



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF THE SECRETARY

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*In the matter of*

**MARYLAND BOARD OF NURSING**

**Docket No. 20-39-AC**

Accreditor Recognition

Complainant.

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**DECISION OF THE SECRETARY<sup>1</sup>**

The Secretary of the U.S. Department of Education (Department) recognizes state agencies for the approval of nursing education. Before me is the question of whether to renew the recognition of such a state agency, the Maryland Board of Nursing (MBN). As discussed below, MBN has a history of noncompliance with certain recognition criteria.

Nevertheless, the record shows that MBN is likely to come into compliance with the below-referenced recognition criteria at issue (Criteria 3(a), 3(d), and 3(g)) within 12 months. MBN must substantially improve its work as an accrediting agency. Because I have confidence that the new executive director of MBN will rise to the occasion (as the executive director has so communicated in the record of this case), and because the evidence indicates MBN can come into compliance within 12 months of my decision, I approve the re-recognition of MBN with the strict terms set forth in this decision. Under the terms of this decision, MBN is required to come into full compliance with the recognition criteria by no later than January 15, 2022.

Background

State agencies for the approval of nursing education must meet criteria for recognition by the Department published in the January 16, 1969, *Federal Register*.<sup>2</sup> These special criteria are

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<sup>1</sup> Secretary of Education Betsy DeVos resigned as Secretary effective January 8, 2020. In accordance with 20 U.S.C. § 3412(a)(1), which states in pertinent part “. . . in the event of a vacancy in the office of the Secretary, the Deputy Secretary shall act as Secretary,” Deputy Secretary Mitchell M. Zais began his service as the Acting Secretary upon the vacancy.

<sup>2</sup> Recognition of State Agencies for Approval of Nurse Education, 34 Fed. Reg. 644–45 (Jan. 16, 1969); Accreditation in the United States, Criteria and Procedures for Recognition of State Agencies for Nurse Education, U.S. Dep’t of Educ., [https://www2.ed.gov/admins/finaid/accred/accreditation\\_pg19.html#CriteriaforNurseEducation](https://www2.ed.gov/admins/finaid/accred/accreditation_pg19.html#CriteriaforNurseEducation), last visited Jan 14, 2021.

different from those that apply to other accreditation agencies. Three of those recognition criteria are relevant to this case, Criteria 3(a), Criteria 3(d), and Criteria 3(g):

3. [The accrediting agency] [h]as an adequate organization and effective procedures, administered by a qualified board and staff, to maintain its operations on a professional basis. Among the factors to be considered in this connection are that the agency:

a. [u]ses experienced and qualified examiners to visit schools of nursing to examine educational objectives, to inspect courses, programs, administrative practices, services and facilities and to prepare written reports and recommendations for the use of the reviewing body—and causes such examination to be conducted under conditions that assure an impartial and objective judgment;

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d. [e]nforces a well defined set of standards regarding a school's ethical practices, including recruitment and advertising;

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g. [m]akes initial and periodic on-site inspections of each school of nursing accredited.<sup>3</sup>

Despite using alternative criteria, state agencies for the approval of nursing education follow the same recognition process as other accrediting agencies under 34 C.F.R. Part 602 Subpart C. After reviewing the state agency's application for compliance with the appropriate criteria, the Department staff forwards its findings and a recommendation to the National Advisory Committee on Institutional Quality and Integrity (NACIQI).<sup>4</sup> NACIQI holds an open meeting to hear public comments and to discuss the submissions of the interested parties.<sup>5</sup> During that meeting, NACIQI votes on its recommendation and forwards it to the Senior Department Official (SDO).<sup>6</sup> Both the agency and Department staff may subsequently submit comments to the SDO.<sup>7</sup> Finally, the SDO makes a decision regarding recognition or re-recognition, weighing the recommendations of the Department staff and NACIQI.<sup>8</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> 20 U.S.C. § 1011c (2016) (establishing NACIQI, including its number of members, qualifications for members, and functions).

<sup>5</sup> 34 C.F.R. § 602.34(e) (providing that NACIQI should “invite[] Department staff, the agency, and other interested parties to make oral presentations during the meeting”).

<sup>6</sup> *Id.* § 602.34(g) (providing that NACIQI forwards its recommendation to the SDO).

<sup>7</sup> *Id.* § 602.35 (allowing the agency and the Department staff to file comments to the SDO prior to making a decision).

<sup>8</sup> *Id.* § 602.36 (providing for the SDO to issue a decision).

