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BEFORE THE  
APPEAL PANEL OF THE  
AMERICAN OSTEOPATHIC ASSOCIATION  
COMMISSION ON OSTEOPATHIC COLLEGE ACCREDITATION

*In re: Lake Erie College of Osteopathic Medicine, Appellant*

On Appeal from a Decision of the  
Commission on Osteopathic College Accreditation  
Denying Reconsideration of an  
Initial Decision Denying a  
Substantive Change Request for an  
Additional Location and Class Size Increase

APPEAL PANEL MEMBERS:

Paul E. LaCasse, DO, MPH  
Chair

Cheryl B. Doane, DO, MEd.  
Bruce B. Cunningham, DO  
Lloyd J. Cleaver, DO, FAOCD  
Frank Kelly

Appeal Hearing: May 2, 2017  
Decision Issued: July 2, 2017

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APPEARANCES:

For:

Lake Erie College of  
Osteopathic Medicine:

Denise A. Lazar, Esq.  
Barnes & Thornburg, LLP  
Chicago, IL  
Counsel for Lake Erie College of Osteopathic Medicine

Silvia M. Ferretti, DO  
Provost, Vice President and Dean of Academic Affairs  
Lake Erie College of Osteopathic Medicine

Richard R. Terry, DO, MBA  
Regional Dean, Chief Academic Officer  
Lake Erie Consortium for Osteopathic Medical Training  
Lake Erie College of Osteopathic Medicine

For:

Commission on Osteopathic  
College Accreditation:

Brian G. Kim, Esq.  
Interim Secretary  
Commission on Osteopathic College Accreditation and  
Associate General Counsel  
American Osteopathic Association

Alissa P. Craft, DO, MBA  
Immediate Past Secretary  
Commission on Osteopathic College Accreditation and  
Immediate Past Vice President of Accreditation  
American Osteopathic Association

Andrea Koepke, PhD, RN  
Associate Vice President for Accreditation  
American Osteopathic Association

Chantel Ishola, PhD  
Accreditation Manager  
American Osteopathic Association

Wambui Wang'ombe  
Accreditation Manager  
American Osteopathic Association

Wonda Stubbs  
Senior Coordinator, Accreditation  
American Osteopathic Association

Lake Erie College of Osteopathic Medicine (LECOM) appeals the decision of the Commission on Osteopathic College Accreditation (COCA) denying LECOM's request for reconsideration of an initial denial of its request for a substantive change to establish an additional location in Elmira, New York, and also to increase its class size by 80 students per year resulting from establishment of the additional location. For the reasons stated below, and upon a review of the record before the Appeal Panel, the Appeal Panel affirms the decision of the COCA. Because the Appeal Panel affirms the COCA's decision regarding the additional location, the issue as to LECOM's request to increase the class size is moot.

The record consists of the following:

1. LECOM Appeal Request Cover Letter (February 13, 2017)
  - a. LECOM Notice of Appeal (February 13, 2017)
  - b. COCA Accreditation Standards (eff. July 1, 2015)
  - c. COCA Decision Denying LECOM's Request for Reconsideration (December 16, 2016)
  - d. LECOM's Request for Reconsideration of COCA Decision Denying Substantive Change Request (October 14, 2016)
  - e. LECOM Substantive Change Request and Supporting Documents (May 31, 2016)
  - f. COCA Letter to LECOM (May 6, 2016)
  - g. COCA Letter to LECOM (September 11, 2015)
2. LECOM's Substantive Change Request and Supporting Documents
  - a. LECOM-Elmira Letter and Feasibility Study and Exhibits (May 31, 2016)
  - b. LECOM First Amendment to Collaborative Agreement (June 2, 2016)
  - c. LECOM Preliminary Designs
  - d. LECOM Revised Timeline for Construction
  - e. LECOM All Campus Budget Revised
  - f. LECOM Clinical Rotation Charts
  - g. Letters of Comment
    - i. Eastern Niagara Hospital Letter of Support (June 9, 2016)
    - ii. LECOM Letter re: NYSOMS Letter (May 26, 2016)
    - iii. NYSOMS Comment Letter (May 20, 2016)
    - iv. NYSOMS Letter of Support (June 8, 2016)
    - v. Samaritan Medical Center Letter of Support (June 17, 2016)
3. COCA Decision Denying LECOM's Substantive Change Request (September 14, 2016)
4. COCA Minutes - LECOM Excerpt (August, 2016 COCA Meeting)

5. LECOM-Elmira Request for Reconsideration of COCA Final Action and Exhibits (October 14, 2016)
6. COCA Final Action on LECOM's Request for Reconsideration of COCA's Decision Denying LECOM's Substantive Change Request (December 16, 2016)
7. COCA Minutes - LECOM Excerpt (December 2-4, 2016 COCA Meeting)
8. Transcript of the May 2, 2017 Hearing before the Appeal Panel

### **PROCEDURAL HISTORY**

This appeal arises from a COCA decision, dated December 16, 2016, to deny LECOM's request for a reconsideration of COCA's September 14, 2016 denial of LECOM's request for a substantive change.<sup>1</sup> The procedural history of LECOM's request for a substantive change, however, dates to January, 2015. By letter, dated January 22, 2015, LECOM submitted its initial notice of intent to submit a substantive change request to establish an additional location in Elmira, New York, and to increase its class size resulting from the additional location. LECOM submitted its materials supporting the substantive change request on or about May 29, 2015. Upon receipt of a request for substantive change, the COCA may evaluate the request along with a comprehensive evaluation or a full survey that includes a site visit. The COCA determined that a comprehensive evaluation to consider the *de novo* request was unnecessary because, although LECOM had had its last comprehensive site visit more than four years before the consideration of the request for a substantive change, LECOM had: 1) no then outstanding findings from its last comprehensive site visit from 2010; 2) no requests for additional information after a review of its mid-cycle report in 2015; and 3) no requests for additional information after a review of its

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<sup>1</sup> A substantive change is one that affects "the educational mission, program, or programs of an institution after the [accrediting] agency has accredited or preaccredited the institution [and] does not adversely affect the capacity of the institution to continue to meet the [accrediting] agency's standards." 34 CFR § 602.22(a). Among the various items that may be considered a substantive change, the establishment of an additional location and an increase in class size are substantive changes under §602.22.

annual report in 2015. Therefore, the COCA determined that it was not then necessary to conduct a site visit to evaluate the substantive change request for an additional location. The COCA considered LECOM's request for a substantive change and denied the request at its meeting on August 29, 2015. This denial was communicated by letter, dated September 11, 2015.

On January 14, 2016, LECOM again submitted to the COCA a *de novo* notice of a substantive change request to establish an additional location in Elmira, New York, with a class size of 80 students to enter in the fall of 2017.<sup>2</sup> Again, for the same reasons stated above, the COCA determined that a site visit was not necessary to evaluate this *de novo* request. The COCA reviewed the January 14 request and denied the request at its meeting in April, 2016. This denial was documented in a letter, dated May 6, 2016.

On May 31, 2016, LECOM again submitted a *de novo* notice of a substantive change request for an additional location. Again, the COCA determined that a site visit was not necessary for the same reasons stated above. The COCA considered this *de novo* request at its August 26-28, 2016 meeting, and denied the request by letter, dated September 14, 2016. Thereafter, by letter, dated October 14, 2016, LECOM submitted a request for reconsideration of the COCA's denial of LECOM's May 31 *de novo* request.

