

BEFORE THE HEARING PANEL OF THE ACCREDITING
COMMISSION OF COMMUNITY AND JUNIOR COLLEGES

In the Matter of:

Appeal of City College of San Francisco

DECISION OF THE HEARING PANEL

Background of the Dispute and Appeal Hearing

On June 7, 2013, the Accrediting Commission for Community and Junior Colleges (“Commission” or “ACCJC”) voted to terminate the accreditation of City College of San Francisco (“CCSF”), a constituent member of the Commission. After an internal review pursuant to Commission policies (the “review process”), on January 10, 2014, the Commission confirmed that decision, to become effective as of July 30, 2014.

CCSF filed an appeal pursuant to the Bylaws of the Commission and the Commission’s Appeal Procedures Manual (“Manual”).

The Commission designated a Hearing Panel consisting of Mr. William McGinnis (Chair), Dr. Erlinda Martinez, Dr. Thomas McFadden, Ms. Margaret Tillery, and Mr. Joseph Richey. A. Robert Singer, Esq., was designated to serve as legal counsel to the Hearing Panel.

Challenges to the designation of Mr. McGinnis and Mr. Richey were asserted by CCSF. After briefing, on April 9, 2014, an Order was issued denying both of the challenges.

On April 4, 2014, the Commission submitted a motion to exclude certain evidence from consideration at the appeal hearing. Specifically, the Commission sought to exclude evidence of alleged compliance by CCSF with accreditation standards and eligibility requirements after June 7, 2013, the date of the Commission’s decision to terminate its accreditation. On April 28, 2014, the motion was denied based upon procedures applicable to the conduct of the appeal and the authority of the Hearing Panel. The written Order, which is part of the administrative record, also concluded and declared in pertinent part:

- 1) CCSF may offer for consideration of the Panel all of the grounds, reasons, and evidence it presented to ACCJC and included in its Amended Notice of Appeal up to and through the date of January 10, 2014;

2) with respect to evidence regarding compliance identified in CCSF's Amended Notice of Appeal beyond January 10, 2014, before such evidence will be considered or may be the subject of comment, question, or testimony at the hearing, CCSF must isolate and identify that evidence and, upon a request and such reasonable terms as may be directed, provide to the Panel and [sic] explanation of "good cause" from persons who can personally describe such cause in sufficient detail, and secure a determination (preliminary, conditional, or otherwise) that such evidence may be presented.

On May 20 and 21, 2014, the Hearing Panel assembled to hear testimony from witnesses and receive other evidence with respect to the matter on appeal, pursuant to the Manual and the Commission Bylaws. In connection with this hearing, CCSF was represented by Larry Frierson, Esq. and Steve Bruckman, Esq. as legal counsel, and the institution was represented by Dr. Robert Agrella and CCSF Chancellor Dr. Arthur Tyler. Scott Kessenick, Esq. and Bryant Young, Esq. appeared as legal counsel for the Commission, and Dr. Barbara Beno, Dr. Krista Johns, and Larry Kessenick Esq. attended as representatives.

At the initial hearing session on May 20, 2014, both parties distributed binders of exhibits, consisting of Joint Exhibits, CCSF Exhibits, and Commission Exhibits. Thereafter, legal counsel for both sides presented opening statements. Thereafter, on that date, oral testimony was received on behalf of CCSF from State of California Community College Chancellor Dr. Brice Harris, CCSF Special Trustee with Extraordinary Powers Dr. Robert Agrella, CCSF Chancellor Dr. Arthur Tyler, CCSF Accreditation Liaison Officer Gohar Momjian, and CCSF Vice Chancellor Ron Gerhard. On the following day, May 21, 2014, the Commission presented oral testimony from past Commissioner Dr. Frank Gornick, Commissioner Chris Constantin, (via speakerphone), Commissioner Dr. Steve Kinsella, Vice President Dr. Krista Johns, and past Commissioner Dr. Marie Smith.

Following the Commission's presentation of evidence on May 21, 2014, CCSF offered some rebuttal evidence, which essentially consisted of a letter from the U.S Department of Education ("DOE") with respect to options of accrediting agencies for extensions of time for "good cause." That was followed by further testimony on behalf of the Commission from Dr. Johns with respect to that letter from the DOE, as well as Commission expectations and entitlements with respect to extensions of time.

In the later afternoon of May 21, 2013, counsel for CCSF and the Commission presented closing arguments. Thereafter, the Panel recessed, and commenced its deliberations, which concluded on May 22, 2104.

Preliminary Considerations

Before addressing the contentions raised by CCSF in this hearing, it is appropriate to acknowledge some general principles that apply to the operations and

review performed by accrediting organizations. First, it is recognized that accrediting agencies are to be afforded considerable deference with respect to the method and manner in which they implement their monitoring and enforcement responsibilities. *Foundation for Interior Design v. Savannah College of Art* (6th Cir., 2000) 244 F.3d 521, 527-8; *Wilfred Academy of Hair and Beauty Culture v. Southern Ass'n of Colleges and Schools* (5th Cir., 1992) 957 F.2d 210, 214 ["Courts give accrediting associations such deference because of the professional judgment these associations must necessarily employ in making accreditation decisions."]; *Rockland Institute v. Association of Indep. Colleges* (C.D. Ca., 1976) 412 F.Supp. 1015, 1018. It has been noted by judicial authority that there are few areas where deference is as appropriate as in the accreditation arena. *St Agnes Hospital v. Riddick* (D. Md., 1990) 748 F.Supp.319, 338, 340; *Transport Careers v. National Home Study Council* (N.D. Ind., 1986) 646 F.Supp. 1474, 1482 ["There is probably no area of the law where deference is as necessary as it is when a court reviews the decision of an accreditation association..."]; *Wilfred Academy of Hair & Beauty Culture, supra* @ 214.

It is also recognized that accrediting agencies must have flexibility to apply their standards to constituent institutions, and that a rigid or uniform application is not expected. To the contrary, since accrediting procedures are guidelines, efforts to impose rigid or uniform application of accreditation standards would essentially strip accrediting agencies of the discretion necessary to assess the unique circumstance presented by different schools. See, *Medical Institute of Minnesota v. National Ass'n of Trade and Technical Schools* (8th Cir., 1987) 817 F.2d 1310, 1314; *Parsons College v. North Central Association of Colleges and Secondary School*, (N.D. Ill., 1967) 271 F. Supp. 65, 74. As a result, legal challenges based on claims of disparate treatment towards different institutions are typically rejected. *Foundation for Interior Design v. Savannah College, supra*, at p. 528. As noted in *Transport Careers v. National Home Study Council, supra* at 1485-6:

....TCI alleges that it was treated differently and more severely than other similarly situated schools, in violation of its right to equal protection. Assuming that plaintiff is entitled to constitutional protection (assuming state action and a legitimate claim of entitlement to a protected property interest), plaintiff's claim must fail. An equal protection claim by definition requires the court to make a comparison between two similarly situated people, or in this case, schools. This would amount to a determination by this court that NHSC was incorrect in its evaluation of TCI, which would take this court beyond the proper scope of review, which does not include *de novo* review of NHSC's evaluative decisions. [citation omitted]. This issue was discussed in [*Marlboro Corp. v. Association of Indep. Colleges and Schools* (1st Cir., 1977) 556 F.2d 78, fn. 2]:

The claim that the school was denied equal protection because the commission granted accreditation to schools in equally poor financial condition, or with equally poor library facilities, really amounts to a claim that the commission was incorrect in its evaluation of either Emory or the other schools. Whatever may be the proper scope of judicial monitoring of

associations like AICS, it does not include de novo review of their evaluative decisions.¹

Finally with respect to general principles applicable to the accreditation function, in the review of accreditation decisions, the courts have applied legal principles derived from cases which involve administrative action that mere variations from customary internal procedures will not typically be deemed inherent violations of the rights of constituent institutions [*St. Andrews Presbyterian Coll. v. S. Ass'n of Coll. & Sch.* (N.D. Ga., 2009) 679 F. Supp.2d 1320, 1332-3] and that mistake or error will not typically constitute a basis for reversal without accompanying evidence of demonstrable prejudice. See, *Thomas M. Cooley Law School v. The American Bar Ass'n* (6th Cir., 2006) 459 F.3d 705, 716; *Coalition for Gov't Procurement v. Federal Prison Ind. Inc.* (6th Cir., 2004) 365 F.3d 435, 468; *Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921.

Contentions at Issue

With these background principles in mind, the Panel will turn to CCSF's contentions of error on the part of the Commission,² and will state below its conclusions, all of which were unanimous by the Hearing Panel members.

