

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

2016 MAR 21 A 8:41

BRISTOL UNIVERSITY

2390 East Oranewood Avenue
Suite 485
Anaheim, CA 92806

Plaintiff,

v.

ACCREDITING COUNCIL FOR
INDEPENDENT COLLEGES AND
SCHOOLS

750 First Street NE, Suite 980
Washington, DC 20002

Defendant.

CLERK OF DISTRICT COURT
ALEXANDRIA, VIRGINIA

CIVIL ACTION NO. 16-CV 307
AJT/MSN

JURY TRIAL DEMANDED

INJUNCTIVE RELIEF SOUGHT

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Bristol University (“Bristol” or “the “University”), by and through its undersigned attorneys, Saul Ewing LLP, brings this action against Defendant Accrediting Council for Independent Colleges and Schools (“ACICS” or the “Council”) and avers as follows:

INTRODUCTION

1. This action has been filed to prevent the certain and permanent demise of Bristol University and to ensure that the University’s students, many of whom expect to graduate in a matter of months, do not become the victims of ACICS’s unreasonable denial of Bristol’s application for the renewal of accreditation. In withholding accreditation from Bristol, ACICS has violated its own procedures and practices, the Higher Education Act, and fundamental notions of fairness and due process.

2. As described further below, ACICS's conduct has been characterized by a punitive refusal to grant Bristol a reasonable amount of time to respond to alleged violations of accreditation criteria identified by ACICS and a sham appellate process tainted by improper *ex parte* communications and a failure to adhere to ACICS's own policies or due process. As a result of ACICS's decision to deny University's application for the renewal of its accreditation, the University is now unable to operate lawfully and has closed while it seeks relief from this Court. If not enjoined by this Court, ACICS's actions will result in the permanent closing of the University and further irreparable harm to the University and its students.

3. In spite of the breadth of ACICS's misconduct, however, the relief sought by Bristol in this civil action is narrow and modest. As Bristol unsuccessfully requested from ACICS before filing this lawsuit, Bristol asks only that consistent with ACICS's policies and practices, Bristol be given a reasonable amount of time to cure the deficiencies on which ACICS based its decision to deny Bristol's application to renew its accreditation.¹ Bristol thus seeks relief returning the parties to the *status quo* prior to ACICS's March 18, 2016 decision to deny Bristol's renewal application and a reasonable opportunity to take corrective action.

THE PARTIES

4. Bristol University, a California corporation with its principal place of business in the State of California, is an educational institution that serves primarily underserved, low-income, international and underperforming students who have been unable to obtain admission to other institutions of higher learning. A large proportion of the University's students are international students from Vietnam, Malaysia, Nigeria, India, and Pakistan, and the

¹ In light of the narrowness of the relief sought in this lawsuit and the University's desire to come into full compliance with ACICS's standards as detailed in the University's prayer for relief, the University does not challenge at this time the accuracy of any of ACICS's allegations of failure on the University's part to meet the criteria for the renewal of accreditation.

University also has a sizeable population of student athletes. Bristol offers one, two and four-year programs in business administration, and the certificate programs in legal studies and hospitality operations.

5. Defendant Accrediting Council for Independent Colleges and Schools is a non-profit corporation organized under the laws of Virginia which is recognized by the Secretary of the Department of Education as a national accrediting agency within the meaning of 20 U.S.C. § 1099b.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337 and 20 U.S.C. § 1099b.

7. This Court may exercise personal jurisdiction over ACICS because, *inter alia*, ACICS is incorporated in Virginia.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1).

FACTUAL BACKGROUND

9. Bristol was founded in 1991 as Kensington College, and was first accredited by ACICS in 1993. From 1993 until 2011, the University maintained consistent accreditation. In 2011, then-Kensington College underwent a change of ownership and became known as Bristol University.

10. In April 2012, Bristol received a 3-year grant of accreditation from ACICS.

11. In December 2012, Bristol received a 3-year grant of renewal license by the California Bureau for Private Postsecondary Education. Such licensure is required for a

postsecondary educational institution to operate lawfully in the State of California, and is voided in the event an institution loses accreditation.

