



Council of Colleges of Acupuncture and Oriental Medicine

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July 12, 2017

Honorable Betsy DeVos
Secretary
U.S. Department of Education

Re: Docket ID ED–2017–OPE–0076 (Negotiated Rulemaking for Gainful Employment and Borrower Defense to Repayment Regulations)

Dear Secretary DeVos:

The purpose of this letter from the Council of Colleges of Acupuncture and Oriental Medicine (Council) is to support the recent decision of the U.S. Department of Education to convene negotiated rule-making committees to improve the department’s Gainful Employment and Borrower Defense to Repayment regulations.¹ As indicated in the succeeding discussion, the Council has major objections to these regulations in their current form and appreciates this opportunity to provide a written statement in anticipation of the work of the rule-making committees.

Since its founding in 1982, the Council has been the national membership association for accredited colleges and programs of acupuncture in the U.S.² The Council’s institutional membership is located in 21 states. All of the Council’s 56 graduate level member colleges as a condition of membership must be accredited or have received pre-accreditation (accreditation “candidacy”) status by the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM), the national accrediting agency recognized by the U.S. Department of Education (USDE) for the accreditation of acupuncture colleges and programs in the U.S.³ The mission of

¹ 79 Fed. Reg. 64890 (Oct. 31, 2014) (Gainful Employment) and 81 FR 75926 (November 1, 2016) (Borrower Defense to Repayment).

² See www.ccaom.org.

³ See www.acaom.org.

the Council is to support its member colleges to deliver educational excellence and quality patient care.

Gainful Employment Rules

Nearly 50% of the Council's member schools are for-profit institutions to which USDE's gainful employment regulations apply. One of the Council's main concerns is that these regulations are generally unfair to the acupuncture educational sector, and specifically discriminatory to the for-profit college membership of that sector which has a very low federal student loan default rate. For both the nonprofit and for-profit acupuncture colleges that comprise the membership of the Council, that rate respectively averaged only 3.7% and 3.4% in 2012 and 4.16% and 4.43% in 2013.⁴ All of the Council's member colleges, whether they are for-profit or nonprofit programs, must meet the same stringent national education and training standards prescribed by ACAOM and obtain the same outcome measures for success by reference to loan default rates, accreditation status, and success on national certification and state licensure exams. According to ACAOM, no significant difference exists concerning the graduation rates or examination board scores when comparing the results of for-profit and non-profit acupuncture schools accredited by the Commission.⁵

Given the comparability in educational curriculum across the institutional membership of the Council, and low student loan default rates within the acupuncture educational sector as a whole, the Council does not believe there is a cogent justification for penalizing those member schools of the Council that are for-profit programs. A fairer evaluation of the success of an educational sector such as acupuncture should be predicated on the quality of the programs that prepare students for licensure in this healthcare field, not on a debt to earnings threshold that can substantially vary according to the particular circumstances of each graduate. In acupuncture education, quality is determined by ACAOM, the USDE-recognized accrediting agency that has had a successful history of working collaboratively with the USDE and state regulatory authorities to hold accountable the acupuncture programs and institutions the Commission accredits.

Not only are USDE's gainful employment regulations discriminatory as applied to for-profit versus nonprofit colleges within the acupuncture educational sector, but the rules fail to

⁴ These loan default rates are based on data supplied by ACAOM. For the year 2012, *see* Letter of August 1, 2016, from Mark McKenzie, Executive Director of ACAOM, to John B. King Jr., Secretary of the U.S. Department of Education, regarding USDE's proposed Borrower Defense to Repayment Regulations, 81 Fed. Reg. 39330-39422 (June 16, 2016), Docket No. ED-2015-OPE-0103, [file:///C:/Users/CCAOM/Downloads/160801_ACAOM_Comments_Def_to_Repayment%20\(1\).pdf](file:///C:/Users/CCAOM/Downloads/160801_ACAOM_Comments_Def_to_Repayment%20(1).pdf) [hereinafter cited as ACAOM BDRR Letter]. In 2013, the loan default rate for institutions accredited by ACAOM averaged 4.16% for nonprofits and 4.43% for the reporting for-profit institutions respectively. The 2013 data was supplied in an e-mail of July 11, 2017, from ACAOM to CCAOM's national office.

