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13
14 **UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**

16 PIHMA Health & Education Network,
17 LLC d/b/a Phoenix Institute of Herbal
Medicine & Acupuncture (PIHMA)
18 a/k/a PIHMA College & Clinic, an
Arizona Limited Liability Company;
19 Emperor’s College of Traditional
Oriental Medicine, a California
20 Corporation; Pacific College of Oriental
Medicine, LLC, a California Limited
21 Liability Company; PCOM NY, LLC, a
New York Limited Liability Company
22 National Institute of Oriental Medicine,
Inc. d/b/a Florida College of Integrative
23 Medicine, a Florida Corporation;
Colorado School of Traditional Chinese
24 Medicine, a Colorado Corporation;
Texas Health & Science University, a
25 Texas Corporation; Acupuncture Center
Inc. d/b/a Midwest College of Oriental
26 Medicine, an Illinois Corporation;
Human Capital, Inc. d/b/a Southwest
27 Acupuncture College, a Colorado
Corporation; American Academy of
28 Traditional Chinese Medicine, Inc. a
Minnesota Corporation; AM College

Case No.

**COMPLAINT FOR PRELIMINARY
AND PERMANENT DECLARATORY
AND INJUNCTIVE RELIEF**

JABURG|WILK
Attorneys at Law

1 LLC d/b/a Acupuncture and Massage
2 College, a Florida Limited Liability
3 Company; American College of
Acupuncture & Oriental Medicine, Inc.,
a Texas Corporation,

4 Plaintiffs,

5 v.

6 Betsy DeVos, Secretary of the United
7 States Department of Education, in her
official capacity,

8 Defendant.

9
10 The Plaintiff Schools, set forth in the caption above and identified further herein,
11 for their Complaint for Preliminary and Permanent Declaratory and Injunctive Relief,
12 allege as follows:

13 INTRODUCTION

14 1. Plaintiffs are twelve private sector colleges and universities from across
15 the country offering advanced degrees in the practice of Acupuncture and Oriental
16 Medicine (“AOM”). For decades, the Plaintiff Schools have been eligible to participate
17 in federal financial aid programs (the “Title IV programs”) under Title IV of the Higher
18 Education Act (“HEA”), 20 U.S.C. §§ 1001 et seq., because, among other things, the
19 AOM programs of these schools “prepare students for gainful employment” in the
20 practice of AOM healthcare. 20 U.S.C. §§ 1002 (b)(1)(A).

21 2. The Plaintiff Schools undeniably offer high quality education in the study
22 of AOM, enjoy high graduation and placement rates, low student loan default rates, and
23 provide valuable service to their communities. Yet, despite their record of success, each
24 of the Plaintiff Schools now has an AOM program that is considered “failing” under the
25 so-called “gainful employment” regulation, 34 C.F.R. § 668.401 *et. seq.* (the “GE
26 Regulation”), promulgated by the U.S. Department of Education (the “Department”) in
late 2014.

27 3. The GE Regulation utilizes an arbitrary “debt-to-earnings test” in an
28 attempt to determine whether a program “prepare[s] students for gainful employment.”

1 The “debt-to-earnings test” is a one-size-fits-all statistical test, based solely on metrics
2 comparing the median debt of graduates in a particular program to their average
3 reported early career earnings (within 18 to 36 months of graduation), without any
4 exceptions or adjustments to account for unique circumstances of any particular
5 program and of the vocation for which it prepares students or the career choices made
6 by its students and graduates.

7 4. For the so-called 2015 debt measures year (or award year) gainful
8 employment debt to earnings rates (“2015 DE Rates”), graduates measured in these
9 rates are individuals graduating between July 1, 2010 and June 30, 2012 (or if there are
10 fewer than 30 program graduates in those two years, then also graduates from July 1,
11 2008 to June 30, 2010). The 2015 DE Rates compare annual debt service on the median
12 debt of these graduates (or, if lower, median debt of graduates in the same program
13 during the period of July 1, 2014 to June 30, 2015) to their calendar year 2014 earnings,
14 but only to those earnings in that year which were reported to the Social Security
15 Administration (“SSA”). 34 C.F.R § 668.404.

16 5. On January 9, 2017, the Department published the 2015 DE Rates, and the
17 AOM programs of the Plaintiff Schools all received “failing” 2015 DE Rates, i.e.,
18 regular earnings 2015 DE Rates in excess of 12.0% and discretionary earnings 2015 DE
19 Rates in excess of 30.0%.

20 6. As applied to the Plaintiff Schools, the “debt-to-earnings test” is arbitrary
21 and capricious because, among other things, it fails to consider or accommodate the fact
22 that a large majority of AOM graduates choose to establish their own practices, and
23 given the cash-pay nature of such practices and the time routinely required to build
24 clientele, such AOM practices typically have lower “net” earnings during the first
25 several years, which is exactly the time period when reported earnings are measured
26 under the GE Regulation.

27 7. A large majority of AOM graduates are self-employed practitioners, and
28 they enter school recognizing this as a likely career choice given limited AOM

1 employment positions in most communities, because, even while the AOM field of
2 healthcare is becoming accepted by and benefiting an increasing number of Americans,
3 AOM care still is not covered by most healthcare insurance plans. Students who want to
4 practice in AOM care do not have a wide range of employment options with hospitals,
5 clinics and private practice groups. Consequently, a majority of the graduates of the
6 AOM programs offered by the Plaintiff Schools establish their own AOM practice
7 shortly after graduation. The SSA reported net early career earnings of these self-
8 employed graduates, no matter the quality of their educational program, are
9 understandably lower in the early years of their careers while they build a client base
10 and still have office and other business expenses.

11 8. The characteristic of a majority of AOM graduates establishing their own
12 practices exists across all AOM degree programs, including degree programs offered by
13 nonprofit and public institutions, but those degree programs are not subject to the GE
14 Regulation since they are not offered by for profit institutions. Following the
15 Department's publication of its Notice of Public Rulemaking on March 25, 2014, 79
16 Federal Register 16426, AOM trade association comment letters informed the
17 Department about the self-employment characteristic of AOM program graduates, but
18 the Department failed to establish any special provisions for AOM programs, such as a
19 later earnings measurement point or a higher rate threshold for an acceptable rate.

20 9. Even if an AOM self-employed practitioner, in the GE earnings year, has
21 roughly the same level of fee revenue as an employed AOM practitioner, the self-
22 employed practitioner will have lower reported SSA earnings, not only because of cash
23 expenses of running a practice, but also because of non-cash business depreciation. The
24 GE Regulation fails to make any adjustment for this factor, as it is based on earnings
25 files maintained by SSA which are derived from tax returns filed with the Internal
26 Revenue Service, which, for self-employed taxpayers using either Schedule C or
27 Schedule SE, report taxable earnings that are net of depreciation and other business
28 expenses.

