further, Mr. Holt stated that if DCEH understood that the schools would lose accreditation as a condition of the sale, DCEH would not have completed the transaction.^{40, 41}

Ms. Solinski told Department staff that she believed both institutions would remain accredited during the six-month period beginning on the date of the transaction. She believed that HLC would begin monitoring the Institutions closely after the transaction to ascertain whether or not they were implementing the various requirements HLC had set forth as expectations in the letter approving the transaction. She stated in a written email to Department staff:⁴²

that HLC did not, either in November 2017 or January 2018, act to withdraw the accreditation of the two institutions ... The purpose of the Change of Control Candidacy was to signal to the institutions and to the public that HLC would need to reconfirm after the closing of the transaction and in short order based on evidence current at that time the institutions' ability to meet the HLC criteria for Accreditation and other policies of the Commission going forward...

HLC has contended that the Department has not provided HLC with all supporting documentation used in writing the draft analysis.⁴³ Specially, HLC contended that the Department must provide HLC with a transcript of a December 23, 2019 interview between

Robert King, Assistant Secretary for Postsecondary Education, and Ms. Karen Solinski. The Department did not create a transcript, nor did it record that interview. However, the Department did not rely on what was said orally in that interview. Instead, we relied exclusively on Ms. Solinski's December 26, 2019 email, which the Department provided to HLC as Exhibit 4 in the January 31, 2019 letter.⁴⁴

The Department communicated the aforementioned information to HLC in a letter we sent on May 1, 2020. However, HLC responded by stating that "It is perplexing that the Department would prepare a "Substantially Verbatim Transcript of Phone Call" that occurred on December 9, 2019 between Mr. King and Ron Holt, outside counsel for DCEH, about these same topics and then not prepare a similar transcript for its *subsequent* phone call with Ms. Solinski just 14 days later. Still, even if the Department failed to record or transcribe Ms. Solinski's interview, it certainly should have notes of the interview. Indeed, it is common practice for persons to take notes contemporaneously with or shortly following a call to record the substance of a conversation. HLC is entitled to any such notes or other documentation, as they would constitute supporting documentation under the regulation."⁴⁵

The regulation at 34 C.F.R. § 602.33(c) requires the Department to send agencies under review a "draft analysis including any identified areas of non-compliance, and a proposed recognition recommendation, and all supporting documentation to the agency."⁴⁶ The Department is supporting its decisions in the draft staff analysis using the aforementioned email that Ms. Solinski sent. We are not relying on any other documentation and therefore are not required to provide other documents to HLC for examination. The interview was conducted two days before the Christmas holiday, which is why administrative Department employees were not present to take substantially verbatim notes of what transpired. Knowing this, staff emailed Ms. Solinski after the phone conversation to ensure that we had a correct understanding of her recollection of the events that transpired.

HLC further stated that "Due to the Department's failure to adequately provide HLC with the supporting documentation to which it is entitled, and that is necessary for it to meaningfully and fully respond to the Draft Analysis, HLC filed a Freedom of Information Act ("FOIA") request on May 21, 2020 (attached hereto as Exhibit B). As such, and as a means of curing any such procedural deficiency, HLC reserves the right to amend its Written Response with any information it learns through the Department's response to this FOIA request."⁴⁷

The regulation at 34 C.F.R. § 602.33 does not confer HLC any right or privilege to "reserve the right to amend its Written Response with any information it learns through the Department's response to this FOIA request."⁴⁸ Accordingly, no privilege will be granted because the Department has already provided HLC with all of the supporting documentation it used in conducting this inquiry.

Several additional factors compounded HLC's failure to provide clear, accurate information regarding the putative loss of accreditation:

- i. Nowhere in the November 16, 2017 letter does HLC explicitly state that accreditation must be forfeited or lost if the transaction is completed.
- ii. Within the site visit report dated October 3, 2017, and the letter from the HLC Board dated November 16, 2017, extensive commentary was included regarding the capabilities of DCEH to meet the financial needs of the Institutions. The report referenced specific revenue projections, a pro forma financial statement, and an array of strategies to increase enrollment by improving the reputation of the Institutions, engaging in new advertising, expanding access to scholarships and state grants, achieving not for profit status, expanding development efforts to raise funds for scholarship programs, and “implementing cost savings in payroll, bad debts, property and excise taxes, facilities related expenses and outside services.”

