

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

NO. 03-11020J

THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., *et al.*

Appellants,

v.

LIFE UNIVERSITY, INC.,

Appellee.

**BRIEF OF APPELLANTS
THE COUNCIL ON CHIROPRACTIC EDUCATION, INC. THE COUNCIL ON
CHIROPRACTIC EDUCATION COMMISSION ON ACCREDITATION,
THROUGH ITS CHAIR JOSEPH BRIMHALL AND PAUL D. WALKER**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

Christopher P. Galanek
Powell Goldstein Frazer & Murphy LLP
191 Peachtree Street, N.W.
Sixteenth Floor
Atlanta, GA 30303
Telephone: (404) 572-6600

Elizabeth Sarah Gere
Leslie S. Ahari
Ross, Dixon & Bell, L.L.P.
2001 K Street, N.W.
Washington, D.C. 20006-1040
Telephone: (202) 662-2043

*Attorneys for Appellants The Council on Chiropractic Education, Inc.,
The Council on Chiropractic Education Commission on Accreditation, through its
Chair Joseph Brimhall and Paul D. Walker*

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Leslie S. Ahari

Joseph Brimhall

Mary M. Brockington

The Council on Chiropractic Education, Inc.

Stanley A. Freeman

Christopher P. Galanek

Elizabeth Sarah Gere

Sherry Mastrostefano Gray

Thomas B. Huffman

Amy Ledoux

Anne W. Lewis

Life University College of Chiropractic

Life University, Inc.

Douglas M. Mangel

The Honorable Charles A. Moye, Jr.

Anthony E. Orr

Mark L. Pelesh

Docket No. 03-11020J

Life University, Inc. v. The Council on Chiropractic Education, Inc., et al.

Ryan T. Pumpian

Frank B. Strickland

Paul D. Walker

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Eleventh Circuit Rule 28-1(c), defendants-appellants respectfully request oral argument. Oral argument will significantly aid the Court in deciding this appeal because it will provide an opportunity for counsel to address any questions that arise from the parties' briefs.

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF JURISDICTION	1
II. STATEMENT OF THE ISSUE.....	1
III. STANDARD OF REVIEW	2
IV. STATEMENT OF THE CASE.....	2
V. STATEMENT OF FACTS	4
A. The Role Of CCE And COA In The Accreditation Of Chiropractic Institutions and Programs	4
B. Life University College Of Chiropractic: 1995-2000	7
C. LUCC’s Request For Reaffirmation Of Accreditation Results In Probation In 2001	9
D. The Complaint Filed Against LUCC By Dr. Steven Petty	13
E. COA Decides Not To Reaffirm LUCC’s Accreditation In June 2002.....	15
F. COA’s Decision Not To Reaffirm Accreditation Is Upheld By the Appeal Panel.....	18
G. COA Denies LUCC’s Request To Waive The Requirements For Reapplying Under The Initial Accreditation Procedures.....	21
H. LUCC’s Students Consider Their Options	21
I. The District Court Proceedings	22
VI. SUMMARY OF ARGUMENT	24
VII. ARGUMENT	26
A. Life Is Not Substantially Likely To Succeed On The Merits.....	26
1. COA’s Decision Was Not Arbitrary And Unreasonable	29

a)	Life/LUCC Was Provided Ample Due Process.....	29
b)	The District Court Erred In Considering Life’s Belated Objections Concerning Alleged Economic Competitors And Philosophical Issues Because Those Issues Were Waived	33
c)	The District Court Erred In Finding That The Participation Of Other Schools In LUCC’s Accreditation Process Denied LUCC Due Process	35
d)	COA’s Proceedings Were Not Biased Against LUCC	42
(1)	CCE’s Corporate Restructuring.....	44
(2)	Life Demonstrated No Link Between The Restructuring And COA’s Decision Not To Reaffirm Accreditation	46
e)	The Remaining Procedural Irregularities Alleged By Life Are Baseless And/Or Are Irrelevant To The Due Process Inquiry.....	49
f)	COA’s Decision Was Supported By Substantial Evidence.....	53
B.	The Balance Of Harms To Life And CCE Does Not Support The Issuance Of An Injunction.....	54
C.	The Injunction Is Adverse To The Public Interest	56
VIII.	CONCLUSION.....	58

TABLE OF AUTHORITIES

FEDERAL CASES	<u>Page</u>
<i>Adidas America, Inc. v. National Collegiate Athletic Association</i> , 40 F. Supp. 2d 1275 (D. Kan. 1999).....	54
<i>All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc.</i> , 887 F.2d 1535 (11th Cir. 1989)	40
<i>Auburn University v. Southern Association of Colleges & Schools, Inc.</i> , No. 1:01-CV-2069-JOF (N.D. Ga. Jan. 3, 2002).....	30
<i>Blalock v. Ladies Professional Golf Association</i> , 359 F. Supp. 1260 (N.D. Ga. 1973).....	37, 38
<i>*Chicago School of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools & Colleges</i> , 44 F.3d 447 (7th Cir. 1994).....	27, 29, 52
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971).....	43
<i>Emory College of Puerto Rico, Inc. v. Accrediting Council for Continuing Education & Training, Inc.</i> , No. 97-1416-A, 1997 U.S. Dist. LEXIS 23487 (E.D. Va. Oct. 22, 1997).....	43, 44
<i>*Foundation for Interior Design Education Research v. Savannah College of Art and Design</i> , 39 F. Supp. 2d 889 (W.D. Mich. 1998), <u>aff'd</u> , 244 F.3d 521 (6th Cir. 2001)	passim
<i>*Foundation for Interior Design Education Research v. Savannah College of Art & Design</i> , 244 F.3d 521 (6th Cir. 2001)	27, 38, 41, 57
<i>Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.</i> , 320 F.3d 1205 (11th Cir. 2003)	40
<i>Guaranty Financial Services, Inc. v. Ryan</i> , 928 F.2d 994 (11th Cir. 1991)	2

<i>Levine v. Central Florida Medical Affiliates, Inc.</i> , 72 F.3d 1538 (11th Cir. 1996)	38
<i>Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.</i> , 432 F.2d 650 (D.C. Cir. 1970)	41
* <i>Marlboro Corporation v. Association of Independent Colleges and Schools, Inc.</i> , 556 F.2d 78 (1st Cir. 1977)	29, 30
<i>Massachusetts School of Law at Andover, Inc. v. American Bar Association</i> , 937 F. Supp. 435 (E.D. Pa. 1996), <u>aff'd</u> , 107 F.3d 1026 (3d Cir. 1997).....	56
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	30
<i>Matthew V. ex rel. Craig V. v. Dekalb County School System</i> , 244 F. Supp. 2d 1331 (N.D. Ga. 2003).....	34
* <i>Medical Institute of Minnesota v. National Association of Trade and Technical Schools</i> , 817 F.2d 1310 (8th Cir. 1987).....	28, 30, 52, 53
<i>Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.</i> , 472 U.S. 284 (1985).....	37, 41
* <i>Parsons College v. North Central Association of Colleges and Secondary Schools</i> , 271 F. Supp. 65 (N.D. Ill. 1967)	28, 30, 36
<i>Peoria School of Business, Inc. v. Accrediting Council for Continuing Education and Training</i> , 805 F. Supp. 579 (N.D. Ill. 1992)	28, 29
<i>Philadelphia Wireless Technical Institute v. Accrediting Commission of Career Schools and Colleges of Technology</i> , No. CIV. A. 98-2843, 1998 WL 744101 (E.D. Pa. Oct. 23, 1998)	34, 43, 57, 58
<i>Poindexter v. America Board of Surgery, Inc.</i> , 911 F. Supp. 1510 (N.D. Ga. 1994), <u>aff'd</u> , 56 F.3d 1391 (11th Cir. 1995) (table)	39

<i>Polytechnical College v. National Association of Trade and Technical Schools</i> , No. 91-1353 (PG) (D.P.R. June 24, 1991)	34
<i>Rockland Institute v. Association of Independent Colleges and Schools</i> , 412 F. Supp. 1015 (C.D. Cal. 1976)	34
<i>Salt Lake Tribune Publishing Co. v. AT&T Corp.</i> , 320 F.3d 1081 (10th Cir. 2003)	54
* <i>Sherman College of Straight Chiropractic v. American Chiropractic Association, Inc.</i> , 654 F. Supp. 716 (N.D. Ga. 1986), <u>aff'd</u> , 813 F.2d 349 (11th Cir. 1987)	passim
<i>Siegel v. Lepore</i> , 234 F.3d 1163 (11th Cir. 2000)	26, 54
<i>Suntrust Bank v. Houghton Mifflin Co.</i> , 268 F.3d 1257, <u>reh'g denied</u> , 275 F.3d 58 (11th Cir. 2001) (table)....	2, 54, 56
<i>Techno-Dent Training Center, Inc. v. Accreditation Alliance of Career Schools & Colleges</i> , No. 95-717-A (E.D. Va. 1995).....	57, 58
<i>Todorov v. DCH Healthcare Authority</i> , 921 F.2d 1438 (11th Cir. 1991)	39
<i>Transport Careers, Inc. v. National Home Study Council</i> , 646 F. Supp. 1474 (N.D. Ind. 1986)	30
<i>U.S. Anchor Manufacturing, Inc. v. Rule Industries, Inc.</i> , 7 F.3d 986 (11th Cir. 1993)	37, 39
<i>United States v. Guthrie</i> , 50 F.3d 936 (11th Cir. 1995)	34
<i>Viazis v. American Association of Orthodontists</i> , 314 F.3d 758 (5th Cir. 2002), <u>petition for cert. filed</u> , 71 U.S.L.W. 3589 (U.S. March 11, 2003)	39

<i>Wilfred Academy of Hair and Beauty Culture v. Southern Association of Colleges and Schools</i> , 738 F. Supp. 200 (S.D. Tex. 1990), <u>rev'd</u> , 957 F.2d 210 (5th Cir. 1992).....	59
* <i>Wilfred Academy of Hair and Beauty Culture v. Southern Association of Colleges and Schools</i> , 957 F.2d 210 (5th Cir. 1992).....	passim
<i>Zardui-Quintana v. Richard</i> , 768 F.2d 1213 (11th Cir. 1985)	26
<i>Zavaletta v. American Bar Association</i> , 721 F. Supp. 96 (E.D. Va. 1989)	56, 57

STATE CASES

<i>State ex rel. Burdick v. Tyrrell</i> , 149 N.W. 280 (Wis. 1914).....	45
--	----

FEDERAL STATUTES

15 U.S.C. § 1 (2003)	37
20 U.S.C. § 1099b(a)(6) (2003)	30
20 U.S.C. § 1099b(f) (2003)	1, 6, 27, 30
28 U.S.C. § 1292(a)(1) (2003)	1
28 U.S.C. § 1332 (2003)	1
34 C.F.R. § 602.25 (2002).....	31
34 C.F.R. § 602.26(b)(1) (2002)	13
34 C.F.R. § 602.35(b)(2)(i), (3) (2002).....	37
Higher Education Act of 1965, 20 U.S.C. § 1070, <i>et seq.</i>	5

MISCELLANEOUS

Kenneth E. Young et al., Understanding Accreditation (1983)..... 4

Robert's Rules of Order Newly Revised (Henry M. Robert III & William
J. Evans eds., Perseus Books 9th ed. 1990)..... 45

11A Charles Alan Wright et al., Federal Practice & Procedure: Civil 2d
§ 2948.1 (1995)..... 53

I. STATEMENT OF JURISDICTION

The District Court properly exercised jurisdiction pursuant to 20 U.S.C. § 1099b(f) and/or 28 U.S.C. § 1332, as this case involves a challenge by an institution of higher education to the decision of an accrediting agency recognized by the United States Department of Education and further because complete diversity exists among the parties. By order dated February 12, 2003, the District Court granted plaintiff-appellee's motion for a preliminary injunction. R4-28-4. Defendants-appellants timely filed their notice of appeal on February 25, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

II. STATEMENT OF THE ISSUE

Whether the District Court erred in issuing a preliminary injunction that restored the accredited status of Life University College of Chiropractic ("LUCC") where Life failed to establish the elements that are required for the issuance of such drastic and extraordinary relief because (1) the District Court's refusal to apply the proper deferential standard to an accrediting agency's decision resulted in a manifestly incorrect conclusion that Life was substantially likely to succeed on the merits; (2) the alleged harm to Life was self-inflicted; (3) the District Court failed to take into account the harm suffered by the Council on Chiropractic Education ("CCE") as a result of the infringement on its First Amendment rights; and (4) the District Court disregarded the various adverse effects on the public,

such as the disruption of the accreditation system relied on by students, state chiropractic regulatory and licensing boards, the United States Department of Education (“USDE”) and consumers of chiropractic health care services.

