

A GUIDEBOOK TO DUE PROCESS FOR ACCREDITORS
Lucien Capone III
University Counsel
University of North Carolina at Greensboro
4 January 2007

This paper is an outgrowth of a session presented at the Fall 2006 meeting of the Association of Specialized and Professional Accreditors.
It is posted to the ASPA web site (www.aspa-usa.org) with the permission of the author.

INTRODUCTION

Lawsuits against accrediting agencies are rarely fruitful for plaintiffs; however one area of particular vulnerability has been the failure to provide adequate due process when contemplating adverse action against institutions and programs. Fortunately it is a problem that is not difficult to remedy as the courts have neither imposed inflexible standards nor overly stringent requirements upon agency decision making. The key to success can be summed up in a single common sense principle; the agency must “conform its actions to fundamental principles of fairness.”¹ Of course the “devil is always in the details,” and in this paper I will flesh out this principle as developed by the courts. Recognizing that the courts afford a great deal of discretion to accreditors, my goal is to define the boundaries within which agencies have freedom to decide for themselves how best to provide due process. I will also discuss common errors and how to fix them before they become fatal. Finally, I will make some suggestions for how to write the essential elements of your due process policies and procedures.

THE DUE PROCESS STANDARD

Although courts have had a difficult time pigeon-holing accrediting agencies for purposes of determining what body of law to apply to them,² case law has developed that, regardless of whether accrediting agencies are considered to be private, public or quasi-public bodies, the following standard of due process will be used to measure an agency’s decisions:

1. The decision or action must not be arbitrary and capricious.
2. The institution must have been given adequate notice and an opportunity to be heard before the final decision is reached.³

“Arbitrary and Capricious”

The phrase “arbitrary and capricious” is a well understood term of art in the law. A decision is arbitrary and capricious if the agency has “*relied on [irrelevant or unauthorized] factors, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or product of agency expertise.*”⁴ Said another way, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.”⁵ If the agency does this, a court will not substitute its own judgment for that of the accrediting professionals.⁶

If we parse out this standard, we get the following elements:

1. The decision or action must be based on factors that are relevant to the issue at hand and that are within the scope of the agency's authority and may not be based on bias, anger or malice.
2. The agency must not ignore important evidence that might impact the issues being decided.
3. The decision must be based on "substantial evidence" supporting the conclusions reached.⁷

This is not exactly rocket science, and it is rare that accreditors run afoul of the "arbitrary and capricious" standard. However, there are two cases that illustrate pitfalls to be avoided.

In *Auburn University v. SACS*,⁸ the accreditor was drawn into a war between faculty and the University trustees over the firing of Auburn's President.⁹ A letter was sent to SACS asking it to investigate various matters including the way trustees were selected, the power of the trustees to remove a president, compliance with state open meetings laws, and allocation of governance responsibilities between the trustees and administration regarding admission, retention, graduation, grade forgiveness, tenure, and athletics. SACS initially indicated that it would undertake the requested investigation and the University sued complaining, among other things, that SACS was exceeding its authority under its own rules. After carefully reviewing SACS' standards and rules the court agreed with the University that SACS had no authority to investigate open meeting law violations or the authority of the trustees to select or remove the University president, and entered an order enjoining SACS' from pursuing investigation into those matters.

A second example occurred in *Life University, Inc. v. The Council on Chiropractic Education, Inc., et al.*, where a federal judge entered a preliminary injunction against an accrediting body that had revoked a school's accreditation status. The judge believed that the decision makers were competitors of the school and had a financial stake in the outcome. In a scathing opinion he said,

Although decisions of accrediting agencies have historically been given deference, where, as here, accreditation decisions are made by actors with a financial interest in the outcome, little deference should be given. Here, there were admitted conflicting economic financial interests in the decisions that were made. That fact is shown by the recruitment of [the school's] students...by competitors whose representatives were involved in the decision making on accreditation; an attempt by a competitor whose representative was one of the decision makers to buy [the school] after its accreditation was withdrawn, at a time when the monetary value of [the school] had been reduced by the accreditation decision; [and by] the fact that persons with competing financial interests to those of [the school] made the accreditation decisions....Actions which could violate the antitrust laws if incorporated in an accreditation procedure, *per se*, indicate a lack of due process.¹⁰

While I personally believe his Honor completely misunderstood the nature of accreditation as a “self-regulatory” endeavor where, by definition, accreditation board members come from institutions that are potential competitors, the real problem in this case was the appearance that CCE’s board members were acting in their competitive self interest, rather than from enforcement of legitimate accreditation purposes.