Nowhere in the report or in the letter from the Board did HLC mention that, if the Institutions lost access to Title IV funding as a result of the transaction, it could create a critical financial obstacle that would need to be overcome for the Institutions to remain financially viable. In the absence of such an observation or other clear statements to the contrary, it was reasonable that DCEH would not be aware that HLC was removing accreditation.

- iii. Shortly after the publication of the formal Disclosure describing the loss of accreditation, Mr. Ron Holt and Dr. David Harpool, Counsel for DCEH, sent a letter to HLC on February 2, 2018, in which he stated: “... we were shocked that the Commission placed the Institutions in candidacy status and did not simply extend the accreditation of the institutions for one year ... as the Commission has done for dozens of other institutions going through a Change of Control ...”⁴⁹

Mr. Holt wrote a letter to HLC dated February 23, 2018, in which he sought confirmation from HLC that the following statements were accurate:

1. Both institutions remain eligible for Title IV, as the Commission clearly suggested in its letter to our clients dated November 16, 2017, referring to the institutions as being in ‘pre-accreditation status,’ a term of art that is defined in federal regulations...
2. Both institutions remain accredited, in the status of change of Control Candidate for Accreditation ... and are eligible to apply for renewal/extension of their accreditation on March 1, 2018, pending their eligibility review.

In response to Mr. Holt letter, Ms. Karen Peterson Solinski, former Executive Vice President at HLC, sent an email dated February 24, 2018, acknowledging receipt and advised DCEH that HLC was “reviewing it and will be in touch early next week.” Ms. Solinski’s employment with HLC ended shortly thereafter. In the November 13, 2019 HLC response to the Department, Dr.

Gellman-Danley wrote that another HLC employee, Dr. Anthea Sweeney, assumed the responsibilities of managing the DCEH proceedings. (Dr. Sweeney is reported to have directed an outside attorney to respond to Mr. Holt letter) HLC's letter states that "Kohart (outside counsel for HLC) made attempts to contact the parties' counsel, but they did not respond to the outreach. As such, it appeared to HLC that the institutes did not wish to communicate further about the matter."

These statements are not consistent with the facts or sound practice. If, in fact, HLC's attorney was unable to reach anyone representing DCEH, standard practice would call for a specific, written response to Mr. Holt's letter conveying that his understandings were incorrect, if HLC's position was that accreditation had been forfeited. No such letter was written. Further, the notion that DCEH had lost interest in further communicating is contradicted by its actions demanding an appeal.⁵⁰

The regulation at 34 C.F.R. § 602.25(a) requires accrediting agencies to provide institutions with "adequate written specification[s] of its requirements, including clear standards, for an institution or program to be accredited or preaccredited." Regulatory "adequacy" is judged based on all of the facts and circumstances of each individual case, but at a minimum requires clear standards, fairly communicated. In this case, the Department finds that HLC's November 16, 2017 letter and subsequent communication with the Institutions failed to provide adequate notice or written specifications, including clear standards, regarding the accreditation status described in the letter.

The letter does not include clear statements that accreditation was being withdrawn, which is required when an agency removes or withdraws accreditation. Instead, it used the vague and ambiguous term "Change of Control Candidacy" status. Understanding the precise meaning of that term requires reference to multiple sections of HLC policy manual that are not identified in the November 16, 2017 letter. In addition, that letter describes the accreditation status using four different terms,⁵¹ without clearly delineating the difference among them, further obfuscating the true nature and meaning of that status. Accordingly, the Department finds that HLC violated the Institutions' due process rights under 34 C.F.R. § 602.25(a) for failure to provide clear standards regarding institutional accreditation and pre-accreditation.

The Department finds that HLC did not "provide sufficient opportunity for a written response...regarding any deficiencies identified by the agency... before any adverse action is taken." No such opportunity was afforded DCEH in the November 16, 2017 letter. Absence of this opportunity violates 34 C.F.R. § 602.25(d), further depriving DCEH of due process required by Department regulations.

In addition, the November 16, 2017 letter fails to describe the Board's action as an adverse action, which it clearly was under INST.E.50.010. HLC has maintained that the action of the Board was not an adverse action, because the Institutions consented to having the conditions of Change of Control Candidacy Status imposed on them. In this instance, the Institutions had applied for Change of Control, Structure or Organization approval. The Board processed the application and provided the Institutions with two options: accept Change of Control Candidacy

Status, meaning forfeit accreditation status in order to proceed with the purchase of the EDMC assets; or do not proceed with the transaction.