Lack of Prior Notice to CCSF of Non-Compliance with Accreditation Standards Prior to Imposition of "Show Cause" Status in 2012

¹ This limitation is not unique to the accreditation process. See, for example, *Fox Ins. Co., Inc. v. Centers for Medicare & Medicaid Services* 715 F.3d 1211, 1222 a 2013 decision where the Ninth Circuit dealt with contentions that that an agency had allegedly acted differently in other situations and, in response, the court noted:

These cases all focused on comparing specific legal or factual rulings. They do not create any principle that a court should second guess an agency's result in light of the result the agency may have reached in an earlier case that is not now before the court. Our review must be of the lawfulness of the agency's action according to the record before us, giving deference to the agency's interpretation of the statutory standards. [Citations omitted].

² In Article IX of the ACCJC Bylaws [See, Joint Exhibit 1.A, Section 7, p.14] the following grounds are specified for an appeal of adverse action:

- 1) There were errors or omissions in carrying out prescribed procedures on the part of the evaluation team and/or the Commission which materially affected the Commission's action;
- 2) There were demonstrable bias or prejudice on the part of one or more members of the evaluation team or the Commission which materially affected the Commission's action;
- 3) The evidence before the Commission prior to and on the date when it made action which is being appealed was materially in error; or
- 4) The action of the Commission was not supported by substantial evidence.

CCSF's first contention on appeal in Section 1.A of its Amended Notice of Appeal is that the Commission abused its discretion by placing CCSF on "show cause" status without prior express notification after a comprehensive evaluation in 2006 that it was not in compliance with applicable standards. There appeared to be different aspects to this complaint, including: 1) a suggestion that CCSF lacked awareness that its accreditation might be in jeopardy, which presumably might have triggered earlier or more aggressive remedial action on its part; and 2) a contention that the imposition of "show cause" status in 2012 was excessive and more severe than other possible remedial actions, as evidenced by actions the Commission had taken against some other institutions which had experienced problems (i.e. a "disparate treatment" contention). See, CCSF Exhibit 51.

The Commission explained that under DOE regulations, accredited institutions were required to be in compliance with standards and eligibility requirements at all times, and that there was no requirement that the Commission offer progressive discipline, or even a notice of deficiencies before an institution was placed on "show cause" status. See, Commission Exhibit 7, p. 36. The Commission explained that recommendations made by visiting accreditation teams indicated changes that were appropriate in order for an institution to remain in compliance with Commission standards, and which called for prompt remedial action. Evidence presented by the Commission included its Policy on Commission Actions on Institutions, a document with which CCSF would be reasonably expected to be aware. This document explained that an institution that received recommendations was expected to follow-up and resolve those issues immediately, but certainly within a year or two and, if it did not, that a continuation of those identified issues "may threaten the ability of the institution to continue to meet [requirements]." Joint Exhibit 1.E, p. 2, subsection II, subparagraphs 1-3.³

To further demonstrate that these recommendations provided to CCSF sent a clear message about serious concerns that needed attention, the Commission pointed to the fact – acknowledged by CCSF - that as a result of the 2006 evaluation and the recommendations made, CCSF was thereafter obliged to submit a progress report on financial planning and stability in 2007 [CCSF Exhibit 3] and a focused mid-term progress report in 2009. CCSF Exhibit 5. CCSF completed the progress report as of March, 2007 [CCSF Exhibit 2], and the focused mid-term report by March 15, 2009, to demonstrate its progress on the recommendations selected for emphasis by the Commission. CCSF Exhibit 4, p. 1. The acknowledgements of receipt of these interim reports from the Commission reminded CCSF of the consequence of remaining out of compliance. CCSF Exhibits 4 and 6. Then, in 2010, CCSF submitted a follow-up accreditation report, and the Commission's response on June 30, 2010, identified a

³ In its Amended Notice of Appeal, CCSF pointed to the fact that around August, 2013, the DOE expressed to the Commission its viewpoint that an accrediting agency should formalize a distinction between "improvement recommendations" and "deficiency recommendations." See, Commission Exhibit 7, p. 24-25. CCSF conceded, however, that during the applicable period at issue in the hearing the Commission was not obliged to implement these distinctions. Instead, CCSF contended it was "within [the Commission's] authority and discretion" to (presumably retroactively) apply "the wisdom" of that position change by the DOE to the benefit of CCSF.

number of important issues which CCSF hadn't resolved, including with respect to its financial status. CCSF was also reminded that it must be prepared to demonstrate compliance at the risk of a possible loss of accreditation. CCSF Exhibit 8.

When CCSF went through its next periodic comprehensive evaluation in 2012, it was apparent to the Commission that little meaningful progress had been made with respect to the matters identified in those recommendations. It was almost universally conceded by witnesses for both sides at the appeal hearing that CCSF was substantially out of compliance in 2012, largely due to entrenched resistance from third parties and organizations affiliated with CCSF who were more focused on protecting their economic or professional status, regardless of the risk to the continuing accreditation of the institution.

In summary, the evidence did not support a conclusion that CCSF was confused or misled in 2006 about its compliance obligations or the risk it assumed by ignoring them, and certainly not because the concerns identified by the Commission in 2006 were described as "recommendations" as opposed to "deficiencies." Nor was there any credible evidence that CCSF was surprised that its failure to make substantial changes would trigger remedial action by 2012.

Following the 2012 evaluation, the Commission determined that CCSF was well outside of acceptable boundaries for compliance, and that the institution appeared to be locked in downward spiral which was likely to continue given the inability of those responsible for the institution to implement the major changes which were necessary. Those conclusions weren't disputed in any significant way by the witnesses for CCSF at the hearing. To the contrary, the CCSF witnesses conceded that the institution was out of compliance at that point in multiple areas.

The Commission's explicit authority under federal rules and its own policies included the entitlement to immediately initiate adverse action upon a finding of non-compliance with any standard [see, 34 C.F.R. sec. 602.20; CCSF Exhibit 46, p. 1537; Commission Exhibit I.E, p.4], even though other provisions allowed a possibility for extensions of time. In this case, there was no serious dispute that years of guidance and persuasion on the part of the Commission had been largely ignored by CCSF. Nor was there any dispute that the institution was nowhere near compliance or even "substantial compliance" in 2012. Finally, no explanation was ever offered why the institution and its enablers apparently felt that CCSF would be allowed to continue indefinitely in noncompliant status except, perhaps, for their assumption it was "too big to fail," and could get by indefinitely with only modest and largely ineffectual efforts at compliance.

As noted above, no evidence was presented that the Commission had adopted any mandatory system of progressive action before "show cause" status could be imposed. Although CCSF pointed to instances where lesser sanctions had been initially imposed on some other institutions [CCSF Exhibit 51], there was little to no evidence that those situations were comparable. Moreover, as discussed above, the "disparate

treatment” argument holds little value in accreditation cases. For its part, the position of the Commission at the hearing was that any decision to impose lesser steps would involve an exercise of informed discretion with respect to the perceived problems of the institutions at issue as well as the likelihood they would, and could, remediate those problems within prescribed time periods. The decision with respect to CCSF was merely a discretionary decision based on the particular circumstances and history of CCSF which pointed to a conclusion that evidence of compliance or likelihood of prompt compliance was lacking.

In this regard, it is important to note that all of CCSF’s witnesses (including Chancellor Harris, Dr. Agrella, and Dr. Tyler) acknowledged that at the time of its comprehensive evaluation in 2012 and its subsequent consideration by the Commission while on “show cause” status, the institution was dysfunctional, troubled, and substantially out of compliance. To illustrate, in October, 2013, Dr. Agrella wrote, in pertinent part:

As the Special Trustee of City College, I feel I must comment on the controversy that certain third parties have brought to the college’s current accreditation status of “Show Cause.” Nothing that has been documented in the site evaluation team reports has been found to be without merit. Although there may be some minor areas of disagreement, overall the site evaluation reports have been found to be accurate and, unfortunately in some areas, even understated in the depth of problems the college faces. The peer review accreditation process revealed problems that are now being addressed to assure the long term viability of the college. Emphasis added.

See, Commission Exhibit 5, p. 246. Dr. Tyler estimated at that point CCSF met less than 60% of the appropriate requirements and that several additional years would be required to come into compliance.⁴ Similarly, in an October, 2013, letter Dr. Scott-Skillman, who was the Interim Chancellor of CCSF when that action was taken wrote to the Commission noting her own experience and commitment to the accreditation process, and stated, in pertinent part:

City College’s “Show Cause” accreditation status in my opinion is justified. Unfortunately much of the needed improvements were not disclosed through the self-evaluation. And, the site evaluation reports, while accurate, in my opinion were limited in scope and magnitude of the issues needing improvement. There is very definitive room for improvement at City College in many areas that will positively ensure a more viable and sustainable institution capable of delivering quality education in a highly effective and efficient environment. (Emphasis added).

⁴ Some evidence was produced at the hearing that around this time Dr. Agrella commented to the Commission that his current estimate for CCSF to come into compliance was four to five additional years, although at the appeal hearing he asserted that estimate had, in fact, been offered as a likely timeframe to change the “culture” at CCSF. At the hearing, he took a far more positive position with respect to CCSF’s compliance status based on developments and efforts to be discussed in more detail below.