An agency may appeal the SDO's decision to the Secretary.<sup>9</sup> In this appeal, the Secretary makes a recognition decision *de novo* based on the regulations<sup>10</sup> and the entire record before the SDO.<sup>11</sup> Approval of recognition requires the agency to show that it both complies with, and effectively applies, the criteria for recognition.<sup>12</sup> If the agency is noncompliant, or fails to effectively apply the criteria, the Secretary will deny, limit, suspend, or terminate recognition.<sup>13</sup> Alternatively, where there is a finding of noncompliance, the Secretary may, in his or her discretion, continue recognition of an agency pending submission of a compliance report, but only if the Secretary "concludes that the agency will demonstrate or achieve compliance with the criteria for recognition and effective application of those criteria within 12 months or less."<sup>14</sup>

I have previously held that substantial compliance with the criteria is sufficient to justify an extension of an agency's recognition provided the agency submits reports allowing the Department to monitor its compliance efforts.<sup>15</sup> Furthermore, where an agency is noncompliant in ways where there are "procedural and documentation or record-keeping deficiencies," Department precedent has recognized the "Department's long-standing practice of not withholding renewed recognition from an accrediting agency based primarily on areas of noncompliance that are not substantive."<sup>16</sup> Continued recognition "provides the least disruptive alternative to schools and students who would be affected by [the agency's] sudden loss of recognition."<sup>17</sup>

MBN is a state agency governed by the Code of Maryland Regulations (COMAR).<sup>18</sup> It has been recognized by the Department to approve nursing education since 1985.<sup>19</sup> In the State

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<sup>9</sup> *Id.* § 602.37 (providing procedures for appealing the SDO Decision).

<sup>10</sup> *Id.* § 602.37(e) ("On appeal, the Secretary makes a recognition decision, as described in § 602.36(e). If the decision requires a compliance report, the report is due within 30 days after the end of the period specified in the Secretary's decision. The Secretary renders a final decision after taking into account the senior Department official's decision, the agency's written submissions on appeal, the senior Department official's response to the appeal, if any, and the entire record before the senior Department official. The Secretary notifies the agency in writing of the Secretary's decision regarding the agency's recognition."); *Northwest Comm'n on Colleges and Univ.*, Dkt. No. 14-07-O, U.S. Dep't of Educ. (Decision of the Secretary) (Dec. 11, 2014) at 5 ("I review Northwest's appeal *de novo*") and n.39 ("While I recognize the expertise of the individuals who have reviewed Northwest's application, the regulations require that I thoughtfully consider the entire record before me [*de novo*].").

<sup>11</sup> The Secretary issues a recognition decision using the same standards as the SDO Decision. *Id.* § 602.37(d) (citing *Id.* § 602.36(e)). Neither the agency nor the SDO may submit additional evidence on appeal to the Secretary. *Id.* § 602.37(d). In limited circumstances, the Secretary may dispose of the case on alternative grounds if new, relevant, and material information comes to the Secretary's attention during the appeal. *Id.* § 602.37(f). No agency may submit information, or ask others to do so, to invoke this narrowly applied rule. *Id.* § 602.37(g).

<sup>12</sup> *Id.* § 602.36(e)(1) ("The senior Department official approves recognition if the agency has demonstrated compliance or substantial compliance with the criteria for recognition listed in subpart B of this part.").

<sup>13</sup> *Id.* § 602.36(e)(2) ("if the agency fails to comply with the criteria for recognition listed in subpart B of this part, the senior Department official denies, limits, suspends, or terminates recognition.").

<sup>14</sup> *Id.* § 602.36(e)(3).

<sup>15</sup> *Accrediting Council for Indep. Coll. and Sch.*, Dkt. No. 16-44-O, U.S. Dep't of Educ. (Decision of the Secretary) (Nov. 21, 2018) at 4.

<sup>16</sup> *In the Matter of New England Ass'n of Sch. and Coll., Comm'n on Technical and Career Inst.*, Dkt. No. 07-25-O, U.S. Dep't of Educ. (Decision of the Secretary) (Dec. 21, 2007) at 2.

<sup>17</sup> *Id.*

<sup>18</sup> COMAR Ch. 10, Subtitle 27 Board of Nursing.

<sup>19</sup> U.S. Department of Education Staff Report to the Senior Department Official on Recognition Compliance Issues (Staff Report) at unpaginated (unp.) 1.

of Maryland, MBN is the only alternative approval agency for nursing education programs that are not accredited by the recognized national nursing accrediting agencies, Accreditation Commission for Education in Nursing and Commission on Collegiate Nursing Education.<sup>20</sup> MBN's approval of nursing programs allows access to Federal assistance under Title VIII of the Public Health Service Act.<sup>21</sup> MBN does not currently recognize any institution for purposes of aid under Title IV of the Higher Education Act. MBN further indicates that it presently evaluates 41 schools on a 5-year site visit schedule.<sup>22</sup>

MBN has a history of noncompliance, on occasion, with the recognition criteria. MBN was in full compliance with the criteria when NACIQI reviewed MBN at its December 2006 meeting.<sup>23</sup> In the Department staff report produced in December 2011 during the next cycle of review, Department staff found MBN out of compliance with various aspects of Criteria 3.<sup>24</sup> The Department staff found that MBN needed to demonstrate that it requires programs to include tuition and refund policies in renewal surveys, that it collects and assesses information to determine the quality of educational programs, and that it regularly reviews programs' audited fiscal reports.<sup>25</sup> MBN came into compliance, but during the following cycle of review in 2015, Department staff found MBN out of compliance with Criteria 3(d).<sup>26</sup> MBN had not demonstrated that it required its programs to show the use of ethical practices in recruitment and advertising.<sup>27</sup> MBN came into compliance by soliciting emails from programs attesting to their compliance with Criteria 3(d).<sup>28</sup> An SDO decision in March 2016 found MBN in compliance with the criteria and granted recognition to MBN for 4 years.<sup>29</sup>