12. In October 2014, Bristol submitted an application to ACICS to renew its accreditation, which, under the April 2012 three-year grant, was set to expire on December 31, 2015.

ACICS'S RELEVANT POLICIES AND PROCEDURES

13. From time to time as accreditation periods come to a close, ACICS evaluates whether institutions meet its criteria for reaccreditation. As part of that process, ACICS sends review teams to such institutions for site visits.

14. In the event that a review team identifies alleged deficiencies in an institution's compliance with ACICS's criteria, ACICS's Accreditation Criteria Policies, Procedures and Standards of the Accrediting Council for Independent Colleges and Schools (the "*Accreditation Criteria*") Title II, Chapter 3, Council Actions, specifies that:

"If the Council determines that an institution is not in compliance with the *Accreditation Criteria*, it will take prompt adverse action against the institution, or it will require the institution to take appropriate action to bring itself into compliance with the *Accreditation Criteria* within a time frame specified by the Council after the institution has been notified that it is not in compliance. The time frame will not exceed the following: (a) twelve months, if the longest program is less than one year in length; (b) eighteen months, if the longest program is at least one year, but less than two years in length; and (c) two years, if the longest program is at least two years in length.

(True and correct copies of selected relevant pages from the *Accreditation Criteria* are attached hereto as Exhibit A).

15. The *Accreditation Criteria* accordingly explicitly contemplates a scenario in which an institution may need to take corrective action and establishes a benchmark of reasonableness of up to two years for institutions like Bristol (whose longest program is four

years) to do so. It is clear that the overriding purpose of the criteria is not to punish educational institutions but to protect the interest of students, which is paramount.

16. In the event that an institution, following a reasonable time frame, is unable to demonstrate that its programs meet the *Accreditation Criteria*, ACICS may take adverse action against the institution. Such adverse action may include deferral, a compliance warning -- in which case an institution is required to demonstrate that it is taking corrective action within a designated time frame -- or probation. *See Accreditation Criteria* 2-3-210; 2-3-220; 2-3-240, p. 28.

17. In the event that adverse action is taken against an institution, it has the right to appeal that adverse action to a Review Board. *See generally id.* at 2-3-600, p. 33. The Review Board is required pursuant to the *Accreditation Criteria* “to provide due process,” and is, at least according to ACICS’s written *Accreditation Criteria*, “separate” and “independent.” *Id.* at 2-3-601, p.33. All members of the Review Board are subject to a conflict of interest policy. *Id.* at 2-3-602, p. 33.

18. Matters appealed to the Review Board may be affirmed, amended, reversed, or remanded by the Board to the Council. In particular, the Review Board must amend or reverse a decision of the Council when it is arbitrary, capricious, or otherwise inconsistent with the *Accreditation Criteria*. *Id.* at 2-3-603, p. 33.

**ACICS’S UNREASONABLE DENIAL OF BRISTOL’S
APPLICATION FOR RENEWAL AND BRISTOL’S APPEAL**

19. The Council sent an on-site evaluation team to Bristol in May 2015. As a result of the team’s May 2015 evaluation, the Council provided a report in June 2015 and requested that Bristol provide explanatory responses to several areas of potential deficiency identified by the team. Bristol submitted a written response in July 2015.

20. In September 2015, the team visited Bristol again for two days and met with various University officials. On October 29, 2015, less than six months after its initial site visit, the Council sent correspondence to the University related to its September site visit. The letter did not invite the University to provide additional information to demonstrate compliance or steps taken toward compliance, nor did the letter designate a time period for the University to cure the citations identified by the review team. In light of what has happened since, it appears to the University that the Council had already decided in October 2015, just six months after its initial site visit, to take the unusual step of denying outright Bristol's request to renew its accreditation with no timeframe to cure or a probationary period.

21. On December 22, 2015, approximately seven months after its initial site visit, ACICS sent correspondence to the University informing it that the Council would not renew its accreditation. As with the October 29, 2015 letter, the December 22, 2015 letter did not provide any time period for the University to come into compliance with the accreditation criteria. The letter advised the University that it had ten days to appeal the Council's decision to a Review Board. Such an appeal would stay the implementation of the Council's decision until the Review Board heard the appeal and decided to affirm, amend, reverse or remand the Council's decision.