The COCA considered LECOM's request for reconsideration at its December 2-4, 2016 meeting. At that time, the COCA recognized that LECOM had met more of the criteria then in effect than in any of LECOM's prior submissions. Specifically, the COCA concluded that LECOM had met the following criteria:

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<sup>2</sup> Although LECOM could have done so, it did not request reconsideration or appeal of the COCA's September 11 or May 6 denial actions.

- 1) LECOM had obtained the appropriate licenses and permissions to offer the degree of Doctor of Osteopathic medicine;
- 2) LECOM had appropriate accreditation status from both the COCA and any other national accrediting agency;
- 3) LECOM demonstrated a degree of local support;
- 4) LECOM presented sufficient evidence of clinical training sites for clinical rotations in the third and fourth year of the curriculum;
- 5) LECOM's graduate medical education (GME) feasibility report demonstrated sufficient GME opportunities for its graduates;
- 6) LECOM demonstrated sufficient student services; and
- 7) LECOM demonstrated sufficient financial stability through projected revenues balanced against projected expenditures and cash flow at the additional location.

However, as further discussed below, the COCA found that LECOM did not meet three other criteria as to the proposed faculty, the facility (operation, management, and physical resources), and the proposed curriculum; thus the COCA denied LECOM's request for reconsideration.

LECOM failed to meet these three criteria in each of its prior submissions, and again, the COCA deemed these criteria not met. Consequently, the COCA denied LECOM's request for reconsideration of the September 14, 2016, decision. The COCA issued its denial of the reconsideration by letter, dated December 16, 2016.

LECOM now appeals the COCA's denial of the reconsideration. The Appeal Panel heard oral argument from LECOM through counsel. Although the COCA appeal procedures provide

for it, the COCA did not offer oral argument, but instead, relied on the record and its written decision of December 16, 2016.<sup>3</sup>

### FACTS

The COCA is a 17-member commission, the function of which is to serve “the public by establishing, maintaining, and applying accreditation standards and procedures to ensure that academic quality and continuous quality improvement delivered by the colleges of osteopathic medicine (COMs) reflect the evolving practice of osteopathic medicine.”<sup>4</sup> The COCA is comprised of: one dean from a public college of osteopathic medicine; one dean from a private college of osteopathic medicine; two educators from colleges of osteopathic medicine, but who are not deans of a college of osteopathic medicine; one director of medical education who must be from an internship or residency program approved by the American Osteopathic Association Program and Trainee Review Council; one hospital administrator; three public members who have experience in higher education or accreditation or public service that allow the public member to bring the perspective of one or more “external publics” to the evaluation of colleges of osteopathic medicine; and eight at-large members who are osteopathic physicians who are members of the American Osteopathic Association (AOA).

Among other things, the COCA serves as the accrediting agency for COMs in the United States, and in this capacity, the COCA “reviews, evaluates, and takes final action on college accreditation status.”<sup>5</sup> The Secretary of the U.S. Department of Education “recognizes

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<sup>3</sup> See *Transcript* (May 2, 2017), at 12-13. Furthermore, While Brian G. Kim is both Associate General Counsel to the American Osteopathic Association and Interim Secretary to the COCA, he participated in the proceedings in his capacity as Interim Secretary to the COCA, and not as counsel to the COCA. See also, *infra*, n.32.

<sup>4</sup> *Commission on Osteopathic College Accreditation Handbook*, at 3.

<sup>5</sup> *Id.*

accrediting agencies to ensure that these agencies are, for the purposes of the Higher Education Act of 1965 [20 U.S.C. § 1099b], as amended (HEA), or for other Federal purpose, reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit.”<sup>6</sup> In this regard, and specifically with respect to LECOM, the COCA is a programmatic accrediting agency, which is “an agency that accredits specific educational programs that prepare students for entry into a profession, occupation, or vocation[,]”<sup>7</sup> such as a COM would provide. The COCA received this recognition in 1952 and has maintained that status since.<sup>8</sup> The COCA is the only accrediting agency that accredits osteopathic medical schools in the United States.<sup>9</sup>

LECOM is a college of osteopathic medical college established in 1992. In addition to LECOM’s main campus in Erie, Pennsylvania, LECOM operates a branch campus in Bradenton, Florida, and an additional location at Seton Hill University in Greensburg, Pennsylvania. LECOM received pre-accreditation from COCA’s predecessor, the AOA Bureau of Professional Education in January, 1993. Thereafter, LECOM was awarded provisional accreditation in February, 1993, and full accreditation status in June, 1997. LECOM now desires to add an additional location in Elmira, New York, with a class size of 80 students. LECOM submitted a notice of intent to submit a request for substantive change to the COCA in January, 2015. Since then, as described above, the COCA has denied the request, leading to this appeal.

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<sup>6</sup> 34 C.F.R. § 602.1(a).

<sup>7</sup> 34 C.F.R. § 602.3

<sup>8</sup> See

<https://ope.ed.gov/accreditation/ViewAgencyInfo.aspx?agencyId=6167656e637949643d3438267264743d362f32382f3230313720343a333383a303920504d&tp=undefined>

<sup>9</sup> The COCA is the programmatic accreditor for the majority of the COMs accredited by the COCA. *Id.* For a handful of COMs, the COCA is the institutional accreditor. *Id.*



LECOM supported its request for substantive change with an extensive feasibility study. The COCA found that many of the submissions supported the feasibility of an additional location. However, the COCA found inadequate LECOM's proposed delivery of the curriculum, proposed faculty adequacy model, and the physical resources. Accordingly, this factual recitation will focus on these three areas of concern.

In its feasibility study, LECOM proposed the following with respect to the preclinical curriculum:

The LECOM-Elmira Additional Location will offer the Doctor of Osteopathic Medicine (D.O.) degree. The LECOM Predoctoral Curriculum is a four-year program divided into Preclinical and Clinical Curriculum – each two years. The two-year Preclinical Curriculum consists of two phases. The first phase is the Core Basic Science Curriculum followed by the System-Based Curriculum. *This curriculum will be delivered from LECOM-Erie (site of origin) to LECOM-Elmira by synchronous videoconferencing.* The decision for this mode of instruction was predicated on recent literature review [of] which indicated that the learning outcomes for videoconferencing lectures – in medical student performance on national boards – were not statistically different from live lectures (Exhibit 4-1 Research Articles on Effectiveness of Videoconferencing in Medical Education.) The format in this study was also a lecture curriculum similar to LECOM's systems-based curriculum.<sup>10</sup> [Italics supplied].

LECOM's proposed curriculum delivered at the Elmira campus, therefore, will be identical to that of the curriculum delivered at the Erie campus. LECOM proposes to deliver the preclinical curriculum through synchronous videoconferencing, and submitted various articles on the effectiveness of delivering a curriculum through such methods.