See, Commission Exhibit 6, p. 248. Clearly there was substantial evidence to demonstrate that the Commission reached a rational and reasonable conclusion that continued prodding of CCSF through lesser sanctions was unwarranted and wouldn't be productive of anything except more delay with a further deterioration of the quality and viability of the institution.⁵

The Hearing Panel concludes: that the Commission's decision in 2012 to impose "show cause" status on CCSF was fully justified, it was consistent with the Commission's regulatory obligations, and it was a reasonable exercise of discretion. With respect to this ground for appeal, CCSF failed to sustain its burden of proof.

Alleged Abuse of Discretion in Imposing Harsher Sanctions in
2012 and 2013 Than Were Recommended by the Visiting Team

CCSF's second allegation of error in Section I.B of its Amended Notice of Appeal was that the Commission imposed harsher sanctions on CCSF than had been recommended by visiting teams in both 2012 and 2013. In this regard, CCSF conceded that the Commission had discretion to modify recommendations it received from visiting teams; however, it asserted that the changes were so "significant, sweeping and substantive" as to raise issues of fundamental fairness and constitute an "abuse of discretion"⁶ on the part of the Commission.

As was the case with several of the grounds of error asserted by CCSF in this appeal, it spent no time demonstrating the legal or factual underpinnings for this contention. While the reports from the various Commission teams were included in the hearing record, CCSF offered no testimony or compilations to identify these alleged discrepancies so the Hearing Panel could understand their nature, number, or significance. Nor did CCSF provide any explanation about the considerations which led the Commission to reach conclusions at variance from some opinions of members of these visiting teams, including through questions along these lines to Commission witnesses. Presumably CCSF expected the Hearing Panel to work its own way through the lengthy reports to identify and isolate alleged discrepancies, and then speculate about why the judgment of the Commission was different in some respects. It is well

⁵ It warrants mention that despite the awareness of the California Community College Chancellor's Office about the problems confronting CCSF, it was only after the Commission's imposed "show cause" status on CCSF that the Board of Governors took the affirmative step to designate Dr. Agrella to serve in the role of "Special or Voluntary Trustee" for that institution. That action turned out to be more symbolic than effective, because his appointment at that time did not include governance powers much beyond the ability to "stay and rescind" actions of the elected board of CCSF. Even that belated and fledgling step, however, would not likely have been taken but for the Commission's imposition of "show cause" status in 2012.

⁶ For this claim, as well as others in which CCSF has asserted an "abuse of discretion" on the part of the Commission, it should be kept in mind that in accreditation cases, this standard typically calls for a situation where there is "no" evidence to support the action or that it plainly constitutes a misapplication of the law. On the other hand, where agency action is within the bounds of its lawful authority, the severity of the sanction it selects is typically not open to review. *Thomas M. Cooley Law School v. American Bar Ass'n*, (6th Cir., 2006) 459 F.3d 705, 713, 714-5.

recognized, however, that it is not the responsibility of an appeal body to search through a lengthy record to try to find facts which might support an appellant's broad contention of error.

Nor did CCSF present any cogent legal or factual foundation for its underlying premise. In this regard, it is self-evident that the decision-making authority in this matter rests with the Commission, not its subordinate agents, a point which even CCSF acknowledged in its Amended Notice. This is certainly the position of the DOE, which confirmed that federal regulations require the agency to independently conduct its own analysis and reach its own decisions, and not merely implement the recommendations of on-site evaluations teams. Commission Exhibit 7, p. 35.

The only authority the Hearing Panel was able to locate that even came close to the claim raised by CCSF was in *Foundation for Design v. Savannah College of Art* (W.D. Mich., 1998) 39 F. Supp.2d 889, 898. In that case, an institution disputing a loss of accreditation pointed to the fact that two "readers" (presumably staff who reviewed the results of the reports of visiting teams to provide summaries to the accrediting body) expressed views inconsistent with the conclusions of the accrediting body. The court rejected the contention that staff disagreement undermined the reasonableness of the decision of the accrediting body. The court also affirmed that a decision by the accrediting agency to review the standards as a whole didn't raise any inference of bias.

The Hearing Panel concludes: that CCSF failed to sustain its burden of proof with respect to this contention on appeal.

Alleged Abuse of Discretion in Allowing CCSF
Less Than One Year to Rectify Deficiencies

The discussion with respect to this ground for appeal found in Section I.C of CCSF's Amended Notice of Appeal will be consolidated with the discussion which follows later in this Decision regarding CCSF's contention that as of March 25, 2014 (the date of filing of its Amended Notice of Appeal) it "is now" in substantial compliance with accreditation standards and eligibility requirements. Joint Exhibit 3, p. 13.

Alleged Incorrect or Unwarranted Finding by the
Commission Regarding Eligibility Requirement 21

In Section I.D of the Amended Notice of Appeal, CCSF asserted that the Commission was in error or unfair when it determined that CCSF had violated Eligibility Requirement 21 by failing to timely or properly communicate a "substantive change" proposal to the Commission.

This was a matter of modest significance which received no separate attention from either party during the hearing. In the Amended Notice of Appeal, CCSF acknowledged that due to some apparent "misstep" on its part (presumably confusion resulting from staff turnover), a "substantial substantive change" document hadn't been

presented in a timely manner as required and, when CCSF sought to submit it, it couldn't because of a Commission rule which precluded submission of such matters within six months of a pending visit or while an institution was on sanction status. For its part, the Commission noted in its response to CCSF's Amended Notice of Appeal that if this were the only area of non-compliance on the part of CCSF, it might well have been reasonable to afford CCSF additional time to comply, but this wasn't the only area of non-compliance. In a further response, which also has application for several other contentions at issue in this appeal (and which will be discussed later in more detail), the Commission pointed to the lack of evidence of any demonstrable prejudice, that is, that the accreditation decision would have been any different without this deficiency.

The Hearing Panel concludes: that CCSF failed to sustain its burden of proof with respect to this contention on appeal.

Alleged Error With Respect to Determinations by the
Commission Regarding CCSF's Failure to
Comply with Certain Financial Standards

A fair amount of testimony was presented at the appeal hearing with respect to the general financial stability of CCSF at the time the Commission imposed "show cause" status, at the time the Commission voted for termination in 2013, and, to some extent, beyond. The claim in Section I.E of the Amended Notice of Appeal, however, was largely focused on one aspect of that broader financial picture. Specifically, CCSF disputed the determination that it had failed to meet Standards III.D.3.c and III.D.3.d related to financial management.

CCSF offered evidence to suggest that as of February, 2013, it had adopted a prospective funding model for future expenses, with the exception of its existing and projected substantial financial obligation for retiree benefits ("OPEB"), which CCSF argued didn't require pre-funding but which could be addressed through a "pay-as-you-go" methodology under pertinent accounting standards (GASB 45), as long as that cost was included in the financial plan, which CCSF claimed it had done. CCSF also contended that steps had been undertaken to permit increased cost-sharing for the OPEB liability to meet its annual required contribution ("ARC").

For its part, the Commission noted that CCSF's claim of error focused only on one or two provisions of the standards which more broadly covered financial stability and resources of the institution. In that regard, the Commission pointed to, among other things, a letter to CCSF on July 3, 2013 [CCSF Exhibit 25, p. 1129-30], in which it was noted:

Finally, City College of San Francisco has still not addressed, and appears to lack the capacity to address, the many financial management deficiencies (Standard IIID) identified by the 2012 Evaluation Team Report. The College has very significant internal control deficiencies that were largely unaddressed over the last year. The college contracted with the Fiscal Crisis Management

Assistance Team (FCMAT) in 2012 and the team made 53 recommendations, most of which the Show Cause Evaluation Report found to be unaddressed as of 2013. In spring 2013, City College of San Francisco contracted with FCMAT for a second study designed to identify problems with financial processes and to inform an improvement in financial controls, but that report was not completed at the time of the Commission's deliberations. The institution's inability to identify the costs associated with all of its sites and centers, identified as a problem in 2006, still remains. The institution does not meet Eligibility Requirement 18 or Standards for financial accountability.

Commission witnesses also explained that: 1) GASB 45 was an accounting standard for reporting, not an accreditation standard for assessment of fiscal soundness; and 2) other information before the Commission when it considered the financial status of CCSF demonstrated that CCSF had no realistic plan or likelihood of covering its ever increasing OPEB obligation and would likely continue in a downward financial spiral at a dramatic rate.⁷ Commission witnesses also noted that the financial information provided by CCSF was sketchy, based on a number of uncertain and questionable assumptions, and had not been validated through reasonable means.

