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## Instructions for Arbitration of an Adverse Appeal Decision

### I. BINDING ARBITRATION OF AN ADVERSE APPEAL DECISION

#### A. Coverage of Binding Arbitration

1. Applicable federal law and the Department of Education’s regulations governing institutions of higher education (20 U.S.C. § 1099b(e), 34 C.F.R. § 600.4(c), 34 C.F.R. § 602.20) provide that the Secretary of Education does not recognize the accreditation of an institution unless the institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to arbitration prior to any other legal action.
2. The New England Commission of Higher Education’s (the “Commission”) *Policy and Procedures for the Appeal of Adverse Accreditation Action Affecting Institutional Accreditation or Candidate for Accreditation Status* (the “Appeal Policy”) provides that, in filing an appeal pursuant to the Appeal Policy, an institution must agree to submit any dispute involving an adverse action to arbitration before the institution initiates any other legal action.
3. For the purposes of binding arbitration pursuant to these Instructions, an “Adverse Appeal Decision” is a decision of an independent Appeals Panel rendered pursuant to the Appeal Policy that results in the affirmation of the withdrawal of an institution’s accreditation, the denial of an application for initial accreditation, or any other adverse accreditation decision.
4. An institution that believes that the Adverse Appeal Decision is not supported by substantial evidence in the record on which the Appeals Panel took action may seek review of that decision through binding arbitration as described in these Instructions. This is the exclusive remedy for an institution which has received an Adverse Appeal Decision and governs any and all claims arising out of the Adverse Appeal Decision as well as the underlying or predicate actions of the Commission. An institution that does not participate in binding arbitration will not have exhausted its administrative remedies.
5. If an institution’s accreditation has been withdrawn by the Commission and that withdrawal is affirmed by the Adverse Appeal Decision of the Appeals Panel, the institution’s accreditation shall remain withdrawn during the pendency of the arbitration proceeding and until the arbitrator renders a final

decision. In such circumstances, the institution should continue to take actions directed by the Commission and as otherwise necessary to prepare the institution for the effective date for withdrawal of accreditation, as set by the Commission in its notice of adverse accreditation action. With respect to other adverse accreditation actions that have resulted in an Adverse Appeal Decision: notwithstanding the pendency of an arbitration proceeding and until the arbitrator renders a final decision, an institution shall remain in the accreditation status established by the Commission's notice of adverse accreditation action (*e.g.*, an institution on probation remains on probation), and the institution shall continue to comply with all terms and conditions provided by the Commission in such notice of adverse accreditation action.

6. The arbitration proceedings shall be conducted in accordance with these Instructions, and the parties and the arbitrator shall maintain the confidentiality of these proceedings except in the case of a judicial challenge or court order concerning the proceedings, or as otherwise required by law.
7. The institution and the Commission may be represented by legal counsel during the arbitration proceeding.

#### **B. Standard of Review in Arbitration and Available Remedies**

1. The arbitration proceeding is not a *de novo* review. It is a review on the record and is limited to the question of whether the Appeals Panel's decision is supported by substantial evidence.
2. The arbitrator may not consider evidence that was not in the record before the Appeals Panel.
3. The institution has the burden of proof in the arbitration proceeding.
4. The arbitrator shall only have the authority to affirm or reverse the Adverse Appeal Decision, subject to the limitations below in Section (I)(J)(3) of these Instructions.

#### **C. Administration of the Arbitration**

1. The arbitration shall be administered by an arbitrator selected from the National Roster of Commercial Arbitrators maintained by the American Arbitration Association ("AAA").
2. The process for selecting the arbitrator is set out below in Section (I)(E) of these Instructions.

#### **D. Initiation of Arbitration Proceeding**

1. Within 10 days of receipt of a final Adverse Appeal Decision, the institution may initiate an arbitration proceeding by providing a written Notice of Intent to Arbitrate to the Commission accompanied by the required fees as provided for below in Section (I)(K) of these Instructions. The notice shall contain a concise statement of the arguments that the institution intends to assert during the arbitration and the remedy that it intends to seek.
2. Within 20 days of the receipt of the Notice of Intent to Arbitrate, the Commission shall file with the AAA:
  - a. A copy of the institution's Notice of Intent to Arbitrate and the statement of the arguments that the institution intends to assert during the arbitration and the remedy that it intends to seek;
  - b. A statement of the arguments that the Commission intends to assert during the arbitration;
  - c. The names and addresses of all parties;
  - d. A copy of these Instructions governing the arbitration process; and
  - e. The appropriate fees as specified by the AAA and provided for in Section (I)(K) below.