III. STANDARD OF REVIEW

Although this Court reviews a district court’s issuance of a preliminary injunction for abuse of discretion, if the lower court misapplied the law in making its decision this Court does not defer to its legal analysis. Guar. Fin. Servs., Inc. v. Ryan, 928 F.2d 994, 998 (11th Cir. 1991). This Court reviews the district court’s legal conclusions *de novo* and its findings of fact for clear error. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260, reh’g denied, 275 F.3d 58 (11th Cir. 2001) (table).

IV. STATEMENT OF THE CASE

This case involves a claim by Life University, which operates LUCC, against CCE, the sole agency recognized by the USDE to accredit chiropractic institutions and programs. In June 2002, after careful consideration and in compliance with its own procedures, CCE’s Commission on Accreditation (“COA”) decided not to reaffirm Life’s accreditation based on COA’s considered judgment that LUCC was not in compliance with accreditation standards because LUCC was providing seriously deficient education and clinical training that impaired its students’ ability to become competent chiropractors. As part of

COA's accreditation procedures, LUCC was afforded due process including, *inter alia*, receipt of CCE's written evaluation criteria, notice of and an opportunity to respond to the agency's concerns, a hearing before the agency, a decision containing the agency's grounds for its ruling, the right to appeal the adverse decision, the right to representation by counsel and a written decision, with its bases, by an appeal panel. The June 2002 decision not to reaffirm LUCC's accreditation was not arbitrary and unreasonable and was supported by substantial evidence. Life, nonetheless, filed this suit challenging COA's decision on the ground that it was denied due process.

Notwithstanding that Life received ample due process, and despite acknowledging that decisions of accrediting agencies "have historically been given deference, even great deference," R6-39-94, the District Court erroneously refused to apply that deferential standard of review to COA's decision and instead granted an injunction restoring LUCC to its pre-June 2002 accreditation status of Probation. In entering the injunction, the District Court predicted that it stood "a very good chance" of being reversed by this Court. *Id.* at 98. This appeal followed.

V. STATEMENT OF FACTS

A. The Role Of CCE And COA In The Accreditation Of Chiropractic Institutions and Programs

“Accreditation” is a voluntary, non-governmental system of evaluating and improving educational quality through self-regulation and peer review. Kenneth E. Young et al., Understanding Accreditation 10-11 (1983), Ex. 1 hereto. Although the United States has no centralized governmental authority that exercises control over post-secondary education, “[i]nstitutions and programs evaluate themselves, and peers from other institutions and programs evaluate those evaluations.” Id. at 12. The goals of accreditation are to foster educational excellence, to encourage self-improvement through continuous self-study and planning, and to assure the public, the educational community and other organizations that accredited institutions and programs are meeting standards of educational quality and institutional integrity. See id. at 22-23, 25. See also R3-11-Ex 3, Pg vii (“accreditation serves as a means by which programs or institutions recognize and accept one another”).

For over 30 years, CCE has existed as an autonomous national organization committed to monitoring chiropractic education. CCE’s purpose is to advocate high standards, to promote institutional excellence and to evaluate and accredit programs and institutions through its accrediting body, COA. R3-11-Ex 2, Pgs v-vii, 69-71. COA’s accreditation process “is designed to help a program or

institution achieve a qualitative measurement of itself as it evaluates itself and is evaluated by highly qualified peers from the educational and professional communities. . . .” R3-11-Ex 3, Pg 19.

For over 20 years, CCE has promulgated criteria (“Standards”) used in the accreditation process for chiropractic institutions. Those Standards undergo continual review to ensure that they provide an effective measure for assessing the quality of chiropractic education and the protection of health care consumers. See R3-11-Ex 3, Pg 1; R3-11-Ex 2, Pg 71; R3-11-Ex 4, Pgs 12-13.

CCE is a voluntary organization. Its Board of Directors is composed of representatives from accredited chiropractic programs, practitioners and the general public. The Board of Directors establishes the Standards, elects the members of COA, and conducts CCE’s business through an Executive Committee and the Executive Vice President. COA is composed of representatives from accredited programs, practicing chiropractors and the public. R3-11-Ex 2, Pg 71.

Since 1974, CCE has been recognized by USDE as a reliable authority on the educational quality of chiropractic programs and institutions participating in the federal government’s funding programs for student financial aid under the Higher Education Act of 1965, 20 U.S.C. § 1070, *et seq.* In 2001, USDE extended its recognition of CCE through 2006, the maximum period for which an accrediting agency may be recognized. See R3-11-Ex 70. The USDE’s decision

to recognize an accrediting agency is based upon the agency satisfying criteria in 20 U.S.C. § 1099b, which require, *inter alia*, that the agency enforce standards designed to ensure the quality of education and employ procedures that comply with due process.

For decades, the chiropractic profession has debated the proper role of a doctor of chiropractic. Views regarding this topic range along a spectrum of thought. The “liberal” school advocates that chiropractors are primary health care providers who, in addition to performing spinal analysis and manipulation, should be able to diagnose other conditions. “They contend the public is better served when chiropractors can identify possible medical problems and if necessary refer the patient to another health care provider.” Sherman College of Straight Chiropractic v. Am. Chiropractic Ass’n, Inc., 654 F. Supp. 716, 718 (N.D. Ga. 1986), aff’d, 813 F.2d 349 (11th Cir. 1987). The “conservative” or “straight” philosophy advocates that chiropractors should be limited to correcting misalignments of the spinal vertebrae. Id.

Neither CCE nor its accreditation criteria advocates one philosophy over another. See R3-11-Ex 29, ¶¶ 7-10; R3-11-Ex 28, ¶¶ 16-21; R3-11-Ex 71, ¶ 16; R3-11-Ex 5, Pg vi; R3-11-Ex 2, Pg v. Rather, CCE’s Standards seek to “ensure that chiropractic schools prepare their students to be qualified, competent providers

of quality health care, regardless of any philosophy the school may espouse.” R3-11-Ex 29, ¶ 7. CCE accredits programs of divergent views. R3-11 -Ex 29, ¶ 10.

B. Life University College Of Chiropractic: 1995-2000

The number of accredited schools in the United States offering doctor of chiropractic degree programs is small, and stood at 16 before the events at issue in this case. Life University College of Chiropractic (“LUCC”) is a self-described “conservative” school that first received accreditation in 1985. R1-1-3, ¶ 2.

Since 1995, COA and LUCC have been engaged in ongoing communications regarding LUCC’s noncompliance with CCE’s accreditation Standards. Although COA last reaffirmed LUCC’s accreditation in June 1995, it continued to express “concern” about issues “relate[d] to . . . the quality of [LUCC’s] educational program.” R3-11-Ex 6. COA therefore requested that LUCC submit a progress report by year end. *Id.*; R3-11-Ex 7. LUCC did so, but after review of the report, COA advised LUCC that it continued to be “strongly concerned” about four issues previously identified:

- (1) Criterion A3. Organization Structure: Administration: There appears to be a lack of communication and integration between the senior administration and other members of the management team, faculty, staff, and students.
- (2) Criterion A4. Organization Structure: Faculty Organization: There is concern regarding the lack of an effective faculty organization and collegiality throughout the institution.
- (3) Criterion E1. Inputs: Faculty and Staff: There is a strong concern with clinical management, especially with regard to:

1) the ratio of clinical faculty to students and 2) the procedures for clinical supervision.

- (4) Criterion G. Planning: There is concern about a perceived lack of understanding of the partnership between the president, vice-presidents, other members of the management team, staff, faculty, and students, as required for effective planning.

R3-11-Ex 8. After noting LUCC's failure to address all the concerns adequately, COA advised LUCC that it had to show progress "in a timely manner." Id. A year later, in 1996, LUCC again submitted a progress report that failed to resolve COA's accreditation concerns. R3-11-Ex 9. COA advised LUCC that it continued to be "strongly concerned" and noted LUCC's lack of a "concerted effort" even to address one of the concerns and its failure to update data with respect to another. Id. CCE advised LUCC that it had to show progress in its next report in September 1997. Id.

LUCC's inability to resolve CCE's concerns satisfactorily continued in 1998 and escalated in 1999, resulting in CCE's imposition of a confidential sanction. In February 1998, CCE advised LUCC that three of the four concerns identified in 1995 had yet to be resolved fully. In an attempt to assist LUCC, COA specified the information that LUCC should provide, noting the information would "allow the [COA] to deal constructively with the way that the School is addressing the concerns." R3-11-Ex 10. Following a site visit to LUCC in May 1999, see R3-11-Ex 11, COA again advised LUCC in July 1999 that it had failed to resolve COA's

concerns about clinical experience, which related directly to student competency and the quality of patient care. COA imposed the sanction of Notice on LUCC,¹ and requested that LUCC submit a report by December 1999 describing “planned actions that will result in the resolution of concerns” and ensure compliance with CCE’s accreditation criteria. R3-11-Ex 12.

In January 2000, COA’s concerns remained unresolved and it continued the sanction. R3-11-Ex 13. Not until June 2000 did COA allow the sanction to expire based on “recent” (but terribly belated) efforts by LUCC to respond to concerns on student competency and quality patient care, but COA still noted the need for “further efforts by [LUCC] to proceed in developing policies and procedures in these areas, toward the goal of continuous improvement.” LUCC had applied for reaffirmation of CCE accreditation, and COA required LUCC to report further progress in the self-study report to be submitted later in the year. R3-11-Ex 14.