In considering this contention, it is worthwhile to recall the general legal principle noted earlier that deference should be afforded to determinations of accrediting agencies. That principle applies with special force to matters related to the financial viability of an institution, especially an institution which has experienced long-standing financial problems and shortcomings, which was the case with CCSF. *Hiwassee College, Inc. v. The Southern Ass'n of colleges and Schools* (11th Cir., 2008) 531 F.3d 1333, 1335. It is understood that evidence of positive financial trajectories is not, in itself, sufficient to demonstrate financial stability. *St. Andrews Presbyterian Coll. v. S. Ass'n of Colleges. & Schools* (N.D. Ga., 2009) 679 F.Supp.2d 1320, 1331. As the court noted in the *St. Andrews* case:

Accrediting agencies are to be afforded great deference in their interpretation of their substantive rules, and these interpretations should be upheld unless "clearly erroneous." [citation omitted]. An accreditor is also "entitled to make a conscious choice in favor of flexible standards to accommodate variation in purpose and character among its constituent institutions...." *Parsons College v. North Central Ass'n of Colleges and Secondary Schools* (N.D. Ill. 1967) 271 F.Supp. 65.

The weight of authority permits an accrediting agency such as SACS to maintain flexible standards to allow it to accredit a wide variety of institutions. An exact definition of financial stability is not required to satisfy common law due process.

⁷ In this regard, the Commission noted that a FCMAT report for CCSF prepared in or around July, 2013 [CCSF Exhibit 27], which was after the Commission had reached its decision to terminate accreditation, was far from positive or optimistic with respect to financial issues confronting CCSF. See, for example, p. 1245-6, 1248-9.

It is also important to bear in mind a related principle that a piecemeal approach to enforcement of accreditation standards is not warranted. *Foundation for Interior Design v. Savannah College of Art* (W.D. MI, 1998) 39 F.Supp.2d 889, 898, *aff'd* 244 F.3d 521, 527 [standards must be reviewed as a whole as they are interrelated in nature, and cannot be evaluate in piecemeal fashion].

CCSF's reliance on this discrete claim of error was an instance of a focus on form over substance. Pointing to inclusion of a line item which consists of questionable and unreliable information does not constitute a meaningful demonstration of financial stability.

The Hearing Panel concludes: that with respect to this claim of error, CCSF failed to meet its burden of proof.

Alleged Abuse of Discretion and Violation of "Traditional" Principles Regarding Conflicts of interest Regarding Members of Accreditation Review Team (Crabtree) and "Show Cause" Review Team (Nixon)

CCSF contends in Section I.F of the Amended Notice of Appeal that in two instances, individuals with an "apparent" conflict of interest participated in reviews leading up to the ultimate decision to terminate accreditation. The first was Mr. Peter Crabtree, who, aside from his professional role as the Division Dean of Instruction, Career, and Technical Education at Laney College [Commission Exhibit 19], is the husband of the President of the Commission. Mr. Crabtree participated as one of seventeen team members that evaluated CCSF during the 2012 comprehensive accreditation review. The second individual was Dr. John Nixon, an Associate Vice-President of the Commission, who served as a member of a nine person "Show Cause" review team for CCSF in April, 2013. Joint Exhibit 8.

Mr. Crabtree

CCSF claims that Commission Policy on Conflict of Interest [Joint Exhibit 1.F] states that immediate family members of Commission staff should not participate on evaluation teams.⁸ CCSF presented no evidence to explain anything about Mr. Crabtree's role on the evaluation team which might have influenced any of the determinations included in the report. As noted, he was one of seventeen members,

⁸ Some clarification is important. While Joint Exhibit 1.F does contain an express provision precluding selection of immediate family members for evaluation teams (see highlighted sentence at p. 3), the policy on conflict of interest in force in 2012 visit did not contain that express prohibition. Nevertheless, CCSF contends that occasional references in the prior version to "appearances" of a conflict of interest were broad enough to encompass a prohibition of family members. This issue was raised before the DOE by the California Federation of Teachers in early to mid 2013. The Commission explained its position that there was no generally accepted rule within the accreditation or higher education communities that would disqualify a family member, at least without evidence pointing to some specific conflict under the circumstances. The DOE replied with a staff opinion that a marital relationship would be within its interpretation of an "appearance" of a conflict of interest. As a result, the Commission added the highlighted sentence which currently appears in Joint Exhibit 1.F.

and did not serve as chair. Joint Exhibit 5, p. 2. There was no evidence anyone at CCSF raised any concern regarding his participation until well after the Commission issued its “show cause” order, despite its obligation to review the prospective membership of the team in advance and immediately notify the Commission of issues. Joint Exhibit I.F, p. 3.⁹ In this regard, the failure to make a timely objection to an accreditation reviewer is a legitimate consideration to overcome any later claim of bias. See, *St. Agnes Hospital v. Riddick* (D. Md., 1990) 748 F. Supp.319 340-1. No evidence was offered about the areas of compliance reviewed by Mr. Crabtree, nor about his conclusions, that is, whether they were favorable or otherwise with respect to CCSF.¹⁰ No evidence was offered with respect to anything he may have communicated to anyone inside or outside of the Commission which revealed bias or lack of an objective point of view towards CCSF. Even if informal comments had been communicated to his spouse, the Panel understands she is not a voting member of the Commission. Asked about this contention at the hearing, Dr. Tyler explained he had no information about any acts or omissions on the part of Mr. Crabtree, and that CCSF’s contention was predicated entirely upon its conclusion that any “appearance of bias” was, *per force*, sufficient to constitute “demonstrable prejudice.”

In offering this claim, CCSF relies on at least two key assumptions. First, that the Commission’s willingness to change its policy to accede to the retrospective opinion of DOE staff somehow retroactively validates that Mr. Crabtree’s selection was an improper violation of Commission policy which rises to the level of a material error or omission. The assumption is unwarranted as a matter of fact or law. The prior version of the Policy on Conflict of Interest without a prohibition against family members apparently received approval from the DOE. It was the view of the Commission as the drafting entity that the policy did not prohibit the participation of spouses on visiting teams. As the President of the Commission later explained to the DOE when the controversy arose in 2013:

The agency stated that there is no commonly-accepted rule within the accreditation community, nor the higher education community-at-large, that would disqualify an individual’s participation on an evaluation team because his/her spouse was employed by the accrediting agency. In addition, the agency also stated that this conflict would only exist if there was an avenue for either spouse to exploit the situation for personal or professional financial gain, or if in opposing roles within the process. However, the existence of a conflict of interest, or the appearance of a conflict, cannot be determined without considering the specific factual situation.

⁹ In this regard, it is ironic to note that with respect to the claim that follows (relating to the allegedly inadequate number of faculty members on a “show cause” team), CCSF complains as part of its grounds for error that in that instance it had no opportunity to protest the composition of that team.

¹⁰ In Section I.B of the Amended Notice of Appeal, CCSF acknowledges that in several, albeit unidentified, instances the conclusions of the evaluation team appeared to be more favorable to the institution than later conclusions of the Commission. Since CCSF’s entire claim regarding Section I.B is based solely on speculation, one might equally speculate that those more favorable aspects of the evaluation report were the product of input from Mr. Crabtree.

See CCSF Exhibit 29, p. 1312. While not an absolute mandate, as a general matter, the accrediting agency's interpretation of its own rules and policies will be afforded deference and will be upheld unless clearly erroneous. *Western State Univ. Of South. Cal. v. American Bar* (C.D. Ca., 2004) 301 F.Supp.2d 1129, 1135 [ordinarily courts defer to agency's reasonable interpretations of its own rules; agency possessed of the ability to adopt and amend rules also may interpret them, even if the interpretation chosen is not the one that most impresses an outside observer]; *St. Agnes Hospital v. Riddick* (D. Md., 1990) 748 F. Supp. 319, 340; *Hennessey v. National Collegiate Athletic Ass'n.* (5th Cir., 1977) 564 F.2d 1136, 1143 [inappropriate to reject association's interpretation of its own rules where the interpretation is certainly one of those reasonably suggested by the words of the by-laws]. Notwithstanding the contrary subsequent opinions of DOE staffers (which are not the product of a rule-making process and, hence, remain opinions), the Hearing Panel does not find the Commission's interpretation of the former version of the policy to be unreasonable. Nor does the Hearing Panel find that there was an actual or apparent conflict of interest on the part of Mr. Crabtree at that time based upon any evidence presented.

