



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

**NATIONAL LEAGUE FOR NURSING,
COMMISSION FOR NURSING EDUCATION
ACCREDITATION**

Docket No. 20-44-AC

Accreditor Recognition

Complainant.

DECISION OF THE SECRETARY

The National League for Nursing (NLN), Commission for Nursing Education Accreditation (CNEA) has appealed the September 4, 2020, decision (SDO Decision) issued by the Senior Department Official (SDO) regarding its application for initial recognition by the U.S. Department of Education (Department). In the SDO Decision, SDO Diane Auer Jones determined CNEA is not eligible for initial recognition.

In making a final decision for the Department, I review the record and arguments of the parties *de novo*.¹ After a careful review, I find that CNEA is compliant with the Department's recognition criteria. Therefore, I will reverse the SDO Decision and grant CNEA initial recognition for a period of 5 years.

Legal Framework

The Department does not directly accredit institutions of higher education, but instead recognizes accrediting agencies. Agencies seeking initial or renewed recognition are evaluated by the Department's staff, reviewed by the National Advisory Committee on Institutional Quality and Integrity (NACIQI), and ultimately receive a recognition decision from an SDO within the Department. The rules for the Department's recognition process are laid out in section 496 of the Higher Education Act of 1965 (HEA), as amended, 20 U.S.C. § 1099b (2012).² At

¹ 34 C.F.R. § 602.37(e) ("On appeal, the Secretary makes a recognition decision, as described in § 602.36(e)."); *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*].").

² When reauthorizing the HEA, Congress passed the Higher Education Amendments of 1992, Pub. L. No. 102-325 (July 23, 1992), 106 Stat. 448, which, among other things, added § 496 to the HEA within Part H – Program Integrity.

each stage of the process, the agency is evaluated based on recognition criteria established at 34 C.F.R. Part 602 Subpart B.

At 20 U.S.C. § 1099b(a)(2), the statute distinguishes different types of agencies that qualify for recognition based on the agencies' principal purposes:

- (A) (i) for the purpose of participation in programs under this chapter, has a voluntary membership of institutions of higher education and has as a principal purpose the accrediting of institutions of higher education; or
 - (ii) for the purpose of participation in other programs administered by the Department of Education or other Federal agencies, has a voluntary membership and has as its principal purpose the accrediting of institutions of higher education or programs;
- (B) is a State agency approved by the Secretary for the purpose described in subparagraph (A); or
- (C) is an agency or association that, for the purpose of determining eligibility for student assistance under this subchapter, conducts accreditation through (i) a voluntary membership organization of individuals participating in a profession, or (ii) an agency or association which has as its principal purpose the accreditation of programs within institutions, which institutions are accredited by another agency or association recognized by the Secretary[.]

The statute then references these distinctions between agencies to apply a requirement that certain agencies be separate and independent from membership associations. At 20 U.S.C. § 1099b(a)(3), the statute requires that if an agency is described in:

- (A) subparagraph (A)(i) of paragraph (2), then such agency or association is separate and independent, both administratively and financially of any related, associated, or affiliated trade association or membership organization;
- (B) subparagraph (B) of paragraph (2), then such agency or association has been recognized by the Secretary on or before October 1, 1991; or
- (C) subparagraph (C) of paragraph (2) and such agency or association has been recognized by the Secretary on or before October 1, 1991, then the Secretary may waive the requirement that such agency or association is separate and independent, both administratively and financially of any related, associated, or affiliated trade association or membership organization upon a demonstration that the existing relationship has not served to compromise the independence of its accreditation process.

The regulations combine the statutory language above to describe four categories of agencies that may qualify for recognition, distinguished by their "purpose and organization" and

laid out at 34 C.F.R. § 602.14(a).³ Relevant to this case is the role of gatekeeper to Title IV, HEA student loan programs that certain agencies fulfill based on this categorization, and the “separate and independent” requirement for such Title IV gatekeepers.

Under the applicable regulations, the Secretary “recognizes only the following four categories of agencies:”

- (1) An accrediting agency that (i) Has a voluntary membership of institutions of higher education; (ii) Has as a principal purpose the accrediting of institutions of higher education and that accreditation is a required element in enabling those institutions to participate in HEA Programs; and (iii) Satisfies the “separate and independent” requirements in paragraph (b) of this section.
- (2) An accrediting agency that (i) Has a voluntary membership; and (ii) Has as its principal purpose the accrediting of higher education programs, or higher education programs and institutions of higher education, and that accreditation is a required element in enabling those entities to participate in non-HEA Federal programs.
- (3) An accrediting agency that, for purposes of determining eligibility of Title IV, HEA programs—(i) Either has a voluntary membership of individuals participating in a profession or has as its principal purpose the accrediting of programs within institutions that are accredited by a nationally recognized accrediting agency; and (ii) Either satisfies the “separate and independent” requirements in paragraph (b) of this section or obtains a waiver of those requirements under paragraphs (d) and (e) of this section.
- (4) A State agency that (i) Has as a principal purpose the accrediting of institutions of higher education, higher education programs, or both; and (ii) The Secretary listed as a nationally recognized accrediting agency on or before October 1, 1991 and has recognized continuously since that date.^[4]