HLC contends that, upon reading the November 16 letter, the institutions “*should reasonably have known* that the condition they were contemplating whether to accept—and ultimately did accept—was a period of time during which the Institutes would hold preaccreditation status.”⁵² The Department disagrees and does not think a reasonable interpretation of the letter implies that the Institutions had the opportunity to appeal the imposition of that condition, or that HLC action in “approving” its application with conditions would be an adverse action.

Department regulations do not allow agencies to force institutions to give up due process rights when processing a change in ownership resulting in a change in control. Accordingly, the Department finds HLC violated the Institutions’ due process rights under INST.E.50.010 and 34 C.F.R. §§ 602.25(e) and 602.25(f).

HLC fairly contends that it “expects any institution accredited by HLC to become familiar with HLC policies generally, and in particular, with those that apply in an immediately relevant circumstance such as a change of control.”⁵³ The Department does not contest that Institutions are expected to be knowledgeable about accreditation policy. However, in this instance, HLC did not reference any of its own policies on which it was relying to take action against the Institutions in its November 16, 2017 letter.

As explained earlier, HLC’s actions are not consistent with INST.B.20.040 and INST.F.20.070, as only INST.E.50.010 explicitly provides a process for candidacy to be conditioned with a Change of Control, Structure or Organization. HLC cites the Institutions failure to ask questions relating to the true nature of the status as evidence that they understood it or should have understood it and implicitly acquiesced to its use. However, HLC was required to prospectively afford them the opportunity to appeal.

This prospective appeal process, where an institution maintains its accreditation status until it has exhausted its appeal rights, preserves its status prior to a final action being taken. This requirement is critically important to the integrity of the accreditation process. HLC’s offer to provide an appeal to the agency on May 30, 2018, after the damage associated with the loss of accreditation had occurred, was a hollow gesture. The notice and right to appeal should have accompanied the November 16, 2017 letter. Furthermore, HLC’s belated decision to provide an appeal conflicts with its theory that the action they took was not an adverse action and was not appealable.

This web of intertwined policies are not substantively straightforward or clear, and accordingly HLC actions were not in compliance with 34 C.F.R. § 602.25(a). Furthermore, the Department does not think it would be reasonable to require institutions to decipher such policies. They should have been advised by HLC on precisely how they would function in the instant case.

The regulation at 34 C.F.R. § 602.25(a) required HLC to provide the institutions with “adequate written specifications of its requirements, including clear standards” for accreditation. Accreditor policies promising accreditation to institutions on terms the accreditor knew, or should have known, would not allow subject institutions to meet the Department’s eligibility requirements plainly fails this test.

III. Staff Proposed Recognition Recommendation

Department staff recommend limiting HLC’s current recognition such that it may not accredit additional institutions of higher education that do not currently hold accreditation or preaccreditation status with the agency for the duration of the 12 month period pending a compliance determination by the Senior Department Official.

The staff also proposes to recommend that the compliance report include details on HLC’s efforts to mitigate the negative effects of HLC’s procedurally erroneous decision to withdraw accreditation from Institutions on students, especially with regard to the status of academic credits earned at the Institutions during calendar year 2018.

In HLC’s response to the draft staff analysis, it asked for the Department for clarity regarding the precise impact of this limitation. Specifically, HLC stated that it “does not interpret this recommendation to prohibit HLC from granting candidacy to new institutions or from granting accreditation to institutions that, prior to the initiation of the relevant 12-month period, were in candidacy status with HLC.”⁵⁴ The Department confirms that HLC’s interpretation, as stated in its June 1, 2020 letter, is correct.

HLC must continue to provide Department staff with 60 days’ advance notice before its Board plans to take action to rescind, modify, revise, or change in any way its policies authorized under 34 C.F.R. § 602.22(a)(2)(ii)⁵⁵ relating to change in ownership or control, so the Department may review any proposals as authorized under 34 C.F.R. § 602.33(a)(2).

HLC also argues that the “recommended limitation on HLC’s accrediting authority is misaligned with what the Department has stated are its concerns. Moreover, the recognition recommendation is arbitrarily punitive.” To the contrary, the Department continues to be concerned about HLC’s ability to make accreditation decisions in a consistent manner and provide due process to institutions. Until HLC has come into compliance with Department regulations, the Department seeks to limit its ability to grow by accrediting new institutions of higher education thereby adding to its membership. We believe this limitation on growth is appropriate and is sufficiently related to the underlying noncompliance.