The second assumption appears to be the lay opinion voiced by Dr. Tyler, that any "apparent" conflict of interest is sufficient to invalidate all acts and decisions, regardless of the circumstances and regardless of any evidence pointing to demonstrable prejudice. That sweeping conclusion is not supported under the law. See, for example, *Coalition for Gov't Procurement v. Federal Prison Ind. Inc.* (6th Cir., 2004) 365 F.3d. 435, 468 [a mistake that has no bearing on the ultimate decision or causes no prejudice is not a basis to reverse an agency's determination]. This principle has been recognized and applied with respect to accreditation actions. In *Hiwassee College v. Southern Ass'n of Colleges* (N.D. Ga., 2007), 490 F.Supp.2d 1348, aff'd, 531 F.3d 1333 (11th Cir., 2008), for example, the court considered the claim of a college that its rights had been violated in connection with a termination of accreditation. The college contended, among other things, that a reviewer should not have served on an appeals committee¹¹ because he had served on teams that reviewed the college on two prior occasions, in violation of the rules of that accrediting organization. The district court noted:

The underlying interest here is whether SACS's alleged departure from its internal rules has resulted in any fundamental unfairness arising out of the process employed. Such a determination is flexible and may vary on a case-by-case basis. It is clear that Dr. Goodson's membership on the Appeals Committee did not interfere with any right of Hiwassee's to have notice and a right to appear and an opportunity to be heard. Further, no party disputes that the Appeals Committee has a quorum of five members under SACS's rules. There were six members on the Appeals Committee that considered withdrawing Hiwassee's

¹¹ The law with respect to conflicts also recognizes a distinction between persons serving in the role of a decision-maker as opposed to those who merely constitute a source of information, with more significance attributed to perceived conflicts on the part of decision-makers. As noted, Mr. Crabtree's role in the instant case was as one of seventeen members of an evaluation team. There is no evidence he had any role in any decision related to accreditation of CCSF.

accreditation. The decision of the Appeals Committee was unanimous. Although Hiwassee asserts that Dr. Goodson asked questions during the appellate hearing, Hiwassee has brought forward no evidence to show that Dr. Goodson's presence on the panel has tainted the Appeals Committee, let alone any other proceeding undertaken by SACS since this issue arose.

The court explained that an alleged "improper motive" of one member of a commission or panel wasn't sufficient to impute such a motive to the entire organization, and went on to comment that even if one were to assume an "actual" (as opposed to "appearance of") conflict, in the absence of evidence that member's participation permeated the entire review panel, there was no basis for reversal. The court explained such a result would:

provide a windfall to Hiwassee in vitiating the procedure SACS has in place to address potential accreditation deficiencies where there is no evidence in the record to indicate that [the reviewer's] presence on the Appeals Committee affected in any way the fundamental fairness of the process afforded to Hiwassee to challenge SACS's accreditation decision.

See also, *St. Andrews Presbyterian College. v. Southern Ass'n of Colleges. & Schools* (N.D. Ga., 2009) 679 F. Supp.2d 1320, 1333 [failure to show that alleged conflict of interest of member appointed to a special committee caused any injury or otherwise affected the accreditation decision insufficient to overturn action]; *St. Agnes Hospital v. Riddick* (D. Md., 1990) 748 F.Supp. 319, 341 [alleged procedural irregularity regarding the composition of an accrediting review board is insufficient in the absence of evidence it affected the outcome of the decision]; *Rockland Institute v. Ass'n of Independent Colleges and Schools* (C.D. Ca., 1976) 412 F.Supp. 1015 1017 [where the matter in dispute relates to adverse action taken by the accrediting agency, alleged procedural irregularities with respect to preliminary reports from investigators who took no part in the ultimate decision are immaterial].

Dr. Nixon

In 2013, it appears that Dr. Nixon was a member of the Commission staff, but not a member of the Commission. He was one of nine members of the "show cause" evaluation team, and did not serve as chair. Joint Exhibit 8, p. 2. There was no evidence that anyone at CCSF or elsewhere objected to his participation. As was the case with Mr. Crabtree, no evidence was presented to explain his role on the "show cause" team. Nothing was presented with respect to what areas he reviewed, with respect to his conclusions, that is, whether they were favorable or otherwise with respect to status of CCSF, or whether his views influenced the conclusions stated in the report. No evidence was offered with respect to anything which suggested, much less reasonably revealed, any bias on his part.¹² Moreover, the evidence indicated the DOE

¹² While the participation of Mr. Crabtree led the California Federation of Teachers to register a formal complaint with the DOE (upon which CCSF relies), there was no evidence of any complaint regarding Dr. Nixon, nor any commentary about him from the DOE staff.

was well aware at the time that the Commission's interpretation of its conflict of interest policy allowed the inclusion of staff members on evaluation teams, and it registered no concern about him. See, CCSF Exhibit 29, p. 1312.

All of the principles and conclusions stated above with respect to Mr. Crabtree apply to Dr. Nixon, and perhaps even more so. Stated differently, there's no credible support for a claim that his participation was even questionable, much less improper.

The Hearing Panel concludes: that as to both Mr. Crabtree and Dr. Nixon, CCSF's claims of error with respect to their selection and participation are not supported by a preponderance of the evidence.

Alleged Inadequate Number of Academicians
On the 2012 and 2013 Visiting Teams

In Section I.G of its Amended Notice, CCSF raises another claim of error with respect to the alleged failure to include a sufficient number of academicians on the 2012 visiting team and the 2013 "show cause" team. CCSF relies entirely upon communications from the DOE to the Commission after both of these visits had occurred, indicating the opinion of DOE staff that the regulatory requirement in 34 C.F.R. 602.15(a)(3) that an accrediting agency have "academic and administrative personnel on its evaluation...bodies" calls for a "reasonable representation" of both categories and, in their opinion, a single academician on a sixteen person team in 2012 and on an eight person team in 2013 was not reasonable representation. CCSF Exhibit 29, p. 1312.

This contention of error was another which garnered little to no attention from CCSF at the hearing. The Commission's position was that while it did often include several faculty members on evaluation teams [see, Commission Exhibit 3, p. 2], it did not view the regulation to require any specific number or balance of "academics" as opposed to "administrative" personnel, and it did not interpret the reference to "academic" personnel to require faculty members whose current and past experience was entirely in direct student instruction. The Commission apparently concluded that individuals with instructional background or shared instructional and administrative responsibilities could still be viewed as "academic" personnel for the purpose of evaluation teams.¹³

With respect to this claim of error, it is worthwhile to first mention that the applicable federal regulations do not contain any definition of "academic" personnel, or of the term "faculty," something one would expect if this were a matter of serious concern. Nor do the regulations specify any required minimum number or ratio between "academic and administrative" representatives on evaluation bodies, or even mandate

¹³ The Commission also suggested in its Response to the Amended Notice of Appeal that the 2012 evaluation team included "several" academics ("three faculty members, a former faculty member recently assigned as dean of institutional effectiveness, and an academic dean"), although that information was not expressly clarified at the hearing.

reasonable representation of both categories. While undoubtedly well intentioned and not inherently unreasonable, the communication from DOE in August, 2013 is simply an after-the-fact expression of opinions of its staff with respect to what they believed to be desirable, not a statement of what was required by the applicable regulations, expressly or otherwise. As a practical matter, that interpretation from DOE might well be enough to influence the Commission to modify its views with respect to appointment of evaluation teams from August, 2013 forward, but that communication does not establish the Commission's prior interpretation was wrong, inherently unreasonable, or in contravention of the regulations. .

In this regard, the factual and legal principles discussed above would also come into play, especially the case authorities which indicate that even departures from normal or customary procedures (which have not been determined here) do not give rise to a viable claim of error. See, for example, *St. Andrews Presbyterian College v. Southern Ass'n of Colleges & Schools* (N.D. Ga., 2009) 679 F. Supp.2d 1320, and cases cited *supra*. No evidence was provided at the hearing to support a conclusion that the absence of some higher number of "academic" personnel diminished the objectivity or quality of the conclusions reached. To the contrary, given the emphasis on the complicated and often technical organizational, operational, and financial issues which figured prominently in the evaluation of CCSF's status, it's difficult to understand what higher or better judgments might have been supplied by individuals with expertise in direct student instruction but little to no knowledge or experience with such matters. Certainly no factual evidence was provided to support a conclusion that valid and viable information was overlooked because of any relatively small number of pure "faculty" on either of these evaluation teams. Nor was there legal or factual evidence to support a conclusion that the interpretation or application by the Commission of 34 C.F.R. 602.15(a)(3) was unreasonable or unwarranted at the time the appointments were made, that the Commission's interpretation at the time was unreasonable or not entitled to reasonable deference, or that demonstrable harm resulted from these appointments.

The Hearing Panel concludes: that CCSF's claim of error in Section I.G of its Amended Notice of Appeal fails for a lack of a preponderance of evidence.

Alleged Unfairness and Due Process Deprivations in the Appeal Process

CCSF's final procedural contention in its Amended Notice of Appeal [Section II.A] does not require extended discussion, because it was effectively withdrawn from consideration in this appeal with the concurrence of both sides.

