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ED Senior Department Official Terminates Federal Recognition of ACICS

September 26, 2016

On September 22, the Senior Department Official (SDO)[1] for the US Department of Education (ED) released a letter announcing the decision to terminate the recognition of the Accrediting Council for Independent Colleges and Schools (ACICS) as a gatekeeper for student financial aid programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV programs). ACICS has already announced it will appeal this decision to the Secretary of ED (Secretary), who is authorized to render the final decision on the approval, denial, limitation, suspension, or termination of federally recognized accreditors. Unless ACICS succeeds in its appeal to the Secretary or any subsequent legal action, its loss of federal recognition will significantly impact schools accredited by the agency as wells as the thousands of students who are currently pursuing their educational goals at these postsecondary institutions.

ACICS has notified the Secretary and the SDO of its intent to appeal the SDO's decision and that a written appeal would be forthcoming within the next 30 days as required by regulation. The SDO will have an opportunity to respond within 30 days of receiving ACICS's appeal but is not required to do so. Neither ACICS nor the SDO may submit any new information for the Secretary's consideration, although the Secretary has some limited discretion to consider information not previously included in the record.

Importantly, if ACICS appeals, the termination decision will be stayed pending final disposition by the Secretary. This means that ACICS would retain its status as a federally recognized accreditor during that time. However, immediately upon a decision from the Secretary to affirm the SDO's decision to terminate ACICS's recognition – which could happen at any time after ACICS submits its appeal (assuming the SDO declines to respond) – ACICS would have no recourse other than to attempt to block implementation of the decision in federal court. Although there is no regulatory time limit on the Secretary's decision, he has indicated that he plans to act quickly.

ED regulations clarify that, unlike an appeal to the Secretary, suing ED does not guarantee that federal recognition will be stayed throughout the duration of the dispute:

An agency may contest the Secretary's decision under this part in the Federal courts as a final decision in accordance with applicable Federal law. *Unless otherwise directed by the court*, a decision of the Secretary to deny, limit, suspend, or terminate the agency's recognition is not stayed during an appeal in the Federal courts. 34 C.F.R. § 602.38 (2016) (emphasis added). The underlined provision does suggest, however, that a federal court would have the discretion to stay withdrawal of an accreditor's recognition pending further proceedings.

As explained in our June 2016 client alert, "Implications of Potential Denial of ACICS Recognition by the Department of Education," ACICS's potential loss of federal recognition has implications for ACICS institutions and students far beyond access to federal student aid. The Secretary has statutory authority to grant institutions *provisional* certification to participate in Title IV programs for a maximum of 18 months in the event that an accreditor's federal recognition is terminated. However, despite the 18-month timeframe to transition, there could be more immediate impacts for institutions accredited by ACICS and the students that attend them. For example, for students enrolled in programs where graduation from a program accredited by a recognized accreditor is required to sit for a certification exam or work in a specific occupation, they will no longer be eligible to do so without changes (or exceptions) to existing requirements. The provisional certification period also would not permit some institutions to continue to operate or grant degrees in states where accreditation by a federally recognized accreditor is required, and ED does not have authority to allow an institution to participate in Title IV programs if it is not legally authorized to provide postsecondary education in the state in which it is located.[2]

In addition, loss of recognition could limit or prevent students from receiving military educational benefits[3] or transferring to other institutions. It could also impact covenants in agreements with financial institutions, private

grant and scholarship funding, and the eligibility of institutions to issue supporting documentation for foreign student visas to students enrolled in certain programs, irrespective of provisional certification to participate in Title IV programs. We also expect that the ability of an institution accredited by ACICS to complete any substantive changes before it secures alternative accreditation will be limited.

Throughout the duration of the appeals process, it will be critical for each ACICS-accredited institution to maintain good standing with the agency in the coming months in order to preserve its opportunity to achieve accreditation with a different federally recognized agency. ACICS has expressed that it will continue to operate through the duration of the appeal, and therefore schools should ensure that they continue to comply with agency standards until membership officially ceases.

For the many institutions accredited by ACICS that are in various stages of exploring alternate accreditation options, comparing applicable standards and alternatives will be essential to completing an accreditation transition within the limited timeframe provided. A proper communications plan also will be an important part of transitioning to a new accreditor and helping students, staff, alumni, and local communities understand the implications of the ACICS action. Cooley is available to help schools explore options, make appropriate notifications and disclosures, and has developed tools to identify variations among agency standards that are likely to have a significant impact on the transition process.

Should you have any questions about these matters, please do not hesitate to contact us.

Notes

1. Pursuant to ED regulations, a "senior Department official" is responsible for making the initial determination regarding whether to approve, deny, limit, suspend, or terminate an accrediting agency's federal recognition. The ED Secretary's Chief of Staff acted as the SDO for all recognition decisions arising from the June 2016 NACIQI meeting.
2. Some states (such as Virginia) have adopted emergency measures mirroring the federal 18-month "grace period," but others have indicated they might be compelled to initiate revocation actions against schools authorized by means of their ACICS accreditation, should the Secretary uphold the SDO's termination decision.
3. Last week, Congress passed legislation (pending the President's signature) that would grant the Secretary of Veterans Affairs limited discretionary authority when an accredited program is subject to disapproval solely based on the accreditor's loss of federal recognition. Such discretionary authority would permit the program to be deemed approved for no longer than 18 months following the accreditor's loss of recognition.

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