

**GORDON REES SCULLY  
MANSUKHANI, LLP**  
111 W. Monroe Street, Suite 1600  
Phoenix, Arizona 85003  
602.794.2460  
602.265.4716 Facsimile

**BRIAN R. BOOKER**  
Arizona Bar No. 015637

**JAMES B. HILLER**  
(motion for admission *pro hac vice* to be filed)

**JULIA K. WHITELOCK**  
(motion for admission *pro hac vice* to be filed)  
*Attorneys for the Plaintiff*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
Phoenix Division**

**National University of Health Sciences,** ) Case No.: \_\_\_\_\_  
)  
Plaintiff, ) **PLAINTIFF’S EMERGENCY**  
) **EX PARTE MOTION FOR**  
v. ) **TEMPORARY RSTRAINING**  
) **ORDER AND**  
**The Council on Chiropractic Education, Inc.,)** **MEMORANDUM IN**  
) **SUPPORT THEREOF**  
Defendant. )  
\_\_\_\_\_ )

Plaintiff, National University of Health Sciences (“NUHS”), by counsel, hereby moves this Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for An ex parte temporary restraining order, enjoining Defendant from enforcing the sanction of Probation or making public disclosure of the same for as long as the Court requires to set a briefing schedule, hold a hearing, and rule on a motion for preliminary injunction. This

1 Motion is supported by the following Memorandum of Points and Authorities, the  
2 accompanying Declaration of Dr. Joseph Stiefel and exhibits, and the entire court record,  
3 which is incorporated herein by reference.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 NUHS, a university that offers a Doctor of Chiropractic Degree program (“DCP”),  
7 seeks a temporary restraining order and preliminary injunction, among other relief, to  
8 prevent the immediate and irreparable harm it will face as a result of the arbitrary and  
9 capricious decision of its programmatic accrediting agency, CCE, to place NUHS on  
10 Probation effective May 21, 2018, in violation of NUHS’s common law due process  
11 rights and in violation of CCE standards.

12 On May 21, 2018, CCE informed NUHS that the Appeals Panel had affirmed the  
13 Council’s decision to place NUHS on Probation. CCE provided NUHS with a draft  
14 Public Disclosure Notice that CCE intended to publish to inform the public of NUHS’s  
15 Probation and informed NUHS that it had until May 23, 2018 to provide comments to be  
16 included in the Notice prior to CCE’s publication. It is anticipated that CCE will publish  
17 the Notice on the evening of May 23, 2018 if this Court does not grant NUHS the  
18 temporary injunctive relief sought in this motion. As set forth more fully in this  
19 memorandum, NUHS is likely to succeed on the merits that CCE violated NUHS’s  
20 common law due process rights, failed to follow its standards, policies, and procedures,  
21 and made arbitrary and capricious decisions. The public notice of CCE’s imposition of  
22 Probation, which was wrongfully decided, will cause immediate and irreparable harm to  
23 NUHS. The balance of the hardships weighs in NUHS’s favor and it is in the public’s  
24 interest that accrediting agencies afford institutions and programs they accredit common  
25 law due process.

26 **II. STATEMENT OF FACTS**

27 Following review of NUHS’s Self Study Report and site visits to NUHS’s Illinois  
28 and Florida campuses, on November 8, 2017, CCE’s Site Team issued the Final Site

1 Team Report. **Exhibit A:** Stiefel Decl. at ¶ 16; **Exhibit 5.** Therein, the Site Team  
2 identified certain areas of “concern,” not no “noncompliance.” *Id.* According to CCE’s  
3 Accreditation Manual, **Exhibit 3**, and Site Team Manual, **Exhibit 4**, the Site Team is not  
4 authorized to identify or determine compliance; determinations of non-compliance are  
5 solely within the authority of the Council. *See Ex. 3* at §§ V(A), VI(C), VII(A) and (B),  
6 and X(B); **Ex. 4** at §§ VI(The Report, Nature of the Report, Concerns with  
7 Recommendations and Suggestions, and Program Response). On December 6, 2017,  
8 NUHS transmitted to CCE its Response to Final Site Team Report, which responded to  
9 the “concerns” identified in the Final Site Team Report. **Ex. A** at ¶ 16; **Exhibit 6.**  
10 Because the Site Team did not identify any noncompliance, NUHS’s Response did not  
11 respond to any written notice of noncompliance. *Id.* During the January 13, 2018 Status  
12 Review Meeting, the Council and NUHS representatives discussed the “concerns”  
13 identified by the Site Team. **Ex. A** at ¶ 17. At no time during the Status Review Meeting  
14 did the Council state that it had determined that NUHS was not in compliance with any  
15 Standards or Policies. *Id.* ¶ 18.