22. The Council's failure in its letter of December 22, 2015 to provide a designated timeframe of at least one year for the University to come into compliance with ACICS's accreditation criteria was a departure from ACICS's written *Accreditation Criteria*, which provides institutions with up to *two years* to do so. It was also a departure from the Council's ordinary practices and the ordinary procedures of accreditors generally, who routinely and as a matter of course impose less draconian measures such as probationary periods prior to

revoking accreditation. ACICS's determination not to provide a probationary period or a designated timeframe of at least one year for Bristol to take corrective measures represents an inconsistent application of ACICS's standards.

23. Proceeding without counsel, the University elected to appeal the Council's decision to deny its application for reaccreditation, and on February 18, 2016 the Council advised the University that a hearing would take place before the Review Board in Washington, D.C. on March 18, 2016.

24. Shortly after receiving that letter, on or about February 18, 2016, Dr. Fathiah Inserto and Lourdes Cruz, President and Director of Compliance of the University, respectively, had a telephone conversation with Ian Harazduk, ACICS's Senior Manager for Policy and Compliance. (A true and correct copy of the February 18, 2016 letter is attached hereto as Exhibit B). During that conversation, Inserto and Cruz inquired about the Council's February 18, 2016 letter's requirement that documents directed to the Review Board be delivered to Kenneth Ingram, Esq., general counsel to ACICS and a partner with the law firm of Whiteford Taylor Preston in Washington, D.C. Inserto and Cruz asked Harazduk whether the University should have counsel to assist the University in its appearance before the Review Board. Harazduk told Inserto and Cruz that legal counsel was not necessary.

25. Without the assistance of counsel, on or about February 29, 2016, the University submitted an informal point-by-point response to the twenty-four citations -- identification of areas of alleged non-compliance with accreditation criteria -- contained in ACICS's December 22, 2015 letter notifying the University of the denial of its application for the renewal of accreditation.

26. On March 10, 2016, Ingram – the same attorney to whom papers were to be delivered as counsel for the Review Board – submitted a formal brief to the Review Board on behalf of the Council and in support of affirmance of the Council’s decision to deny Bristol’s renewal application.

27. On March 14, 2016, having reviewed the Council’s submission and concluded that Harazduk had given bad (and perhaps bad faith) advice regarding the lack of the need for legal counsel, the University hired the undersigned counsel.

28. Because Bristol’s undersigned counsel William D. Nussbaum did not know how to formally contact the Review Board, he immediately called Ingram, whose name appeared on the Council’s brief. Nussbaum asked whether Ingram would agree on behalf of the Council to a brief postponement of the Review Board hearing so that counsel for the University could familiarize themselves with the file.

29. Nussbaum followed up by letter to Ingram on behalf of Bristol dated March 14, 2016 asking that Ingram consent on behalf of the Council to a postponement of the hearing.

30. The University’s March 14 letter further proposed that in lieu of proceeding with the hearing before the Review Board, the University, which by this time had retained experienced legal counsel, would commit (under the guidance of counsel) to remedying all noted citations within six months. The University proposed that if after six months it had not remedied the noted citations, it would accept the Council’s findings without appeal to the Review Board and would not thereafter litigate the denial of the application for renewal of accreditation in any court. (A true and correct copy of the March 14, 2016 letter is attached hereto as Exhibit C).

31. Ingram did not respond to Nussbaum's letter. The response came instead in an email from Albert C. Gray, President and CEO of ACICS, acting on behalf of the Chair of the independent Review Board. Gray's email denied the University's request for a postponement of the hearing and rejected the University's proposed remedy in lieu of a hearing. (A true and correct copy of the March 15, 2015 Gray Email is attached hereto as Exhibit D).

32. The University does not know how the Chair of the purportedly neutral and independent Review Board became aware of Nussbaum's communication with Ingram. The University was not copied on any correspondence between Ingram, the Council's attorney, and the Review Board. It is clear, however, that such *ex parte* communication occurred.

33. It also became plain, as the University's attorneys reviewed the underlying file, that Ingram was acting as counsel to *both* the Council's program review team (and in support of affirmance of the team's recommendation to reject the University's request for renewal) and the Review Board. See February 18, 2016 letter (directing that submissions to the Review Board be sent to Mr. Ingram's attention).