In its request for reconsideration, LECOM elaborated on the curriculum as follows:

In Erie, the total class size is 250, comprised of Lecture Discussion Pathway (LDP) with 180 students, Directed Study Pathway (DSP) with 30 students, and Problem Based Learning (PBL) with 40 students. This translates to a ratio of faculty to student for LDP of 1:180. In small courses such as Geriatrics, which is comprised of two live lectures and directed study, and includes all pathways on

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<sup>10</sup> LECOM-Elmira Letter and Feasibility Study and Exhibits (May 31, 2016), at 200 (hereafter cited as "Study").

the Erie campus as well as the Seton Hill campus, the ratio would be 1:354. When lectures are transmitted to the Seton Hill campus, a designated faculty member from Seton Hill is present in the Seton Hill lecture hall to facilitate, so the ratio on that campus would be 2:104, or 1:52. For all lectures, the LECOM Elmira students will have the lecturer in Erie plus 2 faculty facilitators in Elmira, which produces a faculty to student ratio of 3:80 or approximately 1:26. (Study at page, 86).<sup>11</sup>

According to LECOM, delivering the curriculum in this manner still allows the students in the Erie campus to have the opportunity to ask questions throughout and immediately following the lecture. In addition, LECOM asserts, students may reach the lecturer directly following the lecture, by email, or by making a personal appointment with the lecturer. Because the same lecture will be synchronously transmitted via a Polycom system, students at the Elmira campus will be able to ask questions of the lecturer during the lecture, similar to Erie students. Unlike the Erie students, the Elmira students may not follow up with the ease or convenience as the Erie students. In lieu of direct access to the lecturer, LECOM proposes to place two “whole time” faculty facilitators at the Elmira lecture site who can address any questions the Elmira students may have following a lecture.<sup>12</sup>

LECOM further asserts that lectures would be recorded and placed on the learning management portal for all students to access. Following the lecture, Elmira students, like the Erie students, may contact the lecturer via email similar to the Erie students and a videoconference is readily available through the Educational Liaison or by appointment directly with the faculty member. LECOM anticipates that the majority of questions will be answered by the two on-site facilitators. According to LECOM, having the two faculty facilitators available in the classroom during the lectures would provide the Elmira students with the advantage of having four faculty

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<sup>11</sup> LECOM-Elmira Request for Reconsideration of COCA Final Action and Exhibits (October 14, 2016), at 1-2 (hereafter cited as “Request for Reconsideration”).

<sup>12</sup> *Id.*, at 2.

members as resources if help is needed on a specific lecture topic. LECOM maintains a mandatory attendance policy on all campuses for all pathways, which LECOM contends is further assurance of a student's engagement in, and with, the curriculum.<sup>13</sup>

Furthermore, LECOM asserts that faculty advisors serve as resources for its students. According to its Request for Reconsideration, LECOM states, "On the Erie campus, 28 faculty members serve as advisors to the students during their preclinical years with the majority of faculty members having 10 advisees/year or a total of 20 advisees for the OMS1 and OMS2 classes. The Elmira campus will have 9 faculty members serving as preclinical advisors, resulting in each advisor having 9 or 10 advisees/year with a maximum of 20 advisees, which is the same as the Erie campus. (Study at page, 286-287)." A searching review of the Study did not yield these statistics as represented in the Request for Reconsideration.

With respect to the adequacy of the faculty at the Elmira campus, LECOM offered a faculty adequacy model initially established for the Erie campus and approved by the COCA in 2010. For the Elmira campus, LECOM proposes to allocate a total of 1,856 available hours for each "whole time"<sup>14</sup> faculty member, calculated as follows: (40 hours/week x 52 weeks = 2080)<sup>15</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> LECOM uses the term "whole time" to denote faculty members with contractual agreements requiring day-to-day participation in LECOM activities. The COCA uses the term "Faculty, full-time." In the Glossary of terms in *Accreditation of Colleges of Osteopathic Medicine: COM Accreditation Standards and Procedures* (eff. July 1, 2015) (hereafter cited as *COM Standards*), at 84, a COM must publish its own definition of full-time faculty. That definition must meet the requirements of Standard Four regarding faculty, as well as the requirements in the Glossary. The requirements regarding faculty will be addressed more in detail *infra*. The Appeal Panel is entirely unfamiliar with the term "whole time" faculty, particularly in view of the fact that LECOM also uses the term "full-time" in describing other staff at the Elmira campus. See Study, at 288. Other than to state that this is LECOM's preferred terminology with respect to the faculty, LECOM offers no substantive definition to clarify whether a "whole time" faculty member may reasonably be counted as an "FTE" or a full-time faculty member for purposes of the faculty adequacy model.

<sup>15</sup> LECOM's calculation assumes an eight-hour work day.

hours) - (8 holidays (64 hours) + 20 vacation days (160 hours) = 224 hours). The 1,856 hours includes teaching, service, and research, with each area equally allocated within the 1,856 hours, or 619 hours dedicated to each area. As described in the Study, the Elmira faculty *facilitates* the lectures delivered from the Erie campus.<sup>16</sup> Following a detailed mathematical calculation of the necessary hours versus the available hours for teaching, service, and research to explain its faculty adequacy model at the Elmira campus, LECOM asserted its conclusion that it had met the criterion for faculty to establish an additional location with regard to the faculty adequacy model. Irrespective of LECOM's use and purported definition of "whole time" faculty, if the COCA did not understand or accept LECOM's definition of that term as applied through the *COM Standards*, COCA is entitled to its interpretation of its own rules in rejecting LECOM's preferred use.

In addition, LECOM submitted a list of *potential* candidates, along with each of their *curricula vitae*, who might be considered for faculty positions at the Elmira campus.<sup>17</sup> LECOM asserted in its Request for Reconsideration that the *COM Standards* "do not require a COM to submit faculty information with [a] level of specificity[.]" and that the COCA could not "expect LECOM to list the exact qualifications of faculty it has not yet hired."<sup>18</sup> As to each potential

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<sup>16</sup> See Study, at 285-88 (Examples of facilitation by faculty are as follows: "During Phase I, the five Basic Science Faculty members will facilitate all preclinical lectures[;]" "The anatomist will be responsible for facilitating all anatomy lectures and conducting anatomy forums and laboratories and will facilitate an equitable portion of the remaining lectures[;]" "Content experts will be assigned to those specific lectures and will assist in facilitating other courses[,] as well[;]" "When Phase 2 begins (Systems), the clinical lectures will be facilitated by a clinician and/or a basic science faculty member[;]" "Facilitation of lectures at Elmira will require less preparation time than an actual lecture, but the facilitator will be expected to review the material sufficiently to answer any questions[;]" "There are 320 lecture hours presented by clinicians that will also require facilitation by a Basic Science Faculty member[;]" "This equates to 64 hours per faculty member to facilitate during the Systems Curriculum. . .")

<sup>17</sup> Study, at 290-92; 322-414. See also Request for Reconsideration, at 7 ("Nonetheless, LECOM did present a list of potential faculty members for the Elmira location, all of whom are eminently qualified professionals.").

<sup>18</sup> Request for Reconsideration, at 7.

faculty member; LECOM states that each individual “will serve” in a certain capacity, but each is still identified as a “potential” faculty member.<sup>19</sup> LECOM did not provide, nor refer to, any potential or impending employment arrangement between LECOM and any of the listed potential candidates.