1 10. While many AOM graduates from the Plaintiff Schools have average
2 reported lower early career earnings, this is not proof that the AOM programs of the
3 Plaintiff Schools' programs fail to prepare their students for gainful employment. Quite
4 to the contrary, the Plaintiff Schools turn out graduates who become entrepreneurs and
5 small business owners, who pay back their loans and enjoy successful careers in the
6 practice of AOM, as reflected in the positive student outcome metrics of the schools and
7 the low student loan default rates of their student borrowers, rates that are comparable to
8 those of major public and private universities. It is also noteworthy that the Plaintiff
9 Schools, in providing faculty supervised clinical training for AOM students to prepare
10 them for gainful employment as AOM practitioners, have provided free or reduced
11 charge Acupuncture and Oriental Medicine services through their clinics to thousands
12 of individuals in the communities in which the schools are based.

13 11. Use of a "gainful employment" test or metric which measures only self-
14 reported net early career earnings of AOM graduates is inherently arbitrary, capricious
15 and unlawful as applied to the Plaintiff Schools and is not reasonably and sufficiently
16 related to an assessment of the extent to which AOM programs prepare their graduates
17 for gainful employment, a characteristic which the regulation claims is measured by the
18 metric.

19 12. As a result of the Plaintiff Schools' "failure" of the arbitrary "debt-to-
20 earnings" test with their 2015 DE Rates, they will be required to soon issue a "warning"
21 to current and prospective AOM students, unless any of the schools are able to
22 demonstrate a higher level of earnings – moving their 2015 DE Rates into a 'zone'
23 position – through earnings survey appeals that must be filed by March 10, 2017.
24 Because of the unreasonably high 50% response requirement for such earnings surveys
25 and the factors outlined in paragraphs 6 to 9, there exists a great risk that some or all of
26 the Plaintiff Schools will not win their earnings survey appeals and then will be required
27 to give "warnings." These "warnings" are designed and intended to cause immediate
28 and irreparable harm to the Plaintiff Schools by discouraging prospective students from

1 enrolling and encouraging existing students to withdraw from their current programs
2 and seek education elsewhere.

3 13. As a result of the foregoing, the Plaintiff Schools seek preliminary and
4 permanent injunctive and declaratory relief pursuant to 5 U.S.C. §§ 701, *et seq.*, 20
5 U.S.C. § 1082(a)(2), and 28 U.S.C. §§ 1331, and 2201-2202, declaring that the GE
6 Regulation is arbitrary, capricious and unlawful as applied to the Plaintiff Schools and
7 enjoining its enforcement as against the Plaintiff Schools.

8 **JURISDICTION AND VENUE**

9 14. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331,
10 the declaratory judgment provisions of 28 U.S.C. §§ 2201-2202, the provisions of the
11 Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701, *et seq.*, and the “sue and be
12 sued provision” of the Higher Education Act, 20 U.S.C. § 1082(a)(2).

13 15. Venue is proper in this Court under 28 U.S.C. § 1391(e), because Plaintiff
14 PIHMA Health & Education Network, LLC is incorporated under the laws of the
15 Arizona and has its principal place of business in Arizona.

16 **DEFENDANT**

17 16. Defendant Betsy DeVos (the “Secretary”), is the Secretary of the United
18 States Department of Education and is being sued in her official capacity. The
19 Secretary is the head of the Department, a federal agency which is responsible for the
20 administration of Title IV programs.

21 **THE PLAINTIFF SCHOOLS**

22 **1. Phoenix Institute of Herbal Medicine & Acupuncture**

23 17. Plaintiff PIHMA Health & Education Network, LLC d/b/a Phoenix
24 Institute of Herbal Medicine & Acupuncture, a/k/a PIHMA College & Clinic, is an
25 Arizona limited liability company, maintaining a campus in Phoenix, Arizona.

26 18. Phoenix Institute has been in operation since 1996, has participated in the
27 Title IV programs since 2005, and is accredited by the Accreditation Commission for
28

1 Acupuncture and Oriental Medicine (ACAOM), the accrediting agency recognized by
2 the Department for the approval of programs preparing AOM practitioners.

3 19. Phoenix Institute offers a Master of Science in Oriental Medicine program
4 and Master of Science in Acupuncture program, and has done so for 20 years.

5 20. Phoenix Institute currently has 93 students in its Master of Science in
6 Oriental Medicine and Master of Science in Acupuncture programs, and 47 full and part
7 time employees.

8 21. Phoenix Institute's Master of Oriental Medicine program and Master of
9 Acupuncture program represent approximately 100% of Phoenix Institute's enrollment
10 and 68% of its revenue.

11 22. Phoenix Institute's AOM programs post exceptional graduation,
12 placement and licensure exam passage rates.

13 23. A majority of graduates of Phoenix Institute's AOM programs
14 (approximately 80%) choose to become self-employed and do so within three years of
15 graduation.

16 24. The vast majority of Phoenix Institute's graduates are able to pay back
17 their loans. Phoenix Institute's most recent official three-year federal fiscal year cohort
18 loan default rates are 5.3% for FY 2013 and 2.6% for FY 2012 (the institution's FY
19 2011 two-year rate was 6.6%).

20 25. Phoenix Institute's Master of Oriental Medicine and Master of
21 Acupuncture programs prepare students for gainful employment in the practice of
22 AOM.

23 26. Despite its record of success, Phoenix Institute's Master of Oriental
24 Medicine and Master of Acupuncture programs are now considered "failing" programs
25 under the GE Regulation's "debt-to-earnings test."

26 **2. Emperor's College of Tradition Medicine**

27 27. Plaintiff Emperor's College of Traditional Medicine is a California
28 corporation, maintaining a campus in Santa Monica, California.

1 28. Emperor's College has been in operation since 1983, has participated in
2 the Title IV programs for 28 years, and is accredited by the ACAOM.

3 29. Emperor's College ranked #2 on TheBestAcupunctureSchools.com 2015
4 list of top Acupuncture schools in the United States.

5 30. Emperor's College currently has 240 students and 95 employees.

6 31. Emperor's College offers a Master of Traditional Oriental Medicine
7 program.

8 32. The Master of Traditional Oriental Medicine currently represents
9 approximately 85% of Emperor's College's total enrollment and 90% of its revenue.

10 33. Among other recognitions, in 2015 Emperor's College received a
11 commendation from the County of Los Angeles in recognition of service to veterans in
12 the community, and in 2013 the school received United States Congressional
13 Recognition of its 30th Anniversary and outstanding contributions to Oriental Medicine.

14 34. Emperor's College is a valuable asset to its community. Emperor's
15 College provides free Acupuncture services to the following medical clinics: 2000 to
16 present, Venice Family Clinic—the largest free clinic in the United States; 2000-2010,
17 Los Angeles Free Clinic (now called the Saban Clinic); 2013 to present, Being Alive, a
18 free clinic for those with AID/HIV. In addition, Emperor's College provided free
19 Acupuncture services at the 2014 and 2015 Los Angeles Veterans Stand Down and at
20 the 2015 and 2016 West Los Angeles VA Fair.