These cases illustrate two of the points I made earlier. First, accreditors must remain within the scope of their authority and second, they must avoid even the appearance of being biased as this will inevitably raise questions about whether the action was based on malice or extraneous factors, rather than on relevant matters.¹¹

The “substantial evidence” requirement tends to be subjectively applied by judges who get a feel for whether there is enough relevant evidence in the record to render the decision plausible. But, there is no bright line rule here. Rather, the requirement is applied in the qualitative sense rather than quantitatively. Here again, the courts will look to see whether the documentation of the decision making process (e.g., minutes of the discussion, evidence of the institution’s failure to meet standards, etc.) is germane and presents “more than a mere scintilla” of support for the conclusions reached and actions taken, *even if the court might itself disagree with the outcome*.¹² It is also important to note that internal disagreements evidenced by a minority report or by the minutes of the accreditation agency’s discussions are not necessarily a bad thing. In *Foundation for Interior Design Education Research v. Savannah College of Art & Design*,¹³ for example, the court found that such disagreements “are reasonably understood as part of a procedurally fair deliberative process.”

Finally, although inconsistent decision making can be deemed arbitrary, if not discriminatory, in the words of Ralph Waldo Emerson, “A foolish consistency is the hobgoblin of little minds, adored by little statesmen, philosophers and divines.” This point has been emphasized by at least two courts where the judges observed that accreditation procedures and standards are guides for professionals in the field of education that, if construed by the courts too strictly, would strip accrediting bodies of the flexibility they need to assess the unique circumstances presented by different schools. “Definiteness may prove, in another view, to be arbitrariness.”¹⁴ For example, in *Medical Institute of Minnesota v. National Association of Trade and Technical Schools*,¹⁵ accreditation of the private technical school was withdrawn based, in part, on its failure to demonstrate that it had a sound financial structure. The school argued that the decision was arbitrary and discriminatory because another school, Lakeland Academy, was in worse financial condition, but had been granted reaccreditation. The court rejected that claim stating,

“Fairness requires that Lakeland Academy and MIM be treated similarly, but only if they are similarly situated. MIM has made no showing that it was similar to Lakeland in all other relevant respects. Simply showing that Lakeland also had financial and placement problems ignores all of Lakeland's other attributes.”¹⁶

What is required is consistent application of your standards to similar circumstances. The Department of Education’s regulations expressly require each recognized agency to “have effective controls against inconsistent application of the agency’s published standards,” and a reasonable basis for determining that the information it relies on for making decisions is accurate.¹⁷ Two of the best ways to achieve quality control in decision making are (1) to

encourage your executive director (or other staff who possess your “corporate memory”) to speak up at meetings when potential inconsistencies or inaccuracies are seen and (2) to create an interpretive guide to your standards so that board members will have historical context to guide their current decision making. An excellent example of such a guide may be found in ACOTE’s “Standards and Interpretive Guidelines.”¹⁸

“Notice and an Opportunity to be Heard”

To the extent that there is a “gotcha” lurking in the due process standard it is here. I ascribe this to the fact that courts are more familiar with notice and opportunity to be heard issues and are more willing to question accreditors’ actions because, unlike a decision of whether to accredit or not, process issues do not involve academic expertise.

While the phrase “notice and opportunity to be heard” appears to be self-explanatory, as I mentioned earlier, the devil is in the details. What the courts really mean here is (1) *adequate* notice in order to know with some precision what the charges or proposed adverse actions are, along with sufficient time to prepare a response, and (2) a *meaningful* opportunity to be heard” in order to present relevant evidence that will be reviewed by the ultimate decision makers.

How an agency fulfills these requirements is left to the agency’s discretion. In fact, while the agency’s failure to follow its own procedural rules will certainly raise red flags for a judge (and should be avoided at all cost), that failure is not necessarily fatal so long as what was actually done in the case resulted in adequate notice and a meaningful opportunity to be heard. Conversely, the fact that the agency followed its own rules is no guarantee of success if the court determines those rules fail to meet basic legal requirements.