C. LUCC’s Request For Reaffirmation Of Accreditation Results In Probation In 2001

COA’s comprehensive evaluation, conducted in 2001 in response to LUCC’s application for reaffirmation of accreditation, revealed serious

¹ COA may impose the confidential sanction of “Notice” for no more than one year if it determines that an institution: (a) could be in non-compliance with the criteria for accreditation or the conditions of eligibility in the future if corrective action is not taken; (b) is in non-compliance with the criteria for accreditation but the deficiencies are minor and COA determined that they can be corrected in a

deficiencies and non-compliance with CCE's Standards.² In February 2001, COA obtained LUCC's express consent with respect to the individuals who were to serve on the site visit team (the "2001 Team"). COA directed LUCC to provide the team with its written self-evaluation (the "self-study report"). R3-11-Ex 17; R3-11-Ex 18; R3-11- Ex 19; R3-11-Ex 20; R3-11-Ex 21. On April 2-5, 2001, the seven-member 2001 Team, accompanied by two observers (including one from the USDE), visited LUCC, interviewed students, faculty, staff and administrators, reviewed documents, and observed the school's operations. The team's 66-page report detailed its findings of serious problems that went to the heart of the quality of education at LUCC. Exhibit Envelope-Doc 12-Pogrelis Supp. Aff.-Ex 10.

The 2001 Team found LUCC's self-assessment method to be fundamentally flawed and its self-study report "deficient," in that it was "short on analysis and lacking in critical appraisal," and "did not thoroughly address previous COA concerns." Id. at 2. In short, "[t]he team felt that this lack of frank introspection

(continued from the previous page)

short period of time; or (c) has failed to comply with COA policies or procedures or has failed to provide requested information. R3-11-Ex 5, Pgs 32-33.

² CCE's Standards and COA Manual describe the procedures for reaffirmation of accreditation. The institution initially submits a "self-study" report, after which a team from COA conducts an on-site visit at the school over a period of several days. The site team issues a written report that is provided to the institution, which may respond and provide additional documentation. A "status review meeting" between COA and the institution is held, following which COA makes a decision. R3-11-Ex 5, Pgs 25-30; R3-11-Ex 3, Pg 21. Because LUCC's reaffirmation

demonstrated a fundamental flaw in institutional culture inappropriate for an institution of higher education.” Id. at 6.

In measuring LUCC against CCE criteria, the 2001 Team identified twelve concerns that prompted “recommendations”; fourteen “suggestions”; and four “commendations.”³ The 2001 Team found serious deficiencies in the quality of LUCC’s education. It found insufficient evidence that an LUCC degree candidate “demonstrates proficiency in some competencies sufficient . . . to perform the professional obligations of a primary care clinician”; insufficient evidence that candidates understood “clinical indications for and the relative value of diagnostic

(continued from the previous page)

process began in 2000, COA applied the January 2000 Standards. Exhibit Envelope-Doc 12-Ex 1.

³ The COA Manual (June 2000) explains the distinctions:

A recommendation is a formal written statement for an action that *must* be taken to comply with “The Criteria for Accreditation.” *Although a team must never state in its report that a program or institution is in noncompliance*, a recommendation does identify potential noncompliance issues. Therefore, the team must give specific evidence to support the recommendation in the narrative portion of the report.

A suggestion is a written statement for action a program or institution *should* take, not necessarily for compliance but because it would be in the best interest of the program or institution to do so. . . .

Commendations are laudatory statements regarding areas of demonstrated exemplary performance, not simply good intentions. . . .

R3-11-Ex 3, Pgs 56-57 (original emphasis).

studies”; and insufficient evidence demonstrating understanding of federal and state regulatory guidelines governing diagnostic procedures and equipment. Exhibit Envelope-Doc 12-Pogrelis Supp. Aff.-Ex 10, Pgs 23-24. The 2001 Team “observed substantial evidence of care plans that were not consistent with the diagnosis and the pathophysiology and/or natural history of the disorder.” Id. at 26. LUCC students were unprepared for and experienced failure rates on national board exams that were greater than the national average. Id. at 27. The 2001 Team noted that “basic, clinical and chiropractic science course work is not presented in a manner conducive to the adequate training of primary care clinicians” and “recommended” that LUCC review its curriculum, course sequencing and academic policies. Id. at 32. The 2001 Team also found that some of LUCC’s faculty lacked proper academic credentials and others had no valid chiropractic license. Id. at 43-44. The 2001 Team further detailed deficiencies in the students’ clinical training. Id. at 48-50.⁴

The serious deficiencies in LUCC’s program forced COA to act. Based on its review of LUCC’s self-study report, the 2001 Team Report, LUCC’s response and other documentation, and after meeting with LUCC, COA deferred

⁴ The 2001 Team’s commendations were limited to LUCC’s physical facilities, library, extra-curricular student activities and community service. Exhibit Envelope-Doc 2-Pogrelis Supp. Aff.-Ex 10, Pg 61.

reaffirmation of accreditation pending LUCC's submission of specific evidence for COA's review. COA also imposed the sanction of Probation for failure to comply with the January 2000 Standards.⁵ Due to the "magnitude and seriousness of the deficiencies," COA immediately notified the USDE and the public of the sanction.⁶ COA informed LUCC that unless the deficiencies were remedied, accreditation would be revoked. R3-11-Ex 22; R3-11-Ex 35; R3-11-Ex 4, Pg 50 (BOD-111). COA requested a progress report in December 2001 and an appearance by LUCC at COA's January 2002 meeting. LUCC did not appeal from the sanction of Probation. R3-11-Ex 22; R3-11-Ex 5.

D. The Complaint Filed Against LUCC By Dr. Steven Petty

In February 2001, pursuant to CCE Standards regarding individual complaints against CCE-accredited programs, Dr. Steven Petty, a former LUCC student and clinic instructor, filed a complaint against LUCC. R3-11-Ex 40. The

⁵ Under the Standards, "probation" is a public sanction imposed for more significant deficiencies (e.g., failure to comply with Conditions of Eligibility, failure to correct deficiencies after being given Notice, or failure to conduct an acceptable self-study) which, in COA's judgment, are not serious enough to remove the institution's accreditation. However, if an institution has not remedied the deficiencies at the end of 18 months, accreditation will not be reaffirmed "except in rare instances when probation may be extended for a limited period of time." R3-11-Ex 5, Pg 33. See also R3-11-Ex 3, Pg 35 ("Probation . . . is in order when noncompliance with 'The Criteria for Accreditation' has a significant and continuing negative impact, placing the quality of [the] program or the viability and continuance of the program or institution itself in jeopardy").

⁶ Probations must be made public as USDE regulations require that they be reported to USDE. 34 C.F.R. § 602.26(b)(1) (2002).

Petty complaint contained grave allegations of an “unfavorable educational environment” and alleged serious deficiencies in LUCC’s clinical operations and its clinical educational system, which resulted in the students being ill-prepared to become chiropractors. Dr. Petty also alleged that LUCC could not attract or retain qualified faculty. R3-11-Ex 33, Pgs 3-9.

COA initiated an investigation of the Petty complaint and asked LUCC to respond. R3-11-Ex 33, Pg 2. COA informed LUCC that its investigation would be separate from any other COA processes in which LUCC was involved, even though such separation was not required by CCE policies. R3-11-Ex 34. In its April 2001 response, LUCC disputed the allegations and contended that most of them had no relation to CCE’s Standards. R3-11-Ex 38.

COA appointed an ad hoc committee to investigate the complaint further. In January 2002, the ad hoc committee filed a draft report identifying issues requiring further investigation because they related to CCE’s Standards. By letter dated February 14, 2002, COA informed LUCC of those issues, and LUCC filed a second response on April 8, 2002. COA also appointed a subcommittee that conducted a focused site team visit to LUCC on April 7-10, 2002 (the “Petty Team”). See R3-11-Ex 40, Pg 2; R3-11-Ex 39.

The Petty Team’s report concluded that most of Dr. Petty’s allegations were “credible and, to a large part, were substantiated during the visit.” R3-11-Ex 40,

Pg 23. The report detailed fundamental problems in LUCC's clinical programs. The team determined that LUCC's students were failing at higher and higher rates (even though LUCC's clinical requirements for graduation were among the lowest in the country), and that LUCC's practices employed an "ineffective and dangerous approach to patient management." R3-11-Ex 40, Pgs 3-6.

On May 28, 2002, COA informed LUCC of the Petty Team's summary findings and that COA would discuss resolution of the complaint at its semi-annual meeting in June 2002. Exhibit Envelope-Doc 12-Ex 4.

E. COA Decides Not To Reaffirm LUCC's Accreditation In June 2002

COA's ongoing concerns with LUCC were not resolved in the year following LUCC's Probation. In January 2002, COA met with LUCC after receiving LUCC's special progress report in December 2001. COA again deferred reaffirmation of LUCC's accreditation, continued LUCC's Probation and advised LUCC that it would conduct a focused site team visit in the spring of 2002. R3-11-Ex 23. After obtaining LUCC's agreement to the four members selected to serve on the team (the "2002 Team"), R3-11-Ex 25, the visit took place in April 2002.

Although the 2002 Team's 23-page report noted that LUCC had made progress in some areas and had adopted changes which ultimately might resolve certain issues, the 2002 Team found that students still were not receiving adequate clinical training. The report stated:

The team is concerned that students are not recording a diagnosis or clinical impression that is consistent with history and examination findings, and are unable to formulate a non-subluxation diagnosis.

* * *

Current record keeping practices of the clinics are also inconsistent with the Standards requiring student competency in case follow-up and review.

* * *

Students completing their course of study at LUCC must demonstrate proficiency in the competencies identified in and consistent with the “Foreword” of the Standards. *The team found competency assessment was lacking in educational and clinical value for many of the competencies assessed. The team found that even though each course syllabus meticulously identifies the various components of the competencies addressed in that course there is insufficient follow-through on assessment of skill and/or proficiency acquisition in the clinical training setting.*

R3-11-Ex 53, Pgs 60-61 (emphasis added; underlining in original). The 2002

Team also “felt that the clinic student-to-faculty ratio is far too high to effectively provide quality patient care and simultaneously mentor and assess a student’s progress through the clinical training portion of the program.” R3-11-Ex 53,

Pg 55. The report concludes:

. . . the team’s primary concerns are in the areas of clinical competency of the students and the development of the patient diagnosis in the clinical setting. While significant progress has been made, the team feels LUCC is still not providing adequate or sufficient education to the students to meet the Standards in these areas.

R3-11-Ex 53, Pg 64.

After receiving LUCC's response to the report, and following a meeting with LUCC representatives, COA decided on June 7, 2002 not to reaffirm LUCC's accreditation. R3-11-Ex 37, Pg 5. COA's June 10, 2002 letter to LUCC noted that the reaffirmation decision already had been deferred for the maximum allowable period of one year. Exhibit Envelope-Doc 12-Ex 1; see also R3-11-Ex 3, Pg 34. Despite the additional deferral period, LUCC still did not comply with four criteria for accreditation – all of which previously had been cited in COA's notice of Probation. R3-11-Ex 22:

1. Assessment and Planning:

Each program or institution must maintain a comprehensive and ongoing system of evaluation and planning, and must demonstrate its effectiveness in achieving its mission, goals and objectives.

2. Mission Elements, D.C. Degree Program (including clinical experiences), Objectives

Each program or institution must establish instructional objectives that support its mission and goals.

Instruction leading to the doctor of chiropractic degree must meet the following requirements: The curriculum must be designed and implemented in a manner in which students are able to integrate relevant information presented in the basic, clinical and chiropractic sciences with the clinical, laboratory and patient care experiences in clinical decision making.

3. Mission Elements, D.C. Degree Program, Inputs, Faculty/Staff

Programs and institutions must demonstrate adequacy and stability of basic and clinical sciences faculty and staff. The faculty and staff volume, variety and qualifications must be

appropriate to the mission, goals and program objectives of the program or institution.