21 35. The 2015 Special Olympics World Games selected Emperor's College, its
22 alumni, faculty, and Master's and Doctoral students, to be the sole providers of holistic
23 wellness services to the over 7,000 athletes and coaches representing 165 nations from
24 around the world.

25 36. Emperor's College's AOM program posts exceptional graduation,
26 placement and licensure exam passage rates.

27

28

1 37. A majority of graduates of Emperor's College's AOM program
2 (approximately 80%) choose to become self-employed and do so within three years of
3 graduation.

4 38. The vast majority of Emperor's College's graduates are able to pay back
5 their loans. Emperor's College's most recent official three-year federal fiscal year
6 cohort loan default rates are: 5.4% - FY 2013, 4.7% - FY 2012, and 7.8% - FY 2011.

7 39. Emperor's College's Master of Traditional Oriental Medicine program
8 prepares its students for gainful employment in the practice of AOM.

9 40. Despite its record of success, Emperor's College's Master of Traditional
10 Oriental Medicine program is now considered a "failing" program under the GE
11 Regulation's "debt-to-earnings test."

12 **3. Pacific Colleges of Oriental Medicine – California & New York**

13 41. Plaintiffs Pacific College of Oriental Medicine, LLC (California) and
14 PCOM NY, LLC (New York), both d/b/a Pacific College of Oriental Medicine, are
15 postsecondary institution with campuses in San Diego, California, New York, New
16 York, and Chicago, Illinois.

17 42. Pacific Colleges offer, among other degrees, a Master of Traditional
18 Oriental Medicine.

19 43. Pacific Colleges have been in operation since 1986, have participated in
20 the Title IV programs for 26 years, and are accredited by ACAOM, and regionally
21 accredited by WASC Senior Colleges and University Commission.

22 44. Pacific Colleges currently have approximately 1200 students enrolled in
23 Title IV eligible programs, and more than 550 employees.

24 45. Pacific Colleges have received awards for their AOM curriculum and
25 clinical training, as well as research grants from the National Institutes of Health and
26 Patient-Centered Outcomes Research Institute, among others.

27 46. Pacific Colleges' Master of Traditional Oriental Medicine represents
28 approximately 85% of the schools' enrollment and 85% of the schools' revenue.

1 47. Pacific Colleges' AOM program posts exceptional graduation, placement
2 and licensure exam passage rates.

3 48. A majority of graduates of Pacific Colleges' AOM program
4 (approximately 80% or more) choose to become self-employed and do so within three
5 years of graduation.

6 49. The vast majority of Pacific Colleges' graduates are able to pay back their
7 loans. Pacific Colleges' most recent official three-year federal fiscal year cohort loan
8 default rates are: 8% - FY 2013, 9.9% - FY 2012, and 6.8% - FY 2011.

9 50. Pacific Colleges' Master of Traditional Oriental Medicine program
10 prepares students for gainful employment in the practice of AOM.

11 51. Despite their record of success, Pacific College's Master of Traditional
12 Oriental Medicine program is now considered a "failing" program under the GE
13 Regulation's "debt-to-earnings test."

14 **4. Florida College of Integrative Medicine**

15 52. Plaintiff National Institute of Oriental Medicine, Inc. d/b/a Florida
16 College of Integrative Medicine is a Florida corporation, maintaining a campus in
17 Orlando, Florida.

18 53. Florida College has been in operation for 26 years, has participated in the
19 Title IV programs since 1998, and is accredited by ACAOM.

20 54. Florida College currently has 95 students and 39 employees.

21 55. Florida College offers a Master of Science in Oriental Medicine, and has
22 done so since 1996.

23 56. Florida College's AOM program posts exceptional graduation, placement
24 and licensure exam passage rates.

25 57. A majority of the graduates of Florida College's AOM program
26 (somewhere between 50-75% of a typical graduating class of 15-25 students) choose to
27 become self-employed and do so within three years of graduation.

28

1 58. The vast majority of Florida College’s graduates are able to pay back their
2 loans. Florida College’s most recent official three-year federal fiscal year cohort loan
3 default rates are: 2.5% - FY 2013, 2% - FY 2012, and 9% - FY 2011.

4 59. Florida College’s Master of Traditional Oriental Medicine program
5 prepares its students for gainful employment in the practice of AOM.

6 60. Despite its record of success, Florida College’s Master of Traditional
7 Oriental Medicine is now considered a “failing” program under the GE Regulation’s
8 “debt-to-earnings test.”

9 **5. Colorado School of Traditional Chinese Medicine**

10 61. Plaintiff Colorado School of Traditional Chinese Medicine, Inc. is a
11 Colorado corporation, maintaining a campus in Denver, Colorado.

12 62. Colorado School of Traditional Chinese Medicine has been in operation
13 for 26 years, has participated in the Title IV programs since 2002, and is accredited by
14 ACAOM.

15 63. Since 1999, Colorado School of Traditional Chinese Medicine has offered
16 a Master of Science Traditional Chinese Medicine program.

17 64. Colorado School of Traditional Chinese Medicine currently has almost
18 100 students and 62 employees.

19 65. Colorado School of Traditional Chinese Medicine’s AOM program posts
20 exceptional graduation, placement and licensure exam passage rates.

21 66. A majority of graduates of Colorado School of Traditional Chinese
22 Medicine’s AOM program (approximately 79%) choose to become self-employed and
23 do so within three years of graduation.

24 67. The vast majority of Colorado School of Traditional Chinese Medicine’s
25 graduates are able to pay back their loans. Colorado School of Traditional Chinese
26 Medicine’s most recent official three-year federal fiscal year cohort loan default rates
27 are: 1.8% - FY 2013, 3.1% - FY 2012, and 5.7% - FY 2011.

28

1 68. Colorado School of Traditional Chinese Medicine’s Masters of Science
2 Traditional Chinese Medicine program prepares students for gainful employment in the
3 practice of AOM.

4 69. Despite its record of success, Colorado School of Traditional Chinese
5 Medicine’s Master of Science Traditional Chinese Medicine program is now considered
6 a “failing” program under the GE Regulation’s “debt-to-earnings test.”

7 **6. Texas Health and Science University**

8 70. Plaintiff Texas Health and Science University f/k/a Texas College of
9 Traditional Chinese Medicine is a Texas corporation, maintaining campuses in Austin
10 and San Antonio, Texas.

11 71. Texas Health and Science University has been in operation since 1990,
12 has participated in the Title IV programs for 25 years, and is accredited by ACAOM and
13 the Accrediting Council for Independent Colleges (“ACICS”).

14 72. For 27 years Texas Health and Science University has offered a Master of
15 Acupuncture and Oriental Medicine program.

16 73. In April of 2011, the Texas Higher Education Coordinating Board granted
17 a Certificate of Authority to Texas College of Traditional Chinese Medicine to award
18 the Master of Acupuncture and Oriental Medicine degree with a major in Acupuncture
19 and Oriental Medicine and the Bachelor of Science degree in Traditional Chinese
20 Medicine. Additionally, Texas College of Traditional Chinese Medicine was chosen by
21 Zhejiang Chinese Medical University to be the first institution in the United States
22 offering a Dual Degree program.

23 74. In 2014, Texas Health and Science University received recognition by the
24 President of the United States (The President’s Higher Education Community Service
25 Honor Roll) for “the extraordinary and exemplary community service contributions of
26 its students, faculty, and staff in meeting critical community and national needs.”

27 75. Texas Health and Science University currently has 128 students and 34
28 employees.

1 76. Texas Health and Science University's AOM program posts exceptional
2 graduation, placement and licensure exam passage rates.

3 77. A majority of graduates of Texas Health and Science University's AOM
4 program (for example, 74% for FY 2014) choose to become self-employed and do so
5 within three years of graduation.

6 78. The vast majority of Texas Health and Science University's graduates are
7 able to pay back their loans. Texas Health and Science University's most recent official
8 three-year federal fiscal year cohort loan default rates are: 12.5% - FY 2013, 3.1% - FY
9 2012, 9.0% - FY 2011.

10 79. Texas Health and Science University's Master of Acupuncture and
11 Oriental Medicine program prepares its students for gainful employment in the practice
12 of AOM.

13 80. Despite its record of success, Texas Health and Science University's
14 Master of Acupuncture and Oriental Medicine program is now considered a failing
15 program under the GE Regulation's "debt-to-earnings test."

16 **7. Midwest College of Oriental Medicine**

17 81. Plaintiff Acupuncture Center Inc., d/b/a Midwest College of Oriental
18 Medicine is an Illinois corporation, maintaining campuses in Evanston, Illinois and
19 Racine, Wisconsin.

20 82. Midwest College of Oriental Medicine has been in operation for 38 years,
21 has participated in the Title IV programs since 1991, and is accredited by ACAOM.

22 83. Midwest College of Oriental Medicine offers a Masters in Traditional
23 Chinese Medicine program, which currently represents approximately 75% of the
24 school's total enrollment.

25 84. Midwest College of Oriental Medicine currently has over 120 students
26 and 35 employees.

27 85. Midwest College of Oriental Medicine's AOM program posts exceptional
28 graduation, placement and licensure exam passage rates.

1 86. A majority of graduates of Midwest College of Oriental Medicine’s AOM
2 programs choose to become self-employed and do so within three years of graduation.

3 87. The vast majority of Midwest College of Oriental Medicine’s graduates
4 are able to pay back their loans. Midwest College of Oriental Medicine’s most recent
5 official three-year federal fiscal year cohort loan default rates are: 8.3% - FY 2013, 0%-
6 FY 2012, and 9% - FY 2011.

7 88. Midwest College of Oriental Medicine’s Master of Traditional Chinese
8 Medicine program prepares students for gainful employment in the practice of AOM.

9 89. Despite its record of success, Midwest College of Oriental Medicine’s
10 Master of Traditional Chinese Medicine program is now considered a “failing” program
11 under the GE Regulation’s “debt-to-earnings test.”

12 **8. Southwest Acupuncture College**

13 90. Plaintiff Human Capital Inc. d/b/a Southwest Acupuncture College is a
14 Colorado corporation, maintaining campuses in Boulder, Colorado and Santa Fe, New
15 Mexico.

16 91. Southwest Acupuncture College has been in operation for 37 years, has
17 participated in the Title IV programs for 31 years, and is accredited by ACAOM.

18 92. Southwest Acupuncture College offers a Master of Science in
19 Acupuncture, and has done so for 37 years.

20 93. Southwest Acupuncture College currently has 78 students at its Boulder,
21 Colorado campus, and 60 students at its Santa Fe, New Mexico campus, 29
22 administrative employees and 35 teachers.

23 94. Southwest Acupuncture College’s AOM programs posts exceptional
24 graduation, placement and licensure exam passage rates.

25 95. A majority of graduates of Southwest Acupuncture College’s AOM
26 programs (approximately 82%) choose to become self-employed and do so within three
27 years of graduation.

28

1 96. The vast majority of Southwest Acupuncture College’s graduates are able
2 to pay back their loans. Southwest Acupuncture College’s most recent official three-
3 year federal fiscal year cohort loan default rates are: 2.2% - FY 2013, 0% - FY 2012,
4 and 6.6% - FY 2011.

5 97. Southwest Acupuncture College’s Master of Science in Acupuncture
6 program prepares students for gainful employment in the practice of AOM.

7 98. Despite its record of success, Southwest Acupuncture College’s Master of
8 Science in Acupuncture program is now considered a “failing” program under the GE
9 Regulation’s “debt-to-earnings test.”

10 **9. American Academy of Acupuncture and Oriental Medicine**

11 99. Plaintiff American Academy of Acupuncture and Oriental Medicine, Inc.
12 is a Minnesota corporation, maintaining a campus in Roseville, Minnesota.

13 100. American Academy of Acupuncture and Oriental Medicine has been in
14 operation since 1997, has participated in the Title IV programs since 2003, and is
15 accredited by ACAOM.

16 101. American Academy of Acupuncture and Oriental Medicine offers a
17 Master of Acupuncture and Oriental Medicine program, in which 74 students are
18 currently enrolled, representing approximately 65% of the school’s total enrollment and
19 90% of its revenue.

20 102. American Academy of Acupuncture and Oriental Medicine currently has
21 23 full and part time employees.

22 103. American Academy of Acupuncture and Oriental Medicine’s AOM
23 program posts exceptional graduation, placement and licensure exam passage rates.

24 104. A majority of graduates of American Academy of Acupuncture and
25 Oriental Medicine’s AOM program choose to become self-employed and do so within
26 three years of graduation.

27 105. The vast majority of American Academy of Acupuncture and Oriental
28 Medicine’s graduates are able to pay back their loans. American Academy of

1 Acupuncture and Oriental Medicine’s most recent official three-year federal fiscal year
2 cohort loan default rates are: 0% - FY 2013, 5.4% - FY 2012, and 4.2% – FY 2011,

3 106. American Academy of Acupuncture and Oriental Medicine’s Master of
4 Acupuncture and Oriental Medicine program prepares students for gainful employment
5 in the practice of AOM.

6 107. Despite its record of success, American Academy of Acupuncture and
7 Oriental Medicine’s Master of Acupuncture and Oriental Medicine is now considered a
8 failing program under the GE Regulation’s “debt-to-earnings test.”

9 **10. Acupuncture and Massage College**

10 108. Plaintiff AM College, LLC d/b/a Acupuncture and Massage College is a
11 Florida limited liability company, maintaining a campus in Miami, Florida.

12 109. Acupuncture and Massage College has been in operation for 33 years, has
13 participated in the Title IV programs since 1999, and is accredited by ACAOM.

14 110. Since 1987, Acupuncture and Massage College has offered a Master of
15 Oriental Medicine program, which currently represents 75% of the school’s enrollment,
16 and 80% of its revenue.

17 111. Acupuncture and Massage College currently has 167 students and 32
18 employees.

19 112. Acupuncture and Massage College’s AOM program posts exceptional
20 graduation, placement and licensure exam passage rates.

21 113. A majority of graduates of Acupuncture and Massage College’s AOM
22 program (approximately 73% of licensed graduates from 2013 to present) choose to
23 become self-employed and do so within three years of graduation.

24 114. The vast majority of Acupuncture and Massage College’s graduates are
25 able to pay back their loans. Acupuncture and Massage College’s most recent official
26 three-year federal fiscal year cohort loan default rates are: 12.2% - FY 2013, 7.6% - FY
27 2012, and 10.2% - FY 2011.

28

1 115. Acupuncture and Massage College’s Master of Oriental Medicine
2 program prepares its students for gainful employment in the practice of AOM.

3 116. Despite its record of success, Acupuncture and Massage College’s Master
4 of Oriental Medicine program is now considered a “failing” program under the GE
5 Regulation’s “debt-to-earnings test.”

6 **11. American College of Acupuncture & Oriental Medicine**

7 117. Plaintiff American College of Acupuncture & Oriental Medicine, Inc. is a
8 Texas corporation, maintaining a campus in Houston, Texas.

9 118. American College of Acupuncture & Oriental Medicine has been in
10 operation since 1991, has participated in the Title IV programs since 1997, and is
11 accredited regionally by Southern Association of Colleges and Schools Commission on
12 Colleges and programmatically by the Accreditation Commission for Acupuncture and
13 Oriental Medicine (ACAOM), the accrediting agency recognized by the Department of
14 Education for the approval of programs preparing AOM practitioners.

15 119. American College of Acupuncture & Oriental Medicine offers a Master of
16 Acupuncture & Oriental Medicine program and has done so for 25 years.

17 120. American College of Acupuncture & Oriental Medicine currently has 100
18 students in its Master of Acupuncture & Oriental Medicine and 54 full and part time
19 employees.

20 121. American College of Acupuncture & Oriental Medicine's Master of
21 Acupuncture & Oriental Medicine program represents approximately 75% of
22 enrollment and 63% of its revenue.

23 122. American College of Acupuncture & Oriental Medicine's AOM program
24 posts exceptional graduation, placement and licensure exam passage rates.

25 123. A majority of graduates of American College of Acupuncture & Oriental
26 Medicine’s AOM program (approximately 80%) choose to become self-employed and
27 do so within three years of graduation.

28

1 124. The vast majority of American College of Acupuncture & Oriental
 2 Medicine's graduates are able to pay back their loans. American College's most recent
 3 official three-year federal fiscal year cohort loan default rates are 3.1% - FY 2013 and
 4 8.1% - FY 2012 (the institution's FY 2011 two-year rate was 4.1%). .

5 125. American College of Acupuncture & Oriental Medicine's Master of
 6 Acupuncture & Oriental Medicine prepares students for gainful employment in the
 7 practice of AOM.

8 126. Despite its record of success, American College of Acupuncture &
 9 Oriental Medicine's Master of Acupuncture & Oriental Medicine program is now
 10 considered a "failing" program under the GE Regulation's "debt-to-earnings test."

11 **GENERAL ALLEGATIONS APPLICABLE TO ALL COUNTS**

12 **1. The Acupuncture and Oriental Medicine Practice.**

13 127. Acupuncture and Oriental Medicine—while accepted by and benefiting an
 14 increasing number of Americans—is not covered by most healthcare insurance plans.
 15 As a result, students who want to practice in this field do not have a wide range of
 16 employment options with hospitals, clinics and private practice groups upon graduation.
 17 Consequently, a majority of these schools' graduates are self-employed in their own
 18 practice which they establish within three years of graduation.

19 128. In 2013, the National Certification Commission for Acupuncture and
 20 Oriental Medicine ("NCCAOM") produced a Job Analysis Report ("Job Analysis
 21 Report") based upon a survey of AOM practitioners, which can be found at this link:
 22 [http://www.nccaom.org/wp-](http://www.nccaom.org/wp-content/uploads/pdf/Executive_Summary_Descriptive_Demographic_and_Clinical_Practice_Profile_NCCAOM_2013_Job_Analysis.pdf)
 23 [content/uploads/pdf/Executive Summary Descriptive Demographic and Clinical Pra](http://www.nccaom.org/wp-content/uploads/pdf/Executive_Summary_Descriptive_Demographic_and_Clinical_Practice_Profile_NCCAOM_2013_Job_Analysis.pdf)
 24 [ctice Profile NCCAOM 2013 Job Analysis.pdf](http://www.nccaom.org/wp-content/uploads/pdf/Executive_Summary_Descriptive_Demographic_and_Clinical_Practice_Profile_NCCAOM_2013_Job_Analysis.pdf). Among other things, the survey
 25 asked respondents to identify their primary practice setting. According to the Job
 26 Analysis Report, 58% of respondents (869 of 1492) practiced as solo practitioners.
 27 Approximately another 26% of respondents indicated practice in a group setting. If
 28 respondents reported that they operated in a group, they were asked to identify their

1 primary practice setting. For those individuals, a majority (41%, 254 of 617) operated
2 as independent practitioners in shared spaces, and another 23% (140 of 617) either
3 owned or were partners in a group practice. Thus, the Job Analysis Report summarized
4 that most of the respondents practiced independently or as sole proprietors.

5 129. The results of the Job Analysis Report are consistent with the experience
6 of the Plaintiff Schools and the real world career decisions made by their students and
7 graduates.

8 130. The vast majority of the Plaintiff Schools' graduates choose to become
9 self-employed and start their own practice, and do so within three years of graduation.

10 131. A critical first step in the establishment of an AOM practice is gaining
11 board licensing in the state(s) in which the AOM practitioner is planning to practice.
12 While graduates of the AOM programs of the Plaintiff Schools have high licensing
13 exam pass rates, due to the timing of when such licensing examinations are held relative
14 to program graduation dates and the time required for typical pre-examination review
15 courses, the licensing process can take between 3 to 6 months. Additional time is
16 necessarily required for a newly licensed AOM practitioner to set up an office or clinic
17 and obtain any required local business permits. For AOM program students who
18 graduate toward the end of a GE two-year cohort period, the graduate may have been
19 self-employed for 12 months or less when his/her reported earnings are being measured
20 for the debt-to-earnings rates, such as students graduating in May 2012 (included in the
21 2015 DE Rates) who may not have begun to practice until sometime in calendar 2013
22 but their reported earnings in calendar 2014 were measured for the 2015 DE Rates.

23 132. Due to this unique aspect of the AOM practice, at the time of enrollment,
24 the Plaintiff Schools and their admissions staff discuss with prospective students that a
25 career in AOM is designed primarily for self-employment and that it may take several
26 years to build a practice.

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1 133. The Plaintiff Schools’ students recognize and accept at the time of
2 enrollment that building a practice (and patient base) in AOM may take years, with
3 lower initial earnings in the first few years.