As described above, section 602.14(a)(1) and 602.14(a)(3) agencies’ principal purpose includes acting as Title IV gatekeepers while section 602.14(a)(2) agencies are not Title IV gatekeepers. Under the regulations, section 602.14(a)(1) and 602.14(a)(3) agencies, but not section 602.14(a)(2) agencies, must satisfy the “separate and independent” requirement, described at 34 C.F.R. § 602.14(b):

- (b) For purposes of this section, the term separate and independent means that—
 - (1) The members of the agency's decision-making body—who decide the accreditation or preaccreditation status of institutions or programs, establish

³ 34 C.F.R. § 602.14, Purpose and organization.

⁴ *Id.* § 602.14(a) (2010) (reformatted for readability). These regulations were amended on July 1, 2020, which is after CNEA applied for initial recognition. Therefore, throughout this decision I will reference the 2010 regulations in force during the relevant time period.

the agency's accreditation policies, or both—are not elected or selected by the board or chief executive officer of any related, associated, or affiliated trade association or membership organization;

- (2) At least one member of the agency's decision-making body is a representative of the public, and at least one-seventh of that body consists of representatives of the public;
- (3) The agency has established and implemented guide lines for each member of the decision-making body to avoid conflicts of interest in making decisions;
- (4) The agency's dues are paid separately from any dues paid to any related, associated, or affiliated trade association or membership organization; and
- (5) The agency develops and determines its own budget, with no review by or consultation with any other entity or organization.⁵

Additionally, regardless of the previously described categorization, all accrediting agencies must meet recognition criteria pertaining to administrative and fiscal responsibilities, operating policies and procedures, and accreditation standards, among others. The specific criteria at issue in this case is in regulations 34 C.F.R. §§ 602.15(a)(1) and (a)(6), which require:

The agency must have the administrative and fiscal capability to carry out its accreditation activities in light of its requested scope of recognition. The agency meets this requirement if the agency demonstrates that—

- (a) The agency has—(1) Adequate administrative staff and financial resources to carry out its accrediting responsibilities;

* * *

(6) Clear and effective controls against conflicts of interest, or the appearance of conflicts of interest, by the agency's—

- (i) Board members;
- (ii) Commissioners;
- (iii) Evaluation team members;
- (iv) Consultants;
- (v) Administrative staff; and

⁵ *Id.* § 602.14(b).

(vi) Other agency representatives.⁶

In summary, these requirements help to ensure the agency has sufficient revenues and authority to carry out its accrediting responsibilities and uses sufficient accreditation expertise while making objective decisions.

Having laid out the applicable legal framework for recognition, I turn to the background of the agency under consideration.

Background

CNEA was established in September 2013 by a vote of the membership of NLN, its parent organization.⁷ NLN appointed a steering committee in January 2014 to guide the development of CNEA. CNEA began drafting its accreditation standards in August 2014. In June 2015, the bylaws were accepted by the CNEA Board of Commissioners (Board).⁸ The accreditation standards were approved in February 2016.⁹

Under its bylaws, “CNEA’s sole purpose is to provide accreditation of nursing education programs by establishing and promulgating accrediting standards, conducting the evaluation of nursing programs and granting accreditation to programs in the U.S. and its territories, and globally that meets or exceeds the standards.”¹⁰ Providing access to Title IV programs is not listed as a purpose for CNEA’s existence.

In addition, the bylaws set forth the composition of CNEA’s Board.¹¹ Under its bylaws, the Board shall consist of 15 Commissioners: 10 members representing the program types accredited by CNEA, 3 members representing nursing practice, and 2 members representing the public.¹² “Elected officers, governors, and employees of the NLN or any NLN subsidiary are ineligible to serve as a” Commissioner on CNEA’s Board.¹³ The inaugural Board meeting was held in April 2015.¹⁴ CNEA granted preaccreditation for the first time in June 2016 and granted accreditation to three programs in February 2017.¹⁵

In 2018, CNEA submitted to the Department its application and supporting documents for initial recognition. CNEA’s submission stated that the agency seeks recognition under 34 C.F.R. § 602.14(a)(2) for the purpose of allowing the programs it accredits to participate in non-HEA federal programs.¹⁶ CNEA requested a scope of accreditation described as “[t]he pre-

⁶ *Id.* §§ 602.15(a)(1) and (a)(6).

⁷ Staff Report to the Senior Department Official on Recognition Compliance Issues (Final Staff Report) at 2.

⁸ National League for Nursing Commission for Nursing Education Accreditation Appeal to the Secretary (CNEA Appeal), Exhibit (Ex.) 3, Attachment J (CNEA Bylaws) at 10.

⁹ Final Staff Report at 2.

¹⁰ CNEA Bylaws at 1.

¹¹ *Id.* at 3.

¹² *Id.*

¹³ *Id.*

¹⁴ Final Staff Report at 2.