4. Mission Elements, D.C. Degree Program, Outcomes

The quantitative clinic requirements will not be the sole criteria used to assess the program's or institution's success in educating a student to practice the art and science of chiropractic.

Upon completing his or her course of study, each student must demonstrate proficiency in the following competencies [note: see Clinical Competencies for Chiropractic Programs and Institutions] consistent with the "Foreword" of the CCE Standards for Chiropractic Programs and Institutions.

Exhibit Envelope-Doc 12-Ex 1.

Based upon its separate discussion at the June 2002 meeting, COA also notified LUCC of its findings regarding the Petty Complaint and its determination that LUCC had not been in compliance with CCE's Standards. R3-11-Ex 41.

However, because of its prior decision not to reaffirm LUCC's accreditation, COA advised LUCC that it was taking no action on Dr. Petty's complaint at that time.

Id.

F. COA's Decision Not To Reaffirm Accreditation Is Upheld By the Appeal Panel

LUCC appealed COA's decision not to reaffirm its accreditation. Adhering to its written policy, CCE appointed a three-member appeal panel: Dr. William Ramsey, Vice President of Academic Affairs at Logan College of Chiropractic in Missouri; Dr. Jan Harbour, a practitioner from West Virginia; and Dr. Thurston

Manning, an educator from Colorado (the “Appeal Panel”). R3-11-Ex 49. Life was notified of, but raised no objection to, the composition of the Appeal Panel, although it did object to the proposed observer, which objection CCE honored. R3-11-Ex 50; R3-11-Ex 51. Life filed a brief, signed by its outside counsel, which raised a broad array of issues. R3-11-Ex 52. COA filed a responsive brief that was provided to Life before the hearing on October 20, 2002. R3-11-Ex 56; R3-11-Ex 53. At the hearing, the Appeal Panel heard presentations by Life and COA, asked questions, and then met privately, after which it announced its decision to uphold COA’s determination not to reaffirm LUCC’s accreditation. R3-11-Ex 57, Pgs 14-15.

First, the Appeal Panel rejected Life’s contention that the appeal procedure in the 2000 COA Manual rather than a revised procedure in the 2002 CCE Standards should apply. In any event, it found that there was no practical difference between the two procedures for purposes of LUCC’s appeal. *Id.* at 3.

Second, the Appeal Panel rejected LUCC’s contention that three COA members – Dr. Laura Weeks, Dr. Ann Carpenter and Dr. Lester Lamm – should not have taken part in COA’s June 2002 decision. The Panel found that COA’s rules did not require the exclusion of Dr. Weeks because she was only an observer at the 2002 Team visit and did not participate in the drafting of the 2002 Team report. Dr. Carpenter also was not precluded by the rules from participating based

upon her role on the Petty Team because the two matters consistently had been addressed separately. The Appeal Panel found that although Dr. Lamm should have been excluded because he was a member of the 2002 Team, it was unclear whether he had voted on the June 2002 decision. The Panel further determined that even if Dr. Lamm had voted, his vote would not have affected the decision because it was reached by consensus. R3-11-Ex 57, Pgs 3-4.⁷

Third, the Appeal Panel found insufficient evidence to support LUCC's speculation that the Petty complaint was considered as part of the accreditation determination. R3-11-Ex 57, Pg 6. It therefore did not address whether COA rules even required separate consideration of the Petty complaint.

Fourth, the Appeal Panel held that COA's June 10, 2002 letter adequately apprised LUCC of the evidence that formed the basis for COA's decision by incorporating by reference "all materials related to previous COA considerations and actions on this matter." Id. at 7.

Fifth, the Appeal Panel determined that COA's decision was supported by sufficient evidence. Although the record was "ambiguous" with respect to one of the criteria cited in the June 10, 2002 letter, the Appeal Panel found that COA

⁷ Declarations filed with the District Court confirmed that Dr. Lamm had not voted. See R3-11-Ex 29, ¶ 16; R3-11-Ex 71, ¶ 11; R3-11-Ex 28, ¶ 9.

“reasonably” determined that LUCC was not in compliance with the other three criteria based on the information before it. Id. at 7-13.

Finally, the Appeal Panel rejected as baseless LUCC’s charge that COA had reached a decision before its June 2002 meeting. Id. at 13-14.

G. COA Denies LUCC’s Request To Waive The Requirements For Reapplying Under The Initial Accreditation Procedures

Two days after the Appeal Panel’s decision, LUCC reapplied for accreditation and requested that COA waive its requirement that programs seeking initial accreditation show compliance with CCE criteria for a two-year period. R3-11-Ex 58; R3-11-Ex 2, Pg 3. After COA declined the request, R3-11-Ex 59, LUCC asked the Board of Directors to revise the two-year requirement at its January 2003 meeting. R3-11-Ex 60. CCE’s Executive Committee opposed LUCC’s request, noting that elimination of the two-year compliance requirement was not in the best interests of students or the accreditation process, and further noting that the rule had received broad support when adopted in 2001. See R3-11-Ex 62. CCE’s Board discussed LUCC’s request at its January 2003 meeting but took no action and appointed a committee to study the issue further. R3-11-Ex 29, ¶ 22.

H. LUCC’s Students Consider Their Options

LUCC’s failure to obtain reaffirmation of its accreditation left its students in the lurch. In one lawsuit filed against LUCC, students allege that, dating back to

June 2001, LUCC failed to disclose information concerning its accreditation problems and that, following COA's June 2002 decision, LUCC failed to inform students of the potential impact of those problems on their ability to take licensing examinations in many states. R3-11-Ex 64, ¶¶ 3-11. See also Exhibit Envelope-Doc 12-Pogrelis Supp. Aff.-Ex 6.

Although some students elected to stay at LUCC, others considered their options, including transfer to other schools. A few chiropractic schools stepped forward to assist LUCC's students in their predicament and provided information concerning their programs. See Exhibit Envelope-Doc 2-Ex R ("Palmer Chiropractic officials are not encouraging Life University students to transfer. However, for those who are considering a transfer, we recommend you do so cautiously and be sure to gather all available information in order to make an informed, wise decision that best suits your individual situation.") See also Exhibit Envelope-Doc 2-Webb Aff.; Exhibit Envelope-Doc 2-Floyd Aff.

I. The District Court Proceedings

On January 2, 2003, Life filed suit against CCE, COA and Dr. Paul Walker, CCE's Executive Vice President. Life demanded a "correction" of CCE's actions including its allegedly improper (1) amendment of its Bylaws; (2) application of procedures that purportedly conflict with CCE's Bylaws; and (3) adoption of accrediting Standards that supposedly favor one branch of chiropractic philosophy

over another. Life also alleged CCE had violated its due process rights by conducting a “flawed and biased process” that was “calculated to cause the wrongful denial” of LUCC’s reaffirmation of accreditation. Life asserted that CCE “compounded the problem” by refusing to reconsider LUCC for accreditation in a timely manner. See R1-1-2, ¶ 1. Life’s complaint contained four counts: (1) violation of the common law right of due process; (2) tortious interference with contract; (3) breach of contract; and (4) violation of CCE’s Articles of Incorporation and Bylaws. Life sought a declaration that CCE’s actions since 1999 were ultra vires and that all CCE actions that purportedly favored one chiropractic philosophy over another were null and void. Life sought a preliminary and permanent injunction requiring reinstatement of LUCC’s accreditation, restoration of prior versions of CCE’s Standards and other corporate documents and renewal of the reaffirmation process. Life further sought compensatory and punitive damages.

Life simultaneously sought injunctive relief. The parties briefed that motion and submitted documents and affidavits to the District Court. On February 10, 2003, the District Court heard oral argument but took no testimony. The District Court granted Life’s motion from the bench and issued a written order on February 12, 2003. R5-27-9; R4-28-4.

In its order, the District Court opined that Life satisfied the requirements for a preliminary injunction on the ground that Life would be irreparably harmed by the loss of accreditation and that the balance of equities weighed in Life's favor. The District Court further stated that Life was substantially likely to prevail due to purported conflicting economic interests of LUCC's "competitors" who were involved in the decisionmaking and the District Court's legal conclusion that "[a]ctions which would violate the antitrust laws if incorporated in an accreditation procedure, *per se*, indicate a lack of due process." R4-28-34. The District Court further stated that because of Life's conservative philosophy, it had been the victim of a liberal conspiracy, as manifested by purported "corporate manipulations" by CCE's Board. R4-28-3. Finally, the District Court stated that the danger to the public would be not be as great as the harm of the "destruction" of LUCC, in light of the willingness of one state to continue to permit licensure of LUCC students. R4-28-4.

VI. SUMMARY OF ARGUMENT

The District Court's decision to restore LUCC's accredited status by way of injunction is replete with legal error and is based on the thinnest of evidentiary records. Contrary to settled law, the District Court failed to apply what it acknowledged during the preliminary injunction hearing was the well-established deferential standard of review to be accorded accreditation decisions. The District

Court gave no deference to COA's considered judgment, based on the expertise of chiropractic professionals, not to reaffirm LUCC's accreditation as a result of its failure to satisfy accreditation criteria. Instead, the District Court disregarded the overwhelming evidence in the record supporting COA's decision on the basis of LUCC's trumped-up allegations of conflicts of interest of those who participated in the accreditation process, and a purported violation of antitrust laws, none of which has any basis in law or fact. The District Court's holding that LUCC was denied due process is insupportable, where LUCC was given ample notice and opportunity to be heard, COA's handling of LUCC's request for reaffirmation complied with its own procedures, and LUCC failed to make any showing of bias affecting the outcome of the accreditation process. LUCC has no likelihood of success on the merits.

The District Court's other findings – that LUCC would be irreparably harmed, and that the balance of harms between the parties and the absence of harm to the public favored LUCC – similarly lack support. LUCC's alleged harms were self-inflicted and thus injunctive relief is inappropriate. Moreover, the District Court ignored the serious harm to CCE and to the public caused by an injunction that permits LUCC to enjoy ongoing accredited status notwithstanding the gross deficiencies, the disruption to the accreditation system, the adverse effect on

LUCC students, the danger to consumers of chiropractic health care and the infringement of CCE's First Amendment rights.

VII. ARGUMENT

A preliminary injunction is “an extraordinary and drastic remedy not to be granted unless the movant clearly carries the burden of persuasion as to the four prerequisites.” Zardui-Quintana v. Richard, 768 F.2d 1213, 1216 (11th Cir. 1985) (citation and internal quotations omitted). See also Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000). The movant must show: (1) a substantial likelihood that it will ultimately prevail on the merits; (2) that it will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest. Siegel, 234 F.3d at 1176. Here, Life did not carry its burden on any of the four prerequisites, and the District Court's injunction should be vacated.

