



HIGHER LEARNING COMMISSION

230 South LaSalle Street, Suite 7-500
Chicago, IL 60604-1411
312.263.0456 | 800.621.7440
Fax: 312.263.7462 | hlcommission.org

July 1, 2020

VIA ELECTRONIC MAIL

Annmarie Weisman
Senior Director
Policy Development, Analysis, and Accreditation Services
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202
Annmarie.Weisman@ed.gov

Dear Ms. Weisman,

The Higher Learning Commission (“HLC”) has received your June 17, 2020 letter providing notice that the Department of Education’s (“Department”) draft staff analysis of HLC’s compliance with, or effective application of, the criteria for recognition, will be finalized for presentation to the National Advisory Committee on Institutional Quality and Integrity (“NACIQI” or the “Committee”). We have also received your June 30, 2020 letter, constituting the Department’s final staff analysis pursuant to 34 C.F.R. 603.33(e). Additionally, we received a subsequent email later in the day from the Department’s ASL system informing us that the “Department’s staff report” (presumably the final staff analysis forwarded earlier that day) had been forwarded to NACIQI and will become part of the agency record. Finally, this afternoon we received an email from George Smith, Acting Executive Director/Designated Federal Official of NACIQI requesting the names and titles of HLC staff members who will be participating in the NACIQI meeting. With this letter, HLC seeks immediate clarification and certain action related to this referral to NACIQI.

Request for Transmission of HLC’s Full Response to the Draft Analysis

As an initial matter, and in compliance with 34 CFR 602.34(c)(3), HLC respectfully requests that the Department staff transmit the full substance of its October 24, 2019 compliance inquiry and HLC’s subsequent responses submitted on November 13, 2019 and January 13, 2020 in addition to HLC’s *full* written response to the draft staff analysis to NACIQI. As you are aware, both the Department’s draft staff analysis and HLC’s written response to the draft staff analysis exist in two parts; please ensure that NACIQI is given the [Initial Written Response](#)¹ and the [Supplemental Written Response](#) (inclusive of exhibits A-D).² Both response parts cite to

¹ Letter from Barbara Gellman-Danley, President, Higher Learning Commission, to Dr. Lynn B. Mahaffie, Deputy Assistant Secretary for Policy, Planning and Innovation, U.S. Department of Education (March 20, 2020), <https://tinyurl.com/y7uvh2tc>.

² Letter from Barbara Gellman-Danley, President, Higher Learning Commission, to Annmarie Weisman, Senior Director, Policy Development, Analysis, and Accreditation Services, U.S. Department of Education (June 1, 2020), <https://tinyurl.com/ya7taxw8>.

Ms. Weisman, July 1, 2020 2

narrative responses to specific questions posed by the Department and documents provided by HLC to the Department on [November 13, 2019](#)³ and [January 13, 2020](#).⁴ While some of these documents are hyperlinked in HLC's Initial Written Response, neither HLC's narrative responses nor all of the documents were included in the Department's final staff analysis transmitted to NACIQI, and should have been. Please advise immediately if there is a different individual at the Department to whom this request under § 602.34(c)(3) should be directed.

In addition, in order to facilitate the Committee members' ease of access to the cited documents, all documents cited in HLC's responses can be accessed through the hyperlinks in the November 13 letter, January 13 letter, and Initial Written Response; no password is required. So as to not deactivate the hyperlinks, please ensure that the version sent to the Committee is the same version that was transmitted by HLC to the Department. The written responses, including HLC's two letters not included in the final staff analysis, may also be accessed from the hyperlinks in this letter. If any Committee member is unable to access the responses or cited documents, please direct them to contact Robert Rucker, Manager for Compliance and Complex Evaluations, at rrucker@hlcommission.org for logistical support.

The Department is in Error in Precluding Public Comment on This Issue

HLC is troubled by the Department's decision to not provide an opportunity, ***to the public***, for written comment on the issue of HLC's compliance prior to the NACIQI meeting. Public comment in anticipation of a NACIQI meeting under HLC's circumstance is invited "if practicable." 34 C.F.R. § 602.33(e)(2). The Department's determination that inviting public comment is not practicable here is in error.