4 134. The Plaintiff Schools’ graduates, in choosing self-employment as a career
5 choice, recognize and accept that expenses of setting up and running a new practice may
6 consume a large portion of revenue in the early years of the their practice, resulting in
7 lower initial “net” earnings and a larger percentage of their “net” earnings being
8 required for payment on their college debt.

9 135. The Plaintiff Schools’ students make reasoned decisions, at the time of
10 enrollment, to take on debt to finance tuition with the recognition that, given their
11 planned career choices (i.e., to establish a practice in AOM), the percentage of their
12 initial post-graduation earnings required to pay their college debt might be higher than
13 in other professions.

14 136. The overwhelming majority of the Plaintiffs’ Schools graduates are able
15 to successfully pay back their student loan debt.

16 **2. The Gainful Employment Regulation.**

17 137. Students are afforded the opportunity to pursue AOM educational
18 opportunities at Plaintiff Schools through federal financial aid administered by the
19 Department of Education under Title IV of the Higher Education Act, 20 U.S.C. §§
20 1070-1099d. In Title IV, Congress has established a comprehensive statutory
21 framework for determining eligibility for such financial aid. The central purpose of the
22 Higher Education Act is to “assist in making available the benefits of postsecondary
23 education to eligible students.” 20 U.S.C. § 1070(a).

24 138. Under the Higher Education Act, students may use Title IV funds only at
25 an eligible “institution of higher education.” 20 U.S.C. § 1070. Eligible “institutions of
26 higher education” include private sector “proprietary institution[s] of higher education.”
27 *Id.* § 1002(a)(1). These institutions, however, must “provid[e] an eligible program of
28

1 training to **prepare students for gainful employment in a recognized occupation.**” *Id.*
2 § 1002(b), (c)(emphasis added).

3 139. On October 31, 2014, the Department published the new “gainful
4 employment” regulations as a final rule with an effective date of July 1, 2015. 79 Fed.
5 Reg. 64889-65103. The GE Regulation ostensibly was designed to evaluate whether
6 programs “provid[e] an eligible program of training to prepare students for gainful
7 employment in a recognized occupation” as required under 20 U.S.C. § 1002(b) - (c).

8 140. The GE Regulation does not measure program quality, i.e., whether a
9 program “prepare[s] students for gainful employment” by equipping them with the
10 knowledge and skills to pass vocational licensing requirements and to perform
11 effectively within a particular vocation. Rather, it measures only how early net reported
12 earnings of *some* program graduates – those who received a federal student loan and/or
13 grant – compare to their average college loan debt. That is, the GE Regulation relies on
14 a single test—the “debt-to-earnings test”—as a one-size-fits-all statistical test, which is
15 based on metrics related to graduates’ reported recent earnings and college debt, without
16 regard to any unique circumstances of an institution or academic program or personal
17 career or life choices made by graduates. Notably, this test, without any sound
18 statistical reason and due only to data collection limitations of existing law, excludes
19 graduates who were able to pay for their college education without any federal student
20 aid.

21 141. The GE Regulation’s debt metrics do not depend on program quality, but
22 rather depend on factors outside of the control of an institution or an academic program,
23 including choices of graduates about what kind of jobs and employment terms (e.g.,
24 full-time, part-time, etc.) to pursue, the state of the economy and the job market in the
25 relevant industry, and the individual financial circumstances of students and the amount
26 of debt that they consequently incur to attend a program.

27 142. The debt-to-earnings test consists of two metrics: a debt-to-annual
28 earnings ratio and a debt-to-discretionary income ratio. A program that does not pass

1 one of these two metrics faces sanctions. For programs with “failing” rates for both
2 ratios, there are immediate sanctions.

3 143. The debt-to-earnings test evaluates the ratio of (1) the estimated annual
4 loan payment owed by students who graduated from a program and received Title IV
5 aid to (2) these graduates’ reported (a) average annual earnings or (b) discretionary
6 income. This complex calculation requires three steps: *First*, the Department calculates
7 the median loan debt amount of the relevant “cohort” of Title IV recipient students, i.e.,
8 those who completed the program during the relevant “cohort period.” *Second*, the
9 Department computes an estimated annual debt service payment for the median loan
10 debt amount, using a designated amortization schedule (15 years for bachelor and
11 master level programs). *Third*, the estimated annual debt service payment is divided by
12 two earnings formulas: (a) the higher of mean or median annual SSA reported earnings
13 of the Title IV recipient graduates during a designated earnings year which, for the 2015
14 DE Rates, is calendar 2014; and (b) the “discretionary income” for the same cohort of
15 graduates from the same designated earnings year, with “discretionary income” being
16 equal to the amount of annual earnings in excess of 150 percent of the Poverty
17 Guideline amount for a single person established by the Department of Health and
18 Human Services for the relevant year. See 34 C.F.R. § 668.404. At the present time, the
19 150 percent amount is roughly \$17,500.

20 144. A program is deemed to be “passing” under the debt-to-earnings test if its
21 official DE regular earnings rate is 8.0 percent or less or its official DE discretionary
22 income rate is 20.0 percent or less. 34 C.F.R. § 668.403(c)(1).

23 145. The GE Regulation also establishes a “zone” for gainful employment
24 programs that have a debt-to-annual earnings ratio between 8.1 percent and 12.0
25 percent, or a debt-to-discretionary income ratio between 20.1 percent and 30.0 percent.
26 34 C.F.R. § 668.403(c)(3).

27

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1 146. Gainful employment programs that have both a debt-to-annual earnings
2 ratio over 12.0 percent and a debt-to-discretionary income ratio over 30.0 percent are
3 “failing” under the debt-to-earnings test. 34 C.F.R. § 668.403(c)(2).

4 147. The Department does not itself compute the mean and median earnings of
5 a program’s Title IV recipient graduates in the third step. Rather, the Department
6 obtains from the SSA the mean and median annual reported earnings for the cohort
7 graduates during the designated calendar year, which for the 2015 DE Rates is calendar
8 year 2014.

9 148. Individual Title IV recipient graduates who are within the cohort for a
10 particular debt measure year DE rate will be excluded from the rate calculation only if,
11 at some point during the applicable calendar earnings year, they have or become: (a)
12 enrolled in a higher credential program at the subject institution; (b) enrolled in an
13 academic program at another postsecondary institution; (c) actively serving in a branch
14 of the armed forces; (d) permanently and totally disabled; or (e) died. Graduates with
15 other voluntary or involuntary circumstances during the earnings year that preclude or
16 limit earnings, e.g., establishment of a practice/business, pregnancy leave, medical
17 leave, caregiver role for a family member, volunteer service with a charitable
18 organization, part-time employment chosen to facilitate care of young children and
19 overseas residency and employment, are not excluded from the rate calculation. The
20 only other category of exclusion is for any cohort graduate for which the SSA does not
21 have an earnings record matching the name, social security number and date of birth of
22 the graduate. For any such missing file reported by SSA (SSA does not identify the
23 graduate), the Department removes from the institution’s program cohort the Title IV
24 recipient graduate with the highest debt.