16 On February 2, 2018, CCE gave public notice that it had reaffirmed NUHS’s  
17 accredited status. *Id.* ¶ 19. Subsequent to the public announcement, NUHS received a  
18 letter from CCE dated February 2, 2018 notifying NUHS that CCE had reaffirmed  
19 NUHS’s accredited status, but then notifying NUHS of the contradictory decision that  
20 CCE had decided to place NUHS on Probation. **Exhibit 7.** NUHS was never provided  
21 the opportunity to respond to CCE’s determination that NUHS was not in compliance  
22 with CCE Standards or Policies as CCE’s February 2, 2018 letter was the first notice  
23 NUHS received that CCE had determined NUHS’s DCP had a deficiency of  
24 “noncompliance,” as opposed to a deficiency of “concern.” **Ex. A** at ¶ 21.

25 After timely noticing its appeal, NUHS provided CCE with its Grounds for  
26 Appeal. **Exhibit 8.** During the May 11, 2018 Appeals Panel hearing, NUHS provided  
27 the Panel and CCE with a power point to aid in the Panel’s understanding of NUHS’s  
28 grounds for appeal. **Exhibit 9.** The hearing was transcribed. **Exhibit 10.** On May 21,

1 2018, CCE transmitted the Appeals Panel Report, **Exhibit 12**, indicating that the Appeals  
2 Panel had reaffirmed the Council’s decision to impose the sanction of Probation, thereby  
3 making the decision final. **Ex. A** at ¶ 28. CCE’s May 21, 2018 transmittal letter  
4 informed NUHS that it had until May 23, 2018 to provide its comments to be included in  
5 the Public Disclosure Notice, thereby indicating that it would not publish CCE’s  
6 imposition of Probation until after receiving NUHS’s comments on May 23, 2018. *Id.* at  
7 ¶ 29; **Ex. 11**. As a result of CCE’s wrongful imposition of Probation and soon to be  
8 published Public Disclosure Notice of the same, NUHS will suffer immediate,  
9 substantial, and irreparable harm and prejudice. **Ex. A** at ¶¶ 32-39.

### 10 **III. APPLICABLE LAW**

11 “A plaintiff seeking a preliminary injunction must establish (1) likely success on  
12 the merits; (2) likely irreparable harm in the absence of preliminary relief; (3) that the  
13 balance of equities tips in the plaintiff’s favor; and (4) that an injunction is in the public  
14 interest.” *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (citing *Winter v.*  
15 *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249  
16 (2008)).

### 17 **IV. ARGUMENT**

18 NUHS’s emergency ex parte motion should be granted because it is likely to  
19 succeed on the merits, it is likely to be irreparably harmed in the absence of preliminary  
20 relief, the balance of the equities tip in its favor, and a temporary restraining order is in  
21 the public interest.

#### 22 **A. Likelihood of Success on the Merits**

23 NUHS is likely to succeed on the merits that (1) the Appeals Panel denied NUHS  
24 its common law due process rights when it affirmed the decision of the Council and (2)  
25 the Council denied NUHS its common law due process rights when it imposed a sanction  
26 of Probation. Courts have repeatedly granted preliminary injunctive relief to preserve  
27 educational institution’s accreditation where there was concern that due process had been  
28 denied those institutions. *See, e.g., W. State Univ. S. Cal. v. Am Bar Ass’n*, 301 F. Supp.

1 2d 1129, 1138 (C.D.Cal. 2004) (granting preliminary injunction prohibiting withdrawal  
2 of accreditation); *St. Andrews Presbyterian Coll. v. S. Ass'n of Colls. & Schs.*,  
3 1:07CV00640, 2007 WL 4219402, at \*6 (M.D.B.C. Nov. 29, 2007) (granting preliminary  
4 injunction to preserve accreditation); *Fla. Coll. of Bus. v. Accrediting Council for Indep.*  
5 *Colls. & Schs.*, 954 F. Supp. 256, 260 (S.D. Fla. 1996) (granting emergency motion for  
6 injunctive relief to preserve accreditation status).