Indeed, the practicability standard in this context is akin to the "good cause" standard in the context of notice and comment rulemaking. In that context, the courts have determined that "good cause" exceptions to public notice and comment requirements are reserved for "true emergencies". See *U.S. v. Rainbow Family*, 695 F.Supp. 294, 305 (E.D. Tex. 1988). Likewise and within this same context, "impracticable" has been held to mean a situation wherein an agency's functions would be unavoidably prevented were it to engage in public rule-making proceedings. *Id.* Circumstances warranting the application of a "good cause" exception to public comment are rare. *Council of Southern Mountains v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981). This case is not an emergency and allowing public comment in accordance with long-established precedent would not impair the Department's core functions. The current matter is well short of qualifying as the rare exception that would warrant the elimination of an opportunity for public comment, which is clearly contemplated in 34 C.F.R. § 602.33(e).

To the contrary, the Department simply asserted in its June 17 letter that written public comment on this topic was not practicable because HLC was provided multiple extensions during the

³ Letter from Barbara Gellman-Danley, President, Higher Learning Commission, to Lynn Mahaffie, Deputy Assistant Secretary for Policy, Planning, and Innovation, U.S. Department of Education (November 13, 2019), <https://tinyurl.com/ybx15nu6>.

⁴ Letter from Barbara Gellman-Danley, President, Higher Learning Commission, to Lynn Mahaffie, Deputy Assistant Secretary for Policy, Planning, and Innovation, U.S. Department of Education (January 13, 2020), <https://tinyurl.com/y9ztz796>.

Ms. Weisman, July 1, 2020 3

Department's compliance review. HLC's extensions—totaling 22 calendar days—should have no bearing on whether *the public* is given an opportunity to provide written comments to NACIQI on this matter.⁵ Of further concern, the Department, in granting HLC's extension requests, never informed HLC of any penalty the Department would impose *on the public*, as a result.

There is little precedent in the last ten years of NACIQI meetings to exclude the public from submitting written comments. Moreover, there is more than adequate time to allow for written public comment, as there are 34 days between the June 25 meeting notice and the actual meeting which starts on July 29. In reviewing the meeting agendas and announcements for the last ten years of NACIQI meetings, the Department provides an opportunity for written public comment on all NACIQI agenda items—often through multiple comment opportunities—for at least a two-week period prior to each meeting, with hardly any exception. It is disingenuous for the Department to assert that written public comment is not practicable in the time before the July 29 meeting, when the public comment window could easily occur *twice over* in the same time period. The Department's decision to exclude written public comment relating to its compliance review of HLC is inconsistent with NACIQI's past practice and antithetical to the foundation of NACIQI set forth by the Federal Advisory Committee Act ("FACA") and principles of open government.⁶ *See* 5a U.S.C. § 1 *et seq.*⁷

The Department seems to be disadvantaging *the public*, for whom the written public comment process exists, for actions taken by the Department itself in granting the extensions. Even if the Department puts the responsibility for the extensions on HLC—which were notably granted to allow time *for the Department* to provide input on options to resolve the instant compliance review—the public deserves the ability to comment in writing. For this reason, HLC requests that the Department reissue its meeting notice and provide a two-week written public comment opportunity on this compliance review in advance of its July 29 virtual meeting. If the Department is unable to publish its notice letter in advance of the July 29 meeting, HLC requests that the Department reschedule this virtual meeting—which involves no travel or reservation of room space—to allow for such opportunity.

