
University of Phoenix's Management of Student Financial Assistance Programs

FINAL AUDIT REPORT



Audit Control Number ED-OIG/A09-70022
March 2000

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U.S. Department of Education
Office of Inspector General
Sacramento, California

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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

March 31, 2000

MEMORANDUM

TO: Greg Woods
Chief Operating Officer
Student Financial Assistance

FROM: Lorraine Lewis *Lorraine Lewis*

SUBJECT: FINAL AUDIT REPORT
*University of Phoenix's Management of
Student Financial Assistance Programs*
Audit Control No. ED-OIG/A09-70022

Attached is our subject audit report presenting our findings and recommendations resulting from our audit of the University of Phoenix.

In accordance with the Department's Audit Resolution Directive, you have been designated as the action official responsible for the resolution of the findings and recommendations in this report.

If you have any questions or wish to discuss the contents of this report, please contact Gloria Pilotti, Area Manager, Sacramento, California at 916-498-6622. We ask that you refer to the above audit control number in all correspondence relating to this report.

Attachment

Table of Contents

	<u>Page</u>
Executive Summary	1
Audit Results	3
Finding 1 - The University's Academic Year for Its Undergraduate Programs Did Not Provide the Required Instructional Hours	3
Finding 2 - The University Overawarded Title IV Funds to Students Enrolled in Correspondence Courses	17
Other Matters	21
Background	23
Purpose, Scope & Methodology	25
Statement on Management Controls	28
Attachment – University's Comments on the Report	29

Executive Summary

The University of Phoenix (University) is a private, for-profit educational institution that offers graduate degree, undergraduate degree and certificate programs for working adult students. In addition to providing classroom instruction, the University offers educational programs through its Center for Distance Education (CDE). The University measures its educational programs in credit hours, but does not use a semester, trimester or quarter system. During the two-year period from October 1995 through September 1997, the University disbursed \$339 million in Federal Family Educational Loan (FFEL) funds and \$8.8 million in Federal Pell Grant (Pell Grant) funds.

Our review found that:

- The University's definition of an academic year for its undergraduate programs did not provide the number of instructional hours required to meet the statutory definition of an academic year contained in the Higher Education Act (HEA) of 1965, as amended. The statutory definition is set forth in Title 34 Code of Federal Regulations (CFR) Section 668.2(b). The regulations in this section that apply to institutions not using semester, trimester or quarter systems are commonly known as the 12-Hour Rule. The 12-Hour Rule requires the equivalent of at least 360 instructional hours per academic year. Because the University did not meet the conditions specified by Student Financial Assistance (SFA) for including study group meetings as instructional hours, the University's academic year only provided 180 instructional hours. As a result, the University disbursed Title IV funds to students who were not eligible for all or part of the funds. We estimated that the University disbursed at least \$50.6 million in FFEL and \$4 million in Pell Grant funds to its students in excess of the amounts that students were entitled to receive.
- The University overawarded Title IV funds to students enrolled in correspondence courses provided through CDE. The HEA does not allow institutions to include cost of living expenses when determining financial need for students enrolled in correspondence courses. Also, we estimated that the University improperly disbursed about \$96,000 in Pell Grant funds to CDE students because the University did not adhere to the regulatory requirement that students in correspondence courses cannot be considered as more than half-time students.

We recommend that the Chief Operating Officer for SFA require the University to immediately establish an academic year for its undergraduate programs that satisfies the requirements of the 12-Hour Rule. Also, we recommend that the Chief Operating Officer require the University to cease including living expenses when determining the financial need for CDE students under Title IV programs and limit Pell Grant awards made to CDE students to the amount authorized for half-time

students. The University should be required to return \$50.6 million in FFEL funds improperly disbursed to its students. In addition, the University should be required to return \$4 million in Pell Grant funds that were improperly disbursed. SFA also needs to determine the amount of Title IV funds improperly disbursed for periods not covered by our estimate.¹

SFA's policy is to use an "estimated actual loss" formula to determine the amount of FFEL funds to be returned, when it determines that use of the formula is appropriate. The formula takes into consideration the institution's cohort default rate and the amount of interest subsidies and special allowance paid on ineligible loan amounts. SFA has advised us that it commonly uses the "estimated actual loss" formula for this type of finding in the audit resolution process and that use of the formula would significantly reduce the amount of FFEL funds to be recovered.² The "estimated actual loss" formula does not apply to Pell Grant funds.

In its comments to the draft report, the University did not agree with our conclusions and recommendations. The University's comments did not change our conclusions or recommendations. A summary of the University's comments and our response are presented in the *Audit Results* section of the report. The University's entire comments are included as an attachment to the report.

¹ Institutions were required to comply with the 12-Hour Rule as of July 1, 1995. Our estimate did not include loans and grants with a start date between July 1 and September 30, 1995; grants with a start date of October 1, 1997 or later; and loans with a start date of October 1, 1998 or later. In addition, the estimate did not include certain loans or disbursements on loans that had start dates between October 1, 1995 and September 30, 1998. The Purpose, Scope and Methodology section of this report provides more details on the loans and grants included in our estimate.

² SFA advised us that its preliminary figure of FFEL funds to be recovered using the "estimated actual loss" formula would likely be about \$7 million for the loans included in our estimate.

Audit Results

We concluded that the University needs to improve its management of the Title IV programs. Specifically, we found that the University’s definition of its academic year for undergraduate programs did not provide the 360 instructional hours required to meet the HEA’s statutory definition of an academic year. Also, the University overawarded Title IV funds to students enrolled in correspondence courses.

During our audit work, we also identified issues regarding program eligibility and a “schedule change” policy. The “schedule change” policy contributed to the University’s failure to make refunds within required time frames. Since SFA has already initiated action to address these issues, we did not include the areas as findings in the report. The *Other Matters* section of the report contains additional information on the two issues.

Finding No. 1 – The University’s Academic Year for Its Undergraduate Programs Did Not Provide the Required Instructional Hours

The University defines its academic year as the period of time in which an enrolled student completes at least 24 credit hours in at least 45 weeks of instructional time. The University’s undergraduate programs consist of a series of five-week courses for which a student generally receives three credit hours per completed course. An institution’s academic year and the credit hours that a student is enrolled in are used to determine the amount of funds a student is eligible to receive from the Title IV programs. The University’s academic year for its undergraduate programs did not provide the minimum amount of instructional time required by the HEA. As a result, the University overawarded Title IV funds to its students. We estimate that the University improperly disbursed at least \$54.6 million in FFEL and Pell Grant program funds.

Non-Term Institutions Must Provide a Minimum of 360 Hours of Instructional Time in an Academic Year

The HEA, Section 481(a)(2) specifies that an “academic year” for Title IV, HEA programs:

. . . shall require a minimum of 30 weeks of instruction time, and, with respect to an undergraduate course of study, shall require that during such minimum period of instructional time a full-time student is expected to complete at least 24 semester or trimester hours or 36 quarter hours at an institution that measures program length in credit hours

The HEA definition of an academic year is restated in 34 CFR Section 668.2(b).

The University measured its educational programs in credit hours, but did not use a semester, trimester or quarter system. For such institutions, a “week of instructional time” is defined under 34 CFR Section 668.2(b) Academic year (2)(ii)(B) as at least 12 hours of regularly scheduled instruction, examinations, or preparation for examinations that occurs within a consecutive seven-day period. These regulations, commonly known as the 12-Hour Rule, require the equivalent of 360 instructional hours per academic year (30 weeks times 12 hours per week). Institutions were required to comply with the 12-Hour Rule as of July 1, 1995.

In the preamble section of the Federal Register dated November 29, 1994, which contains the above cited final regulations, the Secretary explained that an institution with a program that meets less frequently than 12 hours per week would have to meet for a sufficient number of weeks to meet the required instructional hours. For example, if an institution decided to establish an academic year for a program with classes that meet for ten hours a week, the classes would need to be held for 36 weeks.

When the 12-Hour Rule regulations were finalized in November 1994, the Secretary stated in the preamble to the regulations that he was:

. . . correcting an abuse of the definition of an academic year whereby an institution that has programs that are measured in credit hours without standard terms could claim that it meets the requirements for the minimum amount of work to be performed by a full-time student over an academic year by giving a full-time student a minimal amount of instruction over a 30-week (or more) period

The preamble further stated that:

The Secretary believes that 12 hours per week is a reasonable measure, since full-time students are expected to carry a minimum of 12 semester or quarter hours per academic term in an educational program using a semester, trimester, or quarter system. Thus, full-time students enrolled in such programs are generally assumed to be in class attendance at least 12 hours per week

SFA Allowed the University to Consider Scheduled Study Group Meetings As Instructional Time Provided That the University Met Certain Conditions

In a letter dated March 9, 1995, the University sought guidance from SFA on the 12-Hour Rule to determine whether its academic year was in compliance with the regulations. The University explained that the academic year for its programs consisted of 45 weeks in which students have four hours of class time instruction and four hours of “scheduled cohort group study” for a total of eight hours each week.

SFA's Policy Development Division responded to the University in a letter dated May 30, 1995, with the following conclusion:

You [the University] asked if the Department would continue to consider the 'scheduled cohort group study' as acceptable hours of instruction under the new 12 hour rule. We would as long as the study group concept is still operating as you described last year. That is, it is required of all students in the program and that it is held at a site under the control of the institution.³

You also asked if the approved four hours of study group added to the regular four hours of class time would count as eight of the twelve hours required under the rule. The answer is yes.

You also asked if, therefore, the eight hours out of twelve meant that the minimum academic year for reasons of annual loan limit could be 45 weeks. Once again, the answer is yes since the statutory minimum of 30 weeks times the regulatory requirement of 12 hours means that the program must consist of 360 hours, and 360 hours divided by 8 hours per week equals 45 weeks.

Thus, the University could award Title IV funds to its undergraduate students using a 45-week academic year provided that the conditions specified in the May 30, 1995 letter were met. The University provided us with no evidence that it made any further inquiry of SFA concerning this issue.

The University Did Not Meet the SFA Conditions for Including Study Group Meetings As Instructional Time Under the 12-Hour Rule

The University did not meet the required conditions specified by SFA for the study group meetings to be included as hours of instruction for purposes of the 12-Hour Rule. SFA had conditioned its acceptance of the University's scheduled cohort group study hours as instructional time under the 12-Hour Rule on the continuation of representations made by the University that study group meetings take place at sites controlled by the University.

Our review found that the University did not require its students to meet at locations that were leased, owned or in any other way controlled by the University. Nor did we find that the University otherwise controlled study group meetings. The Faculty Handbook and materials provided to students did not specify that study group meetings must be held at a location under the control of the University. University officials informed us that study groups met on their own and that the location

³ The Policy Development Division staff informed us that "a site under the control of the institution" meant a location that was either leased or owned by the University.

was up to the students. Our observations at campuses located in the Phoenix area confirmed that, in general, study groups were not meeting at the University's facilities.⁴

Further, our review found that the University did not have adequate documentation to show that students generally spent 180 hours in study group meetings over the 45-week period regardless of location. In addition, the University did not take steps to ensure that all students actually participated in study group meetings.

- Instructors or other University representatives were not required to attend study group meetings.
- The University had an extensive system for tracking and monitoring scheduled class attendance, but had not established such a system for study group meetings. According to University officials, its faculty was provided with a form that students could use to record their study group meetings, including the hours spent in the meetings. However, the University did not require faculty to use or retain the form.
- The University's catalog described its class attendance policy but had no such policy for attendance at study group meetings.
- Student handbooks and other documents provided to the University's students did not mention that four hours of study group meetings per week were required for each course. Also, the "*Faculty Handbook*" used during our audit period did not mention the required four hours per week.