Before moving into a more detailed discussion of this topic, it is important to understand a vitally important concept about the courts’ approach to determining whether due process requirements have been met in any particular case. *The “adequacy of [due] process is to be balanced by ‘reference to the rights and interests at stake.’”*¹⁹ This means that due process is a flexible concept with greater procedural safeguards being required as the seriousness of the action increases. For example, a decision to revoke an institution’s accreditation (the “capital punishment of accreditation”) will require more procedural safeguards than a letter of censure or reprimand. Judges will balance the risk of an erroneous deprivation of the school’s interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, against the fiscal and administrative burdens that the added procedural safeguards will entail. Again, however, there is no bright line set of required procedures. As a practical matter, it still boils down to whether the individual judge believes that the institution was treated fairly.

The case of *Edward Waters College, Inc. v. SACS* is a good illustration of these points and the hidden “gotchas” I alluded to earlier. In 2004, Waters was applying to SACS for reaccreditation. In conjunction with its application, the College submitted a draft quality enhancement plan (QEP) to SACS. Unfortunately, a substantial portion of the document had been copied verbatim from another school’s QEP. SACS raised concerns about the possible plagiarism stating that if true, serious questions would be raised about the College’s integrity.

On November 19, 2004, Water’s president received a letter from SACS informing him that a meeting had been scheduled for December 4, with the Committee on Compliance and Reports, but the letter gave no statement of the issues to be discussed. Upon inquiry the

president was told that the meeting's purpose was not to consider removal of accreditation although that "remained a possibility." Essentially, he was not told what the meeting was specifically about.

At the December meeting the College presented evidence on the plagiarism issue. However, the Committee's findings addressed not only the integrity standard, but also a separate standard related to governance and administration. The Committee recommended that the College be placed on probation for one year with deferral of reaffirmation for six months.

The Committee's recommendations were forwarded to SACS' Executive Council. Without hearing from the College or reviewing the transcript of the hearing, the Executive Council rejected the Committee's recommendations and, instead, recommended removal of accreditation. The full Commission, "without receiving any evidence, without hearing from the College, and indeed without any discussion," adopted the Council's removal recommendation. At this point in his rendition of these facts, Judge Moore said,

Thus, with no opportunity to be heard by the actual decision maker (the Commission) or the body upon which it exclusively relied (the Executive Council), the College had now lost its accreditation, in part for reasons about which it had no notice. This raises substantial questions as to whether the Association's procedures constituted an "open, fair and deliberative process...essential to protect all interests and to assure some measure of confidence in the outcome of the inquiry."

Unfortunately for SACS, Judge Moore did not believe that the subsequent appeals process afforded to the College corrected any of these problems because that process was (too) narrowly limited to reviewing the Commission's decision for arbitrariness and procedural violations of the Association's rules.

Given that the stakes for the College were so high and the additional burden on SACS so low, Judge Moore held that the College was entitled to at least the following procedural safeguards:

1. Particularized notice of the rights at stake and the allegations to be answered, followed by,
2. A meaningful opportunity to be heard either by the actual decision making body directly or at least by a committee whose record of proceedings is reviewed by the actual decision maker.²⁰

"Particularized" Notice

What constitutes "particularized" notice is highly fact specific and must be answered on a case-by-case basis. However, a few general observations may guide your actions. First, the notice must give the institution enough information to know what it is being charged with. Vague phrases such as "violation of the standard on integrity" aren't going to be adequate. The institution needs to be told what particular acts or omissions are of concern and what particular standards are at issue. As the *Waters* case illustrates, simply stating that the institution's integrity is of concern wasn't enough since the standard on governance and administration was

also cited in the Committee's recommendations. Having said this, it is also important to note that not every single act constituting the alleged violation needs to be specified. Where several separate acts fall into the same category it is enough to give a few illustrative instances. For example, in *Transport Careers, Inc. v. National Home Study Council*,²¹ the school was charged with violating NHSC's business standards relating to advertising. In several communications with the school, NHSC had listed a number of specific advertisements that were deemed to violate the standards. However, there were eight advertisements that were not specifically listed. In rejecting the school's claim that it had not been given adequate notice the court said, "due process does not require that [the school] be given notice of every particular advertisement relied on by NHSC."²²

Second, the institution needs to be informed of the range of possible penalties if found guilty of noncompliance. In *Waters* the school had been given confusing information when it was specifically told that the purpose of the Committee hearing was not to consider removal of accreditation although that "remained a possibility." The school might well have assumed that if withdrawal were to later become more than a mere possibility it would receive another opportunity to be heard on that issue. Here again, the courts will look not so much to the formality of the notice but, rather, will focus on what actually occurred to determine if adequate notice was given.