The Department Must Respond to HLC's Outstanding Questions

HLC restates its prior requests for clarification as to issues that are substantively consequential to HLC's preparation before NACIQI, which remain unanswered:

⁵ As detailed in HLC's responses, the Department's initial draft analysis was procedurally flawed, necessitating the production of a supplemental draft analysis (which failed to remedy all deficiencies). The Department failed to respond to HLC's March 20, 2020 written response, in which these deficiencies were raised, until May 1, 2020; as such, any extended process in this review is not HLC's responsibility. Indeed, the Department first became aware of the action underlying its proffered concerns on or about November 16, 2017—nearly 3 years ago—yet did not, to HLC's knowledge, begin the instant compliance review until October 24, 2019, and did not issue a draft analysis until January 31, 2020.

⁶ *See Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994) (stating that FACA requires public observation and comment that is contemporaneous to the advisory committee process itself rather than retrospective scrutiny) (additional citations omitted).

⁷ The FACA regulations state, "In addition to achieving the minimum standards of public access established by the Act and this part, *agencies should seek to be as inclusive as possible.*" 41 C.F.R. § 102-3.95(d) (emphasis added). The regulations also state that any member of the public is permitted to file a written statement with the advisory committee. *Id.* at 102-3.140(c).

Ms. Weisman, July 1, 2020 4

1. **How should HLC, and NACIQI for that matter, interpret the Department’s ambiguous recognition recommendation?** In its Supplemental Written Response, HLC sought clarification of the Department’s three-pronged recognition recommendation. The Department provided clarification relating to portions of its recommendation in its June 30 final staff analysis, but HLC continues to struggle to understand exactly how to achieve what the Department is requiring with regard to coming into compliance with certain regulations and taking steps, beyond those already taken, to support former students of the Institutes.⁸ Specifically, how does HLC “come into compliance” with the five cited regulations with the prescribed 12-month period? HLC has changed its policies to be consistent with new regulations such that this issue will not present itself again. The Department demands that HLC accept its interpretation of events. Setting aside the curious nature of such a demand which calls for HLC to set aside its own argument on the merits, HLC needs specific guidance on what further action the Department believes HLC needs to take in order to come into compliance if the Department’s position is that HLC is not currently in compliance.

2. **If not “retroactive accreditation,” which is not possible in this case, what action can HLC take to satisfy the Department’s concerns relating to HLC’s compliance?** In an effort to assist any students with any ongoing adverse effect caused by the Institutes’ inaccurate disclosures and subsequent closure, HLC sent a letter to its member institutions in Illinois, Colorado, and Michigan encouraging them to consider accepting transfer credits from former students of the Institutes. A similar letter was then sent to all other HLC member institutions. In addition, HLC executed against its “Enhancing Transfer Opportunities – Communications Plan,” which outlines numerous communication vehicles to inform all member institutions and stakeholders about transfer opportunities for students impacted by the Institutes’ closure. Despite its letter of October 24, 2019, the Department has repeatedly failed to describe any effort it is engaged in (outside of this compliance inquiry) to mitigate harm caused by the Institutes’ inaccurate disclosures with which it wishes HLC to cooperate. Without clarity from the Department in response to HLC’s question, it appears the Department is only interested in having HLC retroactively accredit the Institutes, an action that would only ratify the Institutes’ inaccurate disclosures after the fact. Such action is inconsistent with HLC’s initial decision to offer the candidacy condition and its own policies and standards – and, moreover, to the detriment of some affected students.

3. **Is the Department in possession of information relevant to this compliance review that has not yet been provided to HLC?** The Department has provided no documentation of a phone interview with a former HLC employee it interviewed, yet relies upon that information in its draft analysis identifying alleged noncompliance. The

⁸ With regard to the second prong of the recommendation, the Department stated, “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.’” The Department confirms that HLC’s interpretation, as stated in its June 1, 2020 letter, is correct.” June 20, 2020 letter from Ann Marie Weisman to HLC.