34. Such *ex parte* communication and a single legal counsel to *both* the prosecutor *and* jury in proceedings to determine whether the ultimate sanction would be imposed against Bristol is astonishing. ACICS, as detailed above and below, has an obligation to provide fundamentally fair, unbiased proceedings that are not arbitrary, capricious or unreasonable. It violates the most basic notions of due process for a purportedly neutral Review Board to undertake *ex parte* communication with the legal representative of one of the parties appearing before it, and, even worse, to be legally advised by the same counsel. Such a scenario simply does not provide a member institution with a meaningful opportunity for review.

35. Moreover, what happened here raises serious doubts about the integrity and effect of ACICS's conflict of interest policies for Review Board members. *See Accreditation Criteria*, 2-3-602, p. 32; *accord* 34 C.F.R. § 602.25(f)(1)(ii) ("The appeal must take place at a hearing before an appeals panel that . . . [i]s subject to a conflict of interest policy"). Such *ex parte* communications violate both the ACICS policy on conflicts of interest and the federal regulation requiring that accreditors follow such a policy. *See id.*

36. On March 18, 2016 the Review Board heard argument from the University and from ACICS. Roberto Montesinos, a lawyer at Ingram's law firm, made the principal argument on behalf of the Council in support of its denial of the University's application for the renewal of accreditation. Ingram also addressed the Review Board on behalf of the Council. At the hearing, counsel for the University argued that ACICS had failed to follow its own procedures and to exercise basic fairness by not permitting the University a reasonable time period in which to take corrective action before determining that it would not renew the University's accreditation. The hearing concluded at approximately 11:30 AM.

37. Before the hearing, the University was advised that it typically took approximately two weeks for the Review Board to announce its decision on an appeal. But just ninety-four minutes after the hearing concluded, the University received via email the Review Board's official correspondence affirming the decision to reject the University's request for renewal. (A true and correct copy of the March 18, 2015 Review Board Affirmance Email is attached hereto as Exhibit E).

38. Attached to the Review Board Affirmance Email was the Review Board's official letter affirming the decision to reject the University's application for renewal. The letter did not address the reasons for affirming the decision to reject the University's application, nor

did it address any of the arguments the University made at the hearing. (A true and correct copy of the March 18, 2015 Review Board Affirmance Letter is attached hereto as Exhibit F). In light of how soon after the hearing it received correspondence announcing the result, the University suspects that the Review Board had written the Review Board Affirmance Letter prior to the hearing. The Review Board clearly did not spend much time, if any, deliberating before they sent it.

39. The Review Board's March 18, 2016 Affirmance Letter was copied to both the Department of Education and the California Bureau for Private Postsecondary Education.

40. Pursuant to the implementing regulations of the Higher Education Act, accreditors are required to provide an appellate process and to notify the institution "in writing of the result of its appeal *and the basis for that result*," see 34 C.F.R. § 602.25(g) (emphasis added). Such a requirement comports with basic notions of due process. The Review Board Affirmance Letter did not meet this requirement.

41. Further, despite ACICS's own policy that the Review Board identify which of its members concur in the determination of the Review Board, the Review Board Affirmance Letter failed to do so. See *Accreditation Criteria 2-3-606*, p.33; see also Review Board Affirmance Letter.

42. In light of the foregoing, at least with respect to Bristol, ACICS's "independent" Review Board presided over a sham appellate process which provided no meaningful review and failed to satisfy ACICS's own standards of conduct, not to mention standards imposed by federal statutory and common-law standards of due process.

43. As a result of the withdrawal of its accreditation, Bristol may not lawfully operate and has ceased operations. Classes have been canceled. Only if this Court intercedes and grants Bristol the relief it seeks can the University can resume operations and avoid harming its students, some of whom are expecting to graduate and receive their degrees in the coming months.

44. In the absence of such relief, and as a result of both ACICS's unreasonable refusal to give Bristol sufficient time to correct the citations described in its letter of December 22, 2015 and of ACICS's sham internal appeal process, Bristol and its students have been irreparably harmed. - Bristol asks this Court to return the parties to the status quo prior to the Review Board's hearing, to order ACICS to comply with federal law and its own policies, and to give the University a fair opportunity to respond to the concerns ACICS identified.