¹⁵ *Id.*

¹⁶ Department Staff’s Final Analysis and Recommendation for NLNC (Staff Final Analysis and Recommendation) at 9.

accreditation and accreditation of nursing education programs, in the United States and its territories, which offer a certificate, diploma or degree at the practical/vocational, diploma, associate, baccalaureate, masters, [or] doctoral levels, including those offered via distance education.”¹⁷

In its Final Staff Report, the Department’s staff recommended CNEA be granted initial recognition for a period of 5 years for the preaccreditation and accreditation of nursing education programs.¹⁸ Shortly thereafter, NACIQI considered CNEA’s application at its July 2019 meeting and agreed with the Department’s staff.¹⁹ NACIQI determined that CNEA meets the requirements for recognition as a section 602.14(a)(2) agency and unanimously voted to recommend recognition.²⁰ However, the Committee only recommended a 2-year recognition period because of concerns about the financial commitment of NLN without a qualified audit.²¹

After receipt of the Final Staff Report and NACIQI’s recommendation, the SDO issued a letter to CNEA dated November 8, 2019.²² In it, the SDO notified CNEA that she intended to deny its application for initial recognition pending the submission of further documentation and additional information.²³ The SDO asserted that “CNEA has not provided sufficient evidence that its primary purpose will be to accredit programs in order to participate in non-HEA, Federal programs.”²⁴ The letter explained that if CNEA wishes to apply for recognition under section 602.14(a)(2), “then it must provide . . . evidence that CNEA’s primary role is to accredit programs that do not participate in HEA programs and it must acknowledge that it cannot, and will not attempt to, accredit programs offered by institutions accredited by a nationally recognized accrediting agency.”²⁵ Furthermore, that letter stated that if CNEA intends to operate “as a 602.14(a)(3) agency and accredit programs offered by title IV participating institutions, for whom a nationally recognized accreditor serves as a title IV gatekeeper, CNEA would need to meet the requirements of operating ‘separately and independently,’ under § 602.14(b).”²⁶

CNEA submitted a letter to the SDO, dated February 5, 2020, asserting in the summary that the SDO was incorrect in her conclusion that a section 602.14(a)(2) agency could not accredit programs at institutions that had separate accreditation for Title IV programs.²⁷ CNEA included 179 pages of supporting attachments with its February 5, 2020, letter.²⁸ The Office of the General Counsel (OGC), on behalf of the Department’s staff, provided its comments to the

¹⁷ Staff Final Analysis and Recommendation at 2.

¹⁸ Final Staff Report at 1.

¹⁹ NACIQI, Report of the Meeting, (Jul. 30–31, 2019) at 6–7.

²⁰ Transcript of July 31, 2019 NACIQI Meeting (NACIQI Tr.) at 122.

²¹ NACIQI Tr. at 119. During the meeting, Chair Art Keiser stated that “at the current moment, and with the current budget, [CNEA] does not look like it will be making money until sometime in the future, at which point these schools, which are now not having to pay very much, except for the expenses, will have to make a decision now.” However, he also concluded “I have no doubt that they will be successful.” *Id.*

²² November 8, 2019 Letter from SDO to CNEA.

²³ *Id.* at 1.

²⁴ *Id.*

²⁵ *Id.* at 2.

²⁶ *Id.*

²⁷ CNEA Appeal, Ex. 3 (February 5, 2020 Letter from CNEA to SDO).

²⁸ *See id.*

CNEA response on March 6, 2020.²⁹ The Department’s staff reaffirmed its original recommendation that CNEA be granted initial recognition under section 602.14(a)(2) for a period of 5 years.³⁰

Following consideration of CNEA’s and the Department’s staff’s statements, the SDO denied CNEA’s recognition application based on two primary findings. First, the SDO concluded that CNEA cannot satisfy the recognition criteria under section 602.14(a)(2) unless it meets the “separate and independent” requirement, which it does not.³¹ Second, the SDO concluded that CNEA does not qualify for recognition because it does not meet the administrative and fiscal capability requirements under 34 C.F.R. § 602.15(a).

CNEA has appealed, arguing that the SDO Decision applies requirements beyond the statutory criteria, misstates the facts, and introduces matters not present in the record of this proceeding.³² I now turn to my legal analysis, applying the statutory and regulatory language to CNEA’s application for recognition.

Analysis

The first legal issue I must resolve is whether an accrediting agency applying for recognition as a section 602.14(a)(2) agency must meet the “separate and independent” requirement. Next, I must determine whether CNEA satisfies the criteria to be recognized as a section 602.14(a)(2) agency. Finally, I must determine whether CNEA satisfies the criteria for administrative and fiscal capability.

Based on the following analysis, I have determined that CNEA should be recognized as an accrediting agency under section 602.14(a)(2). Agencies recognized under section 602.14(a)(2) are not required to meet the “separate and independent” requirement; CNEA meets the requirements under section 602.14(a)(2); CNEA has demonstrated the requisite administrative and fiscal capability for recognition; and CNEA meets all other applicable criteria.