An illustration of this point can be found in *Parsons College v. North Central Association of Colleges and Secondary Schools*.²³ The College had been placed on probation in 1963. In 1965, the probationary status was removed, but subject to a stipulation that its accreditation status would be reviewed within three years. Pursuant to that stipulation, the College was visited by an Examining Team in 1967. That team found numerous problems and issued a report specifying the deficiencies in detail, recommending that Parsons retain its accreditation in a provisional status. The College was then invited to a meeting with the accreditation Committee ("Committee by Type"). Parsons' representatives attended, and were given the opportunity to present statements and answer questions.

The matter then went to the Executive Board of the Commission which reviewed the reports of the Examining Team and the Committee by Type. Despite the team's recommendations for provisional accreditation, the Board recommended withdrawal of accreditation status for "persistent failure on the part of the College to correct certain serious weaknesses in its operation" and the Executive Board's lack of confidence in the administrative leadership of the College. This recommendation was then sent to the full Commission on Colleges and Universities which voted to accept the recommendation.

Before the Commission's recommendation was transmitted to North Central's Board of Directors for action by the Association's full membership, the Commission offered Parsons an opportunity to consult with Commission staff and to learn what action had been taken by the Commission. However, Parsons did not take advantage of that opportunity, nor did Parsons elect to attend the Board meeting. The Association's final decision was to withdraw accreditation.

Parson's sued claiming, in effect, that it had been sand bagged because it had no notice that withdrawal of accreditation was on the table. The Court rejected that claim off-hand stating,

The Court can give no credence to the claim of the College that they had no notice that their accreditation was in jeopardy...After a

long history of questionable status, the visit of the Examining Team was adequate notice without more. They were therefore on notice that action might be taken at the Association meeting, and they absented themselves at their risk.²⁴

This case can be distinguished from the *Waters* case discussed earlier because here, as the Court pointed out, Parsons College had “a long history of questionable status,” and elected not to take advantage of several opportunities to appear and be heard, whereas Edward Waters College did not have such a long and checkered history and had received conflicting information about whether or not its accreditation was in danger. Nevertheless, in my opinion, it is better practice to give clear notice to the institution about the full range of possible sanctions.

“Meaningful” Opportunity to be Heard by the Decision Maker

Because due process is a flexible concept what courts will accept as a meaningful opportunity to be heard will vary depending upon the facts of the case. However, judges will look to certain common sense factors such as whether the institution had adequate time to prepare and submit its response, whether the decision maker had access to the full record of any hearing and written submissions, and whether the decision maker actually considered those materials.

Adequate Time to Respond

It is obvious that the institution must be given adequate time to prepare its response to the agency’s proposed action. Here again, there is no bright line rule. What is “adequate” will vary with the number and complexity of issues. However, it should come as no surprise that one day’s advance notice was not deemed adequate by the court in *Western State University of Southern California v. American Bar Association*,²⁵ whereas one month was held to be more than adequate by the court in *Rockland Institute v. Association of Independent Colleges*.²⁶ My recommendation here is that unless the situation is a true emergency, schools should get at least 30 days’ advance notice. Additionally, reasonable extensions should be liberally granted if adequate cause is shown by the school. There just isn’t any need to risk the ire of a judge over a time issue unless you have good reason to believe the school is employing illegitimate delaying tactics.

Representation by Counsel

There is no common law right to representation by lawyers in accreditation proceedings.²⁷ However, the Secretary of Education requires that accreditors recognized by the Department allow institutions to have the benefit of legal counsel in cases involving adverse actions.²⁸ This is another place where it may be better practice to err on the side of acquiescing to reasonable requests for permission to have counsel present. My only caveat is that you should be careful to be consistent. Don’t deny one institution’s request for counsel, but grant another’s unless you have a solid basis for making a distinction.

Right to a Personal Appearance

There is also no common law right entitling a school to demand that it be given an opportunity to personally appear in connection with its challenge to an adverse action. An opportunity to provide a written response and supporting documentation is sufficient.²⁹

CRAFTING DUE PROCESS PROCEDURES

Now that we have discussed the legal underpinnings of due process, what procedures should accrediting agencies adopt? It must be emphasized at the outset that this is not a “one size fits all” exercise. So long as the minimum elements are included, agencies are free to choose procedures that best fit their particular organizational structure and culture.