Finally, LECOM presented further information regarding the shared space with Elmira College. Specifically, LECOM included a Collaborative Agreement, executed on May 30, 2015, with its Request for Reconsideration, in which LECOM and Elmira College agree to “collaborate in the establishment and operation of a site for the instruction of LECOM students pursuing the degree of doctor of osteopathic medicine[.]”<sup>20</sup> Notably, the Collaborative Agreement states that LECOM’s proposed Elmira campus “shall be . . . linked through the use of distance learning technology at LECOM’s principal campus in Erie, Pennsylvania.”<sup>21</sup> The Collaborative Agreement further provides that Elmira College would lease 5,700 square feet of classroom space and 14,200 square feet of laboratory space, as well as approximately 1,500 square feet of office space for administrative needs. In addition, the Collaborative Agreement provides for LECOM’s use of the “health sciences simulation suites [at Elmira College] . . . , provided such use does not interfere or conflict with use of the Suites by the College’s students.”<sup>22</sup> Should LECOM students wish to use the health sciences simulation suites, LECOM must “direct requests for use of the Suites to the College’s Dean of Health Sciences, who shall

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<sup>19</sup> Study, at 290-92.

<sup>20</sup> *Id.*, at 471.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, at 474.

determine whether and how such requests will be accommodated.”<sup>23</sup> In the event LECOM requires additional space for classrooms, laboratories, or meeting spaces in addition to those anticipated for lease<sup>24</sup> under the Collaborative Agreement, Elmira College may provide the additional space “to the extent available.”<sup>25</sup>

Under the Collaborative Agreement, the COCA’s grant of approval of the additional location at the Elmira campus is one of the conditions precedent to establishing a site at Elmira College.<sup>26</sup> In the event the COCA does not formally approve the request for an additional location as of May 1, 2016, the commencement date of the Collaborative Agreement is postponed for one year, or until July 1, 2017, and ending on June 30, 2037. In the further event COCA’s approval is delayed beyond May 1, 2017, the delay shall be deemed a denial of the request and shall entitle either LECOM or Elmira College to terminate the Collaborative Agreement.<sup>27</sup>

Following the COCA’s September 14, 2016 decision, LECOM submitted an amendment to the Collaborative Agreement as part of its request for reconsideration.<sup>28</sup> Under this amendment, LECOM agreed to lease an additional 4,900 square feet of space for administrative

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<sup>23</sup> *Id.*

<sup>24</sup> Although the Collaborative Agreement refers to a lease and a ground lease (Study, at 472 and 474), each of which was to be attached as exhibits to the Collaborative Agreement, neither document was attached nor available to the COCA when it reviewed the Collaborative Agreement. Those documents are also not part of this record and the Appeal Panel, similarly, did not review the lease or the ground lease.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*, at 481. The other conditions precedent are LECOM’s receipt of approvals from the Middle States Association of Colleges and Schools and the New York State Board of Regents.

<sup>27</sup> *Id.*, at 482. By these terms, then, the Collaborative Agreement was subject to termination by either Elmira College or LECOM when the Appeal Panel held the hearing in this matter on May 2, 2017.

<sup>28</sup> See First Amendment to Collaborative Agreement (June 2, 2016).

and faculty offices and other programmatic purposes to be determined by LECOM, subject to the lease between LECOM and Elmira College.<sup>29</sup> Following the submission of the First Amendment to the Collaborative Agreement, LECOM submitted a Second Amendment to the Collaborative Agreement, in which Elmira College now agrees to permit LECOM “to use the health science simulation suites . . . to the extent necessary for the fulfillment of LECOM’s curricular requirements on a mutually agreed upon schedule.”<sup>30</sup>

On these facts, the COCA, in its December 16, 2016 decision, denied LECOM’s request for reconsideration following the COCA’s denial of the *de novo* request. The COCA found that LECOM failed to meet the criteria for substantive change to establish an additional location, based on the proposed curriculum, faculty, and operation, management, and physical resources. As stated above, the COCA granted the reconsideration regarding LECOM’s proposed clinical training sites, and therefore, that part of the decision is unaffected by the instant decision. On the three bases on which the decision was based, the COCA stated its denial as follows:<sup>31</sup>

The proposed curriculum - Not Met. There was substantial discussion of the curriculum being the same as that offered at the parent Erie, PA campus. However, the COCA expressed concern surrounding sufficiency of support of that curriculum on the Elmira, NY campus given the description of faculty members to be located on that campus. The ratio of faculty to students on the Erie campus appears to be twice as high as that on the Elmira campus, resulting in concern for how the same curriculum would be both delivered and received by the learner. The COCA also expressed concern as to how clinical skills training and osteopathic manipulative treatment would be taught to students on the Elmira

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<sup>29</sup> *Id.*, at 1. Despite the reference to a lease between LECOM and Elmira College, no lease has been included with the First Amendment. *See also* n.24, *supra*. Indeed, the amendment integrates the terms of the Collaborative Agreement, and the entire agreement remains subject to termination by either party, irrespective of the amendment.

<sup>30</sup> *See* Second Amendment to Collaborative Agreement (October 11, 2016). *See also* n.27 and n.29, *supra*. Again, as with the First Amendment, the Second Amendment does not address the immediate terminable status of the Collaborative Agreement.

<sup>31</sup> *See* COCA Decision Denying LECOM’s Request for Reconsideration (December 16, 2016), at 1-2 (hereafter cited as COCA Decision (Dec. 16, 2016)).

campus given the full time faculty numbers, especially when there are two classes of students receiving those courses.

Faculty – Not Met. In addition to the faculty concerns addressed under criterion 4 (above), the COCA also expressed a lack of clarity surrounding the exact number of FTE faculty members as well as clearly understanding the qualifications and degrees of the faculty members who will be teaching at the Elmira campus. The record demonstrates an insufficiency as to the faculty adequacy model and how additional responsibilities such as, clinical care, research, student advising, and committee work will factor into the faculty adequacy model for both full time and part time faculty members on the Elmira campus. COCA was also concerned that the adequacy model did not give appropriate consideration to the added time required for faculty in Erie to respond to questions from students viewing the same lectures in Elmira. Neither the written submissions nor the oral testimony provided information sufficient for the COCA to consider this criterion to be met.

Operation, management, physical resources – Not Met. The agreement between LECOM and Elmira College indicates that access to shared space on the Elmira College campus would occur only after Elmira College students are accommodated. Because LECOM students may have insufficient study space as a result, and because LECOM students may have a secondary status regarding use of facilities vis-à-vis Elmira College students, the COCA could not conclude that LECOM students would have adequate access to small group learning and study rooms and access to simulation laboratory activities. The contractual arrangement for payment for use of the simulation laboratory and the impact on the operating budget for LECOM-Elmira was not sufficiently explained or demonstrated in either the written submission or in the testimony.

Thus, the COCA affirmed its earlier decision to deny the request for substantive change for an additional location, and further denied LECOM's request for reconsideration.

### LECOM'S BASES FOR APPEAL<sup>32</sup>

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<sup>32</sup> Although LECOM poses this appeal as an adversarial proceeding *against* COCA, it is not an adversarial proceeding. In rendering the decision on LECOM's request for reconsideration, the COCA exercised an adjudicatory function, and in all of the prior COCA proceedings, no evidence contesting LECOM's evidence to support its request, *de novo* or otherwise, was offered to, requested by, or received by, the COCA. The Appeal Panel notes that the instant record is the product of a unilateral submission of evidence by LECOM and the decisions made by the COCA. The COCA's adjudicatory function is based on the requirements mandated by the U.S. Department of Education by recognizing organizations such as the COCA, to make accreditation decisions, and requiring such accrediting agencies to have in place procedures that satisfy due process. See 34 C.F.R. § 602.25.