There is no Separate and Independent Requirement for a Section 602.14(a)(2) Agency

The key controversy in this case is the SDO’s novel interpretation of the statute and regulations. The SDO’s key finding is that a section 602.14(a)(2) agency must meet the “separate and independent” requirement to accredit programs at institutions where the institutions are already accredited by Title IV gatekeeper agencies.³³ The SDO reasoned that “[HEA] 1099b(a)(3)(C) makes clear that the ‘separate and independent’ requirement applies to all of (2)(C) – not just the gatekeeping role.”³⁴ According to the SDO, the Department’s existing interpretation of the law assumes a disjunctive relationship between (2)(C) and (2)(C)(ii)

²⁹ Letter dated March 6, 2020 from Office of Postsecondary Education to SDO (Staff Response) at 8.

³⁰ *Id.* at 8.

³¹ SDO Decision at 9.

³² CNEA Appeal at 12–15.

³³ SDO Decision at 3.

³⁴ *Id.* at 4.

agencies and allows an agency to couple the gatekeeping functions of (2)(A)(ii) and the non-gatekeeping function of (2)(C)(ii).³⁵

The SDO described the “troubling loophole that the [Department’s] staff’s incorrect interpretation of statute and regulation had created.”³⁶ The SDO described the current interpretation, permitting a section 602.14(a)(2) agency to combine Title IV gatekeeping and non-gatekeeping functions, as an “*a la carte approach*.” She asserted the Department’s staff “selects and couples the aspects of 1099b(a)(2)(A), (2)(C), and (3)(C) that are to an agency’s advantage, and ignores those aspects that are not.”³⁷

The SDO found it “impossible to justify” that certain agencies are exempt from the “separate and independent” requirement when HEA 1099b(a)(3)(C) makes it clear that the requirement applies to all agencies described in 1099b(a)(2)(C).³⁸ Under the SDO’s revised interpretation of the regulatory framework, “a recognized agency . . . must meet the ‘separate and independent’ requirement described under 1099b(a)(3)(C) to accredit programs at title IV participating institutions – regardless of whether the agency became recognized through its role as a title IV gatekeeper or a non-HEA funding gatekeeper.”³⁹

The SDO noted that her decision “presents a revised interpretation of the regulatory framework” and argued that she was not bound by any “previous, and incorrect, interpretation” of the recognition criteria.⁴⁰ She argued that her interpretation is entitled to deference because a decision of the SDO is “authoritative,” implicates the agency’s substantive expertise, and reflects the agency’s fair and considered judgement.⁴¹

The SDO also asserted policy reasons to support her interpretation. In observing the current interpretation, she stated “[i]t is incongruous that . . . [agencies] would be held to different standards for the majority of their accreditation activities – accrediting programs at title IV participating institutions (and, by default, also enabling those programs to participate in non-HEA programs), but not serving as a title IV gatekeeper – simply because they each met the gatekeeping requirement (which our regulations require them to do for only one member) in a different way.”⁴² Moreover, the SDO asserted that the current interpretation can result in a membership organization having “two different affiliated accrediting agencies so that one could accredit programs that only participate in non-HEA federal programs – bypassing the separate and independent requirement – and the other could accredit title IV participating programs, but must meet the ‘separate and independent’ standard.”⁴³

The SDO also stated that “CNEA made clear during the NACIQI hearing that CNEA’s primary purpose would be the accreditation of programs at title IV participating institutions to

³⁵ *Id.* at 3.

³⁶ *Id.* at 8.

³⁷ *Id.* at 4.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 6.

⁴¹ *Id.* at 5.

⁴² *Id.* at 9.

⁴³ *Id.* at 4.

enable graduates of those programs to sit for occupational licensure exams in certain states. As a result of this intended function, I determined that CNEA would have to be recognized as a § 602.14(a)(3) agency since only such an agency may be recognized to accredit title IV participating institutions.”⁴⁴

On appeal, CNEA argues the revised interpretation “not only directly contradicts the express language of the HEA but effectively rewrites substantive regulations of [the Department] that have been in effect since 1994.”⁴⁵ CNEA also argues that adding the “separate and independent” requirement to section 602.14(a)(2) “can only appropriately be achieved through amendments to the HEA and through a related rulemaking process pursuant to both the HEA and fundamental principles of the Administrative Procedure Act.”⁴⁶ Through OGC, the Department’s staff expressed its agreement with CNEA, stating unequivocally

a denial of recognition under 34 C.F.R. § 602.14(a)(2) to an agency which accredits programs only for purposes of non-HEA Title IV purposes because it accredits programs within institutions accredited by other agencies for Title IV purposes would be unprecedented and would have wide-reaching implications to similarly situated programmatic agencies, triggering heretofore inapplicable “separate and independent” requirements on such agencies.^[47]