Ms. Weisman, July 1, 2020 5

Department's continued assertions, including in its June 30 letter, that it did not rely on the contents of this conversation simply do not align with the facts of the situation. Moreover, the Department's assurance in its final staff analysis that it has relied only a subsequent email relating to that discussion does not cure HLC's disadvantage. Indeed, providing any documentation relating to the Department's decision is required by the Department's own regulations and is essential for HLC's ability to respond to the final staff analysis, because the credibility, objectivity, and consistency, of these statements is in question. On May 21, HLC filed a [Freedom of Information Act \("FOIA"\) request](#) seeking additional documentation not provided to HLC and reserving the right to amend its Written Response with any information it learns through the request.⁹ To date, despite timely payment of the associated fee, HLC has received no documents in response to that request and the Department has determined that no such "privilege" to supplement based on any information received will be afforded. Despite the Department's assertions to the contrary, without this additional documentation, HLC is at an enormous disadvantage in being able to respond effectively to the Department's recommendation. To the extent the Department in its final staff analysis described its prioritization of this matter as being responsive to complaints from institutions or others, HLC is also entitled to an opportunity to review any such complaints.

Additional Critical Procedural Questions

HLC is also seeking clarification on several process-related matters about the NACIQI meeting, particularly given that it will occur virtually. These issues are not insignificant, as they will directly impact HLC's ability to present and respond to NACIQI's questions.

- 1) How will the virtual meeting be run? What opportunities for technological/logistical support might exist, both before and during the meeting?
- 2) Will HLC's matter be considered on July 29th or July 30th? What time of day?
- 3) How long will HLC have to present?
- 4) Is there any limitation on how many representatives from HLC can present or limitations as to whom those representatives may be?
- 5) Can counsel for HLC provide remarks?
- 6) Will HLC have the opportunity to provide visual aids (screen share) during its presentation?
- 7) Will HLC's representatives be allowed to take brief breaks to consult with one another?
- 8) Who will be presenting the case for the Department?

⁹ HLC Freedom of Information Act request to U.S. Department of Education (May 21, 2020), <https://tinyurl.com/y95nw4tq>.

Ms. Weisman, July 1, 2020 6

- 9) Will the Department be presenting any witnesses? If so, will HLC receive the names of those individuals in advance?
- 10) Will HLC have the opportunity to know the identities of the individuals who have registered to make public comments in advance?
- 11) HLC is not seeing the final analysis in the ASL system. Can someone from the Department help us access the documents and information in the system prior to the meeting? Please provide full contact information for this individual.
- 12) Is HLC required to submit anything through the ASL system as this time?
- 13) HLC staff – in particular, Dr. Anthea Sweeney, Vice President of Legal and Regulatory Affairs – received two automated notifications on June 25, 2020, each providing that HLC’s “ASL e-recognition Response submission” was successful. Dr. Sweeney had not submitted anything on HLC's behalf through this portal at that time. HLC is seeking clarification as to what these automated notices indicate.

In conclusion, in addition to requesting that the Department forward HLC’s *full* response to the draft analysis to NACIQI, we also request that the Department follow standard procedure and allow the public the opportunity to provide written comment on the issue of HLC’s compliance. Not doing so is inconsistent with the intent of FACA and its implementing regulations, and completely unnecessary in this case. In addition, HLC seeks clearer answers to its substantive questions regarding the Department’s processes in connection with this matter. Without these answers, HLC is significantly limited in its ability to respond to the Department, to provide necessary information to NACIQI, and to further assist students affected by the closure of the Institutes. Finally, HLC requests procedural and logistical information regarding the upcoming meeting in light of the revised meeting format due to COVID-19.

We appreciate your assistance with these matters, and we look forward to a prompt response.

Sincerely,



Barbara Gellman-Danley
President

Cc: Herman Bounds, Director of Accreditation, U.S. Department of Education
George Alan Smith, Acting Executive Director/Designated Federal Official, NACIQI
Anthea Sweeney, Vice President of Legal and Regulatory Affairs, Higher Learning
Commission

Ms. Weisman, July 1, 2020 7

Marla Morgen, Associate Vice President of Legal and Regulatory Affairs, Higher
Learning Commission
Julie Miceli, Partner, Husch Blackwell
Jed Briton, Deputy General Counsel, U.S. Department of Education