Under these circumstances, the cohort study groups did not qualify as "regularly scheduled instruction" for purposes of the 12-Hour Rule.

If the University was unclear about the meaning of "a site under the control of the institution" in the Policy Development Division letter, it should have requested further interpretation from SFA. We were provided with no evidence to show that the University had requested any further guidance.

⁴ We estimated that the main Phoenix location would require 513 study group meetings per week. During the four days that we observed the classrooms at the main Phoenix location, we found only seven groups that appeared to be holding study group meetings. Except for one room, all other rooms were being utilized for scheduled classes on Monday through Thursday evenings. We were told that, unless a class was scheduled, the main Phoenix facility was locked on Friday evenings, Saturdays and Sundays. Our weekend observations at four other locations in the Phoenix area confirmed our conclusion that, in general, study groups were not meeting at the University's facilities. According to the Director of Financial Aid, the five sites were typical of other locations in the University of Phoenix system.

The Cohort Study Groups Did Not Otherwise Qualify for Inclusion in the 12-Hour Rule Calculation

In its annual filings with the Securities and Exchange Commission, the Apollo Group, Inc. (parent corporation of the University of Phoenix) described the purpose of study group meetings as: “. . . study group meetings are used for review, work on assigned group projects and preparation for in-class presentations.” The facts described in the previous section and the Apollo Group, Inc.’s own description of study group meetings show that the study group meetings do not represent the time spent in regularly scheduled instruction, examinations, or preparation for examinations required by the 12-Hour Rule.

The regulations refer to three activities that are allowed to be included as instructional time for the 12-Hour Rule calculation: regularly scheduled instruction, examinations, or preparation for examinations. The Policy Development Division May 30, 1995 letter expressly addressed the University’s question regarding cohort study groups in terms of hours of instruction.

If the University had intended for study groups to be considered as regularly scheduled preparation for examinations, it should have expressly stated this in its request to the Policy Development Division. The Policy Development Division advised us that, based on the negotiation of the 12-Hour Rule, preparation for examinations referred to the period set aside to prepare for final examinations after the last day of class in an academic term or other period.

Allowing time spent in study groups working on assignments outside of the classroom to count toward the required hours of regularly scheduled instruction, examinations, or preparation for examinations, would render the 12-Hour Rule meaningless.

The Consequence of Failing to Comply With the 12-Hour Rule Is That the University Overawarded at Least \$54.6 Million of Title IV Funds to Its Undergraduate Students

Since the University did not comply with each of the conditions set forth in SFA’s letter and the study groups did not otherwise qualify for inclusion in the 12-Hour Rule calculation, study group meetings cannot be counted as providing four hours of instructional time. Consequently, the University-defined academic year of 45 weeks only provided 180 hours of the required minimum of 360 hours of instructional time (four hours of instruction per week times 45 weeks equals 180 hours). In order to meet the 360-hour requirement, the University’s academic year would need to be 90 weeks in length. By using an academic year of 45 weeks rather than 90 weeks for awarding Title IV funds, the University disbursed amounts to students that exceeded the maximum amounts for an academic year allowed under the FFEL and Pell Grant programs. Also, the University disbursed FFEL funds to ineligible students who were enrolled less than half-time. We estimated that the University disbursed at least \$54.6 million of Title IV funds to students who were not eligible for all or part of

the funds.⁵ The students included in the estimate had FFELs and Pell Grants with loan/grant periods that started between October 1995 and September 1997.

- *FFEL Loan Limits* - Title 34 CFR 682.603(f)(2) stipulates that the total amount a student may borrow for any one academic year may not exceed the maximum annual loan limits. The maximum annual loan amounts are specified in 34 CFR 682.204. Our estimate includes \$50.4 million in FFEL disbursements that exceeded the annual loan limits.
- *Pell Grant Maximum* - For the Pell Grant program, 34 CFR 690.62(a) specifies that the amount of a student's grant for an academic year is based upon schedules published by the Secretary for each award year. The Payment Schedule lists the maximum amount a student could receive during a full academic year. Our estimate includes \$4 million in Pell Grant disbursements that exceeded the maximum amount allowed.
- *Less Than Half-Time Status* – Title 34 CFR 682.201(a) requires that a student must be at least a half-time student to be eligible for FFEL funds. Our estimate includes \$185,000 in FFEL disbursements for students who were enrolled less than half-time, and thus not eligible for FFEL.

Institutions were required to comply with the 12-Hour Rule as of July 1, 1995. Because the University's 45-week academic year did not meet the 12-Hour Rule, the University has improperly disbursed Title IV funds for its undergraduate students on FFEL and Pell Grants awarded since July 1, 1995.

Recommendations

We recommend that the Chief Operating Officer for SFA require that:

1. As a condition for continued participation in Title IV programs, the University immediately develop an academic year for its undergraduate programs that satisfies the requirements of the 12-Hour Rule.
2. Require that the University return to lenders the FFEL funds disbursed by the University that exceeded the FFEL loan limits for an academic year. The amount returned should include improperly disbursed funds for loans awarded on and after July 1, 1995. We estimate that the amount was at least \$50.4 million (\$22.7 million for subsidized loans and \$27.7 million for unsubsidized loans) for students who had loans with begin dates between October 1995 through September 1997. Also, the University should repay the interest and special allowances incurred on Federally subsidized loans.

⁵ This amount does not include amounts of Title IV funds disbursed for students enrolled at the Puerto Rico campus (a term school), the Center for Distance Education, or the Online Program.

3. Require that the University return the Pell Grant funds disbursed to students that exceed the allowable award for an academic year. The amount returned should include improperly disbursed funds for grants awarded on and after July 1, 1995. We estimate that the amount was about \$4 million for students who had Pell Grants with grant period dates beginning between October 1995 and September 1997.
4. Require that the University return to lenders the FFEL funds disbursed by the University to students who were enrolled less than half-time and, thus, not eligible for the loans. The amount returned should include improperly disbursed funds for loans awarded on and after July 1, 1995. We estimate that the amount was at least \$185,000 (\$83,000 for subsidized loans and \$102,000 for unsubsidized loans) for students who had loans with begin dates between October 1995 through September 1997. Also, the University should repay the interest and special allowances incurred on Federally subsidized loans.
5. Require that the University determine the amounts of FFEL and Pell Grant funds improperly disbursed for periods not covered by our estimate.⁶

SFA's policy is to use an "estimated actual loss" formula to determine the amount of FFEL funds to be returned, when it determines that use of the formula is appropriate. The formula takes into consideration the institution's cohort default rate and the amount of interest subsidies and special allowance paid on ineligible loan amounts. SFA has advised us that it commonly uses the "estimated actual loss" formula for this type of finding in the audit resolution process and that use of the formula would significantly reduce the amount of FFEL funds to be recovered.⁷ The "estimated actual loss" formula does not apply to Pell Grant funds.

⁶ Institutions were required to comply with the 12-Hour Rule as of July 1, 1995. Our estimate did not include loans and grants with a start date between July 1 and September 30, 1995; grants with a start date of October 1, 1997 or later; and loans with a start date of October 1, 1998 or later. In addition, the estimate did not include certain loans or disbursements on loans that had start dates between October 1, 1995 and September 30, 1998. The Purpose, Scope and Methodology section of this report provides more details on the loans and grants included in our estimate.

⁷ SFA advised us that its preliminary figure of FFEL funds to be recovered using the "estimated actual loss" formula would likely be about \$7 million for the loans included in our estimate.

meeting at the University's facilities in Phoenix. The University provided no information to support its statement. The policy, procedural and documentation weaknesses noted in the report show that the University did not maintain "strict control" over study group activities.

Students engaged in additional qualifying hours of scheduled instruction. The University stated that study groups often met more frequently than required and that students engaged in substantial quantities of scheduled instruction above and beyond their class and study group meetings. The University stated that each student engaged in a substantial amount of scheduled preparation in the form of reading assignments, writing assignments, and preparation for examinations and presentations. The University claimed that scheduled preparation time, and cooperative educational activities at the student's place of work, should be included in the academic year. According to the University's provost, students spend, on average, an additional eight hours in these activities between class sessions. The University stated that if these additional hours were included, its 45-week academic year is too long, rather than too short.

OIG Response - When developing the clock hour/credit hour regulations, the Secretary stated that he "did not include outside preparation hours as part of the formula because of the difficulty of independently determining whether the number of outside hours an institution might claim was accurate...." However, in the preamble to the Interim Final Rule issued on April 29, 1994 (which preceded the Final Rule containing the 12-Hour Rule), the Secretary did emphasize the importance of comparable student workloads between institutions. In this preamble the Secretary stated:

... it is important to ensure that full-time students are performing comparable workloads regardless of the type of institution they are attending, and that such work should be ratably allocated throughout the period of instruction.

In the preamble to the Final Rule, issued November 29, 1994, the Secretary explained why 12 hours per week of instruction was chosen for an educational program using credit hours but not using a semester, trimester, or quarter system. The Secretary stated:

...12 hours per week is a reasonable measure, since full-time students are expected to carry a minimum of 12 semester or quarter hours per academic term in an educational program using a semester, trimester, or quarter system. Thus, full-time students enrolled in such programs are generally assumed to be in class attendance at least 12 hours per week.

Even if the OIG had used a "workload" measure, as suggested by the University's comments and accepted the accuracy of the University's time estimates, the workload of the University's full-time students was not comparable to the workload of students at standard-term institutions.

Under the standard unit of measuring credit in higher education (referred to as the Carnegie Unit of Credit), one credit hour generally consists of one hour of classroom work and two hours of outside preparation over the course of its academic term. Using the Carnegie Unit of Credit, a full-time student in an educational program using a semester, trimester or quarter system would have a workload of 36 hours per week through the academic term (12 hours of classroom work and

University Comments and OIG Response

The University did not agree with our conclusions and recommendations. In its comments to the report, the University stated: "...study groups have been, and continue to be, an essential and integral component of the University's regularly scheduled instructional activity." The University's position is that hours spent in study group activities qualified for inclusion in the 12-Hour Rule calculation. The University made the following assertions:

- The University had controls over study group meetings.
- Students engaged in additional qualifying hours of scheduled instruction.
- The U.S. Department of Education (Department) was aware of the University's controls over study groups.
- The condition held at "a site under the control of the institution" is contrary to governing regulations and guidance.
- Study group activities are regularly scheduled instruction.
- The Department failed to give the University proper notice of the policy interpretation.
- The General Education Provisions Act (GEPA) requires that the Department uniformly apply its rules and regulations.
- The GEPA also prohibits the Department from interfering with the University's curriculum.

The University also disputed the estimated liability. The following is a summary of the University's comments and our response to the comments.

The University had controls over study group meetings. The University stated that it maintained strict control over the "scheduled cohort group study" model and activities. Group assignments were specified in the curriculum modules. Faculty reviewed student assignments completed during the particular group study meeting and awarded group grades for oral and written projects completed within the study groups. Faculty reviewed the study group log forms. The University also stated that many study groups met at its facilities in available space, such as study group rooms and vacant classrooms. The University claimed that the report did not refute or deny the foregoing indicia of control, but instead focused solely upon one factor—the prospect that some study groups choose to meet off-campus.

OIG Response - Our review did focus on the site of study group meetings since "a site under the control of the institution" was one of the conditions specified by SFA when it allowed the University to include scheduled study group meetings as instructional time for the 12-Hour Rule. However, the University is incorrect in its statement that we focused solely on this control factor. We also assessed the adequacy of the University's policies and procedures for documenting and monitoring the hours students spent in study group meetings. The weaknesses that we noted in the University's policies, procedures and documentation are disclosed in the report.