7 “Accreditation agencies are private entities, not state actors, and as such are not  
8 subject to the strictures of constitutional due process requirements.” *Prof'l Massage*  
9 *Training Ctr. v. Accreditation Alliance of Careers Sch. & Colls.*, 781 F.3d 161, 169 (4th  
10 Cir. 2015). However, accrediting agencies are “quasi-public” and “wield enormous  
11 power over institutions – life and death power,” and therefore they owe a “common law  
12 duty ... to employ fair procedures when making decisions affecting their members.” *Id.*  
13 at 169-70. The proper scope of a fairness review authorizes a reviewing court “to  
14 consider only whether the decision of an accrediting agency...is arbitrary and  
15 unreasonable or an abuse of discretion and whether the decision is based on substantial  
16 evidence.” *Id.* at 171. “[C]ourts focus primarily on whether the accrediting body’s  
17 internal rules provide a fair and impartial procedure and whether it has followed its rules  
18 in reaching its decision.” *Wilfred v. So. Ass'n of Colls. & Schs.*, 957 F.2d 210, 214 (5th  
19 Cir. 1992). Federally recognized accrediting agencies are subject to the due process  
20 requirements of 20 U.S.C. § 1099b(a)(6) and its supporting regulation 34 C.F.R. §  
21 602.25. *Bristol Univ. v. Accrediting Council for Indep. Colls. & Schs.*, 691 Fed. Appx.  
22 737, 741 (4th Cir. 2017). “Courts adjudicating common law due process claims against  
23 accrediting agencies ‘should focus primarily on whether the accrediting body’s internal  
24 rules provided a fair and impartial procedure and whether it followed its rules in reaching  
25 its decision.’” *Bristol Univ.*, 691 Fed. Appx. at 741 (quoting *Prof'l Massage*, 781 F.3d at  
26 172); *see also Wilfred*, 957 F.2d at 214. “Agency actions are generally invalid where the  
27 ‘agency fails to follow its own procedures or regulations.’” *Bristol Univ.*, 691 Fed. Appx.  
28 at 741 (quoting *Nader v. Blair*, 549 F.3d 953, 962 (4th Cir. 2008)).

1                   **1. The Appeals Panel’s Decision was Arbitrary and Capricious and**  
2                   **Denied NUHS Its Due Process Rights.**

3                   *i. Appeals Panel Considered Information Not Reviewed by the*  
4                   *Council*

5                   CCE Policy 8 states, “With the exception of new information pertaining to failure  
6                   to meet a standard related to finances, information to an appeals hearing will consist of  
7                   that evidence presented to the Council prior to the adverse action. Information not  
8                   reviewed by the Council prior to the Council decision cannot be considered by the  
9                   Appeals Panel.” **Ex. 2.**

10                  The Appeals Panel Report itemizes the entirety of the Record of Accreditation  
11                  Proceedings in Appendix 1. **Ex. 12.** During the Appeals Panel hearing, the Council  
12                  asserted in its verbal response to NUHS’s first ground for appeal that the Council’s  
13                  decision to reaffirm and place NUHS on probation simultaneously was not contradictory  
14                  based on the written language of CCE’s Standards because the Council had done the  
15                  same thing with another school in 2016 at a Council accreditation meeting that was  
16                  attended by a staff member of the Department of Education. **Ex. 10:** 57:5-13. The  
17                  Council asserted that the Department’s recognition of CCE in 2016 constituted an  
18                  endorsement by the Department of CCE’s reaffirming accreditation at the same time as it  
19                  placed the school on probation. *Id.* The Council provided no evidence at the Appeals  
20                  Panel hearing to support its statement that its prior example of reaffirming the  
21                  accreditation of an institution while simultaneously sanctioning it with probation was  
22                  “recognized by the Department of Education.” NUHS asserted that that information was  
23                  not evidence and was not in the record on appeal.

24                  A review of the Record of Accreditation Proceedings confirms that there was no  
25                  evidence submitted to the Council regarding other accreditation actions that would  
26                  displace CCE’s written standards and policies. *See Ex. 12* at Appendix I. In determining  
27                  that CCE followed its procedures, policies, and practices, the Appeals Panel specifically  
28                  cited as the basis for its decision the example CCE provided during the hearing. *Id.* at

1 p.8. The Appeals Panel therefore impermissibly and in violation of CCE's Policy 8  
2 considered information not reviewed by the Council.

3 *ii. Appeals Panel Substantially Disregarded CCE's Standards*  
4 *and Policies Regarding Reaffirmation and Probation*

5 The U.S. Code states that an accrediting agency's action to accredit a program  
6 "ensure[s] that the courses or programs of instruction, training, or study offered by the  
7 institution of higher education...are of sufficient quality to achieve, for the duration of  
8 the accreditation period, the stated objective for which the courses or the programs are  
9 offered." 20 U.S.C. § 1099b(a)(4)(A). CCE Standards states that "CCE accreditation is  
10 granted to DCPs deemed by the Council to comply with the eligibility requirements and  
11 requirements for accreditation." **Exhibit 1** at § 1(I).

12 On the other hand, pursuant to CCE Standards, "Probation is an action reflecting  
13 the conclusion of the Council that a program is in significant noncompliance with  
14 accreditation standards or policy requirements." *Id.* at § 1(V)(B). Reaffirmation of  
15 accreditation and probation require that the Council reach contradictory conclusions  
16 about the compliance of a DCP.

17 The Appeals Panel ignored the express language of CCE's Standards and the U.S.  
18 Code and instead based its decision that the Council followed CCE's procedures,  
19 policies, and practices on a single example where the Council made the same decision.  
20 Rather than an example of CCE following its standards, the example is an admission by  
21 the Council that it does not follow its written standards. CCE's failure to provide  
22 adequate written specifications of its requirements is a violation of its due process  
23 requirements under 34 C.F.R. § 602.25(a).

24 *iii. Appeals Panel Failed to Decide Each of NUHS's Grounds*  
25 *for Appeal*

26 Under 34 C.F.R. § 602.25(f)(iii), the accrediting agency's appeals panel must not  
27 serve only an advisory or procedural role, but rather, must make a decision to affirm,  
28

1 amend, or reverse the accrediting agency’s decision-making body. CCE Policy 8 states:  
2 “The panel members shall decide on the issues presented in the appeal.” **Ex. 2.**

3 The Appeals Panel Report identifies NUHS’s five grounds for appeal. **Ex. 12** at 4-  
4 5. Section “C” of the Appeals Panel Report identifies “Panel Review and Findings.” *Id.*  
5 at 5. Instead of analyzing and deciding any of the five grounds for appeal NUHS raised,  
6 the Appeals Panel Report analyzes two issues that were not before it on appeal: (a)  
7 “Whether each concern or area of non-compliance was supported by substantial evidence.  
8 Substantial evidence is such relevant evidence which might reasonably be accepted as  
9 supporting the concern or area of non-compliance cited.” (b) Whether the concern or  
10 area of non-compliance that are supported by substantial evidence are sufficient to  
11 support the adverse action of the Council.” *Id.* at 5-8.

12 The Appeals Panel Report fails to address or analyze NUHS’s specific grounds of  
13 appeal in reaching its conclusion that it “found no evidence that the procedures, policies,  
14 or practices followed during the reaffirmation process were contrary to established CCE  
15 procedures, policies, or practices.” *Id.* at 8. The Appeals Panel states as its basis for its  
16 conclusory statement that “review of CCE by the Department of Education in 2013 and  
17 2016 demonstrates that CCE is in compliance with the requirements for recognition by  
18 the DOE.” *Id.*

19 The fact that the Department re-recognized CCE as an accrediting agency means  
20 that the CCE was in compliance at the time of the re-recognition. Re-recognition does  
21 not establish that CCE’s accreditation decisions subsequent to the Department’s re-  
22 recognition constitute compliance with Department requirements or common law due  
23 process requirements or that those decisions are immune from judicial review. Similar to  
24 CCE’s authority to reaffirm accreditation of a program and, after complying with due  
25 process requirements, sanction or withdraw accreditation, so too does the Department  
26 have authority to determine that an accrediting agency is no longer in compliance with  
27 the Secretary’s criteria. *See* 29 U.S.C. § 1099b(1).

28



1           The Appeals Panel failed to decide NUHS’s second ground for appeal: whether  
2 the Council’s action to place NUHS on probation violates NUHS’s due process rights as  
3 set forth in 34 C.F.R. § 602.25. The Appeals Panel did not decide whether the Council  
4 complied with the requirements of 34 C.F.R. § 602.25(c) and (d). In the “Background  
5 Information” section of the Appeals Panel Report, the panel stated, “The CCE followed  
6 its policy and provided NUHS written notification of noncompliance in the Final Site  
7 Team Report and provided an opportunity for response in the Response to the Final  
8 Report and also at the CCE Status Review Meeting. Institutions are obligated to  
9 understand terminology used in the accreditation process such as concern and  
10 recommendations following a concern.” **Ex. 12** at 5.

11           The Appeals Panel, like the Council, conflate two terms that are specifically  
12 differentiated in CCE’s Standards and policies – “concern” and “noncompliance” – in  
13 order to find compliance with CCE’s due process requirements. Under 34 C.F.R. §  
14 602.25(c), CCE is required provide written specification of any deficiencies. Section  
15 602.25(d) requires that CCE provide sufficient opportunity for a written response to the  
16 deficiencies identified in Section 602.25(c) before any adverse action is taken.

17           CCE’s February 2, 2018 letter identifies the deficiencies in NUHS’s program as  
18 noncompliance. **Ex. 7**; *see also* **Ex. 1** at § 1(V)(B). However, CCE never provided  
19 written specification of NUHS’s noncompliance prior to February 2, 2018.

20           CCE’s Site Team Manual and Accreditation Manual specifically differentiate the  
21 terms “concern” and “noncompliance,” stating that the site visit team must not indicate  
22 compliance as it is solely in the authority of the Council to make determinations of non-  
23 compliance. *See* **Exs. 3** at § VII(A) and **4** at § VI(Nature of Report). Because the Site  
24 Team does not have the authority to determine non-compliance, its Final Site Team  
25 Report cannot be written notice to NUHS of the deficiency of noncompliance to satisfy  
26 the due process requirements of 34 C.F.R. 602.25(c). Indeed the term “noncompliance”  
27 does not appear in the Final Site Team Report. *See* **Ex. 5**.

28

1           Because the Final Site Team Report does not constitute written notice of the  
2 deficiency of noncompliance for purposes of 34 C.F.R. § 602.25(c), NUHS's Response to  
3 Final Site Team Report cannot constitute written response to the deficiency of  
4 noncompliance to satisfy CCE's due process requirements set forth in 34 C.F.R. §  
5 602.25(d). NUHS's written grounds of appeal does not satisfy 34 C.F.R. § 602.25(d)  
6 because CCE is required pursuant to 34 C.F.R. § 602.25(f) to provide the opportunity for  
7 appeal after CCE notifies the program in writing that it is being placed on probation.

8           The Appeals Panel failed to decide NUHS's third ground of appeal: whether the  
9 Council's decision that NUHS is out of compliance with CCE Policy 56 is arbitrary and  
10 capricious because Policy 56 violates 34 C.F.R. § 602.16(a)(1)(i) and conflicts with  
11 Illinois Public Policy, is unreasonable for requiring NUHS to report misleading NBCE  
12 success rates, and is discriminatory. In the "Background Information" section of the  
13 Appeals Panel Report, the panel stated, "NUHS states that they believe that Policy 56 is  
14 biased against them and that the appeal panel should recommend the policy be changed.  
15 Review of NUHS for reaffirmation of accreditation is based on current accreditation  
16 standards and policies and review of standards and policies is outside the scope of the  
17 appeal panel action." **Ex. 12** at 5.

18           NUHS did not ask the Appeals Panel to change Policy 56. NUHS asked the  
19 Appeals Panel to reverse the decision that NUHS was not in compliance with Policy 56  
20 because the Council's application of Policy 56 to NUHS violated 34 C.F.R. §  
21 602.16(a)(1)(i), causes NUHS to be in violation of Policy 22, and is not applied evenly.  
22 The Appeals Panel must determine whether the procedures used to reach the adverse  
23 action were contrary to established CCE procedures. NUHS's third ground of appeal was  
24 squarely within the Appeals Panel's scope of review.

25           The Appeals Panel failed to decide NUHS's fourth ground of appeal: whether the  
26 Council's action to place NUHS on probation violates NUHS's due process rights  
27 because the decision arises from the Council's arbitrary and capricious decision that  
28 NUHS is out of compliance with CCE Policy 56.

1           The Appeals Panel failed to decide NUHS’s fifth ground of appeal: whether the  
2 Council’s Action to place NUHS on probation should be reversed because the sanction  
3 has the effect of substantially and materially hindering NUHS’s ability to correct the  
4 areas of concern within the permissible timeframe set forth in Standards 1(V).

5                   **2.     The Council’s Decision was Arbitrary and Capricious and**  
6                   **Denied NUHS Its Due Process Rights.**

7                   *i.     Council Failed to Follow Its Standards in Reaching*  
8                   *Contradictory Conclusions on Compliance with*  
9                   *Accreditation Standards*

10           When an accrediting agency accredits a program, it makes the determination that  
11 the program is “of sufficient quality to achieve, **for the duration of the accreditation**  
12 **period**, the stated objective for which the courses or the programs are offered.” 20  
13 U.S.C. § 1099b(a)(4)(A) (emphasis added). CCE grants initial accreditation or reaffirms  
14 accreditation status to “DCPs deemed by the Council to comply with the eligibility  
15 requirements and requirements for accreditation.” **Ex. 1** at §1(I). CCE’s Standards do  
16 not qualify the level of compliance. Instead, CCE’s standards require the Council to  
17 determine complete compliance with CCE’s requirements for accreditation. On the other  
18 hand, a determination of probation, according to CCE Standards § 1(V)(B), “is an action  
19 reflecting the conclusion of the Council that a program is in significant noncompliance  
20 with accreditation standards or policy requirements.” *Id.* at § 1(V)(B).

21           By reaffirming NUHS’s accredited statuses, the Council determined that NUHS’s  
22 DCP “compl[ies] with the eligibility requirements and requirements for accreditation.”  
23 *See Ex. 7.* Additionally, CCE reaffirmed NUHS’s accreditation for the full 8-year cycle.  
24 *Id.* In blatant contradiction to the Council’s reaffirmation of accredited status, in the  
25 same February 2, 2018 letter notifying NUHS that its accreditation was reaffirmed  
26 because it complied with CCE’s accreditation requirements, CCE informed NUHS that  
27 the Council had imposed a sanction of Probation because it concluded that NUHS was in  
28 significant noncompliance with CCE’s standards and policies. *Id.*

1                    *ii. Council Failed to Afford NUHS the Due Process Set Forth*  
2                    *in 34 C.F.R. § 602.25*

3                    CCE is required to afford NUHS due process by providing NUHS with “written  
4 specifications of any deficiencies” and “sufficient opportunity for a written response by  
5 an institution or program regarding any deficiencies identified by the agency” before  
6 notifying NUHS “in writing of any adverse accrediting action or action to place the  
7 institution or program on probation or show cause. The notice describes the basis for the  
8 action.” 34 C.F.R. § 602.25(c)-(e); *accord.* 20 U.S.C. § 1099b(a)(6).

9                    On February 2, 2018, CCE informed NUHS in writing for the first time that the  
10 Council determined NUHS to be in significant noncompliance with CCE standards and  
11 policies and, as a result, imposed a sanction of Probation. **Ex. 7.** “Probation is an action  
12 reflecting the conclusion of the Council that a program is in significant noncompliance  
13 with accreditation standards or policy requirements.” **Ex. 1** at § 1(V)(B). The Council’s  
14 imposition of a sanction of Probation establishes that the deficiency the Council identifies  
15 is noncompliance.

16                    NUHS received no written notice of the deficiency of noncompliance prior to  
17 CCE’s February 2, 2018 letter notifying NUHS that CCE was placing NUHS on  
18 Probation. On November 8, 2017, CCE transmitted the Final Site Team Report to  
19 NUHS, which identified “Concerns with Recommendations” in reference to 2013 CCE  
20 Accreditation Standards, § 2.A, 2013 CCE Accreditation Standards, § 2.H, and CCE  
21 Policy 56: Student Performance Disclosure, Thresholds, and Outcomes. **Ex. 5.** Pursuant  
22 to the Accreditation Manual and Site Team Manual, the Site Team does not have  
23 authority to and shall not make conclusions as to whether NUHS was in compliance with  
24 CCE Standards or Policies. *See* **Exs. 3** at § VII(A) and **4** at § VI(Nature of Report).

25                    If the Site Team were to state conclusions of noncompliance, the Site Team would  
26 be acting in substantial disregard of the CCE Standards and/or procedures of the Council  
27 as only the Council has authority to make noncompliance determinations. Assuming that  
28 CCE complied with its requirement to follow its own standards, policies, and procedures,

1 the Site Team did not provide notice to NUHS of noncompliance because the Site Team  
2 does not have the authority to make such conclusions. The CCE’s February 2, 2018 letter  
3 notifying NUHS for the first time of the deficiency of noncompliance and simultaneously  
4 imposing Probation eliminated the procedure and notice requirements of § 602.25 and  
5 stripped away any chance for NUHS to be heard—or have access to substantive and  
6 procedural due process.

7 *iii. Council Failed to Apply Its Policies with an Even Hand and*  
8 *Failed to Provide a Fair Procedure*

9 CCE standards for accreditation should take into consideration State licensing  
10 examinations in order to meet its requirement that it establish standards that “ensure that  
11 the agency is a reliable authority regarding the quality of the education or training  
12 provided by the [DCPs] it accredits.” 34 C.F.R. § 602.16(a). CCE must apply its  
13 standards with an even hand. 20 U.S.C. § 1099b(a)(4); 34 C.F.R. § 602.18; *Marjorie*  
14 *Webster Jr. Coll.*, 432 F.2d at 655.

15 CCE’s application of Policy 56 to NUHS’s NBCE exam success rates pre-July 1,  
16 2016 does not meet the requirements of 34 C.F.R. § 602.16(a)(1)(i), unreasonably  
17 requires reporting of irrelevant data, and conflicts with Illinois’ public policy as set forth  
18 in 68 Ill. Admin. Code § 1285.60(b)(1). CCE requires DPCs to “post annually the overall  
19 weighted average of the four (4) most recent years’ NBCE Parts I, II, III, and IV Exam  
20 success rates. The DCP’s [sic] may use the Canadian Chiropractic Examining Board  
21 (CCEB) Part C exam data in lieu of NBCE Part IV data.” **Ex. 2** at Policy 56. Prior to  
22 July 1, 2016, successfully passing the NBCE exam for purposes of Illinois licensure  
23 meant attempting and passing only Parts I, II, and III of the NBCE exam. *See* 68 Ill.  
24 Admin. Code § 1285.60(b)(1). NUHS’s Lombard campus is located in Illinois, thus most  
25 of its graduates seek Illinois licensure.

26 In its July 2017 CCE Manual of Policies, CCE added a modification to Policy 56  
27 that permitted DCPs to substitute “Canadian Chiropractic Examining Board (CCEB) Part  
28 C data in lieu of NBCE IV data.” **Ex. 2** at Policy 56. Though CCE was aware that prior

1 to July 1, 2016, Illinois did not require, and therefore NUHS graduates seeking Illinois  
2 licensure did not take, Part IV of the NBCE exam, CCE made no similar modification to  
3 it public disclosure requirements for Illinois NBCE exam takers. CCE allows DCPs with  
4 graduates seeking Canadian licensure to satisfy the NBCE outcomes threshold with an  
5 exception, while unreasonably punishing NUHS and reducing its outcomes because many  
6 of its graduates seek Illinois licensure.

7 CCE requires DCPs to correct any “incorrect, misleading or misrepresentation of  
8 public statements about its...success of graduates.” **Ex. 2** at Policy 22. It requires DCPs  
9 to “disclose information honestly and completely” and not to omit relevant information or  
10 distort information. *Id.* CCE’s application of Policy 56 to NUHS requires that NUHS  
11 report Illinois NBCE exam takers who are not required to and therefore do not take Part  
12 IV but still obtain Illinois licensure as failing NBCE exam Part IV. CCE’s requirement  
13 that Illinois NBCE exam takers who did not take Part IV be reported as failing even  
14 though they were not required to take Part IV to obtain Illinois licensure, requires NUHS  
15 to make “incorrect, misleading or misrepresentation of public statements about  
16 its...success of graduates,” to omit relevant information (that Illinois does not require and  
17 therefore Illinois licensure seekers do not take Part IV of the NBCE exam), and report  
18 distorted information (falsely low success rates because Illinois does not require and  
19 therefore Illinois licensure seekers do not take Part IV of the NBCE exam).

#### 20 **B. Likelihood of Irreparable Harm**

21 As a result of CCE’s wrongful imposition of Probation, public disclosure of  
22 CCE’s decision to place NUHS on Probation and enforce the sanction of Probation will  
23 cause NUHS immediate, substantial, and irreparable harm and prejudice. Irreparable  
24 harm is present when a movant seeks relief “to preserve its existence and its business.”  
25 *Fed. Leasing Inc. v. Underwriters of Lloyd’s*, 650 F.2d 495, 500 (4th Cir. 1981).  
26 Imposing a sanction of Probation “appears to involve a prime example of potential  
27 irreparable harm to a plaintiff.” *Hampton Univ. v. Accreditation Council for Pharm.*  
28 *Educ.*, 611 F. Supp. 2d 557, 566 (E.D. Va. 2009).

1 CCE accredits only 15 DCPs in the United States. **Ex. A** at ¶ 6. Therefore there is  
2 strong competition between the DCPs to recruit, enroll, and graduate committed students  
3 and recruit, hire, and retain good faculty. *Id.* Accreditation by a Secretary-recognized  
4 accrediting agency allows DCPs to participate in the Department of Education's Title IV  
5 programs, which include federal student loans and grants. *Id.* ¶ 7. The vast majority of  
6 DCP students funds their education entirely with Title IV program funds and would not  
7 be able to enroll in a DCP without access to Title IV program funds. *Id.* Therefore a  
8 DCP's loss of accreditation or threatened loss of accreditation, e.g., Probation, is a death  
9 blow to a DCP. *Id.*

10 Public disclosure and enforcement of the sanction of Probation will cause  
11 immediate and irreparable harm to NUHS in the following ways.

12 First, public disclosure and enforcement of the sanction of Probation will cause  
13 NUHS to lose current and prospective students because they may believe that NUHS will  
14 soon be losing its accreditation and therefore access to Title IV program funds. *Id.* ¶ 33.  
15 A DCP's access to Title IV funds, by virtue of accreditation by a Secretary-recognized  
16 accrediting agency, is instrumental to recruiting and retaining students for the duration of  
17 the student's studies. *Id.* Despite NUHS's pursuit of its legal rights in this Court and  
18 assertions that it will maintain its accreditation, current and prospective students may  
19 misinterpret the sanction of Probation as an imminent loss of accreditation and therefore  
20 transfer from or decline to enroll in NUHS's DCP. *Id.*

21 Second, public disclosure and enforcement of the sanction of Probation will cause  
22 NUHS to lose current students because they may encounter more difficulty in obtaining  
23 employment due to the public's false impression that NUHS does not provide a quality  
24 education or prepare DCP graduates for licensure and practice. *Id.* ¶ 34.

25 Third, public disclosure and enforcement of the sanction of Probation will cause  
26 NUHS to lose prospective students because the distorted data CCE requires NUHS to  
27 report will lead the prospective student to believe that NUHS does not adequately prepare  
28 its graduates to obtain licensure because its weighted NBCE exam passage rates are

1 below 80%. *Id.* ¶ 35. The public would have to wade through numerous court  
2 documents and exhibits to learn the truth: NUHS graduates have an 87% board passage  
3 rate and 87.5% of NUHS takers of Part IV pass Part IV. *Id.* NUHS's competitors focus  
4 on NBCE exam passage rates to recruit students and will use the distorted data CCE  
5 requires NUHS to report and Probation to recruit NUHS's current and prospective  
6 students. *Id.*

7 Fourth, public disclosure and enforcement of the sanction of Probation will cause  
8 NUHS to lose prospective students because, rather than attracting students, NUHS's  
9 rigorous admission standards will deter enrollment when juxtaposed with the distorted  
10 NBCE exam passage rates and the sanction of Probation. *Id.* ¶ 36.