This section of the appeal identified at least eight separate aspects of the appeal and hearing process which, according to CCSF, violated its right to "due process." As part of its response, the Commission pointed to provisions of the Appeals Procedures Manual Section 2.A [Joint Exhibit 1.B, p. 2] which declared: "The Hearing Panel shall not consider legal arguments which challenge the legal validity of any of the provisions

of this Manual, ACCJC’s Bylaws, or any ACCJC Policy, or any generally followed practice of ACCJC.”

lit’s not entirely clear that this limitation in the Manual was sufficient to remove such issues from consideration during this appeal, especially since they had been raised in CCSF’s Amended Notice of Appeal. In this regard, counsel for CCSF explained these claims of error had been included in the Amended Notice of Appeal simply to preserve the right of CCSF to challenge them in a different forum, and both sides expressly agreed that those matters should not be presented for resolution by the Hearing Panel. The Chair of the Hearing Panel acceded to this agreement of counsel and, as a result, no issues of fact or law related to those contentions were presented at the hearing, and they are not part of the findings or conclusions of the Hearing Panel.

CCSF’s Claim Regarding “Substantial Compliance”

More than 90% of CCSF’s Amended Notice of Appeal, and a comparable percentage of the evidence presented at the hearing, was devoted to its contentions in Section III of the Amended Notice of Appeal that: 1) it “is now” in substantial compliance with the standards and eligibility requirements; that 2) it was unfairly denied sufficient time which the Commission was allowed to provide within its discretion to bring itself into compliance; and that 3) it should be afforded additional time to achieve compliance. CCSF claimed that these matters constituted material error, fundamentally unfairness, a denial of due process, and weren’t based on substantial evidence.

As a preliminary matter, little assistance was offered by either party regarding the application of “substantial compliance” as a benchmark for accreditation.¹⁴ Commission and DOE policy make it clear that all accredited institutions are expected to “completely meet” all eligibility requirements. Joint Exhibit 1.D, p. 1; CCSF Exhibit 53, p. 1634, Section 602.20 (a) (1). On the other hand, the Commission appears to recognize that something less than full, total, and constant compliance won’t always mean that immediate adverse action must be taken. So, for example, the Policy on Commission Actions on Institutions notes that an affirmation of accreditation may be granted if an institution “substantially meets” the standards, notwithstanding identification of some “small number of issues of some concern which, if not addressed immediately, may threaten the ability of the institution to continue to meet the [requirements].” In that circumstance, certain steps are specified to be taken by the institution and the

¹⁴ This omission included a failure to provide legal authority to assist in understanding the application of “substantial compliance” in this context. For the purposes of this discussion, the Hearing Panel has assumed that while not susceptible of a mathematically precise definition, “substantial compliance” envisions something less than actual and literal compliance, allowing departures of a modest level as long as the intended goal of the process at hand is not defeated. The Panel further recognizes as a general proposition that the determination of “substantial compliance” may take into account efforts to satisfy the obligation through positive means, including what could reasonably have been done under the circumstances. It also recognizes, however, that merely claiming that steps have been taken to improve or rectify omissions with a hope of achieving compliance in the near future isn’t the appropriate standard for “substantial compliance.” See, for example, *Fox Ins. Co, Inc. v. Centers for Medicare & Medicaid Services* (9th Cir., 2013) 715 F.3d 1211, 1221.

Commission to enable the institution to resolve that “small number” of concerns within a one to two year period. Joint Exhibit 1.E, p. 2, subsection II, subparagraphs 1-3.

On this issue, the DOE has explained:

Section 602.20 of the Criteria requires a recognized accrediting agency to initiate an adverse action immediately when the agency finds an institution out of compliance with any standard, or to provide a time period of no more than two years for the institution to return to compliance. This section also provides the opportunity for an agency to grant a “good cause” extension for an institution to return to compliance prior to taking adverse action. The decision of when an institution becomes noncompliant; the responsibility for clearly communicating that determination to the institution; the determination of how much, if any, of the two-year period should be provided to enable the institution to return to compliance; and the decision of whether to provide a good cause extension and for how long, are all matters entrusted to the judgment of the recognized accrediting agency. Emphasis added.

With respect to extensions of time after adverse action is taken, the DOE indicated:

....[T]he ACCJC has the authority to reconsider or rescind its termination decision so as to provide the institution with additional time to come into compliance within the two-year frame, if such period has not run out, or to provide an extension for good cause.¹⁵ While the Department cannot comment on specific actions an accrediting agency may or may not take in the future, in general, an agency may, as permitted by its established policies and procedures, correct any errors it has made, respond to any improvement in institutional performance, and adopt or change its policies with regard to its oversight of the institution it accredits. The Department would then review any changes made, and the process and procedures by which those changes were made, to ensure that the accrediting agency continues to be a reliable authority as to the quality of education or training provided by its accredited institutions.

CCSF Exhibit 58. In other words, it appears that the concept of “substantial compliance” may legitimately come into play as a factor for discretionary consideration

¹⁵ Apparently at some point in or around 2008, the Commission adopted guidelines or policy with respect to a “small list” of reasonable circumstances that might lead the Commission to extend the time for “good cause” after adverse action, albeit within the discretion of the Commission. Commission Exhibit 21. In April, 2014, after the termination decision, CCSF requested that the Commission allow additional time for it to demonstrate compliance for “good cause.” CCSF Exhibit 49. While the evidence at the hearing indicated the Commission concluded those circumstances did not apply to CCSF, as far as the Panel is aware, the “small list” of possible exceptions noted in Commission Exhibit 21 did not find its way into the hearing record, nor were they the subject of direct inquiry by either side at the hearing. There was some evidence and ancillary testimony pertaining to an exchange of correspondence about the meaning of the term “good cause” as that term was used in the Manual, but that exchange did not appear to involve the “small list” of circumstances which might guide or assist the discretion of the Commission. See, CCSF Exhibits 43 and 44.

by the accrediting body with respect to the level of sanction to be imposed and/or expanding the time to achieve full compliance after adverse action is taken.

In the instant case, as discussed in a prior section of this Decision, CCSF acknowledged that the 2012 comprehensive evaluation identified numerous deficiencies, and it further acknowledged that the Commission had the right to initiate immediate adverse action. Nevertheless, CCSF felt it should have been afforded more time since, at least in its view, there were other avenues of remediation the Commission could have chosen, such as warning or probation, which CCSF claimed had been offered to some other institutions also perceived to be in distress.¹⁶ CCSF also complained that for reasons never adequately explained by the Commission, it was given only nine to ten months to correct all of the deficiencies, as opposed to the two year period it described as “standard” for corrective actions.¹⁷

In contrast, the Commission explained there was no requirement that it wait any specified minimum period before taking remedial action. That point was essentially conceded by CCSF, as was the fact that nothing in the federal regulations mandated an extension of time. Supporting the need for immediate action, the 2012 evaluation [Joint Exhibit 5] and the subsequent “show cause” evaluation report in April, 2013 [Joint Exhibit 6] revealed that CCSF was plainly and substantially out-of-compliance. As a result, on June 7, 2013, the Commission decided to terminate CCSF’s accreditation, to be effective as of July 31, 2014. Commission Exhibit 2. Commission witnesses explained that its investigation had included efforts to objectively evaluate compliance efforts on the part of CCSF as of June 7, 2013. They also explained the Commission’s consideration of that evidence was thoughtful and that there was ample support for the conclusion that CCSF was out of compliance at that point. Given the extent of noncompliance and the long history of delay and intransigence, it was reasonable to conclude those problems would continue into the future, which justified the conclusion in June, 2013 that the institution’s accreditation should be terminated. These were all legitimate considerations which were justified by the facts at the time and were matters well within the discretion of the Commission.

The Commission also pointed to the fact that it offered CCSF an opportunity for an internal review after the termination action was issued,¹⁸ and that CCSF pursued this option, which was completed in November, 2013. That process had little impact upon

¹⁶In this regard, it is important to bring back to mind the general legal principles referenced at the commencement of this Decision that arguments with respect to alleged “disparate treatment,” i.e. that an institution denied accreditation was treated differently and more severely than other schools, is a claim which can rarely pass muster in the accreditation context.

¹⁷ This was essentially the contention raised in Section I.C of the Amended Notice of Appeal that the Commission abused its discretion by not allowing more time for remediation, even though CCSF conceded there was no requirement for the Commission to do so.

¹⁸ Although the Commission policy with respect to this review process figured significantly in connection with pre-hearing disputes, the policy itself was not presented as an exhibit by either side. The Panel believes that is an oversight which needs to be rectified, in order for subsequent reviewers to evaluate procedural and substantive matters which were addressed by both parties during the hearing process. Accordingly, that document will be deemed to be part of the administrative record under the designation of “Hearing Panel Exhibit 1.”

the outcome, however, because much of CCSF's presentation related to compliance efforts in late 2013 and beyond, whereas the Commission maintained a consistent position throughout that review process (and, indeed, throughout this appeal) that unless circumstances justified it providing an extension of the time for "good cause" after the adverse action, the only relevant evidence it would consider was that which was extant and presented as of the date of the decision to terminate, i.e. June 7, 2013. A fair reading of the review policy [Hearing Panel Exhibit 1] makes it clear that the scope of that review was intended to be limited in that manner.¹⁹ . As a result, the Commission rejected consideration of any information about actions taken or completed by CCSF after that date [CCSF Exhibits 31, 32, 34] and pointed to the fact much of the information submitted by CCSF merely corroborated that it was noncompliant as of the June 7, 2013 termination decision [Joint Exhibit 10] and, hence, concluded there was no evidence to support any of the four grounds for review. CCSF Exhibit 35. That recommendation for termination was affirmed by the Commission on January 10, 2014. CCSF Exhibit 40. While application of the policy on review might have seemed unwarranted or inappropriate to CCSF, apparently that review policy had been reviewed by the DOE without direction for change, and, more to the point, a rule of procedure which limits the ability of an institutional applicant to provide new evidence at a higher level of internal review is not an inherent violation of due process. *St. Andrews Presbyterian College v. Southern Ass'n of Colleges & Schools* (N.D. Ga. 2009) 679 F. Supp.2d 1320, 1332.