Several of the University's statements regarding controls are contrary to the facts disclosed by our review. The University did not require its faculty to use or retain study group log forms. The University's statement that many study groups use the University's facilities is contrary to our observations at campuses. Our observations confirmed that, in general, study groups were not

24 hours of outside preparation per week). The University informed us that a student at the University has four hours of classroom work each week with five hours of study group⁸ and eight hours of outside preparation between classes for a workload of about 72 hours for each 5-week three credit course. A student at the University in a 45-week academic year would earn 27 credits and have a workload of 648 hours compared to a workload of 1080 hours for a student in a 30-week academic year using a semester, trimester, or quarter system earning 24 credit hours. The workload in an academic year of a student at the University is 60 percent of the workload in an academic year of a student at an institution using a semester, trimester, or quarter system.

The Department was aware of the University's controls over study groups. The University stated that, during August, September and December 1994, it had discussions with Department officials regarding the proposed regulations that resulted in the 12-Hour Rule. The University claimed that during those discussions, it responded to extensive questioning and described in detail the structure of study groups and the methods by which the University exercised control over them. In addition, it informed the Department officials that study groups may meet off campus as a matter of convenience.

OIG Response - The fact that the University had meetings with the Department and requested guidance from the Policy Development Division shows that the University was concerned about its compliance with the 12-Hour Rule. The only record of the meetings is the Policy Development Division letter, which contained a general reference to the University's description of the study group concept. Neither the letter from the University requesting the policy determination nor the Policy Development Division letter contains a description of the asserted controls in place at the University. Regardless of whether the Department was fully aware of the University's controls, the Department, in its approval, did emphasize the key representations on which it relied, that is that study group meetings are required of all students and that the meetings are held at a site under the control of the institution.

The condition held at "a site under the control of the institution" is contrary to governing regulations and guidance. The University stated that neither the report nor the Policy Development Division letter identified any statute, regulations or published guidance requiring institutional control over the site at which instructional time takes place. The University claimed that, instead of requiring such a control, issued regulations and guidance confirm that instructional time may include external course work and other off-site educational activity.

The University stated that the regulatory definition of an "academic year" did not impose a control requirement and acknowledged that instruction included off-site instruction. The definition states that time spent in "preparation for examinations" is included within the 12-Hour Rule calculation. The University emphasized that "preparation for examinations" was an off-site activity. The "academic year" definition also states that instructional time for this purpose excludes "activity not related to class preparation or examination." The University concluded that this statement implied that activity related to class preparation is included regardless of whether or not the activities occur on site. The University claimed that study group meetings are related to class preparation and examination.

The University also stated that the preamble to the issued final regulations for the 12-Hour Rule did not set forth a control requirement and included statements that confirmed instruction may include

⁸ During our audit, the University provided us with estimates of the time student spent in study group meetings. The estimates varied from four to five hours. For purposes of the analysis, we used five hours.

off-campus educational activity and external course work. The University cited the Secretary's reference to the emergence of "many external degree and adult learning programs [that] are trying to reduce the number of days spent in the classroom" as a basis for his determination that "cooperative education programs, independent study, and other forms of regularly scheduled instruction can be considered as part of an institution's academic year."

The University claimed that the regulatory definition of a "full-time student" states that the student's workload may include any combination of courses, work, research or special studies that the institution considered sufficient to classify the student as a full-time student. The University emphasized that the "full-time student" definition bears heavily on the interpretation of the 12-Hour Rule because the Secretary explicitly stated that the definition of academic year was based, in part, on the workload of a full-time student. The regulation also confirmed that it was an institution's discretion to determine whether the educational activity was sufficient to constitute a portion of the student's workload.

The University also claimed that the reference to independent study in the regulatory definition of an "educational program" supported its position that instruction may include off-site educational activity.

OIG Response - We agree that the condition that instruction is held at "a site under the control of the institution" is not contained in statute or Departmental regulations. The Policy Development Division letter reflects that the controls previously represented to the Department by the University were to remain in existence for the study groups to qualify as instructional time under the 12-Hour Rule. If the University knew that the conditions specified in the May 1995 letter did not exist or believed that the letter was contrary to existing statute, regulations or the information it had provided to the Department, it should have notified the Department at that time.

We agree that a student's "preparation for examinations," which is referred to in the regulatory definition of an academic year, may occur off-site. However, the Policy Development Division confirmed to us that "preparation for examinations" referred to the period set aside to prepare for final examination after the last day of class in an academic term or other period. Therefore, study group meetings should not be considered "preparation for examinations."

We also agree that the "cooperative education programs" and "independent study" may take place off-site. However, in the March 9, 1995 letter requesting the policy interpretation from the Policy Development Division, the University did not characterize the group study meetings as "cooperative education programs," or "independent study." Neither did the University mention time spent by its students in such programs. The University described its courses as consisting of four hours of class per week and one evening of "scheduled cohort group study, also of at least four hours."

While the definition of a full-time student does state that the workload of a full-time student is determined by the institution under a standard applicable to all students enrolled in a particular educational program, it also establishes a minimum standard for undergraduate students. That minimum standard is as follows: "Twenty-four semester hours or 36 quarter hours per academic year for an educational program using credit hours but not using a semester, trimester, or quarter system...."

As previously stated, the Secretary emphasized the importance of comparable student workload between institutions in the preamble to the Interim Final Rule, on the definition of a full-time student, issued on April 29, 1994. In this preamble, the Secretary also stated:

Rather than changing the proposed definition of full-time student to require measurement of student workloads, a modification is being made to require a minimum number of days of instruction per week for institutions that offer credit hour programs without terms.

The preamble was referring to the definition of an academic year when the five-day rule was created. The five-day rule was replaced with the 12-Hour Rule on November 29, 1994. The regulations established a minimum standard for an undergraduate academic year, which for the University of Phoenix is the 12-Hour Rule.

Study group activities are regularly scheduled instruction. The University stated that the meeting site of a particular study group session was irrelevant to whether the session constitutes regularly scheduled instruction. The University claimed that the study group meetings relate to “class preparation and examinations,” and, therefore, did constitute instructional activity. The University stated that the study group activities were “regularly scheduled” because: (a) the specific tasks to be performed and completed by the study group in a given week were specified in the curriculum modules for the course; (b) all students enrolled in the course must participate; (c) each designated group study session was slated to occur between specified class meetings; (d) students must complete the rigorous assignments, or submit the specified projects that were to be performed during the sessions in order to progress in their program; and (e) faculty maintained control over the sessions by reviewing the designated group study assignments and projects.

OIG Response - Based on the policy interpretation provided in the Policy Development Division letter, the study group activities described by the University would be considered acceptable hours of instruction under the 12-Hour Rule, but only to the extent they were in fact conducted as represented to the Department, including the representation that the activities took place at a site controlled by the University. The study groups were not generally meeting at the University's facilities, nor did the University otherwise exhibit control over the study groups.

The Policy Development Division letter is not binding or enforceable. The University stated that an individual request for policy guidance was not binding on the requestor. Also, the University asserted that the condition “held at a site under the control of the institution” had no binding effect since the condition had not been subjected to the notice and comment procedures specified under the Administrative Procedure Act. The University stated that the Policy Development Division letter was not a definitive statement of agency policy as no evidence suggests that the Department previously has taken the position outlined in the letter. In addition, the Policy Development Division director authored the letter rather than the Secretary or some other high-level official. The University cited two court cases in support of its position.

OIG Response - The University addressed the request for the policy interpretation to the Policy Development Division director who then responded to the University. The requirement that the study group meetings are held at a "site under the control" of the institution was a condition specified in the policy interpretation allowing the University to include study group meeting hours as instructional hours for the 12-Hour Rule calculation. The interpretation did not impose a rule of general applicability on the University, but rather expressed the Department's agreement that the University's particular practices, as represented to the Department, would conform with existing regulations. Therefore, the University's various Administrative Procedures Act arguments are not relevant.

The Department failed to give the University proper notice of the policy interpretation. The University stated that imposition of a multi-million dollar liability under the policy interpretation violated due process and did not provide the University with “fair warning of the conduct it prohibits or requires.” The University stated that it could not have known, before receiving the Policy Development Division letter that study groups must meet at “a site under the control of the institution.” More importantly, it had no reason to assume that the Policy Development Division defined this phrase to mean a site “owned or leased” by the institution since the letter made no such statement. The University claimed that the Department has yet to determine or announce any final or authoritative policy determination on this matter.

OIG Response – As previously stated, the Policy Development Division letter did not impose a new condition on the University, but stated SFA’s agreement that study group time could be considered scheduled instruction if conducted as represented to the Department. The liability assessed against the institution does not include Title IV funds that the University received for periods prior to the issuance of the Policy Development Division letter. If the University was uncertain of the meaning of “a site under the control of the institution” or the Department’s understanding of its representations, the University should have sought clarification from the Department. As mentioned earlier, our assessment of the University’s policies and procedures for documenting and monitoring the hours students spent in study group meetings disclosed significant weaknesses. Therefore, even if there was a misunderstanding over the meaning of the phrase, the University had not implemented sufficient policies and procedures to provide the required control of the study groups, regardless of where they were located.

The GEPA requires that the Department uniformly apply its rules and regulations. The University referred to the emergence of non-traditional modes of instruction throughout postsecondary education which frequently incorporate off-campus components. The University stated that, to its knowledge, neither OIG nor the Department previously has applied the “site” criteria or any 12-Hour Rule criteria to other educational institutions. The University believed that the report violated the GEPA provision, which states that regulations shall be uniformly applied and enforced throughout the 50 states.

OIG Response - The University’s assertion that the Department’s initial enforcement action of the 12-Hour Rule is a violation of the GEPA is unfounded. The requirement “held at a site under the control of the institution” was a key representation relied upon by the Policy Development Division when it provided the interpretation requested by the University. GEPA does not bar the Department from responding to requests for guidance on how the regulations should be applied in specific situations.

The GEPA prohibits the Department from interfering with the University's curriculum. The University stated that the GEPA precluded the Department from adopting a definition of an academic year that unduly intruded upon the University's right to make curriculum decisions. The University stated that requiring study group meetings to take place at sites "leased or owned by the institution" exceeded the scope of the Department's authority.

OIG Response - We agree that curriculum decisions are matters left to the institutions and their accrediting agencies. At the request of the University, SFA provided the interpretation in order for the University to comply with the instructional time requirement of the 12-Hour Rule. The Department utilizes the 12-Hour Rule to ensure that the appropriate amount of the Title IV, HEA program funds is disbursed to students in an academic year.

The OIG engaged in activities expressly reserved for the Department. The University stated that the OIG's use of the Policy Development Division letter in the audit report resulted in unauthorized policy making in an area over which the Department clearly had "program operating responsibility." The University stated that the Inspector General Act of 1978 states that an agency may not delegate "program operating responsibilities" to an OIG. The University cited a court case to support its position.

OIG Response - The OIG did not engage in program operating responsibilities. The audit sought to determine whether the University's practices met the requirements of the 12-Hour Rule. Since the Policy Development Division letter appeared to approve the University's practices, we evaluated whether the University complied with its representations to the Department, that is, the study group meetings were required of all students and were held at a site under the control of the institution.