Lastly, HLC has stated that it is at a loss regarding what the Department wishes it to report as part of the compliance report and what it should do to address the lingering harm suffered by students. HLC will be required to demonstrate in the compliance report how it has addressed the findings of noncompliance identified in this report. Additionally, the Department continues to believe that because of HLC’s procedural deficiencies that its actions in moving the Institutions

to a candidacy status are void. HLC must take action to rectify this issue and recognize the Department's interpretation of the events before the Department's concerns will be allayed.

IV. Additional issues raised by HLC

The sections below respond to issues raised by HLC in its responses to the staff draft analysis that are not otherwise addressed in the sections above.

A. HLC's claims that the Department's Actions are Arbitrary and Capricious

HLC claims that the Department's actions in this case are arbitrary and capricious because the Department did not take action in the "identical case for Everest College Phoenix("ECP") . . ." The Department is concerned that HLC considers these disparate cases to be "identical." They most certainly are not, as the ECP Change of Control transaction was abandoned by the parties involved. Here, the parties completed the Change of Control which is a "legitimate reason" for the Department to open a 34 C.F.R. § 602.33 inquiry into this case, even though it did not open an inquiry into the ECP case. Here, students were directly harmed by HLC's failure to provide due process. In the ECP case, the institution ultimately voluntarily resigned its accreditation with HLC, and any harm suffered by students was not proximately caused by HLC.

Like all federal agencies, the Department must prioritize its resources regarding the oversight it conducts over regulated entities. Failure to open an inquiry regarding ECP is not affirmative evidence that the Department is treating this case differently than past cases.

B. HLC's Concerns about Department Staff Involved in the Inquiry

HLC claims that because it has received communication and corresponded with several different staff at the Department that it is "at a loss as to who is serving as the 'Department staff' in this review and who is serving as the 'senior Department official,' and seeks transparency and clarity as to: (a) which Department staff are conducting the compliance review and making a determination whether to present a final staff analysis to NACIQI based on review of HLC's Written Response, and (b) the identity of the senior Department official who would make any decision based on any potential NACIQI recommendation. As HLC navigates this compliance review, it is entitled to be on notice as to who is serving as the decision-maker(s) in this process in accordance with these regulations. Indeed, it is of material consequence which Department staff or officials are the decision-makers at which stage of the regulatory process."⁵⁶

As HLC points out, under 34 C.F.R. §§ 602.33-602.36 "Department staff" make initial inquiries into accreditation agency compliance. However, HLC has no such entitlement to know specifically who is working on matters relating to this inquiry as a procedural matter. The Department has the authority to manage and delegate its workload needs as it deems appropriate, and the Department is not required to indicate which specific Department staff are carrying out the Department's duties in any given case. The Department staff that fulfill these responsibilities

include staff in the Office of Postsecondary Education (OPE) as well as attorneys who work in the Department's Office of General Counsel.

The Department also does not have a legal obligation to identify the Senior Department Official (SDO) as demanded by HLC. However, the Department notes that although Diane Jones, Principal Deputy Under Secretary Delegated the Duties of Under Secretary, has generally served as the SDO during her tenure at the Department, she has decided not to participate in the Department's current review of this matter. The SDO will be Dr. Mitchell M. Zais, Deputy Secretary of Education.

HLC's knowledge or lack thereof regarding which Department staff may be working on this inquiry at any given time has no legal bearing on its ability to respond to Department requests or the draft staff analysis. Accordingly, it is not afforded additional time to respond to the staff draft analysis.

C. Timeliness of the Department's Inquiry

HLC has contended that, prior to opening an official 34 C.F.R. § 602.33 inquiry, Department staff were generally aware of the events that transpired with the Institutions' transaction yet did not raise any concerns. HLC points out that nearly two years passed since the November 16, 2017 letter was sent and before the Department sent HLC a letter requesting a production of documents and responses to interrogatories. However, neither Department regulations nor the HEA provide a statute of limitations on when the Department may conduct oversight inquiries. The Department's inquiry in the instant case is fully consistent with our authority to conduct oversight over HLC.