A good starting point is the Department of Education’s regulation, 34 C.F.R. § 602.25, which requires recognized agencies to include the following elements:

- “(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.”

To meet these requirements, the agency’s procedures should address the following topics:

1. A description of what actions may be appealed
2. Description of the grounds upon which an appeal may be based (scope)
3. Time for submitting the appeal and required format for the institution’s request
4. Burden of Proof and allocation of that burden
5. Description of the hearing or review process and the agency’s rights
6. Description of how the agency will be notified of the final decision
7. Status of the institution while the appeal is pending

Description of what may be appealed

It is critical that schools know exactly what agency actions are appealable. The Department of Education's regulations specify that, at a minimum, schools must be permitted to appeal "adverse actions" which are defined to include "the denial, withdrawal, suspension, revocation, or termination of accreditation or preaccreditation, or any comparable accrediting action an agency may take against an institution or program."³⁰ A typical statement might read,

"An institution may file an appeal of an adverse action which includes the denial, withdrawal, suspension, revocation, or termination of accreditation or preaccreditation."

The exact terminology may vary depending on the different nomenclature used by the agency. For example, SACS uses the terms "accredited, accredited advised, accredited warned and accredited probation," all of which are appealable actions.³¹

Description of Grounds for an Appeal

Institutions will be inclined to assert every possible basis for challenging an adverse action, many of which may be irrelevant or beyond the scope of the agency's decision making process. It is important to establish the limitations on these grounds at the outset or the process may quickly become totally bogged down. A good example can be found in the American Library Association's Council on Accreditation Policies and Procedures which states the following:

An institution may file an appeal of a COA decision to withdraw accreditation or to deny initial accreditation. The appeal must be based on either or both of the following grounds:

1. That the Committee on Accreditation failed to follow its established published procedures in reaching its decision, and that this failure to follow procedures caused the decision to be unfair; and/or
2. That the COA's decision was arbitrary, capricious, or not supported by significant, relevant information or evidence that the institution submitted in writing to the External Review Panel (ERP) and/or to the COA at the time of the review or before the decision, and that this oversight resulted in an unfair decision.³²

Time for Submitting the Appeal and Required Format

Institutions must be advised of the time limit for filing an appeal. Otherwise there is effectively no "statute of limitations." Additionally, a description of what the appeal must contain is equally important. For example, ACAOM's rules state that the program's appeal ("petition for reconsideration of the Commission's action") must be filed within 15 calendar days of receipt of notice of the Commission's action and,

Shall completely state all its procedural and/or substantive grounds for seeking reconsideration of the Commission's action, and shall indicate where it believes the Commission erred or made an oversight in its decision. The petition shall be accompanied by all evidence contained in

the official record on which the program relies to support reconsideration relative to compliance with the Commission's standards, and all evidence supporting the program's assertions that the Commission failed to adhere to its published procedures or denied due process to the program.³³

It is also a good idea to state, as ALA does, what the appeal may not contain, e.g. "[t]he institution cannot include in its appeal information about the program not submitted during the review process or changes at the program that occurred after the COA's decision."³⁴

Finally, if there is a fee that must accompany the filing, this should be specified along with a description of any other expenses the institution must bear.³⁵

Burden and Allocation of Proof

It is acceptable practice for agencies to place the burden of proof upon the institution. There are various standards of proof ranging from "by a preponderance of the evidence" to "clear and convincing evidence." Whatever that standard is, it should be spelled out clearly. The clear and convincing standard is the most typical (and advisable). Again, ALA's statement is a good example.

The appealing institution has the burden of proving that the COA committed clear error in making its accreditation decision, that this error resulted in an unfair decision, and that the error falls within the grounds for appeal (see Section IV.2.1) set forth in this document. The Appeal Review Committee (ARC) members are not to determine whether they would have reached the same conclusion as the COA, but rather to determine whether the COA followed established published procedures and reached its decision in a fair manner.³⁶

Description of the Hearing Process

There is tremendous variation between agencies as to how they actually conduct appeals, and this is fine so long as the institution is given a "meaningful" opportunity to present its case. Matters to be addressed might include,

1. what body of the agency will conduct the review, including a description of its composition and quorum requirements;
2. whether a personal appearance and oral presentation is permitted and, if so, how a request for that appearance is to be made;
3. a statement of whether legal counsel may be involved and the limits, if any, on counsel's role (e.g. counsel may attend and present or simply provide advice to institutional officials);
4. the order of presentation;
5. whether cross-examination will be permitted;