The executive director of MBN, who joined the accrediting agency's staff approximately 2 ½ years prior to the February 27, 2020, NACIQI meeting, acknowledged MBN's problems. She stated that "[t]he main purpose for me being hired at the Board of Nursing is to clean up [a] process that has not been cleaned up for a while. So it's a lot of things that I'm cleaning up."<sup>30</sup> She described MBN prior to her arrival as having a "lack of accountability" and mentioned that ineffective staff recently departed the agency.<sup>31</sup> NACIQI members expressed their concerns that MBN's process "has not felt like a very good process . . . momentary compliance falling back into noncompliance."<sup>32</sup> The NACIQI chair indicated that he had "real serious doubt about the administrative capability of the Agency."<sup>33</sup>

Before me is MBN's petition for re-recognition submitted in July 2019. In the course of the current re-recognition process, Department staff conducted a site visit and observed a

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<sup>20</sup> Department Final Detailed Analysis at unpag. 4.

<sup>21</sup> 42 U.S.C. § 296 *et seq.*

<sup>22</sup> NACIQI Transcript (Tr.) at 208.

<sup>23</sup> 2011 Department Staff Report at 3.

<sup>24</sup> *Id.* at 1.

<sup>25</sup> *Id.* at 1–2.

<sup>26</sup> Department Final Detailed Analysis at unpag. 17.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Staff Report at unpag. 2.

<sup>30</sup> NACIQI Tr. at 185.

<sup>31</sup> *Id.* at 210–11.

<sup>32</sup> *Id.* at 186.

<sup>33</sup> *Id.* at 235.

meeting of MBN’s Board.<sup>34</sup> Department staff then prepared a report finding MBN noncompliant with the three criteria listed earlier—Criteria 3(a) (effective staff assuring impartial reviews of programs), Criteria 3(d) (enforcing ethical practices), and Criteria 3(g) (conducting periodic on-site inspections), yet recommended a 12-month continuation of recognition to allow MBN to come into compliance.<sup>35</sup>

On February 27, 2020, NACIQI met to consider the Department’s staff recommendation. After hearing from MBN and the Department, NACIQI deliberated and ultimately voted 12-1 to accept the Department’s staff recommendation.<sup>36</sup> NACIQI forwarded its recommendation to the SDO. The SDO, Diane Auer Jones, then considered and rejected the Department’s and NACIQI’s recommendations and determined the facts warranted a suspension of MBN’s recognition for 2 years. The decision (SDO Decision) was issued May 27, 2020.<sup>37</sup>

### Analysis

With the benefit of recommendations from the Department staff and NACIQI, the SDO Decision, briefs from MBN and the SDO, and the complete administrative record, I now consider whether to grant MBN’s request for re-recognition under the applicable criteria.

#### **Criteria 3(a) – Quality and Quantity of Examiners Who Visit and Evaluate Schools**

Criteria 3(a) requires:

3. [t]he accrediting agency] . . . [to have] an adequate organization and effective procedures, administered by a qualified board and staff, to maintain its operations on a professional basis. Among the factors to be considered in this connection are that the agency:

a. [u]ses experienced and qualified examiners to visit schools of nursing to examine educational objectives, to inspect courses, programs, administrative practices, services and facilities and to prepare written reports and recommendations for the use of the reviewing body—and causes such examination to be conducted under conditions that assure an impartial and objective judgment[.]

Department staff found that MBN did not fully demonstrate its compliance with Criteria 3(a) because it did not “provide the Practice and Education Committee report” to

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<sup>34</sup> Staff Report at unpag. 2; NACIQI Tr. at 175.

<sup>35</sup> Staff Report at unpag. 1.

<sup>36</sup> Report of the Meeting, NACIQI (Feb. 27, 2020) at 7–8.

<sup>37</sup> I note that an undated letter, from the SDO to MBN, is attached to the copy of the SDO Decision submitted to me. The letter indicates that the Department initially failed to serve the SDO Decision on MBN. Therefore, the SDO intended to resend the SDO Decision “to restart the clock on the appeal period” under 34 C.F.R. § 602.37(a). That regulation provides that an agency subject to an SDO Decision may appeal it within 10 business days “after receipt of the decision.” MBN’s appeal letter, dated July 20, 2020, indicates that it received the SDO Decision for the first time on July 16, 2020. Because the appeal period is triggered by the agency’s receipt of the SDO Decision, and MBN did not receive the decision until July 16, 2020, its appeal was timely submitted.