A. Life Is Not Substantially Likely To Succeed On The Merits

The District Court's improper refusal to give deference to COA's accreditation decision resulted in its erroneous conclusion that LUCC is likely to

succeed on the merits. LUCC cannot show, as it must, that COA's decision was arbitrary and unreasonable and not supported by substantial evidence.⁸

Although this Court has not ruled on the issue, it is settled law that judicial review of accreditation decisions is governed by a highly deferential standard.⁹ Because federal courts have accorded an accrediting association's determination "great deference," the courts "have consistently limited their review of decisions of accrediting associations to whether the decisions were 'arbitrary and unreasonable' and whether they were supported by 'substantial evidence.'" Wilfred Academy of Hair and Beauty Culture v. S. Ass'n of Colls. and Schs., 957 F.2d 210, 214 (5th Cir. 1992). "Courts give accrediting associations such deference because of the professional judgment these associations must necessarily employ in making accreditation decisions. In considering the substance of accrediting agencies' rules, courts have recognized that '[t]he standards of accreditation are not guides

⁸ Life's principal claim is its due process claim. If that claim fails, its other claims also fail because each derives from CCE's accreditation decision. See Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521, 532 (6th Cir. 2001) (each of school's common law claims arising out of accreditation decision failed as a matter of law where accreditation decision was not arbitrary or unreasonable and was based on substantial evidence); Chicago Sch. of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schs. & Colls., 44 F.3d 447, 450 (7th Cir. 1994) (principles of federal administrative law, not contract law, govern review of accrediting agencies' decisions). Here, the District Court viewed the issue before it as a "due process situation." R6-39-2.

⁹ Federal common law, rather than state law, appears applicable following the passage of 20 U.S.C. § 1099b(f), which vests the federal courts with exclusive jurisdiction over suits by schools protesting denials of accreditation by USDE-approved agencies. See Chicago Sch. of Automatic Transmissions, 44 F.3d at 449.

for the layman but for professionals in the field of education.” Id. (citations omitted). Accord Found. for Interior Design Educ. Research v. Savannah Coll. of Art and Design, 39 F. Supp. 2d 889, 893-94 (W.D. Mich. 1998), aff’d, 244 F.3d 521, 528 (6th Cir. 2001) (“Courts have refused to conduct de novo accreditation reviews”); Med. Inst. of Minn. v. Nat’l Ass’n of Trade and Technical Schs., 817 F.2d 1310, 1314-1315 (8th Cir. 1987) (agency’s denial of accreditation upheld where “[I]t is neither our nor the district court’s role to reweigh the evidence . . .”); Peoria Sch. of Bus., Inc. v. Accrediting Council for Continuing Educ. and Training, 805 F. Supp. 579, 583 (N.D. Ill. 1992) (following Wilfred); Parsons Coll. v. N. Cent. Ass’n of Colls. and Secondary Schs., 271 F. Supp. 65, 70-74 (N.D. Ill. 1967) (“In this field, the courts are traditionally even more hesitant to intervene. The public benefits of accreditation, dispensing information and exposing misrepresentation, would not be enhanced by judicial intrusion.”).

Under this standard, courts “are not free to conduct a de novo review or to substitute their judgment for the professional judgment of the educators involved in the accreditation process. Instead, courts focus primarily on whether the accrediting body’s internal rules provide a fair and impartial procedure and whether it has followed its rules in reaching its decision.” Wilfred, 957 F.2d at 214 (citation omitted). Moreover, as in administrative law, where a deferential standard also is applied, courts defer to the agency’s interpretation of its own

procedural rules. Chicago School, 44 F.3d at 450. See also id. at 451 (“Harmless deviations from prescribed procedures do not lead to the whopping damages the School requests. . . .”); Found. for Interior Design, 39 F. Supp. 2d at 896-97 (deferring to agency’s interpretation of its own rules because “[a]ccrediting procedures are guides that, if construed by courts too strictly, would strip the accrediting bodies of the discretion they need to assess the unique circumstances presented by different schools”).

1. COA’s Decision Was Not Arbitrary And Unreasonable

COA’s decision was not arbitrary and unreasonable because the record demonstrates that COA’s internal rules provide a fair and impartial procedure and that COA followed those rules and afforded LUCC ample due process before deciding not to reaffirm accreditation.

a) Life/LUCC Was Provided Ample Due Process

Common law due process is a “flexible concept” and its contours vary as the factual situation demands.¹⁰ As explained by the First Circuit, in the accreditation context, current doctrine teaches that procedural fairness is a flexible concept, in which the nature of the controversy and the competing interests of the parties are considered on a case-by-case basis.” Marlboro Corp. v. Ass’n of Indep. Colls. and

¹⁰ Constitutional due process is not at issue. Life did not plead a violation of constitutional due process, nor could it have in the absence of state action. See Peoria Sch. of Business, 805 F. Supp. at 581-83.

Schs., Inc., 556 F.2d 78, 81-82 (1st Cir. 1977) (citing Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976)). See also Med. Inst. of Minn., 817 F.2d at 1314; Transport Careers, Inc. v. Nat'l Home Study Council, 646 F. Supp. 1474, 1482-85 (N.D. Ind. 1986); Parsons College, 271 F. Supp. at 72-73; Auburn Univ. v. S. Ass'n of Colls. & Schs., Inc., No. 1:01-CV-2069-JOF, slip op. at 12 (N.D. Ga. Jan. 3, 2002), Ex. 2 hereto.

Moreover, Congress and USDE have defined “due process” in the accreditation context simply to require notice of deficiencies, the opportunity to be heard, and the right to appeal any adverse action. The Higher Education Act provides that an accrediting agency shall apply procedures that “comply with due process,” including:

- (A) adequate specification of requirements and deficiencies at the institution of higher education or program being examined;
- (B) notice of an opportunity for a hearing by any such institution;
- (C) the right to appeal any adverse action against such institution; and
- (D) the right to representation by counsel for any such institution.

20 U.S.C. § 1099b(a)(6). USDE’s implementing regulations are even more definitive:

The agency must demonstrate that the procedures it uses throughout the accrediting process satisfy due process. *The agency meets this requirement if the agency does the following:*

- (a) The agency uses procedures that afford an institution or program a reasonable period of time to comply with the agency's requests for information and documents.
- (b) The agency notifies the institution or program in writing of any adverse accrediting action or an action to place the institution or program on probation or show cause. The notice describes the basis for the action.
- (c) The agency permits the institution or program the opportunity to appeal an adverse action and the right to be represented by counsel during that appeal. If the agency allows institutions or programs the right to appeal other types of actions, the agency has the discretion to limit the appeal to a written appeal.
- (d) The agency notifies the institution or program in writing of the result of its appeal and the basis for that result.

34 C.F.R. § 602.25 (emphasis added).

Whether COA's procedures are measured by the common law standard or by the Higher Education Act and USDE regulations, they provide adequate due process for reaffirmation of accreditation determinations. COA performs its evaluations based on written criteria that are provided to the programs. See R3-11-Ex 5, Pgs 41-85. At all relevant times, COA's accreditation process has included the submission of a self-study report by the program; review of the program by a site team; receipt of the site team's written report and the opportunity to respond and provide additional documentation; a meeting with COA at a status review; written notification of the decision and the basis therefor; the right to appeal an adverse accreditation decision; the right to representation by counsel for the appeal; the right to a hearing on the appeal, and written notification of the outcome

of the appeal and the basis therefor. See R3-11-Ex 5, Pgs 25-37; R3-11-Ex 3, Pgs 19-36; R3-11-Ex 2, Pgs 9-21; R3-11-Ex 4, Pgs 65-68; R3-11-Ex 3, Pgs 2, 14-27.

Those procedures were followed to the letter in LUCC's case. After LUCC requested that its reaffirmation review be advanced from June 2002 to June 2001 R3-11-Ex 15, it had ample time to submit a self-study report in November 2000, to update the report in March 2001, and to prepare for the site team visit in April 2001. R3-11-Ex 17; R3-11-Ex 22. COA provided LUCC with the 2001 Team report. LUCC responded to the report. COA held a status review meeting with LUCC on June 8, 2001. R3-12-Ex 10; R3-11-Ex 22. COA advised LUCC in writing that it would defer the reaffirmation decision and place LUCC on probation, affording it a further opportunity to respond to COA's concerns, and stated the reasons for that decision. R3-11-Ex 22. LUCC chose not to appeal. LUCC submitted another report in March 2002, hosted another site team visit in April 2002, received the 2002 Team Report, submitted a response in May 2002, and participated in another status review meeting with COA in June 2002. R3-11-Ex 26; R3-12-Ex 3. COA thereafter advised LUCC in writing of its decision not to reaffirm accreditation, stated its reasons, and informed LUCC of the right to appeal. R3-12-Ex 1. LUCC appealed, was represented by outside counsel,

submitted a written brief, received a copy of COA's brief in September 2002,¹¹ presented its case and provided additional documents to the Appeal Panel at the October 20, 2002 hearing. R3-11-Ex 52; R3-12-Ex 5, Pg 2. The Appeal Panel then advised LUCC in writing of its decision and the basis for it. R3-12-Ex 5. Thus, in accordance with CCE/COA procedures, LUCC received more than ample due process in connection with the decision not to reaffirm its accreditation.

b) The District Court Erred In Considering Life's Belated Objections Concerning Alleged Economic Competitors And Philosophical Issues Because Those Issues Were Waived

Life contended for the first time in the District Court that it was denied due process as a result of the participation of alleged economic competitors in the COA decisionmaking process and because of a purported liberal bias within CCE/COA. However, by failing to raise these arguments with the Appeal Panel, Life waived them, and it was error for the District Court to issue an injunction on this basis.

Following from well-established principles of administrative law, issues arising from a denial of accreditation cannot be raised for the first time before the District Court if the institution failed to raise them before the appeal panel below. This is because judicial review of accreditation decisions properly is limited to an

¹¹ CCE provided LUCC with COA's appeal brief even though CCE rules did not require it. R1-2-Ex GG; R1-2-Ex JJ.

examination of the record before the accrediting agency at the time its decision was made. See Found. for Interior Design, 39 F. Supp. 2d at 897; Philadelphia Wireless Technical Inst. v. Accrediting Comm'n of Career Schs. and Colls. of Tech., No. CIV.A. 98-2843, 1998 WL 744101, at *9 (Oct. 23, 1998), Ex. 3 hereto, ¶ 4; Polytechnical Coll. v. Nat'l Ass'n of Trade and Technical Schs., No. 91-1353 (PG), slip op. at 14, n.1 (D.P.R. June 24, 1991), Ex. 4 hereto; Rockland Inst. v. Ass'n of Indep. Colls. and Schs., 412 F. Supp. 1015, 1019 (C.D. Cal. 1976). See also United States v. Guthrie, 50 F.3d 936, 944 (11th Cir. 1995) (a court reviewing an administrative agency's decision does not consider any evidence that was not in the record before the agency at the time it made the decision); Matthew V. ex rel. Craig V. v. Dekalb County Sch. Sys., 244 F. Supp. 2d 1331, 1335 (N.D. Ga. 2003) (“substantive administrative law claims are reviewed by the district court ‘as a quasi-appellate court’”).

Accordingly, by failing to object to the participation of representatives from other schools as purported economic competitors in the COA decisionmaking process and by failing to complain of a bias having tainted COA's proceedings in its appeal to the Appeal Panel, Life waived these arguments. The District Court thus erred by considering these contentions.

c) The District Court Erred In Finding That The Participation Of Other Schools In LUCC's Accreditation Process Denied LUCC Due Process

The District Court's finding of a denial of due process was premised on its erroneous conclusion that the participation of representatives from other chiropractic schools in the accreditation process violated the antitrust laws. It was on that ground that the District Court improperly refused to accord any deference to COA's decision. Although the District Court acknowledged that Life had not pled an antitrust claim, R6-39-4, 97, it nonetheless leapt to hold "that actions which would violate the antitrust laws if incorporated in an accreditation procedure, per se, indicate lack of due process." R6-39-97; R4-28-2-4. Even assuming arguendo that Life had not waived the issue, the District Court's decision is wrong as a matter of law because the COA accreditation process in no sense violated the antitrust laws. The District Court further abused its discretion insofar as its factual conclusions of improper conduct by other chiropractic schools, which it then imputed to the COA accreditation process, were unsupported by the record.

As a threshold matter, the blanket assertion that a school's "economic competitors" could not be involved in accreditation decisions without giving rise to a financial conflict of interest is plainly wrong. R5-27-2-3, 94; R4-28-2-4. Higher education accreditation expressly is based on peer review. As one court observed:

Evaluation by the peers of the college, enabled by experience to make comparative judgments, will best serve the paramount interest in the

highest practicable standards in higher education. The price for such benefits is inevitably some injury to those who do not meet the measure, and some risk of conservatism produced by appraisals against a standard of what has already proven valuable in education.

Parsons, 271 F. Supp. at 74. COA's Manual makes clear that accreditation is based on peer review. See R3-11-Ex 3, Pg vii (Accreditation "is accomplished by establishing criteria to measure the effectiveness, viability, periodic self-evaluation and planning of programs and institutions and *through evaluation by highly qualified peers from the educational and professional communities*") (emphasis added).

Through its voluntary application to CCE and its request for accreditation, LUCC consented to evaluation by individuals from other schools. Moreover, LUCC expressly consented to the participation of representatives from other schools in its reaffirmation process in 2001 and 2002, and it affirmatively requested that representatives of certain schools be involved – including Palmer, a "straight" school, which LUCC later accused of having solicited students after LUCC's accreditation was not reaffirmed. R3-11-Ex 17-19; R3-11-Ex 25. Thus, the District Court's conclusion that accreditation decisionmakers should not include representatives from an institution's peers is contrary to the fundamental

nature of the process and is inconsistent with Life's express consent to be evaluated by its peers.¹²

Second, the District Court's finding of an antitrust violation, particularly where a violation had not even been pled, is wrong as a matter of law. Assuming that the District Court was relying on Section 1 of the Sherman Act, Life would have had to show: (1) an agreement to enter into a conspiracy; (2) designed to achieve an unlawful objective; and (3) proof of an actual unlawful effect or facts that show a potential for future harm to competition. U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 1001 (11th Cir. 1993).¹³ Because accreditation serves an important public purpose and enhances competition, the rule of reason, rather than a *per se*, analysis applies in determining whether a restraint is "unreasonable."¹⁴ See Sherman Coll., 654 F. Supp. at 722 ("Antitrust cases

¹² COA's conflict-of-interest guidelines quite logically do not provide that a commissioner's affiliation with another school is grounds for disqualification. The only geographic limitation contained in the guidelines prohibits a commissioner from reviewing a program if he or she resides in the same state. R3-11-Ex 3, Pgs 31-32; R3-11-Ex 1, Pg 2. See also R3-11-Ex 4, Pg 11 (BOD-18). USDE reviewed these guidelines in connection with its December 2001 decision to recognize CCE as an accrediting agency and found no violations. See 34 C.F.R. § 602.35(b)(2)(i), (3) (2002).

¹³ See 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."). Despite its broad language, Section 1 only prohibits agreements that constitute "unreasonable" restraints of trade. Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985).

¹⁴ Any reliance by the District Court on its own decision in Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973), as support for its

involving the impact of professional educational standards on the consumer public are more appropriately analyzed under the rule of reason.”), aff’d, 813 F.2d 349 (11th Cir. 1987) (affirming on the basis of the district court’s order); Found. for Interior Design, 244 F.3d at 529-30. See also Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1549, 1553 (11th Cir. 1996).

Under a rule of reason analysis, plaintiff’s failure to prove an actual or potential detrimental effect *on competition* in a relevant market is fatal to its case. See Sherman Coll., 654 F. Supp. at 721; Levine, 72 F.3d at 1553 & n.17 (to survive summary judgment, plaintiff must present prima facie evidence of relevant product and geographic markets and demonstrate that defendant has sufficient market power in those markets to affect competition). Lucca thus would have to prove more than its own damages, because “[t]he antitrust laws are intended to protect competition, not competitors.” Levine, 72 F.3d at 1551. See also Found. for Interior Design, 244 F.3d at 530-31 (“We have not found a case . . . in which a

(continued from the previous page)

finding of an antitrust violation in this case was misplaced. R5-27-36. Blalock involved a decision by the Executive Board of the LPGA, which was composed of various player members, to suspend Blalock for cheating. The suspension effectively excluded Blalock from the market because, under LPGA rules, she was precluded from competing in *any* tournament, whether or not sponsored by the LPGA. The court found this was a group boycott – a “naked restraint of trade” – and subject to the *per se* rule. Blalock, 359 F. Supp. at 1265-66. In this case, there was no group boycott and, as set forth above, the *per se* rule is inapplicable in the accreditation context. To the extent that the District Court applied the *per se* rule here, its decision is wrong.

denial of school accreditation gave rise to a successful allegation of antitrust injury.”).

A plaintiff’s failure to prove concerted action, rather than independent conduct, similarly is fatal to a Section 1 claim. Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1455 (11th Cir. 1991). See also Viazis v. Am. Ass’n of Orthodontists, 314 F.3d 758 (5th Cir. 2002), petition for cert. filed, 71 U.S.L.W. 3589 (U.S. March 11, 2003) (No. 02-1337). “[F]ederal antitrust law imposes a heightened standard of proof on a plaintiff attempting to demonstrate the existence of an agreement to restrain trade with circumstantial evidence. Plaintiff must ‘introduce evidence that tends to exclude the possibility that the defendants acted independently *or legitimately*.’” Poindexter v. Am. Bd. of Surgery, Inc., 911 F. Supp. 1510, 1518 (N.D. Ga. 1994) (emphasis added) (quoting U.S. Anchor, 7 F.3d at 1002), aff’d, 56 F.3d 1391 (11th Cir. 1995) (table).

The District Court’s decision addresses none of these elements. There is no evidence whatsoever of any anti-competitive effect, no definition of a relevant market, no showing of antitrust injury, no evidence of an unlawful conspiracy involving CCE, COA or any of the representatives who participated in the LUCC proceedings, and no evidence that the accreditation decision was based on anything but COA’s professional judgment that LUCC was not in compliance with the accreditation criteria.

Third, the District Court’s generalized notion that anti-competitive conduct had occurred was based on vague and conflicting evidence. For example, the District Court accepted as true Life’s contention that Dr. Eugene Sparlin, a trustee of Logan College, offered to purchase Life after its appeal was denied in October 2002. R6-39-3, 94; R4-28-3. The District Court concluded that this was a conflict because Logan’s Vice President of Academic Affairs, Dr. William Ramsey, had chaired the Appeal Panel. However, Dr. Sparlin expressly denied that he ever offered to purchase Life. See R2-15-Ex 7, ¶¶ 8-9. Even though it heard no testimony, the District Court nevertheless ignored Dr. Sparlin’s affidavit and instead credited an affidavit from Life’s representative, notwithstanding that Dr. Sparlin is disinterested and has no stake in the outcome of this dispute.¹⁵

The District Court further baselessly assumed that efforts by other schools to “recruit” Life students were inherently improper. None of the materials Life proffered evidenced any involvement in or knowledge by CCE or any participant in COA’s decision on LUCC’s accreditation of the purported “recruitment” efforts

¹⁵ To the extent that the District Court believed that this (or any other) hotly-disputed fact was material, it erred by resolving such fact(s) in Life’s favor based solely on the conflicting affidavits and without holding an evidentiary hearing. See Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1211 (11th Cir. 2003) (“[W]here facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held.”) (internal citations and quotations omitted); All Care Nursing Serv., Inc. v. Bethesda Mem’l Hosp., Inc., 887 F.2d 1535, 1538-39 (11th Cir. 1989).

by other schools. Exhibit Envelope-Doc 2-De Opazo Aff.; Exhibit Envelope-Doc 2-Ex R; Exhibit Envelope-Doc 2-Webb Aff. (failing to identify any of the representatives from other schools); Exhibit Envelope-Doc 2-Floyd Aff.

Finally, the District Court's attempt to link a purported antitrust violation to a denial of due process is fatally flawed. As evident from the case law in the accreditation context, even where plaintiffs have asserted antitrust claims, courts have analyzed due process considerations separate and apart from the antitrust claim. See, e.g., Found. for Interior Design, 244 F.3d 521; Marjorie Webster Junior Coll., Inc. v. Middle States Ass'n of Colls. and Secondary Schs., Inc., 432 F.2d 650 (D.C. Cir. 1970). Moreover, the United States Supreme Court has rejected the notion that antitrust and due process claims are intertwined:

[T]he absence of procedural safeguards can in no sense determine the antitrust analysis. If the challenged concerted activity of Northwest's members would amount to a per se violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a per se violation because the antitrust laws do not themselves impose on joint ventures a requirement of process.

Northwest, 472 U.S. at 293. The District Court thus erred in concluding that Life was denied due process based on a purported antitrust violation, and its refusal to defer to COA's accreditation decision on this basis is a clear error of law.

d) COA’s Proceedings Were Not Biased Against LUCC

The District Court committed a further mistake of law by delving into the chiropractic profession’s philosophical debate about its health care role in an attempt to probe whether CCE harbored an improper motive for not reaffirming LUCC’s accreditation. The District Court refused to apply the Wilfred “great deference” standard based on its finding, which was unsupported by any evidence in the record, that “an aggressive group of leaders of the eight liberal chiropractic schools . . . had undertaken a series of corporate manipulations in order to reduce the representation and dominance of the eight conservative chiropractic schools (of which Life was one) . . . which were calculated to give dominance to the liberal minority group over the conservative majority group; [and] the end result has been the disaccreditation of the largest of all the colleges. . . .” R4-28-3-4. Such an inquiry and the District Court’s unfounded speculation were manifestly improper.¹⁶ Tellingly, COA accredits a number of conservative schools and has never failed to reaffirm the accreditation of any conservative school other than LUCC. R3-11-Ex 29, ¶ 11.

¹⁶ The District Court improperly credited Life’s counsel’s oral argument – not any testimony or evidence – to conclude that “straight” colleges enrolled two-thirds of chiropractic students while “liberal” schools enrolled the remaining third. Compare R6-39-81-82 *with* R6-39-95-96. Without proper proof, the District Court reached clearly erroneous factual conclusions that a philosophical conspiracy existed. See n.15, supra.

Allegations of bias are not appropriate for consideration under the “arbitrary and unreasonable” standard absent a “strong showing of bad faith or improper behavior.” See Found. for Interior Design, 39 F. Supp. 2d at 897 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).¹⁷ See also Wilfred, 957 F.2d at 215 (“ . . . [i]t is not clear that probing into the association’s motives behind its rules represents a proper subject for our inquiry . . . [because] we restrict our review to whether the association has acted ‘arbitrarily’ or ‘unreasonably’ in light of its policies. Nevertheless, assuming arguendo that we may inquire into the association’s motives, that inquiry must remain limited.”); Philadelphia Wireless Technical Inst., 1998 WL 744101, at *10 (“[A] speculative possibility that the Commission acts not because [it] was persuaded by the evidence, but for some improper reason, fails to overcome the strong presumption of regularity.” (internal quotations and citation omitted)); Emory Coll. of Puerto Rico, Inc. v. Accrediting Council for Continuing Educ. & Training, Inc., No. 97-1416-A, 1997 U.S. Dist. LEXIS 23487, at *7 (E.D. Va. Oct. 22, 1997) (applying bad faith standard, and finding no such evidence where agency “followed its

¹⁷ In Overton Park, the United States Supreme Court held that “such inquiry into the mental processes of administrative decisionmakers is usually to be avoided,” and thus required a “strong showing of bad faith or improper behavior before such inquiry may be made.” 401 U.S. at 420.

internal rules which provided a fair and impartial procedure”), Ex. 5 hereto. Here, there was no “strong showing of bad faith or improper behavior.”

