

Definition of Substantial Compliance -- Briefing for RAC

The Accredited Law School Rules and the Guidelines for Accredited Law School Rules both contain numerous references to “substantial compliance” without providing a definition of the phrase. Rules 4.105, 4.120, 4.170, 4.171, 4.172, 4.174, and 4.175, and Guidelines 1.1, 15.2, 15.3, all use the term in various ways, usually with reference to the minimum standard of compliance with the rules or guidelines required of a provisionally accredited law school.

Definitions of “substantial compliance” in relation to higher education accreditation are rare, but the term is found in other disciplines, such as tax law (where certain entities required to report data are considered substantially compliant -- and thus not subject to IRS penalties – even though their reporting was imperfect, where the degree, extent, and impacts of the errors or omissions were weighed as not significantly harmful to overall accuracy), insurance (where policyholders must substantially comply with insurer’s claim procedures and requests for information in order to recover on a claim), in accreditation of health care providers or sites (where substantial compliance is used in a very similar fashion to the way it is used in education) and in accreditation of surveyors (where the standard focuses on allowing non-compliant error, so long as the risk of harm is minimal.)

What “Substantial Compliance” Cannot Mean

It might be easiest to begin with this. The term can only be applied, of course, where full compliance with all requirements is not demonstrated or not required – otherwise that would be called simply “compliance” or “full compliance.” So, in any “substantial compliance” situation, there will be some, and perhaps a great deal, of non-compliance present. For example, if, under Guideline 6.2(C), a school has not yet developed all course materials (texts, outlines, syllabi) for all courses in a proposed program, but has provided some compliant examples of courses that will be offered upon first opening of the new program, the school has shown the ability and resources to design and deliver compliant courses, and has demonstrated substantial compliance with the requirements of 6.2(C), even if it has not yet fully developed all course materials for an entire multi-year curriculum (including all bar tested, electives, and clinical courses). Here, there is only limited actual compliance, but a demonstrated capacity for compliance and a credible plan for attaining it.

Similarly, if, under 6.2(J) a School has identified the means of access to the required legal research resources and can establish the availability of the funding and other resources necessary to acquire or access them, but at the time of application has not yet actually expended the funds or become legally bound (by purchase, contract, or subscription) to acquire the resources, the school has met the substantial compliance standard, subject to actually acquiring the required resources. The actual acquisition is verified at the next visit following approval. Here, there is no compliance at all at the time of approval, but a credible and resourced plan and commitment to comply on a matter that can be accomplished relatively rapidly.

“Substantial Compliance” as it is Used in Accreditation

“Substantial compliance” is, in most accreditation decision-making, a subjective judgment of the accrediting body. There is surprisingly little regulation or case law defining the term. Does it mean full compliance with some group of essential requirements, and near or non-compliance with all non-essential requirements? Or, does it mean only near compliance with all standards and requirements, whether characterized as essential or not? Or, does it mean partial compliance with some standards and a credible and adequately resourced plan for compliance with all standards by the end of the provisional accreditation period?

Looking at accreditor processes and decision-making, the prevailing definition of “substantial compliance” generally applied by accreditors seems to be:

Substantial compliance is demonstrated where the overall, combined effect of the school’s performance in regulated areas generally satisfies the overall purpose of the regulatory scheme, and the institution has demonstrated the capacity to operate compliantly by the end of the permitted timeframe, even though non-compliance also exists and is permissible until full compliance is required (for example, at the end of a period of provisional accreditation.)

Whether in the “candidacy” model used by some regional accreditors, or the ABA “provisional approval” process, the accreditor is evaluating a plan for compliance, not actual compliance, in considering the application for accreditation. This is similar to the model already incorporated in the Rules and Guidelines for California Accredited Schools seeking to establish branch or satellite campuses, and the process by which new schools would be approved.

The most important reason for this definition is likely public protection. By evaluating the plan, not actual compliance, the regulator can bring the school into a provisional status much faster and thus much sooner apply to it the regulations that protect the public. Waiting until compliance can be proven – for example, by bar pass rate statistics, which by definition can only *begin* to be collected after 3 to 4 years of operation – imposes significant burdens on public protection.

“Discretion” as it is Used in Accreditation

The Committee has the authority to exercise some discretion in accreditation matters, though that term is used only once in the Accredited Law School Rules, and not in relation to the decision whether to accredit or not accredit. (Rule 4.175(C) grants the Committee of Bar Examiners “discretion” to decide how to publicize and communicate its actions following a hearing on termination of accreditation or provisional accreditation.) The exercise of the Committee’s discretionary authority has primarily been in approving variances from existing standards, and thus far variances have been approved only for schools already accredited by the Committee. Another approach, then, to the question of “substantial compliance” is for the Committee to require full or partial compliance with some standards but exercise its discretion to grant general or institution-specific variances to certain requirements to allow a school to establish “substantial compliance”. Procedurally, this would entail the school seeking

accreditation to detail the standards where it can establish full or partial compliance, and ask for a variance as to those standards where it can establish near compliance or reasonably continue with non-compliance. Arguably, the Committee would be required to grant at least the variances it has granted to presently-accredited schools, if similar grounds were presented, and with a variance system the school would have specific direction on which areas require eventual change to be eligible for full accreditation.

Summary

While “substantial compliance” clearly cannot mean full compliance with all accreditation standards – because that would be called “compliance” -- the required level of performance in relation to the standards, or any particular standard, ought to be clearly established, both to guide the Committee and staff in decision-making and also to inform schools seeking accreditation or provisional accreditation of what is expected. The aim of this RAC project is to recommend a definition of “substantial compliance” that can be adopted for use by the Committee in applying all Rules and Guidelines that use the term in a legally operative way. Definitional resources for RAC members, on the application of “substantial compliance” are provided below.

Resource Materials on Definition of Substantial Compliance for RAC

Merriam-Webster Online Dictionary Definition:

“Legal Definition of Substantial Compliance: Compliance with the substantial or essential requirements of something (as a statute or contract) that satisfies its purpose or objective even though its formal requirements are not complied with.”

<https://www.merriam-webster.com/legal/substantial%20compliance>

WASC Initial Accreditation Standard: (Emphasis Added)

Grant Candidacy or Initial Accreditation

(See the [How to Become Accredited Manual](#))

Initial Accreditation: The institution has met the Standards at a substantial level. Initial accreditation is for a period of six years before the next comprehensive review.

<https://www.wscuc.org/resources/handbook-accreditation-2013/part-iv-commission-decisions-institutions/forms-possible-commission-action>

NEASC Initial Accreditation Standard

Commission Action: Approved for Initial Accreditation

The institution was approved for Initial Accreditation because, based on the institution's [self-study](#), the report of the [evaluation team](#), and the [response of the institution](#), the Commission determined that the institution is in substantial compliance with the Commission's [Standards for Accreditation](#). The judgment of "substantial compliance" is a qualitative judgment made by the [Commission](#), consisting of peers and members of the public; in making this judgment the Commission gives principal attention to the [statement of the standards](#) for each of the Commission's Standards for Accreditation. Institutions gaining initial accreditation will undergo a [comprehensive evaluation](#) within five years.

<https://cihe.neasc.org/about-our-institutions/basis-final-decisions-grant-or-reaffirm-accreditation>

Substantial compliance is defined as "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." *Beverly Healthcare Lumberton v. Leavitt*, 2009 U.S. App. LEXIS 16293 (4th Cir. July 22, 2009) Unpublished; discussed in: <https://www.kirschenbaumesq.com/article/pdf/001844-federal-civil-monetary-penalties-42-usc-s-1320a-7a.pdf>