“demonstrate the application of its full review of the approval process.”<sup>38</sup>

The SDO found MBN out of compliance with Criteria 3(a), stating that she was uncertain whether MBN had “sufficient staff to perform the necessary site visits and reviews,” and has expressed her opinion that “MBN does not engage peer reviewers in their site visits” and “[s]ection 602.15(a)(5) [34 C.F.R. § 602.15(a)(5)] makes clear, for example, that educators and practitioners must be included on an agency’s evaluation, policy and decision-making bodies.”<sup>39</sup>

She also found that MBN’s Practice and Education Committee did not provide reports and recommendations to the governing body as required by Criteria 3(a), stating “[i]t is not clear what role this Committee plays or if its work has any bearing on the Board’s consideration of a program.”<sup>40</sup>

In any event, the SDO found that members of this Committee also sit on the 14-member Board, suggesting that “serious additional questions persist about conflict[s] of interest.”<sup>41</sup> The SDO cites 34 C.F.R. § 602.15(a)(6), which “require[s] that an agency have clear and effective controls against conflicts of interest, or the appearance of conflicts of interest.”<sup>42</sup>

On appeal, MBN argues that it is substantially compliant with Criteria 3(a). It states it “employs two highly qualified and experienced staff persons to conduct site visits and assess regulatory compliance at new and existing nursing education programs in Maryland.”<sup>43</sup> MBN asserts that these qualified staff members conduct site visits as a team, that the Executive Director of the Board participates in site visits when needed, and that MBN is currently in the process of hiring additional employees to augment its site visit teams.<sup>44</sup> It further argues that it already demonstrated to the Department and NACIQI that it was compliant “except for further defining the role of the Board’s Practice and Education Committee in the site visit and periodic reapproval process.”<sup>45</sup> MBN states that the Committee is composed of “several Board staff members and three Board members.”<sup>46</sup> MBN further explains in detail the Committee’s function in the “full cycle of review” that had been previously lacking.<sup>47</sup>

[T]he Practice and Education Committee serves an informal review and auditing function, ensuring that staff reports and other items related to programmatic reviews are complete, free of errors and omissions, and prepared for Board review. At the conclusion of its review, and after confirming that an item is properly prepared for Board review and decision, the Practice and Education

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<sup>38</sup> Staff Report at unpag. 1; NACIQI Tr. at 176.

<sup>39</sup> SDO Decision at unpag. 2; SDO Response to MBN Appeal at unpag. 3 (citing 34 C.F.R. § 602.15(a)(5) (requiring an agency to have, among other things, “[r]epresentatives of the public, which may include students, on all decision-making bodies.”)).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> SDO Response to MBN Appeal at unpag. 3.

<sup>43</sup> MBN Appeal at 5.

<sup>44</sup> *Id.* at 6–7.

<sup>45</sup> *Id.* at 5.

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.*; Staff Report at unpag. 2.

Committee determines whether to recommend approval, denial, or another appropriate action on the agenda item, and its recommendation is verbally presented to the Board when the item is considered at the Board's monthly meeting. The full Board retains the authority and responsibility to review all agenda items independently and decide on an appropriate final action. The Practice and Education Committee does not produce its own reports regarding the outcomes of site visits and regulatory compliance assessments; rather, such reports are generated and presented to the Board by the professional staff members that conduct the site visits and perform the regulatory compliance assessments.<sup>48</sup>

As a preliminary matter, I find it inexplicable that MBN failed to provide a requested report from its Practice and Education Committee during the Department's staff review of 2019 or by the time of the February 27, 2020, NACIQI meeting. An agency with a history of past noncompliance such as MBN should be cognizant of its obligation to demonstrate compliance with requests made by the Department during periodic reviews. Where Department staff state that MBN's structure and process are unclear, MBN should provide clear governance documents or internal policies explaining MBN's organization and how its component parts function and any report generated or acted upon by the Committee in question.<sup>49</sup> Although suspension of recognition is disfavored for noncompliance of solely procedural criteria, such suspension is the only recourse after an extended period of willful disregard of simple requests by the Department. While I do not suspend the recognition of MBN in my decision, I do note if such lax practices continue, MBN could face severe consequences in the future.

As to the substantive requirements of Criteria 3(a), I first note that the SDO's Response to MBN's Appeal cites to Department regulations on the criteria for accrediting agency recognition.<sup>50</sup> However, these criteria are not the criteria at issue in this case for nursing education. The criteria at issue are found in Recognition of State Agencies for Approval of Nurse Education, 34 Fed. Reg. 644-45 (Jan. 16, 1969), which deals directly with agencies that evaluate programs of nursing education. Nevertheless, I recognize that the regulations pertaining to peer reviewers on site visit teams suggest best practices that MBN should strongly consider adopting in light of its history of noncompliance.

The Department's staff report supports MBN's representations about its staff qualifications. The report observed that "both board staff evaluators possess doctoral degrees and appropriate levels of higher education and nursing program experience to conduct reviews of nursing programs."<sup>51</sup> Based on knowledge and experience, and the record before me, MBN's staff has the experience and qualifications to conduct site visits.<sup>52</sup>

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<sup>48</sup> MBN Appeal at 5.

<sup>49</sup> MBN's executive director stated that the Practice and Education Committee does not produce minutes of its meetings or "their own report," but does produce transcripts of meetings and the Committee reviews reports produced by "each department." NACIQI Tr. at 190.