In this appeal, LECOM asserts that the COCA: “a) made errors of significant magnitude, and b) departed from the standards of accreditation, as those standards are defined in the Accreditation Standards.”<sup>33</sup> Supporting its assertion regarding COCA’s purported departure from standards regarding the issue of curriculum, LECOM contends that it submitted a “thorough and detailed description of the curriculum to be offered at Elmira, and LECOM’s experience with that curriculum at Erie.”<sup>34</sup> LECOM further asserts that the COCA’s determination regarding the curriculum was made into an issue about faculty. According to LECOM, the COCA’s “reference to faculty support, and particularly to faculty to student ratios, is a clear departure from the Standards of Accreditation.”<sup>35</sup> LECOM asserts that it “cannot even discern which standards the COCA may have been referring to [*sic.*], because the *curriculum standards make no mention whatsoever of faculty support or faculty to student ratios.*”<sup>36</sup> [Italics and underscoring in original]. LECOM asserts that the COCA created its own standards and then declared that LECOM failed to meet them.

LECOM also challenges the COCA’s decision regarding the curriculum as an error of significant magnitude, asserting that the COCA departed so dramatically from the standards “going so far as to create ad hoc [*sic.*] requirements[,]” that LECOM could discern what errors the COCA made in applying the standards.<sup>37</sup> Thus, LECOM concludes that the COCA’s decision rested on the synchronous videoconferencing method of delivering the curriculum.<sup>38</sup>

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<sup>33</sup> LECOM Notice of Appeal (February 13, 2017), at 2. *See also COM Standards*, at 53.

<sup>34</sup> *Id.*, at 3.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*, at 3-4.

<sup>37</sup> *Id.*, at 4.

<sup>38</sup> *Id.*

Furthermore, LECOM asserts that the COCA did not consider the proposed additional on-site faculty at the Elmira campus in making its decision.<sup>39</sup>

With regard to the issue relating to the faculty, LECOM asserts that the hours calculated for its faculty at the Elmira campus meet the faculty adequacy model, having “conclusively demonstrated that the faculty hours available for the new Elmira campus will exceed the necessary hours.”<sup>40</sup> Thus, LECOM asserts that the COCA’s determination in this regard was both a departure from standards and an error of significant magnitude. Furthermore, LECOM asserts that the COCA created its own *ad hoc* faculty adequacy model in contravention to the *COM Standards*.<sup>41</sup> On this issue, LECOM further challenges the COCA’s determination regarding the qualifications of the list of potential faculty members who would be on-site facilitators of lectures delivered from the Erie campus.<sup>42</sup> The appeal on this point is also based on the COCA’s purported departure from standards, as well as an error of significant magnitude.

Finally, LECOM asserts that the COCA departed from standards and made an error of significant magnitude by refusing to consider the *post hoc* submission of the amendments to the Collaborative Agreement.<sup>43</sup>

Each ground for appeal will be addressed.

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<sup>39</sup> *Id.*, at 5.

<sup>40</sup> *Id.*, at 6.

<sup>41</sup> *Id.*, at 7.

<sup>42</sup> *Id.*, at 7-8.

<sup>43</sup> *Id.*, at 9-10.

## DISCUSSION

### A. The COCA Appeal Process

As required by the U.S. Department of Education, an accrediting agency, such as the COCA, must provide “an opportunity . . . for the institution or program to appeal any adverse action prior to the action becoming final.”<sup>44</sup> Pursuant to this mandate, the COCA has written procedures as to both reconsideration and appeal of an adverse action.<sup>45</sup> Therefore, a COM “has the opportunity to make a request for reconsideration of a COCA Accreditation decision not more than thirty (30) days following the receipt of the COCA decision.”<sup>46</sup> Following the reconsideration of an accreditation action before the COCA, a COM may appeal a COCA decision upon receipt of the final disposition of the request for reconsideration.<sup>47</sup> The basis of an appeal is limited to alleged bias, injustice or error of sufficient magnitude to warrant a change in the COCA’s action, or a departure from the standards of accreditation.<sup>48</sup> An appeal of a COCA decision is heard by an Appeal Panel comprised of five members that includes one public member. The members of an Appeal Panel are selected from a list of former COCA members who were not COCA members at the time the COCA rendered the adverse decision.<sup>49</sup> The Appeal Panel may: 1) sustain the original action of the COCA; 2) amend the original action of the COCA; 3) reverse the original action of the COCA; or 4) remand the original action of the

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<sup>44</sup> 34 C.F.R. § 602.25(f).

<sup>45</sup> *See COM Standards*, at 52-55. In this appeal, and throughout the proceedings before the COCA, the standards in effect in 2015 have been, and are, applied, because the initial request for substantive change was submitted in May, 2015.

<sup>46</sup> *Id.*, at 52.

<sup>47</sup> *Id.*, at 52.

<sup>48</sup> *Id.*, at 53.

<sup>49</sup> *Id.*, at 54.

COCA with specific issues to be addressed by the COCA based upon a finding of the presence of bias, injustice, error or departure from the standards and procedures.<sup>50</sup>

B. Substantive Change - Additional Location

Under 34 C.F.R. § 602.22, a request to establish an additional location by a COM constitutes a substantive change. Accrediting agencies must have “adequate substantive change policies that ensure that any substantive change to the mission, program, or programs of an institution after the agency has accredited or preaccredited the institution does not adversely affect the capacity of the institution to continue to meet the agency’s standards.”<sup>51</sup> The *COM Standards* cite ten criteria that a COM must meet in order to obtain approval of a request for substantive change to establish an additional location.<sup>52</sup> Of the ten criteria, the COCA found that LECOM failed to meet the criteria with respect to curriculum, faculty and physical resources.<sup>53</sup>

While the criteria do not specifically cite to the standards, the COCA must necessarily refer to the standards in order to evaluate whether or not each criterion is met, as well as the impact of the substantive change on the COM as whole (*i. e.*, redistribution of resources within the COM). Accordingly, an evaluation of the faculty must be made under Standard Four: Faculty; an evaluation of the proposed curriculum must be made under the auspices of Standard Six: Curriculum; and an evaluation of the facility must be made under Standard Three: Facilities, Equipment, and Resources. To do otherwise, would render the criteria meaningless. The

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<sup>50</sup> *Id.*, at 55.

<sup>51</sup> 34 C.F.R. § 602.22(a).

<sup>52</sup> *COM Standards*, at 67-68.

<sup>53</sup> COCA Decision (Dec. 16, 2016), at 1-2.

application of the criteria and the standards is discussed below following a discussion of the applicable legal principles that guide the Appeal Panel's decision.