D. HLC Argues that the Department has Overstepped its Authority to Intervene in this Case

In its March 20, 2020 letter, HLC stated that the Department cannot intervene in specific accreditation matters at individual schools. Specifically, HLC claims that "the Department of Education Organization Act limits the Secretary's authority over accrediting agencies."⁵⁷ In fact, in *Armstrong v. Accrediting Council For Continuing Educ. & Training, Inc.*, the D.C. District Court held, "[w]hile the Secretary has the authority to decide whether a particular accreditor's standards warrant approval as a reliable indicator of educational quality, 20 U.S.C. § 1099b(a), the Department itself is barred from interfering in an accrediting agency's assessment regarding individual schools. 20 U.S.C. § 3403(b)."⁵⁸

20 U.S.C. § 3403 codifies the Department of Education Organization Act, which prohibits the Department from "exercise[ing] any direction, supervision, or control over ... any accrediting agency ... *except to the extent authorized by law.*" (emphasis added).⁵⁹ 20 U.S.C. § 1099b codifies the Higher Education Amendments of 1992 (Pub. L. 102-325), which amended the HEA to add provisions requiring agencies to provide due process to institutions of higher education, including a provision requiring that "[n]o accrediting agency or association may be determined by the Secretary to be a reliable authority as to the quality of education or training offered for the

purposes of this chapter or for other Federal purposes, unless the agency or association meets criteria established by the Secretary” including “due process procedures that provide ... for an opportunity for the institution or program to appeal any adverse action under this section, including denial, withdrawal, suspension, or termination of accreditation, taken against the institution or program, prior to such action becoming final.”⁶⁰

HLC cites dicta from *Armstrong* to imply that the Department cannot retrospectively second guess HLC’s accreditation decisions regarding the Institutions.⁶¹ However, while the statutes cited by the *Armstrong* Court make clear that while the Department must generally avoid exercising any direction, supervision, or control over accreditation agencies, the statutes also make clear that Department *must* evaluate agencies based on their actions relative to certain criteria in the statute and the regulations, including agencies’ compliance with the requirements of due process when taking adverse actions.

Remedies related to a due process violation by an agency are necessarily retrospective, and the Department cannot ignore such violations merely because they happened in the past. Where accreditation is lost (or withdrawn), in most cases the institutions are forced to close, rendering any litigation challenging the action impractical and of little utility. It would likewise be difficult for a student injured by a procedurally erroneous agency decision to seek relief from such a decision in court, in part because of decisions like *Armstrong*. Thus, to the extent that HLC continues to ignore the ways in which its decision regarding the Institutions violated applicable law designed to protect the Institutions and their students, we must continue to evaluate HLC accordingly under the applicable statutes and regulations.

V. Conclusion

The Department staff continue to have concerns about HLC’s resistance to correcting the record and taking appropriate action to help students that had formerly attended the Institutions. In this instance, the Department does not believe that HLC’s noncompliance is so grave that it would warrant a suspension or termination of recognition. However, the Department staff have proposed a recommendation that we believe reflects the gravity of the circumstance and appropriately limits HLC’s ability to grow until they have come into full compliance. We also believe that the action recommended reminds the larger community of institutions and Agencies that we serve that we take seriously the assurance that institutions are guaranteed due process rights in dealings with accreditors, and that these agencies understand their authority is constrained by basic notions of fair dealing and due process.

Sincerely,

Annmarie Weisman

Digitally signed by Annmarie
Weisman
Date: 2020.06.30 15:48:32 -04'00'

Annmarie Weisman
Senior Director,
Policy Development, Analysis, and Accreditation Services

Endnotes

¹ The Art Institute of Colorado (OPEID: 02078900), including the campuses formerly located at: 1200 Lincoln Street, Denver CO (Extension: 02078900); and 675 South Broadway Street, Denver, CO (Extension: 02078904).

² The Illinois Institute of Art (OPEID: 01258400), including the campuses formerly located at: 350 North Orleans Street, Suite 136-L, Chicago, IL (Extension: 01258400); 1000 Plaza Drive, Suite 100, Schaumburg, IL (Extension: 01258401); and 28175 Cabot Drive, Novi, MI (Extension: 01258405).

³ Letter from the Department to HLC (Jan. 31, 2020) (Exhibit 1).

⁴ Letter from the Department to HLC (May 1, 2020) (Exhibit 2).

⁵ Letter from HLC to the Department (March 20, 2020) (Exhibit 3).

⁶ Letter from HLC to the Department (June 1, 2020) (Exhibit 4).

⁷ Letter from the Department to HLC (June 17, 2020) (Exhibit 5).

⁸ NACIQI Meeting Notice, 85 Fed. Reg. 38132 (June 25, 2020), available electronically at: <https://www.federalregister.gov/documents/2020/06/25/2020-13723/national-advisory-committee-on-institutional-quality-and-integrity>.