<sup>50</sup> SDO Response to MBN Appeal at unpag. 3 (citing 34 C.F.R. §§ 602.15(a)(5), 602.15(a)(6)).

<sup>51</sup> Staff Report at unpag. 2.

<sup>52</sup> MBN should consider including *non-MBN staff* peer reviewers in their site visits as a best practice.

With regard to the SDO's concerns over inherent conflicts of interest, I note that the COMAR provides ethical guidelines for both Board members and investigators such that the examinations referenced in Criteria 3(a) are "conducted under conditions that assure an impartial and objective judgment."<sup>53</sup> A Board member must recuse himself or herself from proceedings where the Board member has a conflict of interest or cannot participate fairly and impartially.<sup>54</sup> Likewise, an "investigator may not conduct or participate in an investigation of a complaint in which the investigator has a conflict of interest."<sup>55</sup>

MBN admits its Board members have both an investigatory and adjudicatory role, asserting that "[m]embers of state health occupations regulatory boards and commissions often are asked to perform multiple, sometimes seemingly conflicting, roles when executing their regulatory responsibilities."<sup>56</sup> MBN asserts that the Department should afford its Board members the presumption of honesty.<sup>57</sup> MBN cites the U.S. Supreme Court case *Withrow v. Larkin*, 421 U.S. 35 (1975) for the proposition that government adjudicators are presumed to be honest and impartial.<sup>58</sup>

In *Withrow*, a physician sued his state medical licensing board alleging that statutes permitting the board to suspend his license without a hearing were unconstitutional.<sup>59</sup> In that case, the board conducted an investigative hearing into the question of whether the physician performed any prohibited acts.<sup>60</sup> Thereafter, the same board issued "'Findings of Fact,' 'Conclusion of Law,' and a 'Decision'" finding "probable cause for an action to revoke the license of the licensee for engaging in unprofessional conduct."<sup>61</sup> The physician challenged the board's decision on the ground that it unconstitutionally denied him due process by combining its investigative and adjudicative functions into the hands of the same board members.<sup>62</sup>

On appeal, the Supreme Court noted that "a 'fair trial in a fair tribunal is a basic requirement of due process.'"<sup>63</sup> This requirement applies to administrative agencies that adjudicate, and it applies in instances of probable unfairness as well as instances of actual conflicts of interest.<sup>64</sup> However, the contention that the combination of investigative and adjudicative functions creates a conflict of interest is a "difficult burden of persuasion to carry. [The contention] must overcome a presumption of honesty and integrity in those serving as adjudicators."<sup>65</sup> The Supreme Court ruled against the physician because the mere structural combination of functions did not *de facto* establish any conflicts of interest.<sup>66</sup> A showing of

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<sup>53</sup> COMAR §§ 10.27.23.03, 10.27.23.04.

<sup>54</sup> *Id.* § 10.27.23.03(A)(1).

<sup>55</sup> *Id.* § 10.27.23.04(A).

<sup>56</sup> MBN Appeal at 5.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 5–6; *Withrow v. Larkin*, 421 U.S. 35 (1975).

<sup>59</sup> *Withrow*, 421 U.S. at 39–42.

<sup>60</sup> *Id.* at 39–40.

<sup>61</sup> *Id.* at 41.

<sup>62</sup> *Id.* at 42.

<sup>63</sup> *Id.* at 46.

<sup>64</sup> *Id.* at 46–47.

<sup>65</sup> *Id.* at 47.

<sup>66</sup> *Id.* at 54–55.

actual prejudice would be required to find a lack of due process.<sup>67</sup> In that case, “[n]o specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing. The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing.”<sup>68</sup>

More recently, in *Caperton v. A.T. Massey Coal Co. Inc.*, the Supreme Court upheld *Withrow*, reiterating that the standard to be applied when determining whether one’s interest creates a conflict is whether “‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’”<sup>69</sup> An example of an interest which would pose such a risk would be a financial interest. In *Caperton*, for instance, the Supreme Court found a conflict of interest and necessity for recusal of a state supreme court justice who “received campaign contributions in an extraordinary amount” from a corporation appearing as a party in a case before the justice.<sup>70</sup>

The U.S. Court of Appeals for the Fourth Circuit more specifically addressed conflicts of interest for members of accrediting agency boards in *Wards Corner Beauty Academy v. National Accrediting Commission of Career Arts and Sciences*.<sup>71</sup> In that case, the Chairman of the accrediting agency, Michael Bouman, served as a substitute for a file review team which determined whether to recommend the agency withdraw accreditation from an institution, Wards Corner Beauty Academy.<sup>72</sup> The review team recommended withdrawal of accreditation, and ultimately the agency withdrew it.<sup>73</sup> While these events transpired, Bouman was Chief Operating Officer and part owner of an institution nearby and similar to Wards.<sup>74</sup> Wards sued the agency, asserting that the agency denied Wards’ right to an impartial decisionmaker because Bouman was compromised by his pecuniary interest in Wards’ loss of accreditation.<sup>75</sup> The court ruled against Wards, holding that “[a]n administrative decisionmaker is entitled to a ‘presumption of honesty and integrity.’”<sup>76</sup>

In MBN’s case, there is no evidence in the record of any particular interest which has in the past created a conflict for a member of MBN’s Board. Applying the analysis in *Caperton* to MBN, I do not find that the Board’s decision-making process is compromised by conflicts of interest. The holding in *Wards* indicates that a decisionmaker in an accrediting body, such as MBN’s Board, is owed a presumption of honesty and integrity. Absent a showing of an actual conflict of interest, I afford MBN the presumption that it engages in impartial decision-making.