I find the SDO’s revised interpretation, requiring section 602.14(a)(2) agencies to meet the “separate and independent” requirement, in direct conflict with both the plain language of the HEA and the Department’s regulations. The SDO misinterpreted the “gatekeeping role” described at 20 U.S.C. § 1099b(a)(2)(C). Agencies described in that provision are programmatic Title IV gatekeepers because they accredit “for the purpose of determining eligibility for student assistance *under this subchapter*”⁴⁸ Those agencies, like institutional Title IV gatekeepers described at 20 U.S.C. § 1099(a)(2)(A)(i), must meet the “separate and independent” requirement under 20 U.S.C. § 1099b(a)(3)(A) and (C). Agencies described at 20 U.S.C. § 1099b(a)(2)(A)(ii) are either institutional or programmatic accreditors who are *not* Title IV gatekeepers, because they accredit “for the purpose of participation in *other programs*,” meaning programs other than Title IV.⁴⁹

The statutory categories of agencies are mirrored in the Department’s regulations. The agencies described at 20 U.S.C. § 1099b(a)(2)(A)(ii) are section 602.14(a)(2) agencies in the regulations. Section 602.14(a)(2) agencies’ principal purpose is to accredit programs and institutions to allow access to non-HEA Federal programs that require program accreditation by an agency recognized by the Department. Section 602.14(a)(2) agencies are not Title IV gatekeepers and do not need to meet the “separate and independent” requirement.

⁴⁴ *Id.* at 1.

⁴⁵ CNEA Appeal at 1.

⁴⁶ *Id.* at 2.

⁴⁷ Staff Response at 3.

⁴⁸ 20 U.S.C. § 1099b(a)(2)(C) (“an agency or association that, for the purpose of determining eligibility for student assistance *under this subchapter*, conducts accreditation”) (emphasis added).

⁴⁹ *Id.* § 1099b(a)(2)(A)(ii) (“for the purpose of participation in *other programs* administered by the Department of Education or other Federal agencies”) (emphasis added).

Had Congress intended to require all agencies to meet the “separate and independent” requirement, it would have done so in the text of the statute. It chose not to. Congress clearly distinguished among the different types of accrediting agencies as to which ones are subject to the “separate and independent” requirement. The SDO does not have the authority to add a substantive requirement to the plain language of a statute.

Had the Department sought to close a loophole in the regulations, as the SDO argues she is doing through her decision, it could have done so through the rulemaking process. It chose not to. During the 2018 rulemaking, the Department even proposed revising the “separate and independent” requirement to prohibit “joint use of personnel, services, equipment, or facilities by an agency and a related, associated, or affiliated trade association or membership organization.”⁵⁰ This proposal was later withdrawn when it failed to gain the necessary support.⁵¹ The Department did not recognize or seek to remedy any recognition loophole during the 2018 rulemaking, undermining the SDO’s conclusion that she has a legal obligation to close such a loophole by imposing her novel interpretation of the regulations in her administrative decision.

Although I recognize the policy considerations raised by the SDO, I am bound by the duly promulgated regulations containing the criteria for recognition in reaching this decision. As such, an agency seeking recognition under section 602.14(a)(2) is not required to be “separate and independent” from any affiliated organizations.

CNEA Meets the Criteria as a Section 602.14(a)(2) Accrediting Agency

I now turn to CNEA’s qualification for recognition as a section 602.14(a)(2) agency. To be recognized under 20 U.S.C. § 1099b(a)(2)(A)(ii) and 34 C.F.R. § 602.14(a)(2) an agency must have a voluntary membership and have as its principal purpose the accrediting of institutions or programs “to participate in non-HEA Federal programs.”⁵²

I first address whether CNEA has a voluntary membership. The SDO’s November 8, 2019, letter to CNEA acknowledged that “[t]he Department [through the SDO] has determined that CNEA satisfies the requirement for having a voluntary membership.”⁵³ The Department’s staff agreed, stating, “the agency provided its revised bylaws which state that membership is voluntary.”⁵⁴ I agree with the conclusions of the Department’s staff and SDO that CNEA has a voluntary membership.

Next, I turn to whether CNEA has as its principal purpose the accrediting of higher education programs or institutions, and that the accreditation it offers is used to provide a link to non-HEA programs. In her decision, the SDO concluded that CNEA has not provided sufficient

⁵⁰ See Part 602-Accreditation U.S. DEP’T OF EDUC., available at <https://www2.ed.gov/policy/highered/reg/heardrulemaking/2018/602-accreditation.docx> at 9 (proposed changes to § 602.14(c)).

⁵¹ CNEA Appeal at 11.

⁵² 34 C.F.R. § 602.14(a)(2).

⁵³ November 8, 2019 Letter from the SDO to CNEA at 1.

⁵⁴ Staff Final Analysis and Recommendation at 9–10.

evidence that its primary purpose is to accredit programs to enable access to non-Title IV Federal programs.⁵⁵

CNEA responds by pointing out that its bylaws state “CNEA’s *sole purpose* is to provide accreditation of nursing education programs by establishing and promulgating accreditation standards, conducting the evaluation of nursing programs and granting accreditation to programs in the U.S. and its territories, and globally that meets or exceeds the standards.”⁵⁶ CNEA also argues that its accreditation enables programs to “access various non-HEA programs including those administered by the Department of Health and Human Services.”⁵⁷

I agree that graduates of CNEA accredited programs might benefit from CNEA accreditation for access to occupational licensure or to access certain employment opportunities requiring graduation from an accredited program. However, that does not modify CNEA’s stated purpose “to provide accreditation of nursing education programs.”⁵⁸ Clearly, the text of the applicable regulations neither states nor suggests that a section 602.14(a)(2) agency cannot provide benefits to institutions or programs in ways outside of gaining access to non-HEA Federal programs, assuming it also provides access to non-HEA Federal programs. The SDO does not point to any authority suggesting that section 602.14(a)(2) agencies can only benefit accredited programs by providing access to non-HEA Federal programs.

Section 602.14(a)(2) agencies commonly provide benefits in addition to access to non-Title IV Federal programs. Most often, accreditation by section 602.14(a)(2) agencies provides access to occupational licensure. This is especially true with programmatic accreditors of programs in the health care fields. Treating CNEA differently is not justified by the SDO.

I also find persuasive the Department’s staff’s, OGC’s, and NACIQI’s unanimous conclusions that CNEA met all of the requirements to be recognized as a section 602.14(a)(2) agency, including the primary purpose requirement.

For the reasons stated above, I conclude that CNEA meets the purpose and organization requirements as an accrediting agency under section 602.14(a)(2).

CNEA Meets the Administrative and Fiscal Capability Requirements for Recognition

Lastly, I turn to the SDO’s alternative basis for denying CNEA’s recognition: its purported lack of the administrative and fiscal capability to carry out accreditation activities as required by 34 C.F.R. § 602.15. CNEA broadly characterizes these findings as an attempt by the SDO to apply the “separate and independent” requirement through alternative regulations.⁵⁹ Below I consider each aspect of the SDO’s ruling alongside CNEA’s response.

Administrative Capability

⁵⁵ SDO Decision at 1.

⁵⁶ CNEA Bylaws at 1 (emphasis added).

⁵⁷ *Id.* at 2.

⁵⁸ *Id.* at 1.

⁵⁹ CNEA Appeal at 15.

The SDO listed several reasons why CNEA lacks the requisite administrative capability. First, the SDO asserted that “NLN’s existential control over CNEA is explicit and in violation of § 602.15, which requires the agency to have the capacity to carry out its own functions.”⁶⁰ The SDO also noted that NLN holds the power to alter, amend, or dissolve CNEA’s current bylaws.⁶¹ Thus, the SDO concluded CNEA cannot “carry out its duties since its fate is in the hands of a self-interested parent organization [NLN] – one that has shown its willingness to take legal action against its other affiliated accrediting agency.”⁶²

CNEA provides examples of protections intended to ensure that NLN cannot exert undue influence. Examples include a conflicts of interest policy that applies to Commissioners, CNEA’s full control over its own budget, and a prohibition on CNEA transferring funds to NLN without the Commission’s approval.⁶³ CNEA cites the memorandum of understanding (MOU) between it and NLN that sets forth how “CNEA will have full autonomy of its accreditation functions, with NLN’s involvement being limited to corporate functions.”⁶⁴ CNEA acknowledges that NLN has certain corporate rights under state law over CNEA. However, CNEA argues, those rights are not related to accrediting activities.⁶⁵ Instead, NLN’s rights under state law pertain to the dissolution of non-profit organizations and as such do not create a conflict of interest.

I find that CNEA has the administrative capacity to carry out its accrediting functions because the MOU expressly grants accreditation functions to CNEA. The CNEA/NLN MOU and CNEA’s bylaws grant CNEA authority to carry out its accreditation activities within the requested scope of recognition. NLN’s interest in the success of CNEA does not, by itself, persuade me that CNEA is ineligible for the category of recognition it seeks. This conclusion that CNEA meets the administrative capability requirement aligns with the Department’s staff’s conclusion that CNEA meets all the applicable requirements and NACIQI’s recommendation that CNEA be granted recognition.

Fiscal Capability

Regarding NLN’s fiscal capability, the SDO pointed to CNEA’s petition which “included a qualified audit that made it impossible for the Department or NACIQI to fully understand the financial position of CNEA or its parent, NLN.”⁶⁶ On the subject of NLN forgiving CNEA’s loan, the SDO asserted “loan forgiveness simply accelerates the pace at which NLN starts benefiting from a larger proportion of CNEA’s revenue,” and revenue collected above CNEA’s operating costs “flows through directly to NLN.”⁶⁷ The SDO also inferred that NLN could influence CNEA to operate with reduced staff and services to maximize the revenue flow-

⁶⁰ SDO Decision at 11.

⁶¹ *Id.*

⁶² *Id.*

⁶³ CNEA Appeal at 18.

⁶⁴ *Id.* at 17.

⁶⁵ *Id.* at 18.

⁶⁶ SDO Decision at 11.

⁶⁷ *Id.* at 12.

through to NLN.⁶⁸ In short, the SDO held CNEA does not meet the requirements for fiscal capability “since it does not have control over the totality of its revenue.”⁶⁹

CNEA responds that the Department’s staff “unequivocally found that CNEA met [the] financial requirements.”⁷⁰ It asserts the audit it provided was qualified only because NLN’s subsidiary, the Accrediting Commission for Education in Nursing (ACEN) had not submitted its audited financial records for inclusion in NLN’s consolidated financial statements.⁷¹ CNEA’s audit was not qualified due to any financial weakness, and the Department’s staff subsequently recognized that CNEA provided the consolidated financial records at a later date.⁷²

According to CNEA, both NLN and CNEA have demonstrated concretely that they are financially sound. Highlighting NLN’s and CNEA’s current financial position, CNEA asserts that NLN has over \$10,000,000 in revenues in FY 2018, and CNEA has generated revenues to date [October 2020] of approximately \$900,000.⁷³ CNEA also argues that “NLN has committed to ensuring that the CNEA has sufficient resources to operate, and it will continue to do so.”⁷⁴

CNEA further asserts that the SDO’s conclusion regarding loan forgiveness is erroneous. The loan from NLN to CNEA was “not really a loan in the traditional sense [I]t was essentially a transfer of funds from one part of the organization to another.”⁷⁵ CNEA admits that it “is an internal division of . . . NLN, and not a separate legal entity” but argues that such an arrangement for a section 602.14(a)(2) agency “is hardly unusual and in fact is an extremely positive factor, as it demonstrates that the agency will continue to have the support it needs to operate.”⁷⁶

I agree with the statement submitted by OGC – CNEA has adequate fiscal resources to carry out its accrediting activities.⁷⁷ As mentioned above, CNEA receives fees from accredited programs that support the agency’s operations. NLN’s commitment to financial support is demonstrated by its transfer of funds to CNEA and its financial audit data. Concerns raised by some NACIQI members as to the financial capacity of the agency rested on the lack of a qualified audit. However, submitting a qualified audit is not a part of the recognition criteria. My decision cannot be based on criteria not included in the applicable regulations.⁷⁸ Nevertheless, CNEA has since provided additional financial data, and has argued persuasively that the fees it will receive from accredited programs will provide a steady revenue source. Accordingly, I find that CNEA satisfies the fiscal capability requirement.

⁶⁸ *Id.*

⁶⁹ SDO Decision at 12.

⁷⁰ CNEA Appeal at 15.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 16.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Staff Response at 8 (“This conclusion is further supported by CNEA’s supplementary materials and consolidated financial statements.”).

⁷⁸ 20 U.S.C. § 1099b(n)(3) prohibits the Department from denying recognition based on unpublished criteria, stating that “[t]he Secretary shall not, under any circumstances, base decisions on the recognition or denial of recognition of accreditation agencies or associations on criteria other than those contained in this section.”

Conflicts of Interest

The SDO also questioned whether CNEA has clear and effective controls to prevent and resolve conflicts of interest. First, the SDO asserted that “NLN will have significant influence over the activities of CNEA” because the CNEA executive director is appointed by the chief executive officer of NLN.⁷⁹ Second, the SDO took issue with the fact that NLN appointed the initial CNEA commissioners, giving NLN “complete control” over the standards and criteria initially established by CNEA.⁸⁰ The SDO stated CNEA is bound to instill NLN’s core values, even if those values do not align with the best interests of students, institutions, and patients.⁸¹ Third, CNEA’s bylaws require that 10 of the 15 CNEA commissioners must be “active or retired individual NLN members, employed at an NLN member institution, or employed at a CNEA accredited or pre-accredited program,” which the SDO found “does not satisfy the regulatory requirements . . . [or] show any significant effort to avoid conflicts of interest.”⁸² Finally, the SDO saw a potential conflict if NLN encourages its members to become members of CNEA instead of ACEN, because NLN only has access to CNEA’s revenue.⁸³

CNEA contends that parent involvement in the selection of the initial Board is permitted for section 602.14(a)(2) agencies because they are not subject to the “separate and independent” requirement. Regarding the composition of the Board, CNEA contends that “[i]t is common for programmatic agencies to have board structures in which the majority of its members are affiliated with a related professional organization, or who are employed by the agency’s accredited institutions.”⁸⁴ CNEA argues that such an arrangement “is not unusual or prohibited under the recognition criteria for section 602.14(a)(2) agencies.”⁸⁵

CNEA argues that its bylaws expressly state that it will “[i]nstill the NLN’s core values of integrity, diversity, excellence and caring into all the business of . . . CNEA and its accrediting activities” and further explains that “[t]hese values [were] approved by the CNEA Board, and [were] not imposed by . . . NLN.”⁸⁶

Regarding competition between CNEA and ACEN, CNEA asserts the agencies have different missions and therefore are not in competition. ACEN serves as a section 602.14(a)(3) agency thereby allowing it to accredit and act as a Title IV gatekeeper for certain stand-alone nursing programs.⁸⁷ To demonstrate that such an arrangement is allowable, CNEA points to a similarly situated organization, the Western Association of Schools and Colleges (WASC), which sponsors multiple accrediting agencies—the WASC Senior Colleges and University Commission and the WASC Accrediting Commission for Community and Junior Colleges.⁸⁸ In

⁷⁹ SDO Decision at 12.

⁸⁰ *Id.*

⁸¹ *Id.* at 12–13.

⁸² *Id.* at 12.

⁸³ *Id.* at 13.

⁸⁴ CNEA Appeal at 17.

⁸⁵ *Id.*

⁸⁶ *Id.* (quoting CNEA Bylaws at 2).

⁸⁷ *Id.* at 3, 13.

⁸⁸ *Id.* at 13.

any event, CNEA argues that there is nothing in the recognition criteria that prohibits such competition. Therefore, the decision on recognition cannot be based on perceived competition.⁸⁹

I find that CNEA maintains effective controls against conflicts of interest. While the influence of NLN members on the Board is relevant, the recognition criteria does not impose any restrictions on such a practice. The Department's staff found that CNEA had a sufficient conflict of interest policy.⁹⁰ The Commission's structure includes additional specific controls including the Commission's sole authority over the executive director, CNEA's control of accrediting decisions, and CNEA's full control over its budget.⁹¹ As such, CNEA meets this requirement.

Conclusion

Based on the foregoing analysis, I find that CNEA has the requisite administrative and fiscal capability for recognition as a section 602.14(a)(2) agency. CNEA also meets the remaining recognition criteria as detailed in the Department's staff's analysis.

Initial Period of Recognition

The final issue I must decide is the length of the initial period for CNEA's recognition. Following its extensive analysis of all recognition criteria, the Department's staff recommended a grant of initial recognition for a period of 5 years.⁹² At the conclusion of the NACIQI discussion of CNEA's qualifications, a NACIQI member moved to vote on the Department's staff's recommendation for a 5-year recognition period. NACIQI, however, voted to recommend only a 2-year period of initial recognition.⁹³

The NACIQI recommendation was amended because the chairperson expressed his concern that "we do not have an audit that we can rely upon because we do not know the positions of the subsidiaries which may or may not be making money."⁹⁴ The chairperson immediately qualified his statement by saying, "Frankly, I have no doubt that they're okay."⁹⁵ The chairperson then expressed concern about the possibility of CNEA losing member institutions in the future, because it is currently "not charging dues, as I think every other agency does," and when it begins charging dues, institutions may terminate their memberships.⁹⁶ The chairperson again qualified his statement by saying, "I have no doubt that they will be successful."⁹⁷

⁸⁹ *Id.* at 17 ("The fact that nursing programs across the United States will have an option to choose which accrediting body best serves their respective mission does not amount to a conflict of interest relating to the CNEA Commissioners, staff, or team members. The NLN also has no intention of recommending to any nursing program which accrediting body it should select.").

⁹⁰ Staff Final Analysis and Recommendation at 21.

⁹¹ *See id.* at 92.

⁹² Final Staff Report at 1.

⁹³ NACIQI Tr. at 121.

⁹⁴ *Id.* at 118.

⁹⁵ *Id.*

⁹⁶ *Id.* at 119.

⁹⁷ *Id.*

CNEA addressed each of the above-described concerns in its appeal of the SDO Decision. First, CNEA stated that the only qualification in the consolidated audit of NLN and its subsidiaries was due to ACEN failing to provide all of its financial information to NLN.⁹⁸ NLN subsequently obtained the missing information and “was able to provide separate consolidated statements that . . . met the auditor requirements.”⁹⁹ Through counsel, the Department’s staff asserted to the SDO that NLN’s audit submission resolved the issues raised by NACIQI.¹⁰⁰

Second, CNEA asserted that NACIQI erred in stating that CNEA did not charge dues to its member institutions.¹⁰¹ CNEA indicates it began collecting dues from “fully accredited programs” in 2018.¹⁰² In supporting its original recommendation of a 5-year recognition period, the Department’s staff corroborated CNEA’s statement, stating that NACIQI’s concern about CNEA not charging dues was erroneous.¹⁰³

All comments by NACIQI members expressing reservations about granting CNEA a full 5-year recognition period were couched in their opinions that CNEA would be a successful accrediting agency. The minor concerns which NACIQI members raised that led them to amend their recommendation to only grant a 2-year recognition period are all fully addressed by CNEA on appeal and corroborated by statements made by the Department’s staff. I find ample justification to approve the original Department’s staff recommendation of a 5-year initial period of recognition.

ORDER

For the foregoing reasons, the SDO Decision is **REVERSED**. I adopt the recommendation of the Department’s staff finding CNEA compliant with the recognition criteria, granting initial recognition for a period of 5 years.

So ordered this 24th day of May 2021.


Miguel A. Cardona, Ed.D.

Washington, DC

⁹⁸ CNEA Appeal at 4, 15.

⁹⁹ *Id.* at 15.

¹⁰⁰ Staff Response at 7.

¹⁰¹ CNEA Appeal at 4.

¹⁰² *Id.*

¹⁰³ Staff Response at 8.

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