⁹ *See generally* Letter from the Department to HLC (Feb. 25, 2020) (granting HLC an eight day extension to respond to the Department's letter from January 31, 2020); Letter from the Department to HLC (Mar. 6, 2020) (granting HLC a 14-day extension to respond to the Department's letter from January 31, 2020); *supra* note 4, (granting HLC a 30-day extension in response to procedural arguments raised by HLC, although the Department noted that it does not believe regulations required us to provide this courtesy to the Agency).

¹⁰ *See* HLC's policy INST.E.50.010 in effect at the time of the transaction (Jan. 18, 2018) (Exhibit 6).

¹¹ 34 C.F.R. § 602.18(c).

¹² 34 C.F.R. §§ 602.25(a), 602.25(d), 602.25(e), and 602.25(f).

¹³ *See* HLC's policy INST.B.20.040 in effect at the time of the transaction (Jan. 18, 2018) (Exhibit 7).

¹⁴ *See* HLC's policy INST.F.20.070 in effect at the time of the transaction (Jan. 18, 2018) (Exhibit 8).

¹⁵ Letter from HLC to the Institutions (November 17, 2017) (Exhibit 9).

¹⁶ *Id.* at 1.

¹⁷ *Id.*

¹⁸ INST.E.50.010, *supra* note 10, at 1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 34 C.F.R. §§ 602.22(a)(1) and 602.22(a)(2)(ii).

²² HLC's contention that it merely used Change of Control Candidate for Accreditation status as a passive condition of approval also conflicts with its own internal policy set forth in INST.B.20.040 that the purpose of approval by HLC is "to effectuate the continued accreditation of the institution subsequent to the closing of the proposed transaction."

²³ HLC Letter, *supra* note 5.

²⁴ INST.F.20.070, *supra* note 14.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See generally* HLC letter, *supra* note 15.

²⁸ The transaction occurred during the 5 years preceding the Department's decision to grant HLC a five-year renewal of recognition on May 9, 2018.

²⁹ HLC Letter, *supra* note 5, at 31-32.

³⁰ *Id.* at 21.

³¹ *Id.* at 22.

³² *Id.* at 28.

³³ INST.E.50.010, *supra* note 10, at 1.

³⁴ *Id.*

³⁵ HLC Letter, *supra* note 5, at 5-9.

³⁶ *Id.*

³⁷ Letter from HLC to the Institutions (Oct. 3, 2017) (Exhibit 10).

³⁸ *Id.*

³⁹ HLC letter, *supra* note 15, at 1-4.

⁴⁰ *See* transcript of Department call with Ron Holt, Esq., outside counsel for DCEH (Dec. 9, 2019) (Exhibit 11).

⁴¹ *See* emails between Department staff and Ron Holt (December 2019) (Exhibits 12.1-12.4).

⁴² *See* e-mail from Dr. Karen Peterson Solinski, former Executive Vice President at HLC (Dec. 26, 2019) (Exhibit 13).

⁴³ HLC Letter, *supra* note 5, at 2-3.

⁴⁴ HLC Letter, *supra* note 3, at 44.

⁴⁵ HLC Letter, *supra* note 6, at 6.

⁴⁶ 34 C.F.R. § 602.33(c).

⁴⁷ HLC Letter, *supra* note 6, at 8.

⁴⁸ *Id.*

⁴⁹ Letter from Ron Holt and David Harpool to HLC (Feb. 2, 2018) (Exhibit 14) at 1.

⁵⁰ *Id.* at 2.

⁵¹ Change of Control, Structure, or Organization; Change of Control Candidacy Status; Change of Control Candidate for Accreditation; Change of Control Candidacy.

⁵² HLC Letter, *supra* note 5, at 22.

⁵³ *Id.* at 25.

⁵⁴ HLC Letter, *supra* note 6, at 14.

⁵⁵ 34 C.F.R. § 602.22(a)(2)(ii).

⁵⁶ *See* HLC Letter, *supra* note 6, at 9.

⁵⁷ *See* 20 U.S.C. § 3403(b).

⁵⁸ *Id.* at 36, quoting *Armstrong v. Accrediting Council For Continuing Educ. & Training, Inc.*, 980 F. Supp. 53, 63 (D.D.C. 1997), *aff'd*, 168 F.3d 1362 (D.C. Cir. 1999), *op. am. on denial of reh'g*, 177 F.3d 1036 (D.C. Cir. 1999).

⁵⁹ *Id.*

⁶⁰ 20 U.S.C. § 1099b(a)(6).

⁶¹ *See Armstrong*, 980 F. Supp. at 63.