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<sup>67</sup> *Id.* at 55.

<sup>68</sup> *Id.*

<sup>69</sup> *Caperton v. A.T. Massey Coal Co. Inc.*, 556 U.S. 868, 883-84 (2009) (quoting *Withrow*, 421 U.S. at 47).

<sup>70</sup> *Id.* at 872.

<sup>71</sup> *Wards Corner Beauty Acad. v. NACCAS*, 922 F.3d 568, 572 (4th Cir. 2019).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 572–73.

<sup>74</sup> *Id.* at 572.

<sup>75</sup> *Id.* at 573–74.

<sup>76</sup> *Id.* at 572.

According to the record, 3 of the 14 members of MBN's Board sit on the Practice and Education Committee. The Committee provides verbal recommendations to the Board but does not prepare the investigative reports underpinning each school's review. The staff who prepare the investigative reports do not sit on the Board. An actual conflict of interest would undermine MBN's compliance, but the record before me shows no evidence or allegation of such conflict. To find MBN noncompliant due to such a conflict, Department staff would have to conduct the kind of analysis discussed in the cases cited earlier. MBN is entitled to the presumption of honesty and integrity afforded to accrediting agencies by courts.

MBN has asserted that its staff are both adequate in quality and quantity to engage in site visits, and that the staff create reports from these visits that are adequate to inform the Board for final deliberations on each school or program.<sup>77</sup> MBN's existing structure and staff are sufficiently compliant with Criteria 3(a) to establish grounds for a 12-month period of continued recognition.

However, MBN will have to demonstrate its compliance with this criterion to the satisfaction of the Department staff over the course of that 12-month period. MBN will also be required to promptly provide a report or transcript of its Practice and Education Committee meeting. Furthermore, MBN will be required to provide to the Department internal policies explicitly demonstrating that its examinations are "conducted under conditions that assure an impartial and objective judgment" as required by Criteria 3(a). These policies should incorporate best practices to avoid the appearance of impropriety.

Based on this analysis, I find that MBN is likely to come into compliance with Criteria 3(a) within 12 months.

### **Criteria 3(d) – Agency Enforces Standards Relating to Schools' Ethical Practices**

Criteria 3(d) requires "[the accrediting agency] . . . [to enforce] a well defined set of standards regarding a school's ethical practices, including recruitment and advertising."<sup>78</sup> Department staff found that MBN was noncompliant with this criterion when MBN was evaluated by the Department during an earlier, separate review in 2015. At that time, MBN came into compliance by requesting each school provide information by e-mail to demonstrate its requisite ethical behavior.

However, MBN did not make a similar effort during this current recognition renewal cycle. Therefore, Department staff found MBN again noncompliant with Criteria 3(d). MBN acknowledged the absence of this requirement from its evaluation standards. In the current

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<sup>77</sup> MBN's representations of the quality and quantity of its site review staff are sufficient to demonstrate compliance with Criteria 3(a)'s requirement of "experienced and qualified examiners." In her response to MBN in this appeal, the SDO asserts that MBN is noncompliant because it "does not engage peer reviewers in their site visits." SDO Response at unpaginated 3. The applicable rule, Criteria 3(a), does not require "peer reviewers."

<sup>78</sup> Recognition of State Agencies for Approval of Nurse Education, 34 Fed. Reg. 644-45 (Jan. 16, 1969); Accreditation in the United States, Criteria and Procedures for Recognition of State Agencies for Nurse Education, U.S. Dep't of Educ., [https://www2.ed.gov/admins/finaid/accred/accreditation\\_pg19.html#CriteriaforNurseEducation](https://www2.ed.gov/admins/finaid/accred/accreditation_pg19.html#CriteriaforNurseEducation), last visited Jan. 14, 2021.

review cycle, Department staff found that MBN did not provide its “standard/policy regarding ethics which includes recruitment and advertising.”<sup>79</sup>

MBN proffered an action plan to come into compliance, but as of the February 27, 2020, NACIQI meeting, “still need[ed] to provide evidence of the execution of the provided action plan.”<sup>80</sup> At the meeting, the executive director of MBN indicated that the agency’s compliance plan for Criteria 3(d) called for establishing a new regulation in Maryland, which would take “anywhere from eight months to two years.”<sup>81</sup> Based on this timetable, the executive director admitted that MBN may not reach compliance with Criteria 3(d) within 12 months. However, upon further questioning, the executive director stated that MBN already engaged in the necessary review of ethical practices to be in compliance with Criteria 3(d) despite the lack of a Maryland regulation, and that in any event, the regulation under discussion could be in place within 12 months.<sup>82</sup> A member of NACIQI contextualized the proposed MBN rulemaking as “codifying what already occurs, to a large extent.”<sup>83</sup>