6. recording of the proceedings, and
7. a description of the deliberation process at the conclusion of presentations, i.e. in executive session and whether that session will be recorded.³⁷

Notification of the Final Decision

The institution must be notified of the final decision and the basis for it. Some agencies permit the institution to comment on the hearing body's report and recommendation before a final decision is reached, but this is not mandatory. Notification should be given as soon as practicable. It is not necessary to set an arbitrary time limit, but some general idea of the timing is advisable, e.g., "The institution will be provided with a written copy of the final decision as soon as practicable, but in no event more than 30 days after the conclusion of the hearing unless the institution is notified of circumstances requiring a delay."³⁸

Status of the Institution During the Appeal

Accredited institutions need to know what their accreditation status will be during the appeal and what representations about their status they are permitted to make to their students, faculty and public. For example, SACS states that "Any institution that appeals the action of CASI will be listed as accredited and placed in the category of "Accredited pending Appeal."³⁹ SACS goes on to warn that misrepresentation by an institution of its accreditation status can, itself, be grounds for revocation.⁴⁰

CONCLUSION

Although providing adequate due process safeguards may seem burdensome, as noted accreditation attorney, Mark Pelesh, pointed out in a July 1999 article written for ASPA, "[d]ue process, '... is your friend in convincing a court that a thorough and fair review has occurred."⁴¹ Getting it right from the outset is well worth the effort. However, even if mistakes are made all is not lost. "Due process does not demand perfect procedure, nor does it expect the formalism employed in a court of law."⁴² So long as the errors are not crucial to the outcome or if they are corrected before the decision becomes final, courts will cut accreditors a great deal of slack. There is no law against backing up a few steps and redoing things the correct way. It is far better to fess up and fix the errors rather than to dig in your heels and risk the cost, embarrassment and damage of a lost fight in court.

The bottom line is BE FAIR.

END NOTES

¹ Thomas M. Cooley Law School v. The American Bar Association, 459 F.3d 705 (6th Cir. 2006), *Petition for Certiorari Filed*, 75 USLW 3285 (Nov 14, 2006)(NO. 06-668) (“We are not free to . . . substitute our judgment for that of the ABA or its Council. Rather . . . we focus on whether the agency ‘conform[ed] to fundamental principles of fairness.’”).

² Although the issue is of primary interest to lawyers and legal scholars, judges often struggle to determine what body of law applies to accrediting agencies. Whether accrediting agencies are public, private, quasi-public or “state actors,” could influence the due process requirements and degree of judicial deference applied to accrediting agency actions. An excellent discussion of this debate can be found in *Auburn University v. Southern Association of Colleges and Schools, Inc.*, 2002 WL 32375008 (Jan. 15, 2002). However, in the final analysis, the standard of due process applied by the courts in these decisions ends up being the one described in this paper.

³ The actual language used by the courts tends to read as follows, “A court’s review of the decision of an accrediting association is limited to a determination that the Associations’ actions were not arbitrary or unreasonable . . . and that the decision was supported by substantial evidence and reasonably related to the legitimate professional purposes of the Association.” *Rockland Institute v. Association of Independent Colleges and Schools*, 412 F.Supp. 1015, 1016 (1.D.Cal. 976).

⁴ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

⁵ *Id.*

⁶ *Id.*

⁷ *Wilfred Academy of Hair & Beauty Culture v. Southern Association of Schools and Colleges, Inc.*, 957 F.2d 210 (5th Cir. 1992); *Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

⁸ *Auburn University v. Southern Association of Colleges and Schools, Inc.*, 2002 WL 32375008 (Jan. 15, 2002).

⁹ This case also illustrates the cynical, but painfully necessary warning I continuously harp upon with administrators at my school that “no good deed shall go unpunished.”

¹⁰ *Life University, Inc. v. The Council on Chiropractic Education, Inc, et al*, No. 1:03-CV-4-CAM (N.D. Ga. February 12, 2003).

¹¹ That is why conflicts of interest policies are so important as I pointed out in some detail in my 2003 paper entitled *What, Me Worry? An Overview Of Legal Concerns For Accreditors*, published on the ASPA website at: <http://www.aspa-usa.org/resources/capone.html>.