CAUSE OF ACTION

Count I

(Due Process – Federal Common Law)

45. All preceding paragraphs are incorporated by reference herein as if set forth in full.

46. Accreditation agencies are required to provide due process to member institutions under federal common law. This includes the obligation to refrain from acting arbitrarily, capriciously, or unreasonably. The amount of process due to an institution increases in proportion to the severity of the adverse action contemplated. Where, as here, the adverse action will result in the permanent closing of the institution, the necessity for strict adherence to due process is at its highest.

47. The standards for the process due to member institutions are also persuasively established by standards set by Congress and the United States Department of Education governing accreditor conduct. *See* 20 U.S.C. § 1099b(a)(6)(c); 34 C.F.R. §§ 602.18, 602.25.

48. An accrediting agency has a duty to, *inter alia*:

(a) Apply clear standards and apply such standards with consistency, 34 C.F.R. § 602.18(a)-(b);

(b) Use “procedures that afford an institution or program *a reasonable period of time to comply* with the agency's requests for information and documents;” 34 C.F.R. § 602.25(b);

(c) Provide an appellate Review Board for agency decisions that is free from bias and conflicts of interest, *see id.* at § 602.25(f)(1)(ii);

(d) Recognize the right of the institution or program to employ counsel to represent the institution or program during its appeal, *see id.* at § 602.25(f)(2);

(e) Notify the institution “in writing of the result of its appeal *and the basis for that result*,” *see id.* at § 602.25(g).

49. In denying the University’s application for renewal of accreditation without providing a reasonable amount of time for the University to cure the purported deficiencies, ACICS failed to follow its own policies and practices, acted unreasonably, arbitrarily, and capriciously, and denied the University the process it was due.

50. In conducting a hearing characterized by conflicts of interest, improper *ex parte* communication, and a prejudged outcome, ACICS deprived the University of the process it was due.

51. In conducting a hearing in which it did not adhere to its own policies and procedures, ACICS deprived the University of the process it was due.

Count II

(Negligence *Per Se* -- Violation of Duties and Standards of Conduct Imposed by the Higher Education Act, 20 U.S.C. § 1099b and 34 C.F.R. §§ 602.16, 602.25)

52. All preceding paragraphs are incorporated by reference herein as if set forth in full.

53. The Higher Education Act and its enabling regulations require accrediting agencies to promulgate and follow rules intended to protect accredited institutions and programs from arbitrary and unreasonable actions by accreditors engaging in adverse actions against institutions or programs seeking accreditation. *See* 20 U.S.C. § 1099b(a)(6)(c); 34 C.F.R. § 602.25.

54. In conducting its procedures through the accrediting process, an accrediting agency has a duty to, *inter alia*:

- (a) Apply clear standards with consistency, 34 C.F.R. § 602.18(a)-(b);
- (b) Use “procedures that afford an institution or program *a reasonable period of time to comply* with the agency's requests for information and documents;” 34 C.F.R. § 602.25(b);
- (c) Provide an appellate Review Board for agency decisions that is free from bias and conflicts of interest, *see id.* at § 602.25(f)(1)(ii);
- (d) Recognize the right of the institution or program to employ counsel to represent the institution or program during its appeal, *see id.* at § 602.25(f)(2);
- (e) Notify the institution “in writing of the result of its appeal *and the basis for that result*,” *see id.* at § 602.25(g).

55. As a result of obligations imposed by the Higher Education Act and its implementing regulations, ACICS had a duty to conduct its review of Bristol's application for renewal of accreditation in a manner that comported with standards of conduct set by statute.

56. ACICS breached the standards of conduct set by statute.

57. ACICS's breach of those standards has caused and is continuing to cause Bristol University to suffer irreparable harm.

Count III

(For Injunctive Relief and Declaratory Relief Pursuant to 28 U.S.C. § 2201 *et seq.*)

58. All preceding paragraphs are incorporated by reference herein as if set forth in full.

59. Justiciable and actual controversies exist before this Court with respect to: (a) whether ACICS followed its policies and procedures in rejecting Bristol University's application for renewal of its accreditation; (b) whether ACICS acted unreasonably, arbitrarily, capriciously, and denied Bristol University due process in rejecting the University's application for renewal of accreditation; and, accordingly, whether (c) ACICS improperly rejected Bristol University's application for renewal of accreditation.