Given the fact that the evidence didn't demonstrate that the Commission was required to provide additional time to CCSF to achieve compliance before or after the decision to terminate accreditation, and given the limited parameters of the internal review process, there's no basis to support a conclusion that the Commission abused its discretion or otherwise acted improperly. The possibility of a difference of opinion on the wisdom of foreclosing additional evidence of compliance doesn't translate into improper conduct.

The foregoing conclusion, however, doesn't end the jurisdiction or authority of the Hearing Panel with respect to any of the issues raised in this appeal, particularly with respect to this contention.

As noted above, the Amended Notice of Appeal submitted by CCSF on March 25, 2014, contained over one hundred pages devoted to facts and arguments that CCSF "is now" in substantial compliance with the accreditation standards and eligibility requirements. CCSF Exhibit 3, p. 13. As a result, consistent with its position that the scope of permissible evidence should be limited to June 7, 2013, the Commission filed with the Hearing Panel a motion to exclude any post-decision evidence from

¹⁹ There are at least one or two possible grounds for uncertainty in this regard, however. For example paragraph 3, p. 1 states that "As a general rule, [written statements by the party requesting a review] should respond only to...the evidence that was before the Commission at the time of its decision." Emphasis added. Moreover, the provision which describes the action that the Commission can take on review is not expressly limited to evidence that was before the Commission at that time [Paragraph 9 (a)], although that might well be a fair conclusion of the intention of the policy.

consideration during this appeal process. That issue was briefed, and on April 28, 2014, the Chair of the Hearing Panel reached a different conclusion. That ruling is part of the administrative record and, since it has bearing upon the conclusions which follow, it is attached for reference. In summary, the ruling observed that the jurisdiction and authority of the Hearing Panel was based upon the Bylaws and the Appeals Procedures Manual, and those documents made it clear that the Hearing Panel was to serve in something more than a subordinate role, a role envisioned by federal mandate. See, 34 C.F.R. 602.25(f)(1)(iii). The ruling explained that while the Commission might construe its responsibility to consider only relevant evidence up to June 7, 2013, the Appeals Procedures Manual vested the Hearing Panel with authority to receive (and, thereby, consider) evidence up through the end of the review process (January 10, 2014), and possibly even beyond, as long as the Hearing Panel was satisfied there was good cause to do so. At the end of the multi-page explanation in the ruling, the following was stated:

In consideration of the foregoing, and with the conditions and limitations described or which may appear appropriate based on new or different circumstances which may arise:

- 1) CCSF may offer for consideration of the Panel all of the grounds, reasons, and evidence it presented to ACCJC and included in its Amended Notice of Appeal up to and through the date of January 10, 2014;
- 2) with respect to evidence regarding compliance identified in CCSF's Amended Notice of Appeal beyond January 10, 2014, before such evidence will be considered or may be the subject of comment, question, or testimony at the hearing, CCSF must isolate and identify that evidence and, upon a request and such reasonable terms as may be directed, provide to the Panel and explanation of "good cause" from persons who can personally describe such cause in sufficient detail, and secure a determination (preliminary, conditional, or otherwise) that such evidence may be presented.

In short, prior to commencement of the evidentiary sessions on appeal, the parties were notified that evidence of purported compliance by CCSF through January 10, 2014, and possibly beyond, could be at least offered as evidence.²⁰

²⁰ Neither CCSF nor the Commission appeared to pay much attention to the express or implied terms of that ruling. During its presentation, the Commission argued that no evidence beyond June 7, 2013 could be considered. At the hearing, in varying degrees, both sides submitted exhibits and then offered testimony of events beyond January 10, 2014, without any effort to "isolate and identify such evidence" for advance determinations, as expressly indicated in the ruling. Indeed, at one point when questioned whether CCSF would be able to distinguish the timing of various alleged compliance efforts, a witness explained it probably could have done if CCSF had been asked. Apparently the foregoing ruling wasn't clear enough, or wasn't read. That point aside, in order to avoid devoting the defined time available for testimony for technical evidentiary disputes, the Hearing Panel concluded it would permit the evidence to

A considerable amount of the testimony at the appeal hearing related to steps taken to bring CCSF into compliance after June 7, 2013. A matter of special significance was that although Dr. Robert Agrella had been appointed as a Special Trustee at CCSF in 2012 by the California Community Colleges Board of Governors, the evidence indicated that his initial role in that capacity had been largely advisory to the elected CCSF Board of Trustees, which hampered his ability (or anyone's) to initiate and implement necessary changes. However, after the Commission issued its notice of termination to CCSF, the Community Colleges Board of Governors exercised an option which allowed it to essentially bypass CCSF's Board of Trustees, which it did by granting Dr. Agrella sole decision-making authority in an expanded role as "Special Trustee with Extraordinary Powers." With this expanded authority, he was able to immediately turn to meaningful efforts to try to remedy the problems facing the institution which had finally led the Commission to terminate its accreditation. Among the steps undertaken was the recruitment of Dr. Tyler, a capable administrator with prior experience in dealing with troubled academic institutions, to assume the role of Chancellor. Drs. Agrella and Tyler and other CCSF witnesses testified at some length about the efforts that were initiated in the latter part of 2013 and continued to the present to bring the institution into compliance, despite the impending termination. Drs. Agrella and Tyler were direct and forthright in acknowledging the existence of deficiencies when they assumed their current roles, and both were direct and forthright in acknowledging the political and practical barriers that impeded necessary changes.

The testimony from Drs. Agrella and Tyler and other CCSF witnesses about what they had been able to achieve since the delegation of "extraordinary powers" was not, however, free of ambiguity and uncertainty. In this regard, Dr. Tyler offered some rough percentage approximations of CCSF's level of compliance at various stages between 2012 and the hearing date; however, these approximations appeared to be based on a cumulative list created by CCSF of approximately 330 "line items" of goals and standards, which included some drawn from sources beyond the requirements of the Commission.²¹ As pointed out by the Commission, a percentage estimate of completion of this type reflects only the quantity of completion (and not entirely of Commission standards) not the quality, nor did that approach distinguish between line items of greater or less importance, such as those which address relatively simple changes versus those of far greater complexity designed to assure long-term financial stability. There was also considerable uncertainty with respect to CCSF's demonstration of plans to deal with projected financial obligations and organizational changes. More to the point, of course, not all of these purported gains were self-evident, none had been subjected to vigorous and objective validation, and there is no assurance that the special powers granted to Dr. Agrella which appeared to enable these belated advancements would be continued in a manner to avoid a relapse to "business as usual" for the institution.

be offered, with a plan to attempt on its own to evaluate what matters might later need to be placed in specific time periods during its deliberations.

²¹ These listings were presented and described at the hearing as the "Roadmap." Different versions and summaries were referenced [CCSF Exhibits 48 and 57], including a version updated just two days before commencement of the evidentiary hearing sessions. CCSF Exhibit 58.

Although uncertainties and concerns remain with respect to what has actually been achieved since Dr. Agrella secured “extraordinary powers,” it is apparent that his acquisition of this authority was a significant event. It was only after June 7, 2013 that he secured sufficient authority to bypass the CCSF elected Board of Trustees which offered some prospect to be able to deal effectively with political and special interests which have hampered the changes necessary to restore the institution’s standing. Granting that level of authority to Dr. Agrella was a major step which was, perhaps, the best and last chance for CCSF to regain its status as a viable institution.²² It went significantly beyond a re-shuffling of leadership for “window-dressing” purposes. Dr. Agrella and the leaders he has assembled appear to have the skills and determination to try to bring about major change and, indeed, contend they’ve essentially been able to bring CCSF into compliance, or at least close it.