¹² *St. Dominic-Jackson Memorial Hosp. v. Mississippi State Department of Health*, 910 So.2d 1077 (Miss. 2005); *Nova University v. Educational Institution Licensure Commission*, 483 A.2d 1172, 1189 D.C. 1984), *cert. denied*, 470 U.S. 1054 (1985).

¹³ 244 F.3d 521, 529 (6th Cir. 2001).

¹⁴ *Parsons College v. North Central Association of Colleges and Secondary Schools*, 271 F.Supp. 65, 73 (N.D.Ill. 1967). *Also see*, *Western State University of Southern California v. American Bar Association*, 301 F.Supp.2d 1129, 1135 (C.D.Cal. 2004).

¹⁵ 817 F.2d 1310 (8th Cir. 1987).

¹⁶ *Id.*, at 1314.

¹⁷ 34 C.F.R. § 602.18.

¹⁸ <http://www.aota.org/nonmembers/area13/docs/acotestandards806.pdf>.

¹⁹ *Edward Waters College, Inc. v. The Southern Association of Colleges and Schools, Inc.*, No. 3:05-cv-180J-16HTS (M.D.Fla. 11 March 2005), quoting from *Washington v. Harper*, 494 U.S. 210, 229 (1990).

²⁰ *Western State University of Southern California v. American Bar Association*, 301 F.Supp.2d 1129, 1137 (C.D.Cal. 2004) (“The question is not whether Western has had *some* opportunity to be heard, but whether Western has had a *fair and effective* opportunity to be heard.”)(Emphasis supplied).

²¹ 646 F.Supp. 1474 (N.D. Indiana, 1986).

²² *Id.*, at 1484.

²³ 271 F.Supp. 65 (N.D. Ill. 1967).

²⁴ *Id.*, at 72.

²⁵ 301 F.Supp.2d 1129 (C.D.Cal. 2004).

²⁶ 412 F.Supp. 1015 (C.D.Cal. 1976).

²⁷ *Parsons College v. North Central Association of Colleges and Secondary Schools*, 271 F.Supp. 65 (N.D.Ill. 1967).

²⁸ 34 C.F.R. § 602.25(c).

²⁹ *E.g.*, *Peoria School of Business v. Accrediting Council For Continuing Education and Training*, 805 F.Supp. 579, 583 (N.D.Ill. 1992).

³⁰ 34 C.F.R. § 602.3.

³¹ SACSCASI, *Accreditation Policies for Member and Candidate Schools*, § 3.16 and .43, http://www.sacscasi.org/region/standards/Accreditation_Policies_for_Member_and_Candidate_Schools.pdf (July 2004).

³² American Library Association *Accreditation Policies and Procedures*, § IV.2.1. <http://www.ala.org/ala/accreditation/accredstandards/ap3.htm#IV21> (2003).

³³ ACAOM *Accreditation Handbook*, <http://www.acaom.org/handbook.htm> (2005).

³⁴ American Library Association *Accreditation Policies and Procedures*, § IV.2.1. <http://www.ala.org/ala/accreditation/accredstandards/ap3.htm#IV21> (2003).

³⁵ SACS' rules specify that the institution must pay a \$5,000 deposit to cover travel and subsistence for Appeals Committee members and two CASI staff members, cost of the hearing room, and stenographic or court reporter costs. SACSCASI, *Accreditation Policies for Member and Candidate Schools*, §3.44, http://www.sacscasi.org/region/standards/Accreditation_Policies_for_Member_and_Candidate_Schools.pdf (July 2004).

³⁶ *Id.*, at § IV.2.2.

³⁷ In the interest of space I will not set out examples in this paper as they tend to be lengthy but two good statements may be found at the American Association of Colleges of Nursing, CCNE's website, <http://www.aacn.nche.edu/Accreditation/procrevd.htm> and at the SACSCASI policies at § 3.44.

³⁸ Recall, also, that the Department of Education's regulations require that notice of the final decision must be given to the Secretary, the appropriate State licensing or authorizing agency, the appropriate accrediting agencies, and the public, no later than 30 days after the decision becomes final. 34 C.F.R. §602.26.

³⁹ *Id.*, at § 3.45. For obvious reasons, that statement won't apply to a school whose initial application for accreditation has been denied.

⁴⁰ *Id.* at § 3.27.

⁴¹ Mark L. Pelesh, *Assessing the Legal Risks of Accreditation Decisions*, ASPA News, July 1999, <http://www.aspa-usa.org/newsletters/news0799.html>.

⁴² *Waters*, at 33.