(1) CCE’s Corporate Restructuring

The District Court’s allusion to “corporate manipulations” is a reference to a restructuring that began in 1998 – four years before LUCC’s accreditation was withdrawn. Before 1999, CCE consisted of two arms – the Board of Directors and COA. COA had nine members, five of whom were appointed by two trade organizations. The Board had 25 members – the nine COA members and the sixteen Chief Executive Officers from the accredited schools. In 1998, a task force convened by CCE’s then-president recommended that CCE be restructured such that COA and the Board would be separated and have no common members, COA’s membership would expand to eleven and no COA Commissioners would be appointed by trade organizations. The Board also would be reduced to thirteen members.

A third arm of CCE – the Council (later renamed the “Corporation”) – also was created, which was to consist of the sixteen CEOs from accredited schools. The Corporation’s existence was to end after the reconstituted Board and COA had functioned for a period of time and the new structure was shown to be feasible. With the addition of the Corporation, the Board, including Life’s representative, unanimously approved the restructuring in January 1999.

Consistent with the restructuring, in March 2002, the Corporation considered its dissolution. The CCE meeting minutes note that representatives from Palmer and Cleveland Colleges objected to not having two votes, as they had in the past, following the adoption in September 2001 of a policy change, consistent with good accreditation practices, that accredited programs with common directors or common administrators operating at more than one geographic location be deemed a single program. Eight of the fourteen CEOs voted for dissolution of the Corporation; two voted against; and four CEOs, including Life's, abstained from the vote. A question was raised whether the policy was required to be adopted by a two-thirds majority vote, but whether or not a two-thirds vote was required, the resolution was, in fact, approved by two-thirds of the *members voting* (8-2 vote). Exhibit Envelope-Doc 12-Ex 7. See, e.g., Robert's Rules of Order Newly Revised § 43, at 396 (Henry M. Robert III & William J. Evans eds., Perseus Books 9th ed. 1990) ("A two-thirds vote . . . means at least two thirds of the votes cast by persons legally entitled to vote, excluding blanks or abstentions[.]"); State ex rel. Burdick v. Tyrrell, 149 N.W. 280 (Wis. 1914) (majority computed on members *voting*, not members *present*).

In this litigation, Life now asserts that CCE violated its Articles of Incorporation by amending the Bylaws in 1999 to reduce the Board members to 13, consisting of seven representatives from schools who would be nominated by a

trade association, four practitioners and two individuals from the general public. Exhibit Envelope-Doc 2-Ex 6, Pg 3. On this basis, Life contends that all actions taken by the Board since 1999 are void.

(2) Life Demonstrated No Link Between The Restructuring And COA's Decision Not To Reaffirm Accreditation

CCE disputes Life's allegations of alleged improprieties in connection with the restructuring and disputes that the Board was improperly constituted. But the Court need not resolve this issue because there is no connection between COA's decision not to reaffirm LUCC's accreditation and the corporate restructuring. Simply put, COA's accreditation decision does not constitute Board action that might be void or voidable. Moreover, in determining whether to reaffirm LUCC's accreditation, COA applied the criteria for accreditation contained in the 2000 CCE Standards. Exhibit Envelope-Doc 2-Ex V. There is no evidence in the record that the four criteria from the 2000 Standards, which are relied upon in COA's June 2002 letter as the reasons for denying reaffirmation, were substantively changed to LUCC's detriment following the 1999 corporate restructuring. Thus, even if LUCC were able to show that the Bylaw amendments were inconsistent with the Articles, such a showing would not entitle LUCC to the court-ordered relief restoring LUCC's accreditation.

Moreover, there is no evidence of any connection between the corporate restructuring and the fundamental fairness of COA procedures that resulted in the decision not to reaffirm LUCC's accreditation. There is no support for LUCC's contention that its accreditation was not reaffirmed because it was a conservative school or because the criteria with which it failed to comply were implemented for the purpose of depriving conservative schools of accreditation. As Dr. Laura Weeks, the Vice President of Academic Affairs at Sherman College of Straight Chiropractic, a conservative school, opined: "I do not believe that the CCE Standards place 'conservative' or 'straight' schools at a disadvantage. The Standards permit a conservative school to maintain its philosophical integrity while ensuring the highest standards of student preparation and clinical competence." R3-11-Ex 21, ¶ 16. Rather, the criteria cited in the 2002 Team Report and the June 10, 2002 letter in which LUCC was found to be deficient went directly to whether LUCC's students were being given the clinical training necessary to prepare them to be competent practitioners. LUCC improperly attempted to mask its lack of quality education with an absolutely irrelevant philosophical label.

It further was manifestly improper for the District Court to ponder whether CCE Standards were biased against the conservative philosophy and to second-guess whether they properly employed the terms "physician" and "clinician" in characterizing the role of a chiropractor, and to speculate that this affected LUCC's

accreditation. R6-39-6-10, 40-45. Quite simply, it is not for the court to determine the appropriate accreditation standards that CCE should apply. In any event, the suggestion (apparently accepted by the District Court) that CCE's Standards only recently were revised to incorporate the terms "physician" and "health care provider" is inaccurate. Such terms have been in use since at least 1986, and their incorporation in the Standards had nothing to do with LUCC. See Sherman Coll., 654 F. Supp. at 719 (quoting Foreword to CCE Standards); Exhibit Envelope-Doc 12-Ex 9, Pg 9 ("WHEREAS, the CCE established criteria of institutional excellence for educating primary health care chiropractic physicians. . . .") (1990 Resolution to Amend CCE Articles of Incorporation).

Finally, the District Court's misguided notion that LUCC's accreditation was not reaffirmed due to a purported liberal conspiracy to steal its students, rather than the overwhelming evidence of LUCC's lack of compliance with CCE Standards, further is undermined by the undisputed fact that representatives of other conservative colleges played key roles in COA's accreditation process. Dr. DuMonthier, from Palmer College, a self-described conservative school, chaired both LUCC site team visits in 2001 and 2002 that resulted in the highly critical site team reports. Similarly, Dr. Weeks, from Sherman College of Straight Chiropractic, was an observer on the 2002 Team, served as Vice-Chair at COA's June 2002 meeting, participated in the June 2002 decision and now is COA Chair.

R3-11-Ex 71, ¶¶ 2, 5, 8, 9; R3-11-Ex 37; R3-11-Ex 28, ¶ 21. If there were some liberal conspiracy to oust LUCC because of its conservative bent, representatives of other conservative schools logically would not have played key roles, lest their institutions be next.

Accordingly, the District Court's refusal to defer to COA's professional judgment based on a perceived CCE pro-liberal bias was error.

e) The Remaining Procedural Irregularities Alleged By Life Are Baseless And/Or Are Irrelevant To The Due Process Inquiry

In the proceedings below, Life tried to buttress its due process claim by alleging various procedural irregularities, including the handling of the Petty complaint and purported conflicts of interest among certain of the decisionmakers involved in COA's June 2002 decision. Although the District Court's order mentions none of these claimed irregularities as a basis for the injunction, they are addressed briefly to confirm that none alters the conclusion that LUCC received ample due process.

First, Life complained that COA's handling of the Petty complaint denied it due process, based on speculation that the complaint was considered in connection with the decision on LUCC's accreditation and that Life neither was informed of that nor provided with the Petty Team report. As the Appeal Panel found, LUCC provided only "meager evidence" to support Life's contentions, which was

insufficient to overcome COA's unambiguous statement that the Petty complaint was handled separately. R3-11-Ex 57, Pg 6. Indeed, the evidence clearly shows that COA's handling of the Petty complaint was separate: COA appointed a separate site team that conducted a separate visit and issued a separate report. R3-11-Ex 34. Although COA discussed the Petty complaint at its June 2002 semi-annual meeting, the discussion was held separately from, and subsequent to, that involving LUCC accreditation. R2-17-Ex 10; R3-11-Ex 37. COA handled the Petty matter in accordance with its rules for handling complaints: It forwarded LUCC the complaint and LUCC responded; COA referred the matter to a committee for inquiry, which issued a draft report identifying issues; LUCC was informed of the issues and provided a second response; a subcommittee then conducted a site team visit and issued a report. R3-11-Ex 3, Pgs 16-17; R2-15-Ex 33; R3-11-Ex 38-40.

Contrary to Life's claim, COA rules do *not* provide that an institution is entitled to receive COA's investigative reports in response to a complaint. R3-11-3-35-36. Moreover, LUCC twice received notice of Dr. Petty's allegations and twice had the opportunity to (and did) respond. To date, COA has taken no action based on the complaint. R3-11-Ex 41. Accordingly, Life's assertion that the accreditation process somehow was infected by COA's investigation of the Petty complaint is baseless. In any event, because the criteria identified in COA's

June 10, 2002 decision independently were sufficient – and without reference to the findings from the Petty investigation – Life’s due process claim fails on this ground as well.

Second, Life’s contention that COA violated its own conflict of interest rules by permitting certain commissioners to participate in the June 2002 meeting is wrong.¹⁸ The pertinent rule states:

In certain conflict of interest circumstances, meeting participation by a Commissioner will be limited. Commissioner participation in a status review meeting may be limited only to discussions if conflicts of interest exist. A Commissioner may not participate in status decision making if he or she:

* * *

- (6) Has served on the site team visit to the program or institution being reviewed.
- (7) Has a conflict of interest of any type.

R3-11-Ex 3, Pgs 31-32. See also R3-11-Ex 4, Pg 11 (BOD-18) (CCE Manual of Policies prohibits participation in discussion or decisionmaking with respect to an institution if the Commissioner graduated from, is employed by, serves on the board, served as a consultant, or has any other affiliation with the institution).

¹⁸ As noted above, Life waived any purported conflicts of interest that were not raised in its brief to the Appeal Panel. Life’s Appeal Panel brief was limited to the conflicts of interest addressed in this section. R3-11-Ex 52, Pgs 16-20.

As found by the Appeal Panel, there was no conflict of interest under COA rules. Neither Dr. Weeks nor Dr. Carpenter was a member of the 2002 Team: Dr. Weeks was an observer only and did not participate in the drafting of the report. Dr. Carpenter was a member of the Petty Team; she did not participate in the 2002 Team. Accordingly, neither was prohibited from participating in the accreditation decision under COA conflict of interest rules.

Life's contention that other COA Commissioners who did not participate in the decision should have been prohibited from participating in discussions concerning LUCC also is without support. COA Manual's conflict of interest rule specifically permits participation in discussion by site team members, even if they cannot vote. R3-11-Ex 3, Pgs 31-32. BOD-18 is inapplicable because it speaks only to instances where the commissioner has ties to the institution under review.