⁵ *Id.*

take account of the reality that most graduates of acupuncture programs enter private practice⁶ and may take five years or more to reach their income potential. Acupuncture, as an independent healthcare profession⁷ requiring a high-level of skill and 3-4 years of training, does not always return substantial income to practitioners in the early years of their practice.⁸ For example, the choice of some graduates to work less than full-time or in lower income settings as a public service affects their income level. Moreover, accredited acupuncture education is not available outside of programs that are regulated by ACAOM. The application of USDE's gainful employment debt to earnings threshold to for-profit acupuncture programs whose graduates have an income potential that may not mature for at least five years potentially jeopardizes the success of these schools. The continued operation of the nearly 50% of the Council's member colleges that are for-profit programs is essential for the development of skilled acupuncture practitioners who are currently licensed to practice in 47 states and the District of Columbia.

Furthermore, to ensure continued access to healthcare, it is most important that USDE not apply its current gainful employment regulations to graduate medical programs that lead to state licensure in a healthcare profession. ACAOM estimates that without some form of relief or suspension from the gainful employment regulations, some or all of the 26 for-profit acupuncture programs and institutions the Commission accredits may be forced to close or file bankruptcy in the next two years.⁹ As acupuncture has been recognized by the World Health Organization for treating an extensive list of diseases and disorders¹⁰ and consumer usage of acupuncture in the U.S. is on the rise,¹¹ the forced closure of nearly one-half of the acupuncture schools in the U.S. would be a devastating blow not only to the affected schools, but to aspiring practitioners (including low-income and minority students) and acupuncture's growing patient population in this country.

⁶ Some 58.2% of acupuncture practitioners practice as sole proprietors. See National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM), 2013 Job Analysis Report, [file:///C:/Users/CCAOM/Downloads/NCCAOM_2013_JA_Report%20\(2\).pdf](file:///C:/Users/CCAOM/Downloads/NCCAOM_2013_JA_Report%20(2).pdf) at p. 15.

⁷ In 2016 the acupuncture profession obtained an independent Standard Occupational Code (SOC) from the U.S. Bureau of Labor Statistics (BLS). The new code for Acupuncturists (SOC 29-1291) will be included in the next edition of the BLS Occupational Handbook, which will be published in 2018. See "Acupuncture Earns Unique Occupational Code from U.S. Bureau of Labor Statistics," Press Release of the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM), July 26, 2016, <http://www.nccaom.org/2016-press-releases/acupuncture-earns-unique-occupational-code>. See also <http://www.nccaom.org/bls>.

⁸ Based on the 2013 Job Analysis of the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM), the median annual income of practicing acupuncturists with a median 10 years of experience is \$52,000. See Descriptive Demographic and Clinical Practice Profile of Acupuncturists: An Executive Summary from the NCCAOM 2013 Job Analysis, at p. 30, [file:///C:/Users/CCAOM/Downloads/Executive_Summary_Descriptive_Demographic_and_Clinical_Practice_Profile_NCCAOM_2013_Job_Analysis%20\(7\).pdf](file:///C:/Users/CCAOM/Downloads/Executive_Summary_Descriptive_Demographic_and_Clinical_Practice_Profile_NCCAOM_2013_Job_Analysis%20(7).pdf).

⁹ ACAOM BDRR Letter, *supra* n. 4.

¹⁰ See World Health Organization, *Acupuncture: Review and Analysis of Reports on Controlled Clinical Trials*, http://www.who.int/otherpublications/acupuncture_WHO_full_report.pdf.

¹¹ See National Health Statistics Reports, *Trends in the Use of Complementary Health Approaches Among Adults: United States, 2002-2012* (Feb. 10, 2015) at p. 10, <https://www.cdc.gov/nchs/data/nhsr/nhsr079.pdf>.

Borrower Defense to Repayment Rules

The Council supports the desire of USDE to protect student loan borrowers from misleading, deceitful, and predatory practices of institutions that participate in the department's student aid programs and to provide debt relief for those students who may be victimized by these practices. The Council does not believe, however, that these practices are endemic within its acupuncture member college community, which as noted above has a low default rate for student loans regardless of the for-profit or nonprofit status of the college.¹² The Council's principal concerns regarding these regulations are noted below.

- **Misrepresentations by a School** (§§ 668.71 and 685.222): The regulations allow a borrower at any time to invoke a “false, erroneous, or misleading statement” by a school, its representatives, or advertising/recruiting agents, including a statement concerning the employability of the school's graduates, as a defense against repayment of an uncollected student loan without proof of any intent to deceive where the misrepresentation is substantial and based on a “preponderance of the evidence.” A borrower may also invoke any statement that omits information in such a way as to make the statement false, erroneous, or misleading.