25 149. The DE Rates for any particular debt measure year, such as the 2015 debt
26 measure year (also known as the 2015 Award Year or AY 2015), generally are made
27 using data for Title IV recipient students who graduated in a two-year period usually
28 consisting of the third and fourth award years prior to the most recently concluded

1 award year (the “two-year cohort period”). 34 C.F.R. §§ 668.402, 404(b)-(d). For
2 example, the 2015 DE Rates (for AY 2015 or the 12 month period ended June 30, 2015)
3 are based on data for Title IV recipient students graduating between July 1, 2010 and
4 June 30, 2012. If there are fewer than 30 Title IV recipient program graduates in the
5 two-year cohort period, then the cohort would be expanded to a four year period (“four-
6 year cohort period”), which, for the 2015 DE Rates would be the period from July 1,
7 2008 to June 30, 2012. If a program has less than 30 Title IV recipient graduates in the
8 four-year cohort period, it does not receive a DE Rate for that debt measures year.

9 150. Programs that have 30 or more Title IV recipient graduates during the
10 two-year cohort period used to generate a DE Rate will be judged based on the SSA
11 reported earnings of those graduates earned within 18 to 36 months from graduation.
12 For example, for the 2015 DE Rates, the focus is on the calendar 2014 reported earnings
13 of Title IV recipient students who graduated between July 1, 2010 and June 30, 2012.

14 151. Programs that fail to satisfy the debt-to-earnings test are subject to a
15 variety of mandatory sanctions. A program loses Title IV eligibility if it fails the debt-
16 to-earnings test for two out of three consecutive years, or if it has a debt-to-annual
17 earnings ratio or a debt-to-discretionary income ration that is either failing or “in the
18 zone” for four consecutive years.

19 152. A program that loses eligibility for Title IV funds cannot seek to
20 reestablish eligibility for that program until at least three years later. 34 C.F.R. §
21 668.410(b)(2)(i).

22 153. More immediately, programs facing potential ineligibility in the next year
23 must provide written warnings to “[current] students and prospective students” about
24 their programs. 34 C.F.R. § 668.410(a)(1). That is, schools with a program that could
25 become ineligible under either metric in the following year must provide a written
26 warning to each prospective and current student, informing them that they “may not be
27 able to use” federal funding to pay for the program because it has failed the
28 Department’s debt metrics. *Id.* § 668.410.(a)(2)(i).

1 154. Schools must also provide a warning to any student who “has contacted . .
2 .or who has been contacted” by an “institution or by a third party on behalf of the
3 institution.” *Id.* § 668.402. Schools must provide the warning “at first contact” with the
4 prospective student or any “third party acting on behalf of the student.” *Id.* §
5 668.410(a)(6).

6 155. In addition to the warning requirement, under other new regulations
7 promulgated on November 1, 2016, 81 Fed. Reg. 75926 (sometimes known as the
8 “Borrower Defense Regulations”), and set to become effective on July 1, 2017, an
9 institution with a program that has one failing DE Rate will be required to establish in
10 favor of the Secretary a letter of credit in an amount equivalent to at least ten percent
11 (10%) of the total amount of Title IV federal student aid funds disbursed to students at
12 the institution in its most recently completed fiscal year, if the removal of revenues and
13 expenses attributable to the failing program would lower the institution’s financial
14 responsibility “composite score” below 1.0 (the “GE Letter of Credit Requirement”). 34
15 C.F.R. §§ 668.171 (c)(1)(iv) & (c)(2)(iv), 668.175 (f).

16 156. The GE Regulation official preamble reported that, for FY 2010, there
17 were 37589 GE programs with total enrollment of 3,985,329 students. 79 Fed. Reg. at
18 65026-29. Schools are not furnished with any of individual earnings records used by the
19 SSA and cannot challenge the mean and median reported earning calculations made by
20 the SSA for their GE programs. The GE Regulation does not identify any audit or
21 review process employed by the SSA, or by any other agency or office with
22 responsibility for overseeing the work of SSA, to ensure the accuracy of SSA’s
23 calculations of mean and median earnings for the thousands of GE programs which
24 exist.

25 157. Schools can challenge the SSA mean and median earnings calculations for
26 a particular GE program only by pursuing an “alternate earnings” appeal based either on
27 (a) earnings information obtained from any state maintained earnings database that can
28 provide applicable calendar year earnings for at least 50% of cohort graduates or (b)

1 earnings information for the applicable calendar year obtained from at least 50% of the
2 cohort graduates through a school survey conducted in accordance with standards
3 developed by the National Center for Education Statistics and specified by the
4 Department (sometimes called a “RGEES” survey). 34 C.F.R. § 668.406. The
5 Department’s selection of a 50% response rate for school earnings survey is neither
6 warranted nor reasonable under statistical theory and relevant circumstances.

7 158. For the 2015 DE Rates issued on January 9, 2017, a notice of intent had to
8 be filed with the Department by January 23, 2017 and earnings appeal materials must be
9 filed by March 10, 2017. The Plaintiff Schools are pursuing timely earnings appeals
10 based on graduate earnings surveys but are concerned that such appeals may not result
11 in their AOM program 2015 DE Rates being moved from “failing” status to “zone”
12 status, due to the 50% response rate and the relatively low net reported early career
13 earnings of their many self-employed AOM graduates.

14 159. Schools are provided with a limited opportunity to challenge the debt
15 information used by the Department to calculate DE rates. While the GE Regulation
16 addresses three types of debt taken on by a student to pay for enrollment in a GE
17 Program, i.e. Title IV federal student loan debt, private education lender debt and
18 student obligations owed directly to a school, 34 C.F.R. §§ 668.404 & 668.405, the debt
19 challenge process used by the Department in late 2016 with respect to the 2015 DE
20 Rates focused on only on federal student loan debt and did not afford an adequate
21 opportunity for institutions to challenge and seek correction of inaccurate debt
22 information for private lender debt and school debt. One of the Plaintiff Schools,
23 Midwest College of Oriental Medicine, despite following the debt challenge process
24 outlined in published guidance given by the Department, was unable to gain correction
25 of erroneous and highly inflated debt information used to calculate its 2015 DE rates.

26 **3. The Immediate and Irreparable Harm Intended to be Caused**
27 **By And Likely to Soon Occur from the Warning Requirement.**

28 160. As set forth above, each of the Plaintiff Schools has an AOM program that
is now considered “failing” under the GE Regulation’s “debt-to-earnings” test. In the

1 absence of an unlikely earnings appeal outcome that lowers these rates to a “zone”
2 level, and absent injunctive relief or repeal of the GE Regulation, each of the Plaintiff
3 Schools will be required to issue ominous warnings to current and prospective students.

4 161. To be sure, these warnings are designed and intended to, and will, cause
5 significant immediate and irreparable harm to the Plaintiff Schools. That is, the
6 warnings are designed and intended to cause students not to enroll, or to leave the
7 Plaintiff Schools and seek education elsewhere. The Preamble to the GE Regulation
8 makes this clear. According to the Department:

- 9
- 10 a. Warnings “will help prospective students make informed
11 decisions about where to pursue their postsecondary education. Some students who receive a warning may decide to transfer to
12 another program or choose not to enroll in such a program.” 79
13 Fed. Reg. 64964.
 - 14 b. “We recognize that some students who receive a warning about
15 a program may decide to transfer to another program or choose
16 not to enroll in the program.” *Id.*
 - 17 c. “We further believe that students are more likely to factor the
18 information contained in the warning into their financial and
19 educational decisions if the warning is delivered when the
20 student is in the process of making an enrollment decision.” 79
21 Fed. Reg. 64970.
 - 22 d. “We continue to assume that a high proportion of students in
23 poorly performing programs will transfer as a large majority of
24 programs will meet the standards of the regulations and students
25 will have access to the information that will help them identify
26 programs that lead to good outcomes.” 79 Fed. Reg. at 65078.

27 162. In other words, the Department’s belief, intent and goal, is that a “high
28 proportion” of students receiving the warnings will not enroll or will drop out of the
29 Plaintiff Schools.

30 163. Indeed, the Department projects that, for the initial DE Rates (the 2015
31 DE Rates forecasted to be issued in 2016 but actually issued on January 9, 2017), in

1 failing or zone programs (the chart also mentions “ineligible” programs, but there are
 2 not yet any “ineligible” programs because it takes two annual “failing” rates to reach
 3 ineligible status), out of 718,310 students in programs forecasted to be in zone, failing
 4 or ineligible, 274,933 will transfer or drop out. 79 Fed. Reg. at 65082 & 65097. Thus,
 5 the Department projects that approximately one-third (1/3) of all students in programs
 6 with a “failing” or “zone” rate will transfer or drop out of the Plaintiff Schools.

7 164. If one-third or more of students withdraw from the Plaintiff Schools, it
 8 will be economically difficult for these schools to continue offering the AOM programs
 9 and to continue operating as schools. This economic difficulty will be greatly
 10 exacerbated by the GE Letter of Credit Requirement set to become effective as of July
 11 1, 2017.

12 165. If the Plaintiff Schools are forced to discontinue offering their AOM
 13 programs and to close their schools, this will result in Plaintiffs losing their economic
 14 investment in their schools, their employees losing their jobs, remaining students
 15 suffering disruption in their education, the federal government having to forgive federal
 16 student loans for any students who are unable to complete their programs, and the
 17 communities in which their schools are based losing AOM training capacity which
 18 ultimately will impact availability of affordable high-quality AOM healthcare to the
 19 public.

20 COUNT I

21 **The GE Regulation, as Applied to the AOM Programs of the Plaintiff Schools and 22 Other Institutions, is Arbitrary and Capricious in Violation of the Administrative Procedure Act**

23 166. Plaintiffs restate and incorporate herein by reference the above allegations
 24 set forth in paragraphs 1 to 165 hereof, as though fully set forth herein.

25 167. The Court is required, under the federal Administrative Procedure Act, 5
 26 U.S.C. §§ 705-706, to declare unlawful and to enjoin and set aside any agency action or
 27 regulation that is arbitrary or capricious or otherwise contrary to law.

28

1 168. The GE Regulation, as applied to AOM programs, is inherently arbitrary
2 and capricious in its use of an early net reported career earnings measurement point for
3 graduates of such programs, without use of any adjustment to “passing”, “zone” and
4 “failing” thresholds or other alternative measurements of program quality.

5 169. The record of the Department’s rulemaking process for the GE Regulation
6 demonstrates that the Department was made aware of the unique self-employment
7 characteristic of AOM program graduates and careers and the business expense impact
8 on SSA reported earnings of self-employed graduates, all as outlined in paragraphs 6-9
9 hereof. The Department failed to account for these significant proven historical factors
10 in the methodology of the GE Regulation and the preamble to the Regulation fails to
11 articulate any sound and empirically based reason for not establishing adjustments to the
12 DE Rates methodology or alternative measures of program quality for AOM programs.

13 170. The DE rate calculation processes, as established in the GE Regulation, do
14 not identify sufficient audit and review processes to ensure that GE rates generated and
15 issued by the Department are accurate. These apparent limitations, on information and
16 belief, are cause for concern about the accuracy of DE rates in light of two recent data
17 limitation and data accuracy events, i.e., the Department’s announcement in September
18 2016 that it would not be able to calculate median debt and placement rates for
19 disclosures to be made by institutions and the Department’s announcement in December
20 2016 that repayment rates calculated for the College Scorecard were not accurate.

21 171. The DE rate challenge processes, including the limited exclusions for
22 special graduate circumstances during the applicable earnings year, the ineffective debt
23 challenge and correction process and the earnings survey 50% response level
24 requirement, are deficient in nature and not reasonably related to or justified by the
25 purposes announced in the GE regulation and the manner in which DE rates are to be
26 calculated under the GE Regulation.

27 172. Accordingly, the GE Regulation, as applied to the AOM programs of the
28 Plaintiff Schools and of any other postsecondary institutions offering such programs, is

1 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with
2 law, in violation of 5 U.S.C. § 706(2)(A), and this Court should declare the GE
3 Regulation to be unlawful as applied to the AOM programs of the Plaintiff Schools and
4 should enjoin Defendant from enforcing the warning requirement and any of the
5 program eligibility components and sanctions of the GE Regulation, including the
6 related GE Letter of Credit Requirement, against the AOM programs of the Plaintiff
7 Schools and any comparable AOM programs of other postsecondary institutions.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, the Plaintiff Schools respectfully request declaratory and
10 equitable or injunctive relief against Defendant, Betsy DeVos, the Secretary of the
11 United States Department of Education, as follows:

12 A. A preliminary injunction, pursuant to 5 U.S.C. § 705 and Rule 65
13 of the Federal Rules of Civil Procedure, enjoining any action by the Department to
14 enforce the GE Regulation, and the related GE Letter of Credit Requirement, as against
15 the AOM programs of the Plaintiff Schools until conclusion of all proceedings in this
16 case;

17 B. A preliminary injunction, pursuant to 5 U.S.C. § 705 and Rule 65
18 of the Federal Rules of Civil Procedure, enjoining any requirement for the Plaintiff
19 Schools to issue any warning statements until conclusion of all proceedings in this case;

20 C. A declaratory judgment that the GE Regulation is unlawful,
21 arbitrary and capricious as applied to the AOM programs of the Plaintiff Schools;

22 D. A permanent injunction prohibiting the Department from enforcing
23 the GE Regulation against the AOM programs of the Plaintiff Schools;

24 E. An award to the Plaintiff Schools all of their expenses of this
25 litigation, including reasonable attorneys' fees, pursuant to the Equal Access to Justice
26 Act, 28 U.S.C. § 2412; and

27 F. Such other and further legal and equitable relief as the Court deems
28 just and proper.

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DATED this 21st day of February, 2017.

Jaburg & Wilk, P.C.

/s/ David N. Farren

David N. Farren

Attorneys for Plaintiffs

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Attorneys at Law