In short, Life's efforts to conjure up procedural irregularities is based on an interpretation of COA's rules that is inconsistent with COA's reasonable interpretation of its own rules, which is entitled to judicial deference. See Chicago Sch., 44 F.3d at 450; Found. for Interior Design, 39 F. Supp. 2d at 896-97; Med. Inst. of Minn., 817 F.2d at 1314.

f) COA's Decision Was Supported By Substantial Evidence

The final inquiry under the standard of deference articulated in Wilfred is whether the decision not to reaffirm LUCC's accreditation is supported by "substantial evidence."

On this issue, there is no room for debate: The 2002 Team documented serious, systemic problems with LUCC's clinical training and concluded that LUCC's failure to comply with CCE Standards had not been remedied. R3-11-Ex 53, Pgs 42-66. These significant deficiencies formed the basis of COA's decision not to reaffirm accreditation. R1-2-Ex U.

Life admitted in its Appeal Panel brief that it was not in compliance with CCE's criteria. Although Life attempted to argue that it was in "substantial compliance," R3-11-Ex 52, Pg 43, it effectively admitted that it was not, when it requested that the Appeal Panel recommend that its probation "be extended in order to afford LUCC a meaningful opportunity to *correct the areas of noncompliance. . .*" Id. at 45 (emphasis added). See also id. at 46 ("twelve months is not sufficient time to correct deficiencies with measurable improvements"). LUCC's own admissions are "self-defeating," and demonstrate that the Appeal Panel's ruling upholding COA's decision was correct. See Med. Inst. of Minn., 817 F.2d at 1315; Wilfred, 957 F.2d at 216. There was no basis for

the District Court to refuse to defer to COA's professional judgment and to restore LUCC's accreditation by way of injunction.

As demonstrated above, the District Court erred in concluding that Life is substantially likely to succeed on the merits. Accordingly, it was error to enter a preliminary injunction.

B. The Balance Of Harms To Life And CCE Does Not Support The Issuance Of An Injunction

The District Court further erred both in finding both that Life would be irreparably harmed and that the threatened injury to Life outweighed the injury to CCE. R4-28-2.

First, "the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." Siegel, 234 F.3d at 1176. "[T]he asserted irreparable injury must be neither remote nor speculative, but actual and imminent." Id. (internal quotations and citation omitted). Harms that may be remedied through an award of monetary damages are not irreparable. Suntrust, 268 F.3d at 1276. Moreover, a party may not satisfy the irreparable harm requirement if the harm is self-inflicted. Salt Lake Tribune Publ'g Co. v. AT&T Corp., 320 F.3d 1081, 1106 (10th Cir. 2003); Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n, 40 F. Supp. 2d 1275, 1281-82 (D. Kan. 1999); 11A Charles Alan Wright et al., Federal Practice & Procedure: Civil 2d § 2948.1, at 152-53 (1995).

Here, Life's assertion that it was unlikely to survive absent an injunction due to the loss of students and because certain states would bar students from taking licensure examinations unless they graduate from a CCE-accredited school is insufficient because the claimed harms are too speculative and, at least in part, compensable by monetary damages. Loss of tuition money and any other financial consequences are compensable. Moreover, Life's claim that it was unlikely to survive was speculative and inconsistent with its own public pronouncements that it had the financial depth to survive for two years. R3-11-Ex 74; R3-11-Ex 73.

Furthermore, Life's claimed harms were self-inflicted. Life's administration dragged its feet and was non-responsive to CCE's expressed concerns of non-compliance with the accreditation criteria for years before the June 2002 decision. See R3-11-Ex 63 ¶¶ 4 (affidavit of former LUCC Academic Dean states that Life president refused to approve proposed changes that would have brought LUCC into compliance); R3-11-Ex 40, Pg 24 ("there continues to be a pervasive failure at the highest levels of institutional leadership to seriously embrace or actively promote compliance"). Indeed, Life admitted to the Appeal Panel that LUCC bore responsibility for delay in instituting necessary changes. R3-11-Ex 52, Pg 38. Further, the decline in student enrollment resulted from LUCC's own conduct. A mass exodus of students occurred *before* COA decided not to reaffirm LUCC accreditation: Between winter 1997 and spring 2002 (before the accreditation

decision) LUCC's student enrollment plummeted 40 percent from 3,549 to 2,100. Exhibit Envelope-Doc 12-Ex 10, Pg 17; Exhibit Envelope-Doc 2-Sheres Aff. ¶ 4. Life – not COA – bears responsibility for the continued decline in student enrollment and resultant loss of tuition money. Such self-inflicted harms preclude injunctive relief.

Second, the District Court ignored the harm to CCE in imposing an injunction that infringes on its First Amendment right to opine on which schools merit accreditation. See Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 937 F. Supp. 435, 443-45 (E.D. Pa. 1996), aff'd, 107 F.3d 1026 (3d Cir. 1997); Zavaletta v. Am. Bar Ass'n, 721 F. Supp. 96, 98 (E.D. Va. 1989) (“the ABA has a First Amendment Right to communicate its views on law schools to governmental bodies and others”). The District Court thus erred in failing to balance the harm to CCE and the public by disregarding the restraint on CCE's First Amendment rights. See Suntrust, 268 F.3d at 1276 (“the public interest is always served in promoting First Amendment values and in preserving the public domain from encroachment”).

C. The Injunction Is Adverse To The Public Interest

Finally, the District Court erred in concluding that the injunction would not be adverse to the public interest on the theory that the danger (meaning, presumably, medical risk) to the public of ill-prepared students was not as great as

LUCC's "destruction," based on the State of New Jersey's willingness to license LUCC graduates notwithstanding LUCC's non-accredited status. R6-39-98; R4-28-4.

First, the District Court ignored the public interest in avoiding disruption to the accreditation system. Accrediting agencies essentially serve a watchdog function for the public by using their expertise to formulate and apply appropriate standards to those entities seeking accreditation. The public and professional licensing boards rely on accrediting agencies' expertise, and thus, "the public interest lies in allowing the Commission to perform its duty of insuring that educational institutions seeking accreditation meet certain standards. . . . Techno-Dent Training Ctr., Inc. v. Accreditation Alliance of Career Schs. and Colls., No. 95-717-A, slip op. at 11 (E.D. Va. 1995), Ex. 6 hereto. See also Philadelphia Wireless, 1998 WL 744101, at *8, ¶ 77; *12, ¶ 26; Found. for Interior Design, 244 F.3d at 530 ("accreditation serves an important public purpose and can enhance competition"); Zavaletta, 721 F. Supp. at 98 (most states adopt ABA's accreditation list as their own). Particularly in the area of health care, the public interest lies in ensuring that chiropractic care providers are competent.

Second, the District Court ignored the harm to LUCC's students of restoring LUCC's accreditation by way of injunction. As one court noted:

An injunction restoring Plaintiff to the list of accredited schools would harm current and prospective students because it would mislead

students into believing that the School has provided all necessary information to the Commission to show that it meets the standards of excellence embodied in accrediting standards. If a preliminary injunction is granted, the students who decide to enroll this fall . . . may suddenly be shocked by the knowledge, six or eight or twelve months after classes begin, that the school they are attending is no longer accredited, and indeed has been deemed unworthy of accreditation from August 1998.

Philadelphia Wireless, 1998 WL 744101, at *8, ¶ 61; *12, ¶ 24. See also Techno-Dent, slip op. at 10-11. Here, too, continuing LUCC's accreditation serves only to mislead its students about its compliance with accreditation standards. Should LUCC revert to its non-accredited status, its students will face significant obstacles in becoming licensed and securing employment.¹⁹ Moreover, LUCC's students continue to be harmed by the same educational deficiencies that lead COA not to reaffirm LUCC's accreditation.

Accordingly, the District Court erred in concluding that the injunction would not be adverse to the public interest.

VIII. CONCLUSION

This case is similar in a significant respect to Wilfred, where a district court entered a preliminary injunction restoring accreditation based on its conclusion that a cosmetology school had been wronged and its refusal to apply the proper

¹⁹ To the extent LUCC students are financing their schooling through federal funding, the District Court's injunction raises the specter of loan defaults, harming both the students and the public fisc.

standard of review to an accrediting agency's decision. As the Wilfred District Court stated, "No amount of deference by this Court to the special expertise of an accrediting agency can permit the Defendants to destroy Plaintiffs' business upon such defective procedure and in light of the complete absence of credible evidence of violations." Wilfred Academy of Hair and Beauty Culture v. S. Ass'n of Colls. and Schs., 738 F. Supp. 200, 209 (S.D. Tex. 1990). The Fifth Circuit was not swayed by the inflammatory arguments that had succeeded with the district court and therefore vacated the injunction because the lower court's refusal to apply the correct standard of review to the agency's decision was clear error. Wilfred Academy of Hair and Beauty Culture v. S. Ass'n of Colls. and Schs., 957 F.2d 210 (5th Cir. 1992).

Here, too, Life's inflammatory and unfounded accusations convinced the District Court that LUCC was wronged by an imagined juggernaut orchestrated by competitors at other schools and adherents to a different philosophy, all in an effort to steal students. As a result, the District Court improperly was distracted from applying the highly deferential standard of review to COA's decision not to reaffirm LUCC's accreditation. COA afforded LUCC more than ample due

process, its decision was based on substantial evidence and was not arbitrary or unreasonable. Accordingly, the District Court's injunction should be vacated.

Date: April 22, 2003

Respectfully submitted,

ROSS, DIXON & BELL, LLP

/s/

Elizabeth Sarah Gere
Leslie S. Ahari
2001 K Street, N.W.
Washington, D.C. 20006-1040
Telephone: 202/662-2000
Facsimile: 202/662-2190

Christopher P. Galanek
Ryan T. Pumpian
POWELL, GOLDSTEIN, FRAZER &
MURPHY, LLP
191 Peachtree Street, N.W., Sixteenth Floor
Atlanta, Georgia 30303
Telephone: 404/572-6600
Facsimile: 404/572-6999

Of Counsel:

Mark L. Pelesh
DRINKER, BIDDLE & REATH
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005
Telephone: 202/842-8837
Facsimile: 202/842-8465

Counsel for the Council of Chiropractic
Education, Inc., The Council of Chiropractic
Education Commission on Accreditation and
Dr. Paul D. Walker

Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,466 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 97 in 14 point Times New Roman.

Dated: April 22, 2003

_____/s/_____
Elizabeth Sarah Gere

Counsel for the Council of Chiropractic
Education, Inc., The Council of
Chiropractic Education Commission on
Accreditation and Dr. Paul D. Walker

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 22 day of April, 2003, served a copy of the Brief of Appellants The Council on Chiropractic Education, Inc., The Council on Chiropractic Education Commission on Accreditation, through its chair Joseph Brimhall and Paul D. Walker on the counsel listed below by Federal Express, properly addressed:

Frank B. Strickland
Mary M. Brockington
Strickland Brockington Lewis LLP
Midtown Proscenium, Suite 2000
1170 Peachtree Street, N.E.
Atlanta, GA 30309
Telephone: (678) 347-2200

Stanley A. Freeman
Sherry Mastrostefano Gray
Powers Pyles Sutter & Verville, PC
1875 Eye Street, N.W.
Twelfth Floor
Washington, D.C. 20006
Telephone: (202) 466-6550

/s/
Elizabeth Sarah Gere