



July 2, 2018

Ms. Diane Auer Jones
U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue, S.W.
Washington, DC 20202

Re: Recusal from ACICS Recognition Decision

Dear Ms. Jones:

We write to formally request that you recuse yourself from any further review of the 2016 petition for recognition filed by the Accrediting Council for Independent Colleges and Schools (ACICS). As you know, the Department of Education—after a lengthy and rigorous review process—initially denied ACICS’s petition because of “the nature and scope of ACICS’s pervasive noncompliance.”¹ In remanding the Department’s decision for the consideration of additional evidence, the United States District Court for the District of Columbia expressly did not pass on the merits of that decision.

Students and other stakeholders deserve a recognition process that comports with the highest standards of fairness and objectivity. Your extensive connections to ACICS and your past statements and positions on the accreditation process create, at the very least, the appearance that you may have prejudged both the facts and the law regarding whether ACICS should receive recognition. Thus, recusal is necessary to ensure that the recognition process is administered by a neutral and detached adjudicator—and that it maintains the appearance of complete fairness that is required by the Constitution, principles of administrative law, and the Executive Branch’s own ethics requirements.

I. Legal Standard for Impermissible Prejudgment in Administrative Adjudication

Both the Due Process Clause of the Constitution and general principles of administrative law require that an agency adjudication be administered by a “neutral and detached adjudicator.” *Ass’n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1168 (D.C. Cir. 1979) (comparing the standard to rulemaking). An administrator conducting an adjudication—like whether to recognize an accreditor—must be disqualified if “a disinterested observer may conclude that [she] has in some measure adjudged the facts as well as the law” of the proceeding “in advance of hearing it.” *Cinderella Career & Finishing Sch., Inc. v. F.T.C.*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. Sec. & Exch. Comm’n*, 267 F.2d 461, 469 (2d Cir. 1959)).

¹ Accrediting Council for Indep. Colls. & Schs. at 1, U.S. Dep’t of Educ., No. 16-44-O (Dec. 12, 2016), <https://www2.ed.gov/documents/acics/final-acics-decision.pdf> [hereinafter “ACICS Decision”].



Indeed, the impression that an agency has prejudged an outcome, even in the absence of direct evidence that it has in fact done so, is sufficient for disqualification. “[A]n administrative hearing ‘must be attended, not only with every element of fairness but with the very appearance of complete fairness.’” *Id.* (quoting *Amos Treat & Co. v. Sec. & Exch. Comm’n*, 306 F.2d 260, 267 (D.C. Cir. 1962)).

In addition, the U.S. Office of Government Ethics has promulgated Standards of Ethical Conduct for Employees of the Executive Branch, which require all executive branch employees to “respect and adhere to” certain “principles of ethical conduct.” 5 C.F.R. § 2635.101(a). Employees cannot, for example, “hold financial interests that conflict with the conscientious performance of duty” (*id.* § 2635.101(b)(2)), nor can they “use public office for private gain” (*id.* § 2635.101(b)(7)). They are likewise banned from giving “preferential treatment to any private organization or individual.” *Id.* § 2635.101(b)(8). In addition to adhering to these requirements, employees must also “endeavor to avoid any actions creating the appearance” that they are violating the law or the Standards of Ethical Conduct. *Id.* § 2635.101(b)(14).

II. Grounds for Recusal

Your extensive connections to ACICS and the for-profit education industry, and your long history of consistently opposing regulatory scrutiny of accreditors, require that you recuse yourself from reviewing ACICS’s application for recognition. At a minimum, your connections to ACICS and your statements on the accreditation process give the appearance that you may well have prejudged the facts and the law governing ACICS’s application for recognition.

A. Connections to ACICS

As the senior vice president and chief external affairs officer at Career Education Corporation (CEC) from 2010 to 2015, you served as CEC’s primary representative to accreditation agencies, including ACICS. CEC was, and continues to be, one of the largest for-profit education companies in the United States. Indeed, while you served in this role, CEC operated approximately 80 campuses in the United States, over **70** of which were accredited by ACICS—*i.e.*, nearly all of CEC’s campuses.²

During that same period, CEC faced multiple civil lawsuits and official investigations regarding its conduct. Like many ACICS-accredited schools, CEC entered into several **multi-million-dollar** settlements over allegations that its colleges made fraudulent statements regarding job placement statistics in order to lure students into enrolling.³ It was also the subject of **twenty-**

² Letter from Sen. Richard Blumenthal, et al., to Sec’y of Educ. Betsy DeVos 1 (Apr. 26, 2018), <https://www.blumenthal.senate.gov/imo/media/doc/04.26.2018%20-%20DeVos%20-%20Jones%20Conflicts%20of%20Interest.pdf> [hereinafter “Senators’ Letter”].

³ *Id.* at 3.



two separate investigations led by state attorneys general.⁴ A 2012 report by the Senate Committee on Health, Education, Labor and Pensions found that “[t]he student withdrawal rate for the Associate program is among the highest analyzed by the committee and the company also has *unusually high rates of students defaulting on federal loans*.”⁵ The Committee concluded that “it is unclear that CEC delivers an educational product worth the rapidly growing Federal investment tax payers and students are making in the company.”⁶

It was precisely ACICS’s refusal to protect students and taxpayers from fraudulent and substandard for-profit colleges that led the Department of Education to revoke its recognition in 2016.⁷ In fact, ACICS’s failure to take action against CEC was an important part of the Department’s decision. ACICS failed to take any action against CEC, unlike CEC’s other accreditor, which sanctioned several campuses based on concerns over job placement rates.⁸ The fact that you were involved in CEC’s accreditation processes and worked directly with ACICS raises, at the very least, significant questions about whether you are able to conduct a review of ACICS’s application with the complete fairness required by law.

Your connections to ACICS and other for-profit colleges and accreditors run deeper still. In 2014, you appeared on an ACICS-sponsored panel advocating for less stringent review of for-profit colleges and accreditors.⁹ And, in your capacity as President of AJsquared Consulting, you lobbied on behalf of the Association of Private Sector Colleges and Universities (APSCU), which includes many ACICS-accredited schools.¹⁰ Finally, you served as an expert witness defending the Center for Excellence in Higher Education, a chain of for-profit colleges that sought accreditation from ACICS in 2016 and may do so again if ACICS maintains its recognition.¹¹ These ties further contribute to—again, at the very least—the appearance that you may be biased in favor of ACICS.

B. Positions and Statements on the Accreditation Process

Throughout your career, you have expressed criticism of the accreditation process. You are, of course, entitled to disapprove of the process and to use your position within the Department to advocate for a change in that process. However, your past statements and

⁴ *Id.* at 2.

⁵ *Career Education Corporation*, U.S. Sen. Comm. on Health, Educ., Labor & Pensions 1, https://www.help.senate.gov/imo/media/for_profit_report/PartII/CEC.pdf (last visited June 29, 2018).

⁶ *Id.*

⁷ ACICS Decision at 8.

⁸ Senators’ Letter at 3.

⁹ *How ‘Gainful Employment’ Fits in the Toolbox for Measuring Institutional Effectiveness*, ACICS 3 (2014), <http://www.acics.org/WorkArea/DownloadAsset.aspx?id=6231>

¹⁰ Senators’ Letter at 2.

¹¹ *Id.*



positions regarding the accreditation process go further, and suggest, at the very least, that you may have prejudged both the facts and the legal questions regarding whether ACICS is in compliance with Department regulations.

For example, you have acknowledged in interviews that you resigned as the Assistant Secretary for Post-Secondary Education in 2008 “in large part [due to your] repeated inability to soften the department’s treatment of colleges through the accreditation process.”¹² In 2014, you again suggested that the Department’s recognition process is too hard on accreditors, writing that the Department “is requiring accreditors to jump through an ever-changing and ever-expanding set of hoops in order to gain or maintain the Department’s recognition.”¹³

You have also been particularly critical of the idea that accreditors should be responsible for monitoring certain aspects of student success, stating, “the Department of Education has developed a series of metrics to serve as proxies for educational quality, with graduation rates and starting salaries at the top of the list of most important measures.”¹⁴ In your words, these metrics “require accreditors to put bureaucratic opinion ahead of academic peer review in making their determination of which institutions and programs should be accredited and which should not.”¹⁵

These comments suggest that you may have prejudged issues related to ACICS’s recognition. Department regulations specifically require that an accreditor establish “standards for accreditation . . . that are sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the institutions.” 34 C.F.R. §602.16(a)(1)(i). In order to meet this requirement, the accreditation standards must address “[s]uccess with respect to student achievement . . . including, as appropriate . . . course completion, and job placement rates.” *Id.* Thus, in the course of reviewing ACICS’s materials and determining whether ACICS should receive recognition, you will have to evaluate whether the accreditor has sufficiently met this standard, whatever objections you may have to the standard as a policy matter. Your past statements, at the very least, could cause a disinterested observer to conclude that you may have prejudged the issue, and that you will be inclined to find in favor of ACICS on the basis of your belief that course completion and job placement rates are not appropriate metrics.

¹² Paul Baskin, *Liberal Arts Undervalued by Education Department, Official Says After Quitting*, Chron. of Higher Educ. (June 27, 2008), <https://www.chronicle.com/article/Liberal-Arts-Undervalued-by/940>

¹³ Diane Auer Jones, *The Changing Role of Accreditation and the Department of Education: Benefit or Menace*, Am. Acad. for Liberal Educ. 4 (Apr. 2014), <https://www.aale.org/docs/AuerJones.2014.pdf>.

¹⁴ *Id.* at 2

¹⁵ *Id.* at 4.



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In sum, your extensive ties to, and apparent lack of neutrality toward, for-profit colleges and accreditors raise serious questions about your ability to be objective regarding the recognition of ACICS. To preserve the appearance of complete fairness required by the law, we respectfully request that you recuse yourself from the ACICS decision.

/s/ Anne Harkavy

Anne Harkavy, Executive Director
John Lewis, Counsel
Democracy Forward Foundation