#### **E. Appointment of Arbitrator from AAA National Roster**

1. The arbitration shall be heard and determined by one arbitrator who shall be impartial and independent.
2. As soon as practicable after receipt of the materials from the Commission described in Section (I)(D)(2) above, the AAA shall simultaneously submit to the institution and the Commission an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed. The list of proposed arbitrators shall be accompanied by biographical descriptions of each arbitrator on the list.
3. The institution and the Commission may each strike two names from the list and return it to the AAA within seven days from the date of receipt of the list of arbitrators from the AAA. If, for any reason, the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other arbitrators from the National Roster without the submission of additional lists to the institution or Commission.

4. The AAA shall promptly provide written notice to the institution and the Commission of the appointment of the arbitrator. The decision of the AAA shall be final.
5. If, for any reason, an arbitrator is unable to perform the duties of his/her appointment, the AAA may, on proof satisfactory to it, declare the office vacant and fill the vacancy with another arbitrator. Such action by the AAA shall be final.
6. Neither the institution nor the Commission nor anyone acting on their behalf shall communicate *ex parte* with the arbitrator or anyone who is a candidate to be the arbitrator.

#### **F. Creation of the Record for the Arbitration Proceeding**

1. Within 20 days from the date of the appointment of the arbitrator, the Commission shall submit to the arbitrator and the institution the Arbitration Exhibits which shall include the record before the Appeals Panel. The documents shall be true, legible, and complete copies.
2. Within 10 days of receipt of the Arbitration Exhibits, the institution shall have the opportunity to file with the arbitrator and the Commission for inclusion in the Arbitration Exhibits any material relevant to the arbitration proceeding that was not included by the Commission. The institution shall not submit for inclusion in the Arbitration Exhibits any material that was not submitted to the Commission prior to the decision of the Appeals Panel or any material that was not submitted to the Appeals Panel. Within 10 days of receipt of any documents proffered by the institution for inclusion in the Arbitration Exhibits, the arbitrator shall make the final decision as to whether such documents or materials shall be included in the Arbitration Exhibits. The arbitrator shall also decide any disputes over whether specific documents or other materials should be included in the Arbitration Exhibits. All materials to be included in the Arbitration Exhibits shall be prepared in electronic format.
3. The materials in the Arbitration Exhibits shall constitute the evidentiary record upon which the arbitrator shall render his/her decision. 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 as may be necessary to determine whether substantial evidence supported the decision of the Appeals Panel.

#### **G. Institution's Arbitration Brief, Commission's Response**

1. Within 20 days from the date the arbitrator deems the Arbitration Exhibits to be complete, the institution shall submit to the arbitrator and the Commission

its written Arbitration Brief that sets out the reasons why the decision of the Appeals Panel was not supported by substantial evidence in the record before the Appeals Panel. The brief shall be no longer than 20 double-spaced pages.

2. Within 20 days of receipt of the institution's Arbitration Brief, the Commission shall submit to the arbitrator and the institution a Response Brief, which shall be no longer than 20 double-spaced pages.
3. For good cause shown, the arbitrator may extend the length of a brief.
4. References to documents or other materials in the briefs shall include a reference to the documents as they appear in the Arbitration Exhibits.
5. All briefs shall be filed in electronic format.

#### **H. Discovery Not Available**

Depositions, interrogatories, requests for admission, and other forms of adversarial discovery shall not be used during the arbitration proceeding.