While the Commission may have believed its policies precluded its review of evidence beyond the June 7, 2013 decision to terminate, the authority of the Hearing Panel is not similarly constrained. As discussed above, pursuant to the Appeals Procedures Manual, the Panel not only may receive evidence up to the date of the Commission review (January 10, 2014), it may extend the time for receipt of additional evidence even further upon a showing of “good cause.” Such an entitlement would not exist in the governing documents related to this appeal process without a concurrent expectation that the Hearing Panel could utilize that evidence in its decision-making, and factor it in to what is believed to be the best resolution under the authority granted to the Hearing Panel. As earlier noted, while the Hearing Panel shares some of the apparent reservations of the Commission whether sufficient meaningful change has occurred, there is little question that concerted efforts have been made based upon this new grant of “extraordinary” powers to Dr. Agrella . In short, **the Hearing Panel concludes** these new and different circumstances appear sufficient to support the existence of “good cause” sufficient to justify and allow the consideration of further evidence.

Given this conclusion, the next issue for resolution is what action should be taken to implement the Panel’s determination that “good cause” exists for an expanded consideration of evidence. Section 8 of the Bylaws declares, among other things, that the decision of the Hearing Panel “may” include a determination whether the grounds for appeal were established. In other words, it is not obligated to make an ultimate finding on all issues if there are reasons not to do so. The Panel also has the express right to “remand the action being appealed and the reasons that were cited in its support.” In this regard, there is some modest uncertainty with respect to the subparagraphs of Section 8. Subparagraphs (1) and (2) appear to explain what

²² It warrants mention that the belated and radical action of vesting extraordinary powers in the Special Trustee was apparently a direct result of the action by the Commission on June 7, 2013 to terminate CCSF’s accreditation in one year’s time. It’s hard to believe that extraordinary step would have been taken without such an action by the Commission. There is no small irony to the fact that the Commission now finds itself the target of sharp criticism along with claims of unfairness and even violations of law on the part of CCSF stakeholders, some of whom were responsible for placing and maintaining the institution in a deteriorating situation for the past several years.

happens when the Panel expressly finds against the institution, which is the case with respect to the claims actually presented to the Panel for resolution in Sections I.A through II.B of its Amended Notice of Appeal, as discussed above. It is not entirely clear, however, whether the remand option which is then mentioned (again) in subsection (3) of Section 8 is dependent on some unresolved issue that prevents a complete finding against one party or another, or whether subsection (3) has independent vitality regardless of a determination in favor or against either party. That subparagraph states:

If the Hearing Panel finds that there are issues which deserve further consideration by the Commission, the Hearing Panel shall remand the Commission's action to the Commission. Such remand decision shall identify the issues that must be addressed further by the Commission and shall include any instructions which the Hearing Panel believes are necessary in order to assure that the Commission's final action will be consistent with the Hearing Panel's decision. The Commission shall thereupon consider such issues and arrive at a final action which shall be consistent with the Hearing Panel's decision and instructions. The action by the Commission following such remand shall be final and shall not be subject to further review or appeal.

That ambiguity becomes largely academic, however, if the Hearing Panel elects not to issue a final determination on a particular contention on appeal and opts instead to remand that issue for further consideration by the Commission. That is what the Hearing Panel believes is the appropriate course of action, that is, to remand to the Commission the issue of whether or not CCSF was, in fact, in actual compliance (or, in the view of the Commission in sufficient "substantial compliance" if that standard is to be applied) as of the conclusion of the evidentiary sessions of the appeal hearing on May 21, 2014.²³

It is important to reiterate that the Hearing Panel has reached no conclusion that CCSF was at any time in compliance (or even "substantial compliance") with Commission standards or eligibility requirements, or even that it currently is in compliance or "substantial compliance." To the contrary, as previously noted, there are reservations about the quality and quantity of achievement by CCSF through the time of the hearing, and the Panel is mindful of the caution expressed by the Commission that all or most of the allegations of change have yet to be examined and validated.²⁴ Nor does the Panel's conclusion of "good cause" constitute an express or implied determination that compliance is likely to be achieved by CCSF in the foreseeable future, or that the institution should be given time beyond May 21, 2014 to demonstrate that goal. All of those matters are for the informed discretion of the Commission. The

²³ To ensure there is no ambiguity, the Panel concludes that as of June 7, 2013 CCSF was not in actual or substantial compliance with standards or eligibility requirements and, hence, that the Commission's decision to terminate as of that date was supported by substantial evidence and was not a violation of any other rights of CCSF.

²⁴ In this regard, it is a matter of special concern to the Panel that no assurances were provided at the hearing that the current leadership team (or their successors) would retain these extraordinary powers and mandates for significant change.

conclusion of the Panel is essentially based on its view that the determined efforts of Drs. Agrella and Tyler and their colleagues following a grant of sufficient authority warrants an evaluation by the Commission whether or not there has been sufficient and verifiable change as of the date of the appeal hearing²⁵ to justify a reconsideration of the termination action.

The Hearing Panel concludes: that Section I.C of the Amended Notice of Appeal is not supported by a preponderance of the evidence. With respect to Section III of the Amended Notice of Appeal, **the Hearing Panel concludes** that CCSF was not in substantial compliance with accreditation standards and eligibility requirements as of June 7, 2013, however, for the reasons discussed above, that there is “good cause” for a consideration of CCSF’s achievement of compliance with accreditation standards and eligibility requirements though January 10, 2014 and up to and including the end of the evidentiary hearing sessions on appeal (May 21, 2014) and, since the evaluation of the additional facts and circumstances during that time period best rest within the expertise of the Commission, **the Hearing Panel directs a remand to the Commission under the terms and conditions described below:**

a. The Commission is directed to conduct and complete as soon as reasonably practicable an evaluation of CCSF’s state of compliance with accreditation standards and eligibility requirements as of May 21, 2014, which shall be based upon 1) the evidence and documents submitted to the Commission through January 10, 2014 (the date of the decision on review), 2) the exhibits and testimony offered in conjunction with the appeal hearing through and including May 21, 2014, with one exception²⁶, and 3) all other resources of information that the Commission might reasonably elect to secure and utilize within its sole discretion. In pursuing this evaluation, the Commission need not follow the express requirements or procedures which govern its routine evaluations including, but not limited to comprehensive evaluations or reviews of adverse actions, or subsequent appeals, but may, within its sole discretion, develop a format and methodology for this task which it believes will enable an efficient but fair evaluation of the pertinent facts to enable a final decision;

b. With respect to the evidence in subsection (a) immediately above, the Commission shall give consideration to the documents described , including, to the extent practicable, information referenced on the face of those documents which were (and remain) readily retrievable via electronic means. However, the Commission is not obligated to secure or consider information or sources referenced in those documents

²⁵ Among other things, that date is set not only because it includes evidence already assembled for the hearing, but also because setting a specific date will avoid problems of a “rolling target” for compliance, unless a later or broader date for is allowed by the Commission. It might also be added that the net effect of offering a period through May 21, 2014, will afford CCSF almost two years to have demonstrated compliance, which it claimed was unfairly denied, even though that perception of unfairness is not shared by the Panel.

²⁶ The exception is the most recent audit report which was referenced during the hearing and apparently prepared but not available in time for presentation at the hearing. Because of the circumstances of its timing and, more to the point, its importance to assist in validating the financial status of CCSF, that document may be produced to the Commission.

which were not provided at the time as hard copy attachments or which were not then capable of ready retrieval via electronic means. To the extent that any of the foregoing support documents which can be secured via electronic means have been updated with information beyond May 22, 2014, the updated information need not be considered, except at the sole discretion of the Commission;

c. The Commission, or any of its authorized representatives, may elect in their sole discretion to meet and/or confer with representatives or agents of CCSF under terms and conditions acceptable to the Commission or its representatives, for the purpose of exploring, confirming, and validating any of the matters described in subsection (a) immediately above, and the prompt cooperation of CCSF and its representatives, or any lack thereof, shall be a valid consideration on the part of the Commission in reaching any final conclusion on the matter at issue. Aside from communications which may be deemed appropriate by the Commission and its authorized representatives, CCSF and its representatives shall have no entitlement to participate in the evaluation process, to receive any written or verbal progress reports with respect to the evaluation, or to attend any meetings where the Commission may discuss or reach final conclusions with respect to the matter, except as the Commission may direct within its sole discretion. The Commission shall, however, ensure that CCSF does timely receive a written version of its final decision;

d. During the pendency of this evaluation, unless otherwise required by some superseding authority, the Commission shall not affirm or finalize the termination of CCSF's accreditation and, instead, to the extent possible, shall treat CCSF's status as being within the scope of a "good cause" exception while remaining on "show cause" status;

e. The decision reached by the Commission with respect to compliance/noncompliance by CCSF with accreditation standards and eligibility requirements as of May 21, 2014 shall not be subject to any further process of review or consideration within the Commission, including by review or appeal, except as the Commission may wish to allow within its sole discretion;

f. In the event of any disputes or uncertainties with respect to duties and obligations under this remand, general jurisdiction for resolution of such matters will remain in the first instance with the Hearing Panel, as may be directed or decided by its Chair.

Date: _____

William G. McGinnis, Chair, on behalf
of the Hearing Panel