NACIQI voted 12-1 to recommend that the Secretary continue MBN’s recognition while requiring MBN to come into compliance with the criteria within 12 months.<sup>84</sup> In so voting, several members of NACIQI admitted their skepticism that MBN could achieve the implementation of the COMAR regulation that MBN staff suggested was necessary to reach compliance with Criteria 3(d). Nevertheless, NACIQI members indicated that they would be satisfied if MBN had achieved compliance with all other requirements except Criteria 3(d), which would give them confidence that MBN would eventually reach full compliance after a re-evaluation before NACIQI.

In rejecting NACIQI’s recommendation, the SDO found it unlikely that such regulations could be implemented in a timely manner to allow MBN to come into compliance within 12 months. On appeal, MBN asserts that it has already made significant progress on the proposed regulations to bring it into full compliance with Criteria 3(d).<sup>85</sup> MBN drafted the regulations, its Board approved them in June 2020, and the Secretary of the Maryland Department of Health has represented that he fully supports their adoption.<sup>86</sup>

MBN came back into compliance with this criterion in 2016 after being found out of compliance in 2015, yet reverted to noncompliance in the current cycle. This concerns me. If MBN could achieve compliance in 2016—indeed, at any time since it was first recognized in 1985—it should have sought to maintain compliance through the same course of action in future reviews. The NACIQI chair pointed out that Criteria 3(d) is a federal requirement for recognition of a state agency such as MBN; MBN must enforce it regardless of whether the State of Maryland has a parallel requirement in the COMAR.<sup>87</sup> Another NACIQI member noted:

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<sup>79</sup> Staff Report on unp. 2.

<sup>80</sup> NACIQI Tr. at 176.

<sup>81</sup> *Id.* at 184.

<sup>82</sup> *Id.* at 218–220.

<sup>83</sup> *Id.* at 218.

<sup>84</sup> *Id.* at 244; Report of the Meeting, NACIQI (Feb. 27, 2020) at 7–8.

<sup>85</sup> MBN Appeal at 7.

<sup>86</sup> *Id.*

<sup>87</sup> NACIQI Tr. at 218–19.

“We’re not waiting for the Code of Maryland to be changed . . . [i]n no way should that slow you down in meeting our standards.”<sup>88</sup>

Nevertheless, I disagree with the SDO’s conclusion that MBN is unlikely to achieve compliance with Criteria 3(d) within 12 months. The SDO Decision partly rested on MBN’s apparent lack of understanding of Criteria 3(d) and partly rested on the SDO’s assumption that the COVID-19 pandemic would substantially slow a process that was already projected to take between 8 months and 2 years. MBN’s representations on appeal demonstrate otherwise. MBN understands this criterion and indicates it based its proposed regulations on regulations promulgated by two other state boards of nursing. MBN further indicates that it, like many government and private entities throughout America, has forged ahead with accomplishing its mission amidst the challenges presented by COVID-19. I also note that MBN gave its estimated timetable of 8 months to 2 years for promulgation of the regulations at the February 27, 2020, NACIQI meeting. More than 10 months have elapsed since then, and during the interim, MBN has made meaningful progress. The question before me is whether MBN is likely to achieve full compliance within 12 months of my decision.

Additionally, testimony from MBN staff at the NACIQI meeting asserted that MBN already engages in the necessary review of institutions to achieve compliance with Criteria 3(d) even in the absence of a regulatory change.<sup>89</sup> To achieve compliance with Criteria 3(d) in this context, MBN need only certify that these practices are in place and provide supporting evidence. The record shows it is probable that MBN will achieve substantial compliance with the requirement through its existing authority and the solicitation of information from institutions similar to what it conducted in 2016. Based on all of these factors, I find that MBN is out of compliance with Criteria 3(d), but it is likely to achieve compliance with Criteria 3(d) within 12 months of my decision.

### **Criteria 3(g) – Makes On-site Inspections of Nursing Programs**

This criterion requires “[the accrediting agency] . . . [to make] initial and periodic on-site inspections of each school of nursing accredited.”<sup>90</sup> Presently, the COMAR requires site visits at least once every 5 years.<sup>91</sup> Based on MBN’s site visit schedule, Department staff found MBN out of compliance with this COMAR requirement.<sup>92</sup> MBN admitted its noncompliance “and attests to the formulation of a corrective action plan to bring delinquent site visits into compliance with the COMAR requirements.”<sup>93</sup> At the NACIQI meeting, MBN’s executive

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<sup>88</sup> *Id.* at 226.

<sup>89</sup> The executive director of MBN stated that the activities needed to comply with Criteria 3(d) “actually occur[.]. [MBN staff] are going out and they’re verifying by way of the catalogue and other things that the institutions do have these ethical practices and follow these ethical practices.” *Id.* at 218–19.