The repeal of the former regulatory language that referenced statements by a school that have the likelihood or tendency “to deceive,” in preference for statements that have a tendency “to mislead under the circumstances,” coupled with the lesser standard of proof for a misrepresentation by a preponderance of the evidence, will open the door to frivolous or fraudulent claims by graduates who for a variety of reasons unrelated to representations by a school encounter challenges in obtaining gainful employment. Graduates from acupuncture schools primarily enter private practice and their income potential may take 3-5 years to mature and measure adequately. Moreover, the income of some graduates may be affected by their choice to work part-time for personal reasons or in low income areas as a public service. The regulations now heighten the possibility that a graduate who is professionally frustrated for any reason may assert a federal debt relief claim for career misrepresentation (i.e., lack of employability) against his or her acupuncture institution.

By reinstating the former regulatory requirement that ties misleading statements by a school to an intention by the institution to deceive students, the department will avoid unjustly enriching those students who may wish to avail themselves of the more permissive current regulations to avoid financial responsibility for their education on the basis of what may well be an unintended and correctable mistake by a school.

- **Prohibition against Use of School's Internal Complaint Process or Pre-Dispute Agreements** (§ 685.300): The prohibition against the initial use of a school's internal

¹² See n. 4 *supra* and accompanying text.

complaint process or a pre-dispute arbitration agreement for resolving student loan disputes in favor of a formal and intricate federal judicial or administrative claims procedure will have the following detrimental consequences for both the school and an affected student: (1) diminishment of the opportunity the school's internal process and/or arbitration agreement provides for flexibility in resolving the dispute based on the unique situation of the school and the student; and (2) exacerbation of the adversarial nature of the dispute at the expense of the mutual interest of the institution and the student in maintaining a continuing positive relationship as part of the student's educational experience. While this concern is applicable to all of the Council's member colleges, it is particularly germane to small acupuncture colleges (i.e., less than 50 students enrolled) where the relationship between the institution's administration and its students may be very close.

- **Warnings to Students** (§ 668.14): Requiring only for-profit colleges to warn prospective and enrolled students about the poor loan repayment rates of the institution's graduates fails to extend the benefit of the warning to students who attend nonprofit institutions and creates an inequitable disparity between non-profit and proprietary programs. If the department's intent is truly to protect student loan borrowers from misleading, deceitful, and predatory practices at institutions that participate in the department's student aid programs, then in fairness to all students and programs the regulations should be applied equally to for-profit and nonprofit institutions.
- **Letter of Credit** (§§ 668.171 and 668.175): Requiring a school before final judicial resolution of a legal claim to post a letter of credit in an amount of 10% or more of the value of federal financial assistance received by its enrolled students in the previous year could jeopardize the education of students at that school if the school has to divert resources that would otherwise be devoted to the educational program or if the school has to close because of the financial distress caused by the letter of credit requirement. This concern is particularly applicable to small acupuncture schools. In fairness to these schools, a letter of credit, which may be difficult to obtain for a school that is under a USDE mandate to provide evidence of financial stability, should only be required after a final decision has been rendered by a court on the merits of a legal claim.
- **Claims Resolution Process** (§ 685.222): The authority of the department under the regulations to appoint its own officials to preside over the fact-finding process and to render a final decision on the merits of a claim raises issues of potential agency bias and unfairness toward affected educational institutions. This concern is further underscored by the department's authority to define and advocate on behalf of a group of borrowers who the agency believes are similarly situated and to include in that group borrowers who

have not even filed a claim. Schools that are subject to a borrower's claim ought to have the right to defend against the claim on an individual basis.

In general the regulations appear to be a reaction to the collapse of for-profit Corinthian Colleges involving some 85,000 federal loan borrowers rather than a tailored response that takes account of much smaller educational sectors such as that of acupuncture educational institutions where total college enrollment (including branch campuses) through 2016 was around 7,000 and, as previously indicated, the loan default rate in 2012 for both nonprofit and for-profit institutions respectively averaged 3.7% and 3.4% and in 2013 was 4.16% and 4.43%.

Thank you, Secretary DeVos, for your consideration of the concerns raised in this letter about the department's Gainful Employment and Borrower Defense to Repayment rules. For the reasons stated in this letter, the Council believes that these rules are very unfair and onerous as applied to graduate medical educational programs such as those in the field of acupuncture.

Sincerely,

A handwritten signature in cursive script that reads "Misti Oxford-Pickeral".

Misti Oxford-Pickeral, M.Ac., A.P.
President