#### **I. Arbitration Hearing**

1. The institution and the Commission may agree to waive an oral hearing before the arbitrator and proceed to a decision on the documentary record only.
2. The institution and the Commission may also agree to a telephonic or video hearing before the arbitrator.
3. Upon the request of either the institution or the Commission, an in-person hearing shall be held. As set out in Section (I)(K) below, the convening of an in-person hearing will entail an additional AAA administrative fee and additional compensation for the arbitrator.
4. All in-person arbitration hearings shall be held in an area proximate to the Commission's office at a location selected by the Commission.
5. Where an in-person hearing has been requested, the arbitrator shall set the date and time for the hearing, to be held within 30 days after receipt of all briefs. The institution and the Commission shall respond to requests from the arbitrator for hearing dates in a timely manner, be cooperative in scheduling the earliest practical date, and adhere to the established hearing schedule.
6. Within 10 days of the scheduling of an in-person hearing, the institution and the Commission shall submit to the arbitrator and one another the names of all individuals who will represent them at the hearing.

7. The arbitrator will conduct the hearing expeditiously, determine the order of the hearing, direct the order of proof, and may direct the parties to focus their presentations on issues that could dispose of all or part of the case.
8. The hearing shall be private and not open to the public.
9. A stenographic transcript of the hearing shall be made.
10. The arbitrator will be requested to render a decision promptly within 21 days from the date of closing of the telephonic, video, or in-person hearing, or, if there was no hearing, from the date of the submission of all briefs and materials to the arbitrator. The decision shall be in writing, shall be signed by the arbitrator, and shall provide the reasons for the decision.

#### **J. Effect of Decision**

1. The arbitrator shall have the authority to affirm or reverse the Adverse Appeal Decision but shall have no authority to remand or amend the Adverse Appeal Decision. The arbitrator shall not have the power to order other actions reserved to the Commission, *e.g.*, order an on-site visit, compel the filing of reports or materials to the Commission, or other such actions.
2. If the arbitrator affirms the Adverse Appeal Decision, the Commission's adverse accreditation action becomes final immediately, unless the Commission's notice of adverse accreditation action sets a different effective date for the finality of the adverse accreditation action, in which case that different effective date shall be controlling. Once a decision to withdraw accreditation is final, the institution is removed from the Commission's list of accredited institutions.
3. If the arbitrator reverses the Adverse Appeal Decision, the Commission shall carry out that decision in a manner consistent with the decision, except that the arbitrator shall have no authority to grant accreditation to the institution. Pursuant to the regulations of the U.S. Department of Education, that power is reserved exclusively to the Commission.

#### **K. Fees and Expenses**

1. The AAA charges a fee to compensate it for the cost of providing administrative services in connection with the arbitration. The fee is specified in the current schedule of fees published by the AAA. The institution requesting arbitration is fully responsible for payment of this fee.

2. In addition to fees required by Section (I)(K)(1) of these Instructions above, the arbitrator shall be compensated at the rate specified in the current schedule published by the AAA.
3. Other than the AAA's administrative fee, the institution and the Commission shall be responsible for sharing the costs and expenses associated with the arbitration. If, however, the Commission prevails in the arbitration, the institution shall be responsible for all costs associated with the claim made against the Commission, including the expense of assembling the record and reasonable attorneys' fees, if any.
4. The institution's Notice of Intent to Arbitrate shall be accompanied by a deposit of \$35,000 to cover the administrative costs borne by the Commission in preparation of the record by the Commission, securing the facility for the arbitration hearing (if an in-person hearing is held), selecting and compensating a stenographer (if an in-person hearing is held), and other expenses directly related to the administration of arbitration. At the conclusion of the arbitration process, the Commission shall compute these costs, deduct the total amount from the institution's deposit, and remit to the institution any remaining sum along with an accounting of how the funds were spent. In the event such administrative costs of the arbitration exceed the amount of the deposit, the institution will be responsible for the excess expenses. The AAA's administrative fee, and the institution's share of the costs of the arbitrator's fee, and any other AAA arbitration administrative fees must be paid in advance of the arbitration hearing or for fees accrued after the hearing within 10 days of receipt of the billed amount. A failure to pay any required fee will halt the arbitration proceedings.
5. The AAA may require a deposit in advance of any hearing to cover the expense of the arbitration, including the arbitrator's fee. If a deposit is made, the AAA shall be requested to render an accounting to the institution and the Commission and return any unexpended balance at the conclusion of the proceeding.

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