C. Standard of Review and Guiding Legal Principles

The Appeal Panel is guided by federal jurisprudence on accreditation decisions.<sup>54</sup> Since the Seventh Circuit decided *Chicago School of Automatic Transmissions v. Accreditation Alliance of Career Sch. & Colleges*,<sup>55</sup> the federal courts have widely adopted the principles of administrative law in reviewing accreditation decisions.<sup>56</sup> Therefore, the proper standard of review of a private accrediting agency considers only whether the accreditation decision is based on substantial evidence.<sup>57</sup> In this regard, courts agree that "elementary principles of administrative law call for significant, though not total, deference to decisionmaking by

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<sup>54</sup> The Appeal Panel looks to federal case law because the COCA's accrediting authority arises under the Higher Education Act of 1965, P.L. 89-329, 20 U.S.C. § 1099b, as amended, and the regulations promulgated thereunder at 34 C.F.R. pt. 602. Congress has determined that any civil action brought by an institution of higher education seeking accreditation from an accrediting agency, such as COCA, "shall be brought in the appropriate United States district court." 20 U.S.C. § 1099b(f). Accordingly, federal common law is an appropriate source of guidance in the Appeal Panel's review of the COCA's decision in the instant case. *Prof'l Massage Training Ctr. v. Accreditation Alliance of Career Sch. & Colls.*, 781 F.3d 161, 170 (4th Cir.2015) (citing *Thomas M. Cooley Law Sch. v. ABA*, 459 F.3d 705, 712 (6th Cir.2006) ("This grant of exclusive federal jurisdiction necessarily implies that federal law should govern disputes relating to decisions made by [accrediting agencies]." (brackets in original)); see also *Chicago Sch. of Automatic Transmissions v. Accreditation Alliance of Career Sch. & Colleges*, 44 F.3d 447, 449 (7th Cir.1994) (If a grant of federal jurisdiction sometimes justifies creation of federal common law, a grant of exclusive jurisdiction necessarily implies the application of federal law.").

<sup>55</sup> 44 F.3d at 449 ("We think that principles of federal administrative law supply the right perspective for review of accrediting agencies' decisions").

<sup>56</sup> See, e.g., *Thomas M. Cooley*, 459 F.3d at 712-13; *Fine Mortuary College, LLC v. Am. Bd. Of Funeral Serv. Educ., Inc.*, 473 F.Supp.2d 153, 157-58 (D.Mass.2006) ("When proceeding under the exclusive grant of federal jurisdiction provided by the HEA, 20 U.S.C. § 1099b(f), courts analyze a claim for violation of common law due process in a manner similar to the inquiry under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), (D)) (citing *Chicago Sch. of Automatic Transmissions*, 44 F.3d at 449); *Massachusetts Sch. of Law v. ABA*, 1997 U.S. Dist. LEXIS 7033, at \*20 (D.Mass.1997) (citing *Chicago Sch. of Automatic Transmissions*, 44 F.3d at 449).

<sup>57</sup> *Prof'l Massage Training Ctr.*, 781 F.3d at 166.

accreditation agencies.”<sup>58</sup> Accrediting agencies perform a quasi-public function and their “wide-ranging expertise in what may be highly technical and specialized fields of education also provide justification for a deferential standard.”<sup>59</sup> The Fourth Circuit relied on the *Chevron*<sup>60</sup> doctrine, stating that an “accreditation agency’s expertise and knowledge merit a measure of deference from generalist federal courts.”<sup>61</sup> In addition to the accrediting agency’s expertise, “the agency’s executive staff [has] experience with the accreditation process as well as with higher education, including but not limited to ‘curriculum development, faculty and academic administration, and distance learning[.]’”<sup>62</sup> Therefore, in the accreditation process, “experts”<sup>63</sup> perform important fact-finding missions akin to investigative undertakings at federal agencies. And because “standards of accreditation are not guides for the layman but for professionals in the field of education[.]”<sup>64</sup> the federal courts should not “presume to be equipped to ‘substitute [their] judgment for the professional judgment of the educators involved in the accreditation process.’”<sup>65</sup> Concomitant to a court’s review of an accrediting agency’s decision against the backdrop of common law due process, “courts should primarily focus on whether the accrediting

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<sup>58</sup> *Id.*, at 169 (citing *Thomas M. Cooley*, 459 F.3d 705; *Wilfred Acad. Of Hair & Beauty Culture v. S. Ass’n of Colls. & Schs.*, 957 F.2d 210 (5th Cir.1992); *Chicago Sch. of Automatic Transmissions*, 44 F.3d 447).

<sup>59</sup> *Prof’l Massage Training Ctr.*, 781 F.3d at 171.

<sup>60</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)

<sup>61</sup> *Prof’l Massage Training Ctr.*, 781 F.3d at 171.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*, at 172.

<sup>64</sup> *Id.* (quoting *Parsons Coll. V. N. Cent. Ass’n of Colls. & Secondary Schs.*, 271 F.Supp. 65, 73 (N.D.Ill.1967)).

<sup>65</sup> *Prof’l Massage Training Ctr.*, 781 F.3d at 172, (quoting *Wilfred*, 957 F.2d at 214).

body's internal rules provide[d] a fair and impartial procedure and whether it [followed] its rules in reaching its decision.”<sup>66</sup>

The Appeal Panel looks to this well-established standard of review as a guiding principle in reviewing the COCA's decision. Under the standard of review stated in the *COM Standards*, the Appeal Panel's review of the COCA's decision is limited, similar to a court's review of an accrediting agency's decision. Nevertheless, the Appeal Panel is mindful that at this level of review, the Appeal Panel has the authority to “amend the original action of the COCA,”<sup>67</sup> thereby retaining somewhat more latitude than might exist under judicial review of a COCA decision. The Appeal Panel is of the opinion that, to amend the COCA's decision, the record would have to demonstrate a manifest error resulting in an arbitrary and capricious decision; the burden on this point falls on LECOM. Without such record evidence, the Appeal Panel should extend that level of deference to the COCA as would a court under judicial review standards, since it is the COCA that made the initial factual determinations, having extensively reviewed the materials placed before it both in the *de novo* context and for reconsideration. Therefore, following the foregoing principles of administrative law, even if the Appeal Panel might differ as to any portion of the COCA's decision, if there is substantial evidence to support the COCA's decision, the Appeal Panel believes that it should defer to the COCA's decision, and not substitute its own judgment for that of the COCA. Moreover, if the Appeal Panel finds that the COCA followed and applied its stated procedures impartially in reaching its decision, then the COCA's decision should not be disturbed.<sup>68</sup>

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<sup>66</sup> *Prof'l Massage Training Ctr.*, 781 F.3d at 172 (quoting *Parsons Coll. V. N. Cent. Ass'n of Colls. & Secondary Schs.*, 271 F.Supp. at 73).

<sup>67</sup> *COM Standards*, at 55.

<sup>68</sup> *Prof'l Massage Training Ctr.*, 781 F.3d at 172.

In this case, LECOM appeals the COCA's denial of a request for reconsideration. The procedural history in this case shows that LECOM filed both *de novo* applications for substantive change to establish an additional location, as well as requests for reconsideration to the COCA. The former - *de novo* - contemplates a fresh consideration of the matter, including new or additional evidence.<sup>69</sup> A *de novo* review, by definition, then requires no deference to a prior determination and in the Appeal Panel's opinion, a COM requesting *de novo* review may submit its request with additional information to support its request. On the other hand, reconsideration is a procedural method "to correct manifest errors of law or fact or to present newly discovered evidence."<sup>70</sup> Under the Federal Rules of Civil Procedure, for example, a motion for reconsideration is the functional equivalent to a motion to alter or amend judgment under F.R.Civ.P. 59(e). The standard for obtaining relief under Rule 59(e) is difficult to meet.<sup>71</sup> As the Third Circuit has expressed, a court should exercise the discretion to alter or amend a judgment - or to reconsider - "only if the movant demonstrates one of the following: (1) a change in the controlling law; (2) a need to correct a clear error of law or fact or to prevent manifest injustice; or (3) availability of new evidence not available when the judgment was granted."<sup>72</sup> A manifest error "is not demonstrated by the disappointment of the losing party."<sup>73</sup> And "new evidence" for purposes of reconsideration does not refer to evidence that a party obtains or submits after an

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<sup>69</sup> See, e.g., *United States v. Sholola*, 124 F.3d 803, 822 (7th Cir.1997) ("The very meaning of 'de novo' review is that the appellate court approaches its task from a clean slate[.]"); *Perry v. Simplicity Eng'g, Div. of Lukens Gen. Indus.*, 900 F.2d 963, 966 (6th Cir.1990) (citing *U.S. v. Raddatz*, 447 U.S. 667 (1980)).

<sup>70</sup> *In re Certain Consol. Roflumilast Cases*, 2017 U.S. Dist. LEXIS 84970, at \*6 (D.N.J. 2017).

<sup>71</sup> *Ironworks Patents, LLC v. Apple, Inc.*, 2017 U.S. Dist. LEXIS 89374, at \*12 (D.Del. 2017).

<sup>72</sup> *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3rd Cir.1999).

<sup>73</sup> *Barnes v. Lashbrook*, 2017 U.S. Dist. LEXIS 91837, at \*3-4 (S.D.Ill. 2017).



adverse ruling.<sup>74</sup> A motion for reconsideration in the judicial context, therefore, and by definition, can only pertain to issues that were actually considered.<sup>75</sup> The Appeal Panel believes that these principles are no less applicable in the context of reviewing the COCA's decision in this case.

D. This Case

In this case, LECOM disregards the notion that rational minds can reach differing conclusions. LECOM asserts its position regarding the curriculum, faculty, and physical resources (*i.e.* facility) as the only possible outcome. According to LECOM, the COCA has manufactured non-existing standards in an *ad hoc* fashion. The Appeal Panel is not persuaded. As the Fourth Circuit recognized in *Prof'l Massage Training Ctr.*, standards are often general in nature, and such generality would not invalidate the standards.<sup>76</sup> Standards need not outline specific numerical goals for management and staff, for example, because such standards should retain some element of flexibility.<sup>77</sup> Indeed, the Fourth Circuit instructs that “[s]trict guidelines would strip . . . [the accreditor] of the discretion necessary to adequately assess the multitude of variables presented by different schools.”<sup>78</sup>

Thus, specifically, with respect to LECOM's bases for appeal, the Appeal Panel concludes that the COCA applied the standards impartially and followed its procedures in

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<sup>74</sup> *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 251-52 (3rd Cir.2010).

<sup>75</sup> *Matthews v. Runco's Tavern & Grill, Inc.*, 2013 U.S. Dist. LEXIS 163169, at \*9 (M.D.Pa. 2013).

<sup>76</sup> *Prof'l Massage Training Ctr.*, 781 F.3d at 174.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (quoting *Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Technical Schs.*, 817 F.2d 1310, 1314 (8th Cir.1987)).

rendering its final decision. And the Appeal Panel would be loath to second guess the COCA.

### 1. Curriculum and Faculty

As to curriculum, the COCA properly concluded that LECOM's proposed delivery of the curriculum from the Erie campus to the Elmira campus did not meet the criterion for curriculum to approve an additional location. Under Standard Six, 6.1 of the *COM Standards*, a COM "must develop and implement a method of instruction and learning strategies designed to achieve its mission and objectives." In the context of this case, this standard must necessarily be considered with the standard with respect to faculty under Standard Four, which provides, in pertinent part, that a COM: 1) "must have sufficient and appropriately trained faculty" (Standard 4.1); and 2) "must develop a faculty adequacy model appropriate to the COM's mission and objectives *and curriculum delivery model*" (Standard 4.1.1) (italics supplied). Moreover, the Glossary provides further guidance with respect to curriculum and faculty. A faculty adequacy model "compares the total number of faculty hours necessary and the number of total faculty hours available *to deliver the curriculum.*"<sup>79</sup>

Here, LECOM proposes to deliver the entire curriculum to the Elmira campus through synchronous videoconferencing from the Erie campus. LECOM suggests that the faculty lecturer may adequately deliver the curriculum from the Erie campus because the Polycom system effectively allows students to receive the lecture material contemporaneously, and because LECOM proposes to have two facilitators at the receiving campus in Elmira. LECOM further asserts that distance learning technology is such that it affords the same learning opportunities as live lectures. The Missouri Supreme Court considered a substantially similar scenario when it refused to change its rules regarding admission to the Missouri Bar of graduates

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<sup>79</sup> *COM Standards*, at 83. (Italics supplied).

of a law school that had inadequate faculty to deliver the curriculum.<sup>80</sup> In *Laclede*, the proposed law school proposed to maintain a program staffed entirely by part-time faculty consisting of judges and practicing attorneys, all “of the highest reputation.”<sup>81</sup> In opining on the value of an adequate faculty for a school, the Missouri Supreme Court rejected the notion of a part-time faculty, stating that the “heart and soul of [a] law school . . . is its full-time faculty.”<sup>82</sup> That court concluded that, in order for the law school to succeed, “there must be a financial commitment many times larger than has been suggested[.]”<sup>83</sup> referring to the school’s lack of commitment to staff an adequate faculty to deliver the curriculum.

Similarly, LECOM proposes to staff its Elmira campus with only two “whole time,” faculty. Otherwise, the Erie faculty will serve as the full-time faculty for the Elmira students. COCA reasonably determined that LECOM’s delivery of the curriculum with the aid of facilitators misses the mark. While distance learning and the use of technology may be a useful and beneficial method, LECOM’s curriculum disregards the importance of face-to-face interaction between faculty and students.<sup>84</sup> In *Nova University*, the District of Columbia Educational Institution Licensure Commission denied a university’s application for license to offer Doctorate of Public Administration degree courses in the District of Columbia because the university failed to meet the requirements for adequate faculty and library resources under District of Columbia law. The District of Columbia Court of Appeals affirmed that

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<sup>80</sup> *In re Laclede School of Law*, 700 S.W.2d 81 (1985).

<sup>81</sup> *Id.*, at 83, n. 3.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*, at 84.

<sup>84</sup> *See Nova University v. Educational Institution Licensure Comm.*, 483 A.2d 1172, 1191 (D.C.App.1984).

commission's denial applying principles of administrative law. Like the COCA with respect to LECOM, the District of Columbia commission had concerns regarding the insufficiency of full-time faculty, as well as the inadequate interaction between faculty and the students. In *Nova University*, the court gave due deference to the commission's interpretation and application of broad standards that permit room for discretionary enforcement.<sup>85</sup> These cases are entirely consistent with the Fourth Circuit's consideration of the same issue in *Prof'l Massage Training Ctr.*, in which the accrediting agency considered issues regarding faculty and administrator qualifications. In reversing the district court's decision against the accrediting agency, the Fourth Circuit rejected the district court's view of the generality of the standards. Instead, the Fourth Circuit condoned the accrediting agency's need to have flexibility in applying its standards with respect to terms such as "sufficient" and "necessary."<sup>86</sup>

The Sixth Circuit similarly upheld an accrediting agency's accreditation decision where that agency "found problems with the proposal's outline of student services, library resources, full-time faculty, and facilities" in the context of denying a request for substantive change to establish a branch campus.<sup>87</sup> In *Thomas M. Cooley*, the Sixth Circuit affirmed the district court's grant of summary judgment and affirming the American Bar Association's accreditation decisions under administrative law and common law due process principles. As did the Fourth Circuit in *Prof'l Massage Training Ctr.*, the Sixth Circuit relied on established principles of administrative law and deferred to the accrediting agency in affirming the district court's determination.

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<sup>85</sup> *Id.*, at 1189.

<sup>86</sup> 781 F.3d at 173-74.

<sup>87</sup> *Thomas M. Cooley*, 459 F.3d at 708.

Here, the Appeal Panel must defer to the COCA's "concern surrounding sufficiency of support of [the] curriculum" and "lack of clarity surrounding the exact number of FTE faculty members." To do otherwise would be to substitute the Appeal Panel's judgment to that of the COCA. The COCA's concern dealt with one faculty member's ability to deliver a lecture to the Erie students while at the same time delivering that lecture to the Elmira students. Even with facilitators at the Elmira campus, the students at that campus are obviously disadvantaged as compared to the students at the Erie campus, as the Elmira students' access to the lecturer is severely limited. As distinguished as the facilitators may be, they did not prepare the lecture, they are not equivalent subject matter experts as the lecturer, and they would not necessarily provide the same information as the lecturer. Limiting the Elmira students' contact to only electronic mail, telephone, and vying to ask questions (through the Polycom) with all of the other Erie students who are attending the lecture in person, simply is "not the same" as having a full-time live lecturer whom the students can readily access.

With respect to the list of potential candidates to fill faculty positions at the Elmira campus, the COCA's concerns with respect to qualifications are not unreasonable. LECOM lists these individuals merely as *potential* candidates; LECOM has not provided any *potential* agreements or evidence of an employment relationship. The COCA, therefore, cannot be faulted for noting the speculative nature of the potentiality of hiring these individuals.

Moreover, LECOM's proposed faculty adequacy model, while apparently well-intentioned, does not, *per se*, address the concerns raised by the COCA regarding the adequacy of the faculty. While a mathematical calculation may demonstrate one thing, the actual implementation of this faculty adequacy model would reflect something different. As experts in accreditation, the COCA's view must be given deference. Were it to be only an issue of

numbers, there would be no need for an accrediting body to determine the adequacy of a school's faculty. LECOM may have made a plausible, if not semantic, assertion as to its proposed faculty adequacy model,<sup>88</sup> but that assertion, no matter how plausible, does not render the COCA's interpretation of the standards and its interpretation of a proper faculty adequacy model unreasonable or inconsistent.<sup>89</sup> In interpreting and applying the standards, the COCA must be permitted a certain measure of flexibility and discretionary authority applying its expertise in making these types of decisions.<sup>90</sup>

Finally, as regards the faculty, the COCA took issue with LECOM's proposed faculty to teach osteopathic manipulative medicine (OMM) and clinical training during the first and second years of the curriculum. According to LECOM's submission, there would be only two full-time faculty who would teach OMM, with other faculty whom LECOM describes as merely being "competent in OMM;" not all faculty who would teach OMM are identified as osteopathic physicians. Moreover, teaching OMM cannot be accomplished through synchronous

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<sup>88</sup> Still, LECOM's faculty adequacy model did not sufficiently address how the faculty hours would be allocated to responsibilities other than teaching, such as clinical care, research, student advising, and committee work; nor did LECOM factor into the faculty adequacy model considerations between full-time and part-time faculty. Moreover, LECOM did not contemplate the additional hours necessary for the Erie faculty to address questions posed by students from the Elmira campus, whether the faculty chooses to address those questions during the Polycom lecture, by electronic mail, or in person.

<sup>89</sup> See *Thomas M. Cooley Law Sch. v. ABA*, 376 F.Supp.2d 758, 769 (W.D.Mich.2005) ("That Cooley has made a plausible semantic argument does not render the ABA's interpretation unreasonable or inconsistent.").

<sup>90</sup> *Prof'l Massage Training Ctr.*, 781 F.3d at 174 ("The Standards are often general in nature, but we do not think to the point of invalidity. It was not necessary, or indeed practical, for the Standards to outline more specific numerical goals for management and staff. Instead, it was permissible for the Standards to retain some element of flexibility.").

videoconferencing. OMM requires hands-on instruction by qualified faculty, not merely faculty “competent in OMM.”<sup>91</sup>

## 2. Facility

LECOM’s submission of the two amendments to the Collaborative Agreement demonstrates its concession that the COCA correctly concluded that the Elmira students would have insufficient facilities at the Elmira campus. LECOM’s *post hoc* submission of the Second Amendment to the Collaborative Agreement is the type of new evidence disfavored by the courts when considering a motion for reconsideration. COCA should be held to no less a standard in its determination of LECOM’s request for reconsideration. The Second Amendment is dated October 11, 2016, just days before LECOM’s submission of its reconsideration request on October 14, 2016. This is new evidence, which might have been considered by the COCA had LECOM submitted a *de novo* request for substantive change.<sup>92</sup> But in the posture of a reconsideration request, applying the jurisprudential standards recited above, the Appeal Panel cannot conclude that the COCA erred in refusing to consider the Second Amendment to the Collaboration Agreement. The COCA merely followed its procedures and the applicable legal principles.

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<sup>91</sup> The importance of hands-on opportunity is an integral part of an osteopathic medical education. Under the *COM Standards*, a COM’s mission statement must include, among other things, goals and objectives appropriate to osteopathic medical education. Standard One: Mission, Goals, and Objectives, Standard 1.1. The curriculum “must provide for integration of osteopathic philosophy, principles and practices, *including didactic and hands-on opportunities*, through each year of the curriculum.” Standard Six: Curriculum, Standard 6.3 (italics supplied).

<sup>92</sup> *See, supra*, at 23-24. Moreover, because the COCA procedures have no limit as to how often a COM may submit a *de novo* application, LECOM might have done so in this case to have these documents considered by the COCA.

## DECISION

For all of the reasons stated above, the Appeal Panel concludes that:

1. The COCA did not depart from the standards or commit any errors of significant magnitude when it denied LECOM's request for reconsideration;
2. There is no evidence of bias, factual error, departure from standards, or errors of significant magnitude.

Therefore, the Appeal Panel AFFIRMS the COCA's decision to deny LECOM's request for reconsideration.

This decision is a final action of the Appeal Panel.

PAUL E. LACASSE, DO, MPH  
CHAIR

CHERYL B. DOANE, DO, MSED.  
BRUCE B. CUNNINGHAM, DO  
LLOYD J. CLEAVER, DO, FAOCD  
FRANK KELLY