60. A declaratory judgment resolving these questions is likely to: (a) prevent future harm to Bristol University resulting from ongoing disputes between the University and ACICS; (b) clarify or settle the legal rights of the parties to this action; and/or (c) terminate a principal source of the insecurity and/or controversy that brought about this action.

61. Bristol University will suffer immediate and irreparable injury if ACICS's rejection of its renewal application and resulting revocation of accreditation is permitted to stand. If equitable relief is not granted, Bristol University will be unable to lawfully operate and must

accordingly shut its doors. Without accreditation, the University will be unable to maintain its license with the California Bureau for Private Postsecondary Education and likewise cannot offer its students the option of federal funding through Title IV or the Veterans Administration. University students who are in this country on student visas will be unable to remain in the United States legally. The harm to the University is therefore irreparable, as is the harm to current University students who expect to graduate with degrees in the coming weeks and months. Moreover, federal law prohibits an educational institution whose renewal application accreditation is denied from re-applying for two years, a period of dormancy from which the University does not believe it will be able to reemerge. Failure to provide immediate injunctive relief will accordingly result in a death sentence to the University and in harm to its students that is likewise irreparable.

62. No adequate remedy at law exists to redress the irreparable harm the University will suffer if it is not awarded the relief that it seeks.

WHEREFORE, Plaintiff Bristol University respectfully requests:

(a) A declaration that ACICS improperly denied Bristol University's application for renewal of its accreditation, and that ACICS's determination is therefore vacated, because ACICS: (i) failed to follow its own policies and procedures; (ii) acted unreasonably, arbitrarily, capriciously, and denied Bristol University due process; and (iii) failed to comply with federal law governing the conduct of accreditation agencies;

(b) A temporary restraining order and preliminary injunction directing ACICS to: (i) send correspondence to the United States Department of Education and the California Bureau for Private Postsecondary Education explaining that it has been ordered by this Court to withdraw its letter dated March 18, 2016 and further explaining that it has been

ordered by the Court to hold any decision about Bristol's accreditation in abeyance until further instructed by the Court; (ii) post on its website a substantially similar statement;

(c) A permanent injunction: (i) vacating the March 18, 2016 decision of the Review Board; (ii) returning the parties to the positions they were in prior to ACICS's March 18, 2016 decision; (iii) ordering ACICS to provide Bristol University with six months from the date of the injunction to demonstrate that it has cured all deficiencies identified by ACICS as part of Bristol's application for a renewal of its accreditation; and (iv) ordering ACICS to resume the re-application process with Bristol University after that six-month period has expired in compliance with ACICS's own policies and procedures and in good faith and in a manner that affords Bristol University due process;

(d) An Order retaining jurisdiction over this matter to enforce the terms of the foregoing injunctive relief and to ensure that ACICS does not engage in retaliation;

(e) Such other relief as this Court may deem just and proper.

Dated: March 21, 2016

/s/ Robert C. Gill



Robert C. Gill, VSB # 26266
William D. Nussbaum (*p.h.v. motion pending*)
SAUL EWING LLP
1919 Pennsylvania Ave NW, Suite 550
Washington, D.C. 20006

Joshua W. B. Richards (*p.h.v. motion pending*)
SAUL EWING LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102

Counsel for Plaintiff Bristol University

CERTIFICATE OF SERVICE

I, William D. Nussbaum, hereby certify that on this day of March 20th, 2016, I have served via email upon counsel listed below, a true and correct copy of the COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, of Plaintiff, Bristol University, in this matter:

Kenneth J. Ingram, Esquire
Whiteford, Taylor, and Preston, LLP
1800 M Street, NW, Suite 450 N
Washington, DC 20036
kingram@wtplaw.com

Counsel for the Accrediting Council for Independent Colleges and Schools

SAUL EWING LLP

By /s/ William D. Nussbaum

WILLIAM D. NUSSBAUM

Dated: March 20, 2016