<sup>90</sup> Recognition of State Agencies for Approval of Nurse Education, 34 Fed. Reg. 644–45 (Jan. 16, 1969); Accreditation in the United States, Criteria and Procedures for Recognition of State Agencies for Nurse Education, U.S. Dep’t of Educ., [https://www2.ed.gov/admins/finaid/accred/accreditation\\_pg19.html#CriteriaforNurseEducation](https://www2.ed.gov/admins/finaid/accred/accreditation_pg19.html#CriteriaforNurseEducation), last visited Jan. 14, 2021; Staff Report at unp. 1–3.

<sup>91</sup> Staff Report at unp. 3; COMAR § 10.27.03.15.G

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

director indicated that she had only been with the agency “for the past two and a half years” during which she sought to hire additional full time staff to comply with the regulatory site visit requirements.<sup>94</sup>

The SDO found MBN delinquent in its implementation of the 5-year site visit schedule regarding “at least seven programs.”<sup>95</sup> The SDO found it “unclear” whether MBN could come into compliance with the 5-year schedule within 12 months, citing additional challenges posed by the COVID-19 pandemic.<sup>96</sup> The SDO also found MBN noncompliant due to a discrepancy between the number of approved nursing programs reflected in its petition to the Department and the number of programs listed on the MBN public website.<sup>97</sup>

On appeal, MBN indicates that all overdue site visits were already scheduled to be completed by the end of 2020.<sup>98</sup> The last such visit was scheduled for completion on November 13, 2020.<sup>99</sup> MBN asserts it has already adapted to the COVID-19 pandemic by modifying its site visits to “be conducted remotely, via document review, telephone interview, and synchronous audiovisual technologies.”<sup>100</sup> MBN also states that, going forward, its expanded staff are ready and able to remain in compliance with the review period mandated by COMAR.<sup>101</sup> Incidentally, MBN notes that its proposed regulations modify that schedule to require site visits of accredited schools only once every 10 years, while retaining the 5-year schedule for unaccredited programs.<sup>102</sup>

The Department’s temporary flexibilities to allow “accrediting agencies to perform virtual site visits during this [COVID-19 national emergency]”<sup>103</sup> is relevant to my decision. Although the Department’s March 17, 2020, guidance does not expressly include state agencies, it does suggest that campus site visits during the national emergency are significantly more difficult due to reduced campus operations and restrictions on visitors. State accrediting agencies face the same hurdles other accrediting agencies must overcome—campus operations disrupted due to the national emergency. Thus, MBN’s progress in meeting this requirement given the challenges facing state agencies during the COVID-19 outbreak should be factored into my decision.

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<sup>94</sup> NACIQI Tr. at 182.

<sup>95</sup> SDO Decision at unpag. 2.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at unpag. 3.

<sup>98</sup> MBN Appeal at 8.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*, n.7.

<sup>103</sup> U.S. Dep’t of Educ., Office of Postsecondary Educ., *Information for Accrediting Agencies Regarding Temporary Flexibilities Provided to Coronavirus Impacted Institutions or Accrediting Agencies*, available at <https://www2.ed.gov/about/offices/list/ope/20-007covid19accreditorsfromomb317s.pdf> (Mar. 17, 2020) (last visited Jan. 14, 2021).

The record shows that MBN was out of compliance with Criteria 3(g) during the 2019 review cycle. However, based on MBN's representation that all seven overdue site visits were scheduled to be completed by the end of calendar year 2020, I find it reasonably likely that MBN will be able to come into compliance with Criteria 3(g) within 12 months of my decision in this case.

### Conclusion

After considering the recommendations of Department staff, NACIQI, and the SDO, and reviewing the arguments made by MBN on appeal, I find MBN out of compliance with Criteria 3(a), 3(d), and 3(g), but find it likely that MBN will be able to achieve full compliance with Criteria 3(a), 3(d), and 3(g) within 12 months of this decision.

### ORDER

Accordingly, the SDO Decision is hereby **REVERSED**. MBN is granted continued recognition for 12 months from the date of this decision with the condition that it must submit a report at the end of each 3-month period detailing its interim progress in achieving full compliance with the three recognition criteria. At the end of the 12-month period, MBN must file a final report demonstrating full compliance with Criteria 3(a), 3(d), and 3(g), including a governance document or internal policy discussed on page 10 of this decision detailing MBN's structure and process. MBN must also submit a report or alternatively a meeting transcript of the Practice and Education Committee requested by the Department within seven (7) days of receipt of this decision.

Please work with Department staff to submit the monitoring reports using the Department's electronic submission system, which may be accessed at <https://opeweb.ed.gov/>. Material that cannot be submitted electronically may be forwarded in hard copy. Please submit four copies of any hard copy material to: Accreditation Group, United States Department of Education, 400 Maryland Avenue, Southwest, Suite 6W243, Washington, DC, 20202.

So ordered this 19<sup>th</sup> day of January 2021.



Mitchell M. Zais, Ph.D.

Washington, DC

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