11 Fifth, public disclosure and enforcement of the sanction of Probation will cause  
12 NUHS to lose significant amounts of revenue and, therefore, be less likely to continue to  
13 develop and utilize the academic and programmatic improvements CCE recognized as a  
14 positive. *Id.* ¶ 37. NUHS reasonably expects to lose millions of dollars in tuition  
15 revenue as a result of CCE's wrongful probation tarnishing NUHS's standing and  
16 reputation and incentivizing students to attend other DCPs. *Id.*

17 Sixth, public disclosure and enforcement of the sanction of Probation will cause  
18 NUHS to lose current faculty because CCE's Probation determination will convey to the  
19 public that NUHS is not a quality DCP. *Id.* ¶ 38. Faculty will not want to continue  
20 teaching at a school with a negative reputation and will therefore look for opportunities at  
21 other DCPs or be the target of other DCPs' faculty recruiting efforts. *Id.*

22 Seventh, public disclosure and enforcement of the sanction of Probation will cause  
23 NUHS's insurance premiums to increase and reduce its insurability. *Id.* ¶ 39.

24 NUHS further incorporates by reference as though set forth fully herein **Exhibit**  
25 **A**, Dr. Stiefel's Declaration.

### 26 **C. Balance of Hardships**

27 CCE will not suffer any harm by not enforcing Probation whereas NUHS will  
28 suffer significant irreparable harm just by the public disclosure of Probation and during



1 the pendency of litigation to resolve its claims that CCE violated NUHS's common law  
2 due process rights. Indeed, CCE's reaffirmation of accreditation and public notice  
3 thereof indicated that the Council had determined that NUHS was in compliance with  
4 CCE accreditation requirements. The balance of harm often weighs in favor of the  
5 education institution. *See St. Andrews Presbyterian Coll.*, 2007 WL 4219402, at \*3  
6 (Balance of harms favored education institution); *Fla. Coll. of Bus.*, 9454 F. Supp. at 259-  
7 60 (same).

#### 8 **D. Public Interest**

9 The public interest will not be injured by the grant of preliminary relief. ““The  
10 public interest analysis for issuance of a preliminary injunction requires us to consider  
11 whether there exists some critical public interest that would be injured by the grant of  
12 preliminary relief.”” *Alliance for The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th  
13 Cir. 2011) (quoting *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1114-15  
14 (9th Cir. 2010)). On February 2, 2018, CCE publicly announced that it had reaffirmed  
15 NUHS's DCP's accreditation status. It thereby stated publicly that NUHS met all of  
16 CCE's accreditation requirements. In light of CCE's failure to follow its standards,  
17 follow the due process requirements of 34 C.F.R. § 602.25, apply its policies with an  
18 even hand and not in conflict with public policy, the public interest is not injured by the  
19 Court granting the preliminary relief sought by NUHS.

#### 20 **V. CONCLUSION**

21 For the foregoing reasons, Plaintiff's emergency ex parte motion for a temporary  
22 restraining order should be granted and this Court should enter an order (1) enjoining  
23 Defendant from publicly disclosing that it has placed NUHS on Probation and (2)  
24 enjoining Defendant from enforcing the sanction of Probation for a period of time  
25 sufficient for the parties to brief a preliminary injunction action and the Court to hear oral  
26 argument and decide whether a preliminary injunction is appropriate.

1 Date: May 23, 2018

Respectfully submitted,

/s/ Brian R. Booker

Brian R. Booker, Esq. (AZ Bar No. 015637)  
GORDON REES SCULLY MANSUKAHNI, LLP  
111 W. Monroe Street, Suite 1600  
Phoenix, Arizona 85003  
T: 602.794.2460  
F: 602.265.4716  
[bbooker@grsm.com](mailto:bbooker@grsm.com)

2  
3  
4  
5  
6  
7  
8 James B. Hiller, Esq. (motion for admission *pro*  
*hac vice* to be submitted)  
9 GORDON REES SCULLY MANSUKAHNI, LLP  
10 One North Franklin, Suite 800  
11 Chicago, IL 60606  
12 T: 312.565.1400  
13 F: 312.565.6511  
14 [jhiller@grsm.com](mailto:jhiller@grsm.com)

15 Julia K. Whitelock, Esq. (motion for admission  
16 *pro hac vice* to be submitted)  
17 GORDON REES SCULLY MANSUKAHNI, LLP  
18 1300 I Street, NW, Suite 825  
19 Washington, DC 20005  
20 T: 202.399.1009  
21 F: 202.800.2999  
22 [jwhitelock@grsm.com](mailto:jwhitelock@grsm.com)

23  
24  
25  
26  
27  
28  
*Counsel for Plaintiff National University of  
Health Sciences*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of May, 2018, I caused a true copy of the foregoing to be served by US Mail, postage pre-paid and electronic mail on the following:

Craig Little, D.C., M.Ed.  
President  
The Council on Chiropractic Education  
8049 N. 85<sup>th</sup> Way  
Scottsdale, Arizona 85258  
[clittle@cce-usa.org](mailto:clittle@cce-usa.org)

/s/ Brian R. Booker  
Brian R. Booker, Esq. (AZ Bar No. 015637)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28