The University disputes the estimated assessment of liability. The University stated that the OIG improperly included in its estimate loan disbursements made after the audited period. The University reserved the right to further respond to the estimated liability upon receipt of detailed information concerning the data, basis and methodology utilized by OIG in arriving at its estimates and the calculation of liability under the "estimated actual loss formula." The University also objected to the extension of liability to periods beyond the audit period.

OIG Response - The OIG's audit working papers were available for the University's review during the period provided for the University's comments. As of the date of this report, the OIG has not received a request to review the working papers. Our working papers will continue to be available to address questions that the University may have regarding the OIG's methodology and estimated liability during the Department's audit resolution process.

Finding No. 2 — The University Overawarded Title IV Funds to Students Enrolled in Correspondence Courses

Through its Center for Distance Education (CDE), the University offered undergraduate degree and graduate degree programs to students using a “directed study” delivery system.⁹ This delivery system allowed CDE students to complete all course work and degree requirements from their home, work or on the road. The students completed weekly assignments and either mailed, faxed or e-mailed the work to the instructor for grading. The University did not require the CDE students to combine classroom instruction or residential training with the “home study” program.

The University overawarded Title IV funds to students enrolled in correspondence courses provided through CDE. HEA does not allow institution to include cost of living expenses when determining financial need for students enrolled in correspondence courses. Also, we estimate that the University improperly disbursed about \$96,000 in Pell Grant funds to CDE students because the University did not adhere to the regulatory requirement that students in correspondence courses can not be considered as more than half-time students.

CDE Courses Meet Federal Definition of Correspondence Courses

Title 34 CFR Section 600.2 defines a correspondence course as: A “home-study” course provided by an institution under which the institution provides instructional materials, including examinations on the materials, to students who are not physically attending classes at the institution. When students complete a portion of the instructional materials, the students take the examinations that relate to that portion of the materials, and return the examinations to the institution for grading. The University’s educational courses offered through CDE meet the regulatory definition of correspondence courses. CDE students do not physically attend classes at the institution and they send completed assignments to the institution for grading.

The president of Apollo Group, Inc. asserted that CDE programs could not be correctly classified as correspondence. He claimed that courses delivered through “directed study” are virtually identical in structure, course content and academic rigor to the University’s resident programs. However, the regulatory definition of a correspondence course focuses on the method of delivery, not the structure, content and academic requirements of the course. The CDE method of delivery parallels the description provided in the regulatory definition of a correspondence course.

⁹ The University began using its “directed study” delivery system in 1989 under the name of ACCESS. In an Institutional Eligibility Notice dated December 7, 1990, the Department approved courses provided through ACCESS for Title IV programs. The University changed ACCESS to CDE in 1995. The University reduced the length of individual courses from ten weeks to five weeks for undergraduate students and six weeks for graduate students.

The University's accrediting agency has also recognized that CDE's directed study are comparable to correspondence courses. In July 1990, North Central Association of Colleges and Schools conducted a review at the University. In its report, the accrediting agency concluded that the University's "directed study" delivery system ". . . is probably very similar to correspondence courses or independent study courses at the other universities."

We considered whether courses offered through CDE were telecommunications courses. Title 34 CFR Section 600.2 defines a telecommunications course as: "A course offered in an award year principally through the use of television, audio, or computer transmission, including open broadcast, closed circuit, cable, microwave, or satellite, audio conferencing, computer conferencing, or video cassettes or discs." In our opinion, the CDE courses do not meet the requirement that telecommunications courses be "principally" offered through computer transmission.

Title IV Funds Are Limited for Correspondence Courses

Cost of attendance and enrollment status are factors used to determine the amount of Title IV funds that a student is eligible to receive. The HEA does not allow institutions to include cost of living expenses in the cost of attendance for students enrolled in correspondence courses. Specifically, Section 472 of the HEA specifies that for a student engaged in a program of study by correspondence, the cost of attendance is ". . . only tuition and fees and, if required, books and supplies, travel, and room and board costs incurred specifically in fulfilling a required period of residential training. . . ." As for enrollment status, 34 CFR Section 690.2 (c) states that ". . . no student enrolled solely in correspondence study is considered more than a half-time student."

The University disbursed \$10.8 million in FFEL and \$193,000 in Pell Grant funds to over 1,200 CDE students with loan and/or grant periods beginning between October 1995 through September 1997. We estimate that the students were ineligible for about \$96,000 of Pell Grant funds disbursed, because the University did not adhere to the requirement that students in correspondence courses cannot be considered more than half-time students. In addition to cost of living expenses, the University's calculation of the cost of attendance includes tuition, allowances for books and loan application fee, and may include child/dependent care expense. Because we did not obtain the information needed to determine the child/dependent care expense used in the calculations, we were unable to identify the portion of FFEL funds disbursed to CDE students to cover living expenses.

Recommendations

We recommend that the Chief Operating Officer for SFA require the University to:

1. Cease including living expenses when determining the financial need for CDE students under Title IV programs.
2. Limit Pell Grant awards made to CDE students to the amount authorized for half-time students.

3. Determine the portion of FFEL funds disbursed to CDE students to cover living expenses and return those funds to lenders.
4. Return the portion of Pell Grant funds that were improperly distributed to CDE students. We estimate that the amount was about \$96,000 for CDE students with grant periods beginning between October 1995 through September 1997.

University Comments

The University did not agree with our conclusions and recommendations. In its comments to the report, the University stated that the CDE offered independent (directed) study rather than correspondence courses. The University stated that, based on the regulatory definition, correspondence is a home study course that is administered without any direct faculty supervision, where student accountability is achieved by having the student take tests at home and send the tests back to the institution for grading. The University claimed that, in contrast, CDE utilized the same faculty and same admissions standards, curricula, grading systems and graduation requirements as the University's resident programs. Also, the University stated that a mandatory weekly student-instructor contact ensured that students were subjected to meaningful and direct ongoing faculty instruction.

The University stated that the definition of "independent study" adopted in regulation by the Department of Veterans Affairs (VA) was instructive since the Department of Education regulations did not explain what constitutes independent study. The University also cited the VA's regulatory definition of a "home study" course. In contrasting the two VA definitions, the University concluded that VA's definition of independent study placed special emphasis upon collegiate-level instruction, degree-granting authority, and interaction between the student and the instructor. The University stated that the VA regulations do not determine a course as correspondence rather than independent study solely based on the institution's use of the mails or other means of corresponding with the student. The University stated that the definitions and distinctions promulgated by the VA paralleled the distinctions that the University had drawn between CDE's independent study courses and correspondence courses.

The University stated that the report did not explain the basis for the opinion that CDE courses did not meet the requirement that telecommunications courses be principally offered through computer transmission. Also, the University expressed concern that the audit did not consider the frequent use of facsimile transmittals, in combination with the emails, when determining whether CDE's courses qualified as telecommunication courses.

OIG Response

The Department's regulatory definition of a correspondence course, which is quoted in the finding, does not include a reference to "without any direct faculty supervision." The procedures that the University described are not in conflict with the definition of a correspondence course.

The Department does distinguish between correspondence programs leading to certificates and those leading to degrees. The HEA provides that correspondence programs that do not lead to a degree are not eligible for Title IV funds. With regard to the Title IV programs, the University is bound by the Department of Education's regulations, not the Department of Veterans Affairs' regulations.

The Department's regulatory definition of a telecommunications course, which mirrors the HEA provision and is quoted in the finding, lists the mediums comprising telecommunications. Facsimile is not included in the list. The students' use of facsimile to submit assignments and examinations was one of the factors that led us to the conclusion that CDE courses were correspondence courses.

Other Matters

Eligibility of Educational Programs

As a result of our work, SFA has notified the University that two of its educational programs are not eligible programs as defined by 34 CFR Section 668.8. Paragraph (d)(iii) of the section states that an eligible program provided by a proprietary institution of higher education must provide undergraduate training that prepares a student for gainful employment in a recognized occupation. The two programs which did not prepare students for gainful employment in a recognized occupation are the University's Associate of Arts Degree in General Studies and the Associate of Arts - Credit Recognition.¹⁰

Our review found that students enrolled in these two programs received Title IV funds. From University records reviewed during our audit, we identified 19 students who were enrolled in the Associate of Arts Degree in General Studies or Associate of Arts - Credit Recognition programs. These 19 students received \$137,663 in Title IV loans and grants that had loan/grant periods that started between October 1995 and September 1997.

Refund and Other Problems Identified by IPOS Program Review

Prior to the start of our review, SFA's Institutional Participation and Oversight Service (IPOS) completed a program review that identified significant refund problems at the University. Since the period covered by IPOS' review included our audit period, we limited our review of the University's refund procedures to identifying causes that contributed to the University's failure to make refunds or to make the refunds within required time frames.

The systemic issues identified by the IPOS review were presented in a report to the Apollo Group, Inc. entitled "*Corporate Summary Program Review Report*," dated April 21, 1998. The report covered systemic issues identified during on-site reviews conducted at six University locations during the period of April 7, 1997 through May 2, 1997. IPOS concluded that the Apollo Group, Inc. did not comply with various Title IV regulations for the Pell Grant and FFEL programs. In its report, IPOS disclosed that the University (1) had unpaid or late refunds and credit balances; (2) made untimely determinations that a student has withdrawn; (3) had failed to provide records; (4) had not enforced its satisfactory academic progress policy; (5) had financial aid policies and procedures that

¹⁰ The Associate of Arts degree through credit recognition is designed for active duty, retired, and separated U.S. military personnel. The University acts as a "credit bank" where service members may transfer credit from other education sources, thus, allows applicants to fulfill their degree requirements.

were incomplete or conflicted with Federal regulations; and (6) had incomplete or deficient audit trails for confirming compliance with Federal regulations. IPOS concluded that these findings indicated that Apollo Group, Inc had an impaired capability for administering Title IV programs. The report outlined the actions that Apollo Group, Inc. was required to take to address the findings.

One required action was that Apollo Group, Inc. complete a file review of refund calculations and timeliness of refunds for the 1994-95, 1995-96 and 1996-97 award years. In January 1999, the University notified IPOS of the results of the review. The University's contractor had identified 3,302 "out-of-attendance" students that had unpaid refunds/credit balances of about \$2.9 million at the time of the contractor's review. (The contractor stated in its December 21, 1998 report that the University has now paid these unpaid refunds to the applicable lender and/or Pell fund account.) The contractor also identified 4,760 "out-of-attendance" students that had refunds/credit balances of about \$6.9 million that were not paid on a timely basis. In addition, the contractor identified 3,774 students that had been "out-of-attendance," but subsequently re-entered and continued in their program of study.

Apollo Group, Inc. has acknowledged that its mechanisms for monitoring individual students' enrollment status may in some cases have been insufficient. In a letter to IPOS dated November 2, 1998, the Apollo Group stated it had contracted for a file review of all students that withdrew during the 1997-98 fiscal year. The University reported to IPOS that the review identified \$2.8 million in unpaid refunds for these students and that it subsequently paid the refunds. In addition, the review identified \$8.5 million of refunds that had not been paid on a timely basis.

Our review found that, in addition to the findings disclosed in the IPOS report, the University had implemented a "schedule change" policy that allowed students up to the equivalent of two leaves of absence beyond what the regulations allow. The policy also allowed school officials to approve breaks in a student's attendance without the student's request for the approval. In a letter to Apollo Group, Inc. dated November 19, 1998, IPOS informed the University that it may grant a student an official leave of absence for a period of up to 60 days to bridge the gap between courses, but this approach may only be used once in a 12-month period.

SFA reviewed Apollo, Inc.'s response to the program review and conducted a follow-up site visit to the Apollo Group's corporate office and the University's main student financial assistance offices. In its Final Program Review Determination Letter dated July 28, 1999, IPOS concluded that the University had completed a satisfactory response to all findings in the program review report.

Background

The University of Phoenix (University) is a private, for-profit higher education institution that provides educational programs for working adult students. The University was founded in Phoenix, Arizona in 1976, and is a subsidiary of Apollo Group, Inc. It is accredited by the Commission on Institutions of Higher Education of the North Central Association of Colleges and Schools. The University ranks as one of the institutions that annually disburses the highest total amount of Title IV funds.

As of August 31, 1998, the University reported a total of 70 main campuses and learning centers¹¹ located in 13 states, and the Commonwealth of Puerto Rico. The Online Campus is located in San Francisco, California. The University describes its Online Campus as a computer-based educational delivery system. The Center for Distance Education (CDE) is located in Phoenix, Arizona. The University describes CDE as directed study. On-site classes are provided at the other 68 campuses and learning center locations. The University also provides education courses that do not participate in Title IV Programs: CPEInternet (continuing professional education via the Internet) and FlexNet (courses for executives who need to earn an accredited graduate degree).

The University offers certificate programs, and graduate and undergraduate degree programs. Certificate programs are available in several fields such as negotiation, conflict resolution and total quality management. Bachelor of Science and Associate of Arts Degree programs offered by the University include general studies, business and management, health care professions, counselor education, and technology programs. The University also offers an Associate of Arts Degree through Credit Recognition. In 1998, the University received approval from its accrediting agency to offer a Doctor of Management degree.

	<i>1996</i>	<i>1997</i>	<i>1998</i>
Tuition Revenues	\$165 million	\$221 million	\$305 million
Student Enrollment	33,096	42,134	53,249
Percentage of Revenue From Tuition and Other Institutional Charges That Was Received from Title IV Programs	51 percent	56 percent	58 percent

¹¹ In its 10K report to the Security and Exchange Commission, Apollo Group, Inc. described campuses as classroom and administrative facilities with full student and administrative services. Learning centers were described as primarily classroom facilities with limited on-site administrative staff.

The University information was derived from figures reported in the Apollo Group, Inc.'s 10-K reports filed with the Securities and Exchange Commission. The tuition revenue amounts are for the year ended August 31. The student enrollment numbers and revenue percentages are as of August 31.

The University participates in the Federal Family Education Loan Program and the Federal Pell Grant Program.

Title IV Disbursed to Students	October 1, 1995 through September 31, 1996	October 1, 1996 through September 31, 1997	Total for Two Year Period Ended September 31, 1997
Federal Family Education Loan Program			
Subsidized Loans	\$ 63,894,633	\$ 95,691,627	\$159,586,260
Unsubsidized Loans	79,935,702	99,218,644	179,154,346
PLUS Loans	198,464	424,739	623,203
Total	\$144,028,799	\$195,335,010	\$339,363,809
Federal Pell Grant Program	\$ 3,870,234	\$ 4,974,156	\$ 8,844,390
Total Title IV Funds Received	\$147,899,033	\$200,309,166	\$348,208,199

The U.S. Department of Education reported a FFEL cohort default rate of 5.8 percent for fiscal year 1996.

Purpose, Scope and Methodology

The objective of the audit was to evaluate the University's management of Title IV programs. After conducting a survey of the University's control environment, electronic data systems, and policies and procedures, we focused our review on the following areas: (1) Required hours of instruction in an academic year under the 12-Hour Rule, (2) Institutional and program eligibility for Title IV funds, and (3) Causes that contributed to the University's failure to make refunds or to make the refunds within required time frames.

To accomplish our objectives, we reviewed the University's financial aid policies and procedures. We also reviewed the most recent Title IV audit reports prepared by the University's Certified Public Accountants and the program review report prepared by SFA's Institutional Participation and Oversight Service. We interviewed University officials, faculty and staff.

We relied extensively on computer-processed data extracted by the University from its databases and our extract of data from National Student Loan Data System (NSLDS). To ensure that the University provided us with records for all students, we compared students' social security numbers on the NSLDS and the University's extract. We gained an understanding of the various data elements contained on the University's extract. We also held discussions with University staff to gain an understanding of the automated process used for determining the number of credit hours that the student is expected to complete for the loan period. We did not perform other tests to establish the reliability of data contained on the University and NSLDS extracts. Nothing came to our attention during our review that would cause us to doubt the acceptability of the extracted data used in our analyses.

The audit covered loan and grant periods with start dates between October 1, 1995 and September 30, 1997. We performed fieldwork on-site at the University from October 1997 to March 1998. We continued to collect and analyze data in our offices through April 1999. Our audit was performed in accordance with government auditing standards appropriate to the scope of the review described above.

Methodology Used to Estimate the Title IV Funds Improperly Disbursed By the University

The University provided electronic files containing information on students who received disbursements for FFEL and/or Pell Grants with loan/grant periods started between October 1, 1995 and September 30, 1997. We used the information contained on these files and additional information extracted from the NSLDS to estimate the improperly disbursed funds.

Estimates for Finding No. 1

The University's academic year would need to be 90 weeks in length in order for it to meet the 360-hour requirement for an academic year. Therefore, the University could not (1) disburse Title IV funds to students during a 90-week academic period that exceeded the maximum annual amounts for an academic year allowed under the FFEL and Pell Grant programs and (2) disburse FFEL funds to students who were enrolled less than half-time during a 90-week academic period.

For the FFEL estimates, we analyzed disbursements for two separate groups of undergraduate students identified from the University-provided files.

- The first group consisted of students who received disbursements for *loans with loan start dates* in the period October 1, 1995 through September 30, 1996 **AND** disbursements for *loans with loan start dates* in the period October 1, 1996 through September 30, 1997.
- The second group (which excludes students included in the first group) consisted of students who received disbursements for *loans with loan start dates* in the period October 1, 1996 through September 30, 1997 **AND** disbursements for *loans with loan start dates* in the period October 1, 1997 through September 30, 1998.¹²

For students in each group, we analyzed loan period start dates, credit hours and other information to identify the maximum number of credit hours certified and the loan disbursements covering a 90-week academic period.

Students Who Were Enrolled Less Than Half-Time. Students who had less than 27 credit hours certified during the period and who were not at the end of their educational programs were not

¹² The University-provided files did not contain information for the entire period of October 1, 1997 through September 30, 1998. Therefore, we used the NSLDS to obtain the loan information needed for our analysis of loans with loan start dates after September 30, 1997 and loan disbursements after that date.

enrolled at least half-time.¹³ Therefore, these students were not eligible for FFEL. We identified \$185,000 in FFEL disbursements made to students who were not enrolled at least half-time.

Students Who Received FFEL Disbursements In Excess of Annual Limits. For the remaining students, we compared the disbursements to the applicable annual loan limit. Students were not eligible to receive the amounts that exceeded the limit. For the two groups, we identified \$50.4 million of disbursements that exceeded the annual limits

Students Who Received Pell Grant Disbursements In Excess of Annual Limits. We identified the funds awarded for Pell Grants started between October 1, 1995 and September 30, 1996 and the funds awarded for Pell Grants started between October 1, 1996 and September 30, 1997. To determine the amount of Pell Grant funds that a student may receive in a payment period, institutions without standard terms multiply the maximum amount shown on schedules published by the Secretary by a specified fraction. The numerator of the fraction is the number of credit hours in a payment period and the denominator is the number of credit hours in an academic year. Since the University used the credit hours for a 45-week academic year rather than a 90-week academic year as the denominator, the Pell Grant award was overstated by one-half, or 50 percent. We identified \$4 million in Pell Grant disbursements that exceeded the maximum amount allowed.

Estimates for Finding No. 2

No student enrolled in a correspondence course is considered to be more than a half-time student. To determine the Pell Grant fund improperly disbursed for CDE students, we identified from the University-provided files the CDE students who received Pell Grant funds for grants that started between October 1, 1995 and September 30, 1997. For this group of students, we identified the total amount of the Pell Grant disbursements.

As mentioned in the previous section, institutions without standard terms multiply the applicable maximum Pell grant by a specified fraction to determine the Pell funds that a student may receive in a payment period. The numerator of the fraction is the number of credit hours in a payment period and the denominator is the number of credit hours in an academic year. Because CDE students could only be considered half-time students, the student could only receive Pell grant funds for up to one-half of the credits hours in the institution's academic year. Since the University did not consider CDE students as half-time student, the credit hours used in the numerator of the fraction were overstated by 50 percent. Therefore, we estimated that the CDE students were ineligible to receive 50 percent, or \$96,000 of the Pell Grant disbursements made during each period.

¹³ We used 27 credit hours to conclude that students were at least half-time students. The University's undergraduate courses are five-weeks in length during which a student receives four hours of class time instruction per week. A student generally earns three credit hours for each completed course. Therefore, a full-time student would need to complete 18 courses (54 credit hours) in a 90-week academic year to receive 360 hours of instruction. A half-time student would need to complete at least nine courses (27 credit hours) in a 90-week academic year to receive 180 hours of instruction.

Statement on Management Controls

As part of the review, we gained an understanding of the University's management control structure, as well as its policies, procedures, and practices applicable to the scope of the audit. Our purpose was to assess the level of control risk for determining the nature, extent, and timing of our substantive tests. We assessed the significant management controls in the following categories:

- Cash Management
- Student Attendance
- Refunds and Cancellations
- Institutional and Program Eligibility

Because of inherent limitations, a study and evaluation made for the limited purpose described above would not necessarily disclose all material weaknesses in the control structure. However, our review identified weaknesses related to controls over hours spent by students in study group meetings and program eligibility. These weaknesses are discussed in the *Audit Results* and *Other Matters* sections of this report.

Attachment

University's Comments on the Report

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J. MICHAEL HALL, GOVERNMENT RELATIONS
October 30, 1999

CONFIDENTIAL
VIA FEDERAL EXPRESS

Ms. Gloria Pilotti
Regional Inspector General for Audit, Region IX
U.S. Department of Education
Office of Inspector General
801 I Street, Room 219
Sacramento, CA 95814

Re: Draft Audit Report - University of Phoenix
Audit Control No. A0970022, July 1999

Dear Ms. Pilotti:

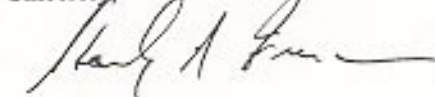
Enclosed are written comments submitted on behalf of the Apollo Group, Inc. and the University of Phoenix (the "University") as an initial response to the above-referenced draft Audit Report.

Your July 28, 1999 letter of transmittal to the University stressed the confidentiality of the draft Audit Report and instructed Apollo to "safeguard it against unauthorized use." Our client has abided by that directive, and respectfully requests that these Comments also be maintained as confidential.

As you know, the University and the U.S. Department of Education Office of Student Financial Assistance ("OSFA") are actively engaged in cooperative discussions aimed at achieving an agreed-upon resolution of this matter. Based upon statements made during those discussions, it is the University's clear understanding that no final Audit Report will be issued while these discussions are underway. If that understanding is somehow incorrect, we ask that you notify the University or myself immediately. Moreover, we request that, in any event, the University be given at least ten days advance notice prior to issuance of any final Audit Report. Please let the University know whether this request will be honored.

Lastly, we are informed that OSFA is simultaneously presenting written comments to the Office of Inspector General. The University requests a copy of those comments and further requests an opportunity to respond to you in writing concerning the OSFA commentary, prior to issuance of any final OIG Audit Report. Please let the University know whether this request will be granted, and specify any deadline for response to the OSFA comments.

Sincerely,



Stanley A. Freeman

Enclosure

cc: Mr. Todd S. Nelson (with enclosure)
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**BEFORE THE UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL**

COMMENTS IN RESPONSE TO THE JULY 28, 1999 DRAFT AUDIT REPORT

Audit Control No. A0970022
Submitted: November 1, 1999

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TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY OF THE UNIVERSITY'S RESPONSE TO THE OIG DRAFT AUDIT REPORT.	1
II.	RESPONSE TO FINDING ONE: THE UNIVERSITY'S "SCHEDULED COHORT GROUP STUDY" QUALIFIES AS INSTRUCTIONAL TIME UNDER THE 12-HOUR RULE.	3
A.	SUMMARY FACT STATEMENT RELATING TO STUDY GROUPS.	3
1.	<i>The University Maintains Strict Control Over Its Scheduled Cohort Group Study Model And Activities.</i>	4
2.	<i>In 1995, After Extensive Discussion, The Department Confirmed That UOP's Study Groups Are Properly Included In The University's Academic Year.</i>	5
3.	<i>ED Policy Staff Did Not And Could Not Reverse The Secretary's Published Guidance Crediting Off-Site Instructional Activity.</i>	6
4.	<i>UOP Students Engage In Substantial Quantities Of Scheduled Instructional Time Above And Beyond Their Class And Study Group Hours.</i>	7
5.	<i>The 12-Hour Rule Is Not Uniformly Applied. It Would Appear That ED Does Not Apply <u>Any</u> 12-Hour Rule Criteria To A Broad Array Of Covered Programs.</i>	8
B.	REGULATORY AND LEGAL ARGUMENTS REFUTING DRAFT OIG FINDING ONE.	10
1.	<i>As The Department Has Long Since Agreed, The University's SCGS Activities Plainly Qualify For Inclusion In The 12-Hour Rule Calculation.</i>	10
2.	<i>Draft Finding One's Central Premise – That Group Study Activity Must Occur At Sites Owned Or Leased By The University – Is Contradicted By The Governing Regulations And Guidance.</i>	12
a.	<i>The 12-hour rule itself acknowledges that off-site instruction can be included, and neither ED nor OIG has ever published or made known any rule to the contrary.</i>	12
b.	<i>Accompanying regulatory guidance explicitly acknowledges that various forms of unsupervised off-site instruction, such as internships, can be included.</i>	13
c.	<i>The ED definition of full-time student, which encompasses the academic year definition, explicitly encompasses off-site instruction, research and "special studies that the institution considers sufficient."</i>	14
d.	<i>Similarly, nowhere in the governing statute, regulations, or subregulatory guidance is the scope of qualified instructional activity conditioned by any requirement of institutional "control" over the situs of such activities.</i>	16
3.	<i>If The PDD Staff Letter Opined That UOP Should Conduct SCGS On-Campus, That Opinion Was Not Binding Or Enforceable.</i>	18
a.	<i>The PDD staff letter is not enforceable agency action</i>	18
b.	<i>The PDD staff letter is not binding on UOP</i>	19
c.	<i>Even if the policy constitutes the agency's official position, it still is not binding authority.</i>	21
4.	<i>The Department Failed To Give UOP Proper Notice Of The Policy Interpretation Upon Which Draft Finding One Was Premised.</i>	22

TABLE OF CONTENTS - Cont'd

C. **OIG LACKS THE AUTHORITY TO PROCEED WITH DRAFT FINDING ONE**.....24

 1. *The General Education Provisions Act Prohibits The Department From Interfering With UOP's Curriculum*.....24

 2. *If Made Final, The Proposed Finding Would Violate The GEPA Provisions Requiring ED To Uniformly Apply Its Rules And Regulations*.....25

 3. *OIG's Issuance of Draft Finding One Also Exceeds Its Authority Under the Inspector General Act of 1978*.....26

D. **THE UNIVERSITY DISPUTES THE ESTIMATED ASSESSMENTS PRESENTED IN DRAFT FINDING ONE**.....27

III. **RESPONSE TO DRAFT FINDING TWO: CDE COURSES ARE NOT CORRESPONDENCE COURSES**.....28

 A. **CDE IS OFFERED VIA INDEPENDENT (DIRECTED) STUDY, NOT CORRESPONDENCE**.....29

 B. **OIG FAILED TO ADEQUATELY CONSIDER WHETHER CDE COURSES ARE TELECOMMUNICATIONS COURSES**.....31

IV. **RESPONSE TO OTHER MATTERS CITED IN THE DRAFT AUDIT REPORT**.....33

V. **CONCLUSION**.....33

I. EXECUTIVE SUMMARY OF THE UNIVERSITY'S RESPONSE TO THE OIG DRAFT AUDIT REPORT.

By these Comments, The Apollo Group, Inc. and The University of Phoenix (the "University" or "UOP"), through their undersigned counsel, respond to the Draft Audit Report issued July 28, 1999 by the U.S. Department of Education (the "Department" or "ED") Office of Inspector ("OIG") under Audit Control Number A0970022.¹

The University strongly disagrees with the findings and recommendations set forth in the Draft Audit Report for the reasons detailed below.² Most importantly, the University strenuously objects to the principal finding, by which OIG recommends that ED reverse itself and invalidate the University's Scheduled Cohort Group Study ("SCGS") model. Under the UOP SCGS model, the University's faculty members implement mandatory curriculum modules that provide for the completion of projects by student task teams, or "study groups," whose activities comprise an important component of UOP's acclaimed educational model. The SCGS model is designed to enable working adults to engage in instructional activity and class preparation that simultaneously develops the strong teamwork skill set currently demanded by American businesses and the global economy.

As will be shown, the Department agreed with the University's conclusion that SCGS activities qualify for inclusion in the "12-hour rule" calculation of the academic year definition. Yet, the OIG now asks the Department to reverse its position and instead disallow substantial Title IV funds long since received by participating students. More specifically, OIG recommends retroactive application of a previously unstated and unpublished policy purportedly requiring all study group activities to take place at a site owned or leased by the University. In the Comments that follow, the University establishes that the OIG draft recommendation is devoid of any legal, regulatory, or factual basis, and that draft Finding One should be rescinded for the following reasons:

- The University maintains control over its SCGS activities. Study group activities are specified in the curriculum modules for the pertinent course and require students to complete academically rigorous projects as a team. These study group activities are a crucial component of each student's instructional activity and class preparation.
- The Department has long since determined that the University's study groups qualify under the 12-hour rule. That determination was reached based upon a series of discussions and informational exchanges between the University and the Department.

¹ These Comments are timely submitted. By letter dated August 28, 1999, OIG affirmed the extension of the due date for response to November 1, 1999.

² The facts and assertions set forth herein do not constitute the sole or exclusive reasons why the University disagrees with the draft findings and recommendations stated in the Draft Audit Report. The University expressly reserves its right and opportunity to supplement those facts and assertions. Moreover, the University expressly reserves its right and opportunity to respond further in the event that any Final Audit Report should issue. Finally, in the event that ED issues a Final Audit Determination or initiates any administrative action arising out of the matters set forth in the Draft Audit Report, the University expressly preserves and reserves all rights of appeal available by law, including, but not limited to, those set forth at 34 C.F.R. Part 668, Subpart H.

- The governing regulations and the Secretary's published statements confirm that the University's SCGS activities plainly qualify for inclusion in the 12-hour rule calculus. Whereas draft Finding One relies solely upon a policy staff opinion stated in an unpublished letter, the Secretary's commentary published in the *Federal Register* with the final 12-hour rule clearly affirms that the regulations intended the University's study groups to be included, not excluded.
- The central premise of draft Finding One – that SCGS must occur at sites owned or leased by the University – is contradicted by the text of the 12-hour rule, by ED's definition of a "full-time student," and by the accompanying published commentary. Those authoritative sources establish that no such "on-campus" requirement was ever contemplated or imposed.
- As a matter of law, even if the ED staff opinion relied upon by OIG had stated that SCGS activity must occur on-campus – which it did not – that opinion was neither binding nor enforceable.
- The absence of any authoritative or binding effect of the ED staff "on-campus" opinion is apparent from the fact that, even now, the Department has yet to finally determine or announce any final or authoritative policy determination on this matter.
- OIG lacks any legal authority to proceed with draft Finding One because the proposed finding would violate the statutory prohibition against ED interference with the curricula of educational institutions.
- If issued in final, the proposed finding would violate the General Education Provisions Act, which requires the Department to uniformly apply its rules and regulations.
- In issuing Finding One, even in draft form, the OIG has exceeded its authority under the Inspector General Act of 1978 by engaging in prohibited "program operating responsibilities" expressly reserved to the ED program office, not OIG.
- The "estimates" comprising the draft disallowance recommendations presented in the draft finding are incorrect and arbitrary. Those unexplained estimates cannot lawfully be sustained, and, therefore, they must not be incorporated into any Final Audit Report.

In draft Finding Two, the Draft Audit Report also focuses upon courses offered by the University's Center For Distance Education ("CDE"). The University disagrees with the OIG's proposed characterization of these CDE courses as "correspondence courses." The CDE instructional mode does not constitute "correspondence" as defined by ED. Accordingly, OIG should rescind this draft finding as well.

For all of these reasons, each of which is detailed in the Comments that follow, the Draft Audit Report presents no proposed finding justifying the issuance of a Final Audit Report. No Final Audit Report should be issued, and the Office of Inspector General should instead affirm in writing that the audit identified as Audit Control Number A0970022 is now closed without further action.

II. RESPONSE TO FINDING ONE: THE UNIVERSITY'S "SCHEDULED COHORT GROUP STUDY" QUALIFIES AS INSTRUCTIONAL TIME UNDER THE 12-HOUR RULE.

A. SUMMARY FACT STATEMENT RELATING TO STUDY GROUPS.

Before presenting a detailed legal and regulatory response to draft Finding One, a few simple, but crucial, facts must be mentioned.³

First, the term "study groups" is a misnomer. As will be shown, the University's long-standing and much acclaimed SCGS model entails far more than what might be commonly inferred from the label "study groups." To more accurately describe what the model entails, and to address the confusion that the title has already created, the University plans to change the name to "task teams." However, for clarity, these Comments will continue to refer to "the SCGS model" or, simply, to "study groups."

Second, draft Finding One does not and cannot question whether the University's study groups qualify as instruction under the 12-hour rule. As will be shown, the Department has long since answered that question in the affirmative by its written statements and published regulations. Even though the essential instructional and academic content of the study groups is not at issue, the Comments that follow present information on these topics to provide the necessary background and context. The essential fact is that UOP's study groups have long since been determined by the Department to qualify as instruction under the 12-hour rule.

Third, study groups have been, and continue to be, an essential and integral component of the University's regularly scheduled instructional activity. To progress and ultimately succeed in UOP's residential programs, enrollees must participate actively in the study group component of each course. These students are required to be part of a study group and to complete activities and produce academic products as a team. The required study group activities are not merely preparatory in nature, as might occur in a group study setting at a traditional institution. These are proactive instructional activities, entailing specified student work projects and outcomes, and they form an essential component of the curriculum.

Fourth, for all of these reasons, the University's study groups have always constituted regularly scheduled instructional activity. The Department agreed with that conclusion when UOP described the SCGS model in exhaustive detail at a series of meetings and discussions in 1994 and 1995. The shared conclusion reached – that the University's study groups qualify as regularly scheduled instruction under the 12-hour rule – holds true regardless of whether the groups meet on campus or elsewhere. Indeed, the situs of a particular study group session is

³ The facts presented in these Comments with regard to the University's academic programs and practices are drawn from and based upon information already submitted to OIG by the University in letters dated March 12 and April 17, 1998 from the University's Provost and President, respectively.

irrelevant to whether the session constitutes regularly scheduled instruction. As will be shown, the Secretary's own regulations and guidance affirms this latter conclusion.

Lastly, there has never been, nor could there ever be, any question about whether UOP's students do in fact participate in mandatory group study activities.⁴ The Draft Report does not contend otherwise.

1. The University Maintains Strict Control Over Its Scheduled Cohort Group Study Model And Activities.

Draft Finding One seeks to exclude SCGS from the 12-hour rule calculation based upon OIG's purported finding that "the University did not require its students to meet at locations that were leased or owned by the University or that the study group meetings were otherwise controlled by the University." Draft Report at 5. The finding does not clearly specify the statutory or regulatory basis or other legal authority establishing this "control" standard, but, in any event, the premise is incorrect. The group study sessions are operated under the control of the University. UOP previously detailed such control in separate letters sent to OIG in March and April of 1998. The University's Provost explained that the University has in place extensive controls over the cohort group study sessions, including, but not limited to, the following:

- The University's educational model relies on the use of study groups or "task teams." The study group assignments are specified in the curriculum modules for the course. The assignments are designed to be rigorous, and their completion entails substantial amounts of group time between class meetings.
- The task team and study group portions of the curriculum necessitate that group study meetings occur outside of class. Many groups use the University's facilities, i.e., study group rooms and vacant classrooms. However, if the study group decides that some other mutually acceptable location is beneficial, the group study meeting may be scheduled off-campus. Study groups often meet more frequently than required.
- The faculty maintains control over the group study sessions in a number of ways. For example, faculty review the student assignments, which are required to be completed during particular group study sessions. Group grades are awarded for oral and written projects completed within the study group. Study group log forms are reviewed by faculty members.
- In addition to the scheduled group study and class time required of all UOP enrollees, each student also engages in a substantial amount of scheduled preparation in the form of reading assignments, writing assignments, and preparation for examinations and presentations.

Hence, contrary to Finding One, the SCGS methodology is dictated, defined, scheduled, monitored, and controlled by the University of Phoenix. Every study group that meets does so

⁴ The Draft Report at page 6 criticizes the University's documentation of study group attendance and asserts that, for this reason, UOP "did not take steps to ensure that all students actually participated in study group meetings." That assertion is false and groundless. As was fully apparent to OIG, UOP's curriculum and academic requirements include the mandatory study group sessions, and the students do, in fact, participate in the sessions.

for the express purpose of achieving the academic objectives specified in the curriculum modules for the course for that particular study group session. The study group sessions are comprised of instructional activity and classroom preparation, all of which are regularly scheduled.

The Draft Report does not refute or deny the foregoing indicia of control. Instead, OIG's focus is solely upon one non-qualitative factor: the prospect that some study groups choose to meet off-campus. By itself, this factor presents no compliance issues. As explained immediately below, there is no requirement, regulatory or otherwise, mandating that study groups otherwise controlled by the University must meet on-campus. Indeed, the applicable regulations explicitly contemplate inclusion of off-campus activities within the 12-hour rule calculation. Draft Finding One errs by focusing on the off-campus locale of certain group study sessions without taking into consideration the University's numerous qualitative methods of control described above.

2. *In 1995, After Extensive Discussion, The Department Confirmed That UOP's Study Groups Are Properly Included In The University's Academic Year.*

In 1994, the University took the unusual step of requesting a series of meetings with the Department to discuss some of the practical implementation problems posed by the proposed 5-day rule. As a result, the University engaged in discussions with the Office of the Assistant Secretary for Postsecondary Education in Washington, D.C. on or about August 16, 1994, September 6, 1994, September 9, 1994, and December 9, 1994.

During these meetings, there was considerable focus upon UOP's cohort study group methodology. The University strongly believes that its innovative cohort study group teaching methods (pioneered over the last 25 years) provide a strong teamwork skill set currently demanded by American businesses. It is a valuable asset to its graduates, and the methods are a concept now emulated by many other institutions of higher education. The University believes that teaching teamwork is a concept that is good for its students, for American businesses, for America's educational system, and for the global economy.

UOP intended that these meetings would serve to ensure that the Department understood the valuable nature of UOP's study group concept and that it would take this fact into account when reviewing the 5-day rule proposed regulation. The discussions included cooperative exchanges during which University officials responded to extensive questioning from various Department officials and described in specific detail the precise structure of the study groups and the methods by which UOP exercised control over them. The University also stated that the groups may meet off-campus as a matter of convenience.⁵

The Department's final adoption of the 12-hour rule reflected the concepts discussed in those meetings. The final rule, published in the *Federal Register* on November 29, 1994,

⁵ The University previously described its cooperative exchanges with the Department in the Apollo President's letter to OIG dated April 17, 1998.

expressly states that time spent in "preparation for examinations" — i.e., outside preparation time — is included within the 12-hour calculation. 34 C.F.R. § 668.2(b)(2)(ii)(B).⁶ Whereas draft Finding One proposes to exclude the University's group study based solely upon the fact that some study groups choose to meet off-site as a matter of convenience, the rule itself expressly includes activities occurring outside the classroom in the 12-hour rule calculation. Nowhere does the regulation expressly or implicitly impose an "on-campus" requirement; instead, as detailed immediately below, the Secretary expressly included off-campus activities in the 12-hour rule formulation. The rule adopted as the culmination of UOP's meetings with the Department is directly at odds with draft Finding One.

3. *ED Policy Staff Did Not And Could Not Reverse The Secretary's Published Guidance Crediting Off-Site Instructional Activity.*

The correspondence between the University and ED pertaining to the 12-hour rule included a May 30, 1995 letter from the Director of ED's Policy Development Division ("PDD") to an Apollo Vice President (hereinafter the "PDD staff letter"). That letter confirmed that the University's study groups are properly included in its academic year for purposes of compliance with the 12-hour rule. The letter also included a passage by which PDD staff expressed its understanding that: "the study group concept is still operating as you described last year. That is, it is required of all students in the program and that it is held at a site under the control of the institution." This characterization now serves as the sole basis for Finding One in the Draft Audit Report. It was contained in a letter written in the first person and signed by the Policy Development Division's Director. The letter apparently was not approved or reviewed by the Secretary of Education, by the Assistant Secretary for Postsecondary Education, by the pertinent Deputy Assistant Secretary, or by any ED official other than the signatory. The letter shows no distribution of copies to any other ED official.⁷

Draft Finding One now proposes to disallow all UOP group study, and exclude all such instructional activity from the University's academic year, solely because the study groups may have met at sites not owned or leased by the University. The draft finding cites to no statute, regulation, or case authority to support this 180-degree reversal of the prior confirmation that study groups are properly included in the University's academic year. Instead, it relies exclusively upon the above-quoted staff opinion, in combination with a follow-up discussion by which "the Policy Development Division staff informed OIG that 'a site under the control of the

⁶ The rule specifically identified activities that do not qualify as "instructional time." The rule stated that "instructional time does not include periods of orientation, counseling, vacation, or other activity not related to class preparation or examinations." 34 C.F.R. § 668.2(b) (definition of "academic year" at subsection (2)(iii)). This passage again makes clear that the definition of instructional time focuses upon whether the activities are class-related, not on whether they occur on or off-campus.

⁷ These facts are not intended to minimize or to call into question the legitimate functions and responsibilities of ED's policymaking personnel. However, they are pertinent to the legal issue of whether the PDD staff letter's opinions regarding study group locations are legally binding. See section II.B.3. of these Comments.

institution' meant a location that was either leased or owned by the University." Draft Report at 5 n.4.

As detailed below, the PDD staff lacks any authority to simply "announce" new regulations in this fashion.⁸ Moreover, the one-phrase reference to "a site under the control of the institution" directly contradicts prior statements published by the Secretary of Education. Just a few months before the PDD staffer shared his views regarding the location of study group activities, the Secretary published in the *Federal Register* a definitive commentary making it clear that the definition of "regularly scheduled instructional activity" was not and is not constrained by any "on-site" requirement. The Secretary declared that "internships, cooperative education programs, independent study, and other forms of regularly scheduled instruction can be considered as part of an institution's academic year." 59 Fed. Reg. 61148 (November 29, 1994) (emphasis added).⁹ That commentary reaffirmed virtually identical statements that had accompanied the 5-day rule, a precursor to the 12-hour rule. *See* 59 Fed. Reg. 22362 (April 29, 1994) (emphasis added).¹⁰ Hence, in the months preceding issuance of the PDD staff letter, the Secretary repeatedly endorsed inclusion of off-campus instructional activity in the academic year calculation.

Now, by draft Finding One, the OIG asserts that: (1) the University and the Department were obligated by law to disregard the Secretary's formal published guidance and to abide instead by the opinions expressed in the May 30, 1995 PDD staff letter, and (2) the PDD staff letter meant to exclude all study group activity occurring at sites not owned or leased by the University from the academic year.

The University rejects both of these unlikely premises. The University did not understand the PDD staff letter to signify that study groups must meet at sites owned or leased by the University. The letter made no such statement. If that meaning had been intended, the letter would have said, "held at a site owned or leased by the University," instead of referring generally to the concept of "control." It cannot be reasonably suggested that the PDD staff letter obligated the University to disregard formal published regulatory guidance issued by the Secretary.

4. *UOP Students Engage In Substantial Quantities Of Scheduled Instructional Time Above And Beyond Their Class And Study Group Hours.*

Class time and group study sessions by no means represent the entirety, or even necessarily the majority, of scheduled student activity. Students also engage in many hours of

⁸ See Sections II.B. and II.C. of these Comments.

⁹ The complete commentary by the Secretary is quoted verbatim at page 13 below.

¹⁰ This commentary is quoted at page 13 below.

scheduled preparation time, as well as in cooperative educational activities in their place of work. These components should also be included in UOP's academic year.

As pointed out in the March 12, 1998 correspondence to OIG from the University's Provost and Vice President for Academic Affairs, in addition to required scheduled group study and class time, each student also engages in a substantial amount of scheduled preparation in the form of reading assignments, writing assignments, and preparation for examinations and presentations. UOP's Provost noted that, on average, students spend an additional eight hours in these activities between sessions.

In addition, the UOP model encompasses parallel periods of academic study and public or private employment designed to give students work experience and earning potential, which facilitates accomplishment of academic or occupational objectives. The University's cooperative model requires that students maintain a job (or, in limited cases, a "work environment"); that they apply what they have learned at work; and that they complete projects that relate directly to their current employment and that directly benefit their employer. These activities entail numerous additional hours of instruction.

There is no indication that the OIG considered the enormous volume of instructional time required of students during every academic year. These hours should have been counted. If anything, the University's 45-week academic year is too long, rather than too short.

5. *The 12-Hour Rule Is Not Uniformly Applied. It Would Appear That ED Does Not Apply Any 12-Hour Rule Criteria To A Broad Array Of Covered Programs.*

By its Draft Report, OIG applies the 12-hour rule to UOP because "the University measured its educational programs in credit hours without standard terms." The Draft Report then defines an institution without standard terms as one that "does not use semesters, trimesters, or quarters." Draft Report at 4 n. 3. In support of this definition, the Draft Report relies upon the Secretary's published guidance applying the 12-hour rule to "programs that are measured in credit hours without standard terms." Draft Report at 4.¹¹ OIG then proposes to apply retroactively, and, for the first time, a new "on-campus" criterion to UOP only.

The OIG's assertion that the 12-hour rule applies only to institutions that "do not use semester, trimesters, or quarters" is at odds with the published regulatory guidance issued by the Department. Under the Department's formulation, the 12-hour rule applies to all non-standard term programs, regardless of whether the program or institution "uses" semesters, trimesters, or quarters. Therefore, institutions that enroll and bill students on a semester, quarter, or trimester

¹¹ See 59 Fed. Reg. 61,149 (November 29, 1994). Ironically, for this proposition the Draft Report relies upon the Secretary's same formal published Preamble that endorsed the inclusion of off-campus activities in the 12-hour rule computation. See *id.* at 61,148 and the discussion at page 7 of these Comments. The Draft Report ignores the Preamble's statements on the latter subject, while citing to the Preamble for other purposes.

basis are, nonetheless, subject to the 12-hour rule if those academic terms are "non-standard" terms.

This established dichotomy between "standard term" programs and institutions — i.e., those not subject to the 12-hour rule — and "non-standard term" programs and institutions — i.e., those that are subject to the 12-hour rule — has been advanced by the Department in its published rules and in informal written guidance disseminated to the financial aid community. The distinction between standard and non-standard is spelled out in the Pell Grant regulations at 34 C.F.R. § 690(a)(1)(i). That provision states that, to meet the definition of a standard term, a program must: (a) measure progress in credit hours; (b) be offered in semesters, trimesters, or quarters; (c) require at least 12 credit hours' enrollment each term for full-time students; and (d) not offer its program with overlapping terms.

The Department has embellished upon this distinction between standard and non-standard terms in written materials presented to the financial aid community. For example, materials disseminated at the 1999 Convention of the National Association of Student Financial Aid Administrators included a listing of factors distinguishing standard and non-standard terms, and attached a "case study" pronouncing a "weekend program" offered in semesters to be non-standard, and subject to the 12-hour rule, notwithstanding its characterization as a semester-based program.

Therefore, by the Department's formulation, the mere fact that an institution may purport to offer a program on, for example, a "semester" basis does not necessarily render the 12-hour rule inapplicable. By the Department's own regulations and guidance, the rule applies unless the program is offered on a standard term basis.

In recent years, the higher education community has seen a veritable explosion in non-traditional programs utilizing non-standard terms. In fact, the Secretary's *Federal Register* commentary accompanying the publication of the 12-hour rule referenced the emergence of "many external degree and adult learning programs [that] are trying to reduce the number of days spent in the classroom" as the basis for his determination that "cooperative education programs, independent study, and other forms of regularly scheduled instruction can be considered as part of an institution's academic year." 59 Fed. Reg. 61148 (November 29, 1994).

These emergent non-traditional modes of instruction frequently incorporate off-campus components (for example, directed study, independent study, distance learning, and study groups), most often in the context of a non-standard term format offered on an accelerated or weekend basis. In many instances, these programs are offered by traditional institutions that seek to accommodate the unique needs of working adults in a manner clearly intended to emulate and replicate the acclaimed success of the University of Phoenix model. Yet, notwithstanding the broad-based emergence of UOP-type program delivery modes throughout postsecondary education, neither the OIG nor the Department can point to even a single instance where an institution's academic year has been redefined by ED based upon the purported "on-campus" requirement cited in draft Finding One. No such requirement has ever been published or

disseminated in any statute, regulation, Dear Colleague letter, Dear Partner letter, Student Aid Handbook excerpt, or other guidance.

Indeed, despite ED's statements that semester or quarter credit hour offerings delivered in the form of weekend and accelerated programs are "non-standard" and, therefore, subject to the 12-hour rule, there is little or no evidence to indicate that these proliferating program offerings are being held to any 12-hour rule criteria, much less to a standard that would exclude all instructional activity offered off-campus.

For these reasons, the University respectfully submits that the 12-hour rule is not uniformly applied. OIG draft Finding One proposes to retroactively impose upon UOP only a new and different site criteria that has never been formulated, determined, published, or disseminated by ED, even though such a standard, if properly promulgated and enforced, would apply to a broad array of higher education institutions. Indeed, it would appear that neither the OIG nor the Department is applying any 12-hour rule standard to the broad array of covered programs. On this basis alone, the draft Finding One is arbitrary and capricious and must not be incorporated into any Final Audit Report.

B. REGULATORY AND LEGAL ARGUMENTS REFUTING DRAFT OIG FINDING ONE.

The foregoing factual recitation sets forth many of the reasons why draft Finding One is in error and should be excluded from any Final Audit Report. The recited facts also allude to an array of substantial legal and regulatory arguments that serve to further refute the finding. Those arguments are presented in more detail below.

1. As The Department Has Long Since Agreed, The University's SCGS Activities Plainly Qualify For Inclusion In The 12-Hour Rule Calculation.

Draft Finding One is contradicted by the governing regulations. The plain meaning of the rule confirms that the University's study groups qualify for inclusion in the 12-hour rule calculation. The regulation expressly includes in the 12-hour calculus all "regularly scheduled instruction, examinations, or preparation for examinations...." 34 C.F.R. § 668.2(b) (definition of "academic year" at subsection (2)(ii)(B)). The rule also explicitly identifies those activities that are not included, stating that "[i]nstructional time does not include periods of orientation, counseling, vacation, or other activity not related to class preparation or examinations." *Id.* at subsection (2)(iii).¹²

As demonstrated by the factual summary set forth in Section II.A. of these Comments and by the University Provost's March 1998 letter, the University's study groups easily fall

¹² Contrary to draft Finding One, the regulation contains no language stating or implying that instructional activity must occur at a location that is owned or leased by the institution. See Section II.B.2 of these Comments below.

within this regulatory definition. Study group activities are "regularly scheduled" because: (a) the specific tasks to be performed and completed by the study group in a given week are specified in the curriculum modules for the course; (b) all students enrolled in the course must participate; (c) each designated group study session is slated to occur between specified class meetings; (d) students must complete the rigorous assignments, or submit the specified projects that are to be performed during the sessions in order to progress in their program, and (e) faculty maintain control over the sessions, for example, by reviewing the designated group study assignments and projects. The group study sessions are both "regular" and "scheduled."¹³

Furthermore, the University's study groups fit squarely within the phrase "instruction, examinations, or preparation for examinations." Simply stated, task team activities, performed pursuant to mandatory curriculum modules, do constitute instructional activity. Moreover, the Department's own regulatory definition affirms this conclusion. The rule states that "instructional time" for this purpose excludes "activity not related to class preparation or examinations,"¹⁴ implying that activity related to class preparation is included. The University's study groups are related to class preparation and examinations. Through the study group process, students complete academically rigorous projects, learn the course content, and engage in effective teamwork and problem-solving skills that are integral to both class preparation and to the ultimate achievement of designated course outcomes.¹⁵ Any suggestion that these activities are somehow unrelated to class or that they do not constitute instructional activity is simply wrong. Indeed, the specific examples of excluded activities cited in the rule — orientation, counseling, and vacation — confirm that study groups are included. The sharp contrast between the instructional and preparatory time spent in the University's study group activities, and the examples of excluded activities cited in the regulation, is clear and confirms that OIG draft Finding One is erroneous.

On the basis of these facts and regulations, the University concluded that its study groups qualify for inclusion under the 12-hour rule. The extensive discussions between the University and the Department served only to affirm that conclusion. The OIG draft finding does not

¹³ The Draft Report also asserts that because the University allegedly did not take attendance during the group study sessions, SCGS did not qualify as "regularly scheduled instruction." Draft Report at 6. That argument is not persuasive because no Title IV rule or regulation requires participating institutions to take attendance, and it is a well-known fact that many colleges and universities do not do so. This fact was recently confirmed when the Department proposed new "return of funds" regulations that apply different calculations depending upon whether the subject institution is "required to take attendance." 64 Fed. Reg. 43024 (Aug. 6, 1999) (proposed rules to be codified at 34 C.F.R. § 668.22(b) and (c) and preamble discussion at 43029 stating that "only an institution that is required to take attendance by an outside entity would be considered an institution that is required to take attendance.") Under the approach suggested in the draft finding, every non-standard term program that does not take attendance would be subject to wholesale disallowance under the 12-hour rule. Significantly, the OIG has not alleged or suggested that students were not actually attending and participating in study groups as a mandatory and essential component of their program of study.

¹⁴ The language cites "orientation, counseling, [and] vacation" as examples of excluded activity. Of course, the University's study groups do not engage in such activities.

¹⁵ See March 12, 1998 letter from the University's Provost to OIG.

contest the conclusion but instead proposes to annul the qualified status of study groups on the basis of a purported rule requiring that they meet on campus. As shown immediately below, no such rule exists. Indeed, the regulations state just the opposite.

2. *Draft Finding One's Central Premise – That Group Study Activity Must Occur At Sites Owned Or Leased By The University – Is Contradicted By The Governing Regulations And Guidance.*

Draft Finding One is premised on the erroneous assumption that instructional time must occur at a site owned or leased by the institution in order to count toward the institution's academic year. Draft Report at 5. That presumption is contradicted by the 12-hour rule itself and by the Secretary's published statements explicitly acknowledging that instructional time may include educational activity that occurs off-campus. The draft finding is also at odds with the regulatory definitions of a full-time student and of an educational program, both of which confirm that a student's workload may include off-site educational activity. Indeed, draft Finding One does not, because it cannot, identify any statute, regulation, or published guidance requiring institutional control over the site at which instructional time takes place. No legal or regulatory basis exists for draft Finding One.

- a. The 12-hour rule itself acknowledges that off-site instruction can be included, and neither ED nor OIG has ever published or made known any rule to the contrary.

Draft Finding One erroneously alleges University noncompliance with the 12-hour rule, contained within the regulatory definition of an "academic year." Specifically, the finding contends that the 12-hour rule includes only educational activity occurring at a site under the control of the institution. The definition provides, in relevant part:

(B) For an educational program using credit hours but not using a semester, trimester, or quarter system, the Secretary considers a week of instructional time to be any week in which at least 12 hours of regularly scheduled instruction, examinations, or preparation for examinations occurs.

34 C.F.R. § 668.2(b) (definition of "academic year" at subsection (2)(ii)(B)). The above regulation does not explicitly or implicitly require that the 12 hours of instructional time occur at a site owned or leased by the institution. On the contrary, the regulation presumes the opposite by encompassing within the 12-hour rule computation time spent in "preparation for examinations" – i.e., outside preparation time. The regulation contradicts draft Finding One, which seeks to exclude SCGS hours based solely upon the fact that some study groups have chosen to meet off-site as a matter of convenience.

The 12-hour rule further provides that:

(iii) Instructional time does not include periods of orientation, counseling, vacation, or other activity not related to class preparation or examination.

34 C.F.R. § 668.2(b) (definition of "academic year" at subsection (2)(iii)). This language identifies those activities that are excluded from the definition of instructional time, but nowhere does the rule suggest that control or location are even factors, let alone determinative. Instead, the passage again affirms that "instructional time" includes off-campus activities. The regulation excludes "activity not related to class preparation or examination." It logically follows that activities that are "related to class preparation or examination" are included, regardless of whether or not they occur on-campus. As detailed in Section II.B.1, SCGS activities fall squarely within the scope of instructional time because they are directly related to class preparation and examinations.

- b. Accompanying regulatory guidance explicitly acknowledges that various forms of unsupervised off-site instruction, such as internships, can be included.

The extensive commentary accompanying the promulgation of the "academic year" definition further confirms that instructional time may include off-site educational activity. In the course of setting forth the original definition of a week of instructional time premised on the "5-day rule," a precