

Arbitration of Disputes Concerning Final Adverse Actions Procedures

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I. Purpose

The Mid-Atlantic Region Commission on Higher Education (MARCHE), doing business as the Middle States Commission on Higher Education (MSCHE or the Commission), seeks to ensure fair and expeditious procedures for an institution to submit disputes concerning final adverse actions to arbitration prior to any other legal action. Under applicable federal law, 20 U.S.C. § 1099b(e), 34 CFR § 600.4, 34 CFR § 602.20, an institution must arbitrate such disputes prior to taking any other legal action. The purpose of these procedures is to implement the *Accreditation Actions Policy and Procedures*. The institution and the Commission agree that the following procedures will apply in any such post-appeal arbitration.

II. Scope of Arbitration Process

The United States Department of Education's (USDE) regulations governing institutions of higher education (*34 CFR § 600.4(c)*) provide that the United States Secretary of Education does not recognize the accreditation of an institution unless the institution agrees to submit any dispute involving a final adverse action (denial or withdraw of candidate for accreditation status or accreditation) to arbitration prior to any other legal action. In accordance with federal regulations, Commission policy and procedures, and the MARCHE Bylaws, institutional members will exhaust all appeal opportunities pursuant to the Commission's *Appeals from Adverse Actions Procedures* and submit any post-appeal disputes to arbitration prior to taking any other legal action.

- A. The arbitration proceeding is not a *de novo* review. The scope of review is based solely upon the designated Appeal Record on File that existed when the Appeal Panel rendered its decision. This narrow standard of review reflects that arbitration is intended to resolve disputes "more quickly" than litigation and should be "considerably less expensive for the

accrediting agencies and schools than litigation in the first instance...” 84 Fed. Reg. 27412, 27447 (June 12, 2019).

- B. The burden of proof will be on the institution to demonstrate by clear and convincing evidence of the legitimacy of a dispute concerning final adverse action.
- C. The arbitration will be heard and determined by a single Arbitrator who is impartial and independent.
- D. The institution and the Commission have the right to be represented by legal counsel during the arbitration, each at its own expense.
- E. In accordance with the *Communication in the Accreditation Process Policy and Procedures*, Commission representatives will safeguard the confidentiality of discussions, conversations, accreditation materials, proposals for action, and the institutional record except as required by Commission policies or procedure, or applicable law.
- F. The institution and the Commission will provide all briefs, documents, and materials directly to the Arbitrator.
 - 1. The Commission will retain an independent record of the briefs, documents, or materials submitted in accordance with the Commission’s *Maintenance and Retention of Commission Records Policy and Procedures*.
 - 2. The institution is responsible for retaining a record of the submitted materials for its own use.
- G. The institution remains a candidate for accreditation status or accredited until the completion of any arbitration proceeding so long as the following conditions are met:
 - 1. The institution will not enroll new students.
 - 2. The institution will not market or recruit new students.
 - 3. The institution will provide a clear and accurate statement about its accreditation status for the public on its website.If any of the three conditions listed above are violated, the Commission reserves the right to revise the date that accreditation will cease.
- I. The Arbitration and these *Procedures* shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

III. Jury Trial and Class Action Waivers; Non-Preclusion.

- A. In arbitration, the parties waive any right to have claims or disputes decided by a jury.
- B. In arbitration, neither the institution nor the Commission will have the right to (i) participate in a class action in court or in arbitration, either as a class representative or class member, (ii) act as a private attorney general or in another representative capacity in court or in arbitration, (iii) join or consolidate claims with claims of any other person or entity or (iv) seek public injunctive relief.

- C. No arbitration award involving the institution and the Commission will have any preclusive effect as to issues or claims in any dispute involving anyone who is not a party to the Arbitration, nor will an arbitration award in prior disputes involving other parties have preclusive effect in an Arbitration between the institution and the Commission.

IV. Procedures for Requesting Arbitration

- A. The Commission will provide notification of accreditation actions in accordance with *Communication in the Accreditation Process Policy and Procedures* and federal regulation 34 CFR § 602.26.
 - 1. In the case of a final adverse action, the Commission will mail a hardcopy of the action notification with delivery confirmation. The date of the delivery confirmation is considered the date of receipt by the institution.
 - 2. The action notification will provide the action taken by the Commission, provide procedural information about the arbitration process, refer to these procedures, and include a statement that the institution is obligated to evenly share the fees and expenses charged by the Arbitration Administrator and the Arbitrator and bear its own legal expenses pursuant to Section IX: Procedures for Costs of Arbitration of these procedures.
- B. An institution may initiate arbitration by submitting a written *Notice of Intent to Arbitrate*, as specified herein, with the Commission within ten (10) calendar days of receipt of a notice of a final adverse action.
 - 1. The institution will submit its share of the required filing fees as provided for below in Section IX of these *Procedures*.
 - 2. The notice will contain a concise statement of the arguments that the institution intends to assert during the arbitration.
 - 3. The notice will be signed by the institution's Chief Executive Officer (CEO)/President or the chair of its governing body.
- C. The Commission will file the following with the Arbitration Administrator within ten (10) calendar days of the date of receipt of the *Notice of Intent to Arbitrate*:
 - 1. The institution's *Notice of Intent to Arbitrate* and the institution's statement;
 - 2. A statement of the arguments that the Commission intends to assert during the arbitration;
 - 3. The names and addresses of all parties and their counsel;
 - 4. A copy of these *Procedures* governing the Arbitration process; and
 - 5. The filing fees specified by the Arbitration Administrator (which will include the institution's share of the filing fees).

V. Procedures for Selection of the Arbitrator

- A. The arbitration will be administered by an Arbitrator selected from the National Roster of Arbitrators maintained by the Arbitration Administrator.
- B. The Arbitrator will be selected pursuant to the procedures specified in the Arbitration Administrator's rules for selecting an arbitrator from its National Roster. Any list(s) of potential arbitrators must identify at least five individuals who are lawyers experienced in

higher education matters (including but not limited to arbitrators who participate in JAMS Solutions for Higher Education) and/or retired appellate judges.

1. If there is any conflict or inconsistency between these *Procedures* and the Arbitration Administrator's rules on this or any other issue, these *Procedures* will govern.
2. If this process fails to identify an acceptable Arbitrator within thirty (30) calendar days and the parties are unable to agree on a substitute, a court with jurisdiction will select an Arbitrator, consistent with these qualifications, who will be bound to apply these *Procedures* and the rules of the Arbitration Administrator.
3. Neither the institution nor the Commission nor anyone acting on their behalf will communicate *ex parte* with the Arbitrator or anyone who is a candidate to be the Arbitrator.

VI. Procedures for the Designation of the Arbitration Record on File and Submission of Briefing

- A. The Commission will submit the Appeal Record on File (including the transcript of the Appeal Panel, if any) to the Arbitrator within ten (10) calendar days from the date of the appointment of the Arbitrator.
- B. Within ten (10) calendar days of receipt of the existing Appeal Record on File, the institution may file with the arbitrator and the Commission for inclusion in the Arbitration Record on File any material relevant to the Arbitration proceeding that was not included by the Commission but was reviewed by the Appeal Panel in making its decision. The institution is not permitted to submit any new material that was not submitted to the Appeal Panel prior to its decision.
- C. If there is any dispute concerning the documents or materials submitted, the Arbitrator shall promptly make a final decision as to whether such documents or materials will be included in the Arbitration Record on File.
- D. The Arbitrator, at any time during the pendency of the proceeding, may require the Commission or the institution to submit other documents or materials as additional exhibits, but only if they were submitted to the Appeal Panel prior to its decision.
- E. Within twenty-one (21) calendar days after the Arbitrator notifies the parties that the Arbitration Record on File is complete, the institution will submit to the Arbitrator and the Commission its written Arbitration Brief setting out the factual basis for disputing the final adverse action.
 1. The brief will be no longer than 25 double-spaced pages.
 2. The brief will reference documents, evidence, or materials in the Arbitration Record on File as appropriate.
 3. The brief will be submitted in PDF format.
- F. Within twenty-one (21) calendar days of receipt of the institution's Arbitration Brief, the Commission will submit to the Arbitrator and the institution a Response Brief.
 1. The brief will be no longer than 25 double-spaced pages.

2. The brief will reference documents, evidence, or materials in the Arbitration Record on File as appropriate.
 3. The brief will be submitted in PDF format.
- G. For good cause shown, the Arbitrator may extend the permissible length of a brief or may permit the filing of an additional brief.
- H. The existing Appeal Record on File (including the transcript of the appeal hearing), Arbitration Brief, Response Brief, and any additional exhibits will constitute the evidentiary Arbitration Record on File upon which the Arbitrator will render his or her decision.
- I. Neither the institution nor the Commission will be permitted to engage in adversarial discovery (including, without limitation, document requests, depositions, interrogatories, or requests for admission) during the Arbitration proceeding.

VII. Procedures for the Scheduling and Conduct of the Arbitration

- A. The Arbitration Administrator will schedule an arbitration at the earliest possible date within thirty (30) calendar days after receipt of all the briefs (the date of the designation of the Arbitration Record on File).
1. The arbitration will be held virtually (video conferencing) unless the institution requests an in-person arbitration.
 - a. The institution is responsible for the costs associated with an in-person arbitration.
 - b. The convening of an in-person arbitration may entail an additional administrative fee and additional compensation for the Arbitrator.
 - c. Any in-person arbitration will be held in a location reasonably convenient to the parties and determined by the Arbitrator.
 2. The parties may agree to waive the oral presentations before the Arbitrator and proceed to a decision on the documentary record and briefs only.
 3. The institution and the Commission will respond to requests from the Arbitrator for arbitration dates in a timely manner, be cooperative in scheduling the earliest practical date, and adhere to the established arbitration schedule.
- B. Within ten (10) calendar days of the scheduling of an arbitration, the institution and the Commission will submit to the Arbitrator and one another a list of the names, titles, phone, and email of all representatives (including counsel or other professional representatives) who will attend the arbitration. The arbitration is not a public proceeding and attendance will be limited to the identified representatives only.
- C. The arbitration will be conducted in accordance with these *Procedures* and the applicable rules of the Arbitration Administrator.
1. The arbitration will consist solely of legal argument.
 2. No fact witnesses will testify at the arbitration.
- D. The Arbitrator will be requested to conduct the arbitration expeditiously and may direct the parties to focus their presentations on issues that the Arbitrator finds most helpful to his or her consideration of the case.

- E. The Arbitrator may not consider evidence that was not in the record before the Appeal Panel issued its decision.
- F. The Commission will arrange for a stenographic transcript to be made of the arbitration for its own records.
 - 1. The institution may request a copy of the transcription and will be invoiced for its share of the cost.
 - 2. Upon receipt of payment, the Commission will provide the transcript to the institution.
- G. The Arbitrator will render a decision within thirty (30) calendar days from the date of closing of the arbitration or, if there were no oral presentations, from the date of the submission of all briefs and materials to the Arbitrator. The decision will be in writing, will be signed by the Arbitrator, and will provide the reasons for the decision.

VIII. Procedures for the Effect of Decision and Subsequent Action by the Commission

- A. The Arbitrator will have the authority only to affirm or reverse the decision of the Appeal Panel. The Arbitrator will not have authority to remand or amend the Appeal Panel's decision or require the institution or the Commission to take specified actions.
- B. The Commission, or the Executive Committee on its behalf, will take an accreditation action in accordance with its *Accreditation Actions Policy and Procedures* to implement the Arbitrator's decision at a special meeting to occur within thirty (30) calendar days of the Arbitrator's decision. The Commission reserves the right, at its sole discretion, to take any appropriate action available to it in *Accreditation Actions Policy and Procedures*.
- C. In the event the Arbitrator affirms the decision of the Appeal Panel, the Commission's adverse action will become final, binding, and fully enforceable within thirty (30) calendar days. Consistent with federal law, nothing herein precludes an institution from pursuing a legal remedy after the arbitration has concluded.
- D. In the event the Arbitrator reverses the decision of the Appeal Panel, the Commission will carry out that decision in a manner consistent with the decision, except that the Arbitrator will have no authority to grant accreditation to the institution. Pursuant to the regulations of the USDE, that power is reserved exclusively to the accreditation agency.
 - 1. The Commission may rescind the final adverse action.
 - 2. The Commission will review the Arbitration Record on File and consider the Arbitrator's written decision to determine whether further monitoring of the institution is required.
 - 3. The Commission may request follow-up reports or visits, request updated teach-out plans or agreements, or request additional information.
 - 4. The Commission may take a non-compliance action if conditions warrant.
- E. The Commission reserves the right, at its sole discretion, to monitor the institution throughout the arbitration proceeding and any time the institution remains a candidate for accreditation status or accredited by the Middle States Commission on Higher Education.

- F. The Commission will provide notification of accreditation actions in accordance with *Communication in the Accreditation Process Policy and Procedures* and federal regulation 34 CFR § 602.26.
- G. An institution that is subject to a final adverse action may not be considered for membership for two years from the date that accreditation ceases in accordance with federal regulation 34 CFR § 600.11(c).

IX. Procedures for Costs of Arbitration

- A. The institution and the Commission will evenly share the fees and expenses charged by the Arbitration Administrator and the Arbitrator. The Commission will request that each party is billed separately.
- B. The institution is responsible for the costs associated with an in-person arbitration if it requests one. The convening of an in-person arbitration may entail an additional administrative fee and additional compensation for the Arbitrator.
- C. The Commission will request a stenographic transcription of the arbitration, which the institution may request and make payment for a copy.
- D. The institution and the Commission will bear their respective legal fees for the Arbitration, unless the Arbitrator determines that the institution acted frivolously or in bad faith in commencing or continuing the Arbitration.

X. Procedures for Arbitration of Other Disputes (other than an adverse action) Between an Institution and the Commission

- A. All claims, disputes and controversies (whether past, present or future) arising out of or related to the relationship between an institution and the Commission, other than disputes that are the subject of the foregoing *Arbitration of Disputes Concerning Final Adverse Actions Procedures*, will be submitted to binding arbitration before the Arbitration Administrator pursuant to the applicable rules established by the Arbitration Administrator.
- B. The provisions set forth in the *Procedures for Arbitration of Disputes Concerning Final Adverse Actions* are incorporated herein by reference, except for the following provisions: II.A.1, 3; II.B.1-4; III.B, D-F, G.5, H.

XI. Definitions

The following definitions are used in this policy and/or procedures:

- A. **Accreditation materials.** All documentation related to accreditation activities including but not limited to the institution's written reports to the Commission, submitted evidence, team reports, institutional responses, confidential briefs, complaints or third-party comments, action notifications, substantive change requests, transcripts of proceedings, team rosters, and any correspondence of record. Accreditation materials are considered confidential

information and are retained as part of the institutional record in accordance with the Commission's *Maintenance and Retention of Commission Records Policy and Procedures*.

- B. **Accreditation phase.** The stage of the institution in the accreditation lifecycle (applicant, candidate, accredited). The phase will also indicate if an institution is a former applicant, candidate, or accredited institution. Accreditation phase is posted on the institution's directory listing on the MSCHE website, with the exception of applicant institutions which are not displayed publicly in the institution directory.
- C. **Accreditation status.** The member institution's standing with the Commission based on the most recent grant of candidate for accreditation status, grant of accreditation, reaffirmation, non-compliance, or adverse action taken by the Commission. Accreditation status is posted on the institution's directory listing on the MSCHE website.
- D. **Adverse action.** An accreditation action taken by the Commission to:
 - a. deny the Candidate for Accreditation status of an institution;
 - b. withdraw Candidate for Accreditation status of an institution;
 - c. deny accreditation; or
 - d. withdraw accreditation.
- E. **Appeal.** A timely request by an institution filed in accordance with Commission policy and procedures for a review by an Appeal Panel of an adverse action of the Commission.
- F. **Arbitration.** A post-appeal proceeding in which certain defined disputes are resolved by an Arbitrator out of court, without a judge or jury, pursuant to the appropriate rules established by the Arbitration Administrator and the process set forth in these Procedures.
- G. **Arbitration Administrator.** JAMS (<https://www.jamsadr.com>).
- H. **Arbitrator.** The arbitrator selected under the rules of the Arbitration Administrator and these Procedures to preside over the arbitration.
- I. **Date of receipt.** The date a document is actually received by a party, as evidenced by a postal service, courier or private carrier receipt, the date of upload into the Commission's secure MSCHE portal, or an email receipt when email delivery is permitted under these procedures.
- J. **Day.** Any reference to the word "day" or "days" herein shall mean calendar day or calendar days, respectively, including weekends and Federal Holidays, unless otherwise expressly provided. To the extent a deadline falls on a weekend or Federal Holiday, the next business day will be the applicable deadline.
- K. **Final adverse action.** A final determination by the Commission regarding an adverse action taken against an accredited or candidate institution at the conclusion of any appeals process available to the institution under the Commission's policies and procedures (*based on a federal definition found in 34 CFR § 602.3*).

- L. **Institutional record.** The compilation of all materials and data the Commission has on file related to the applicant, candidate, or accredited institution, including but not limited to the all accreditation materials related to any accreditation activity, the record on file and transcripts for any proceeding, complaints, action notifications, and any information or documents related to the institution collected by the Commission or received from external sources such as the government or other quality assurance agencies as part of ongoing monitoring activities.
- M. **Record on file.** A segment of the institutional record used in a Commission proceeding such as show cause appearance or appeal. It includes but is not limited to the accreditation materials for accreditation activities for the period of non-compliance (since the first non-compliance action), transcripts from other proceedings, action notifications, and correspondence of record.

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Related Documents: *Accreditation Actions Policy; Accreditation Actions Procedures; Appeals from Adverse Actions Procedures; Communication in the Accreditation Process Policy and Procedures; Dues and Fees Policy; Dues and Fees Procedures; Maintenance and Retention of Commission Records Policy and Procedures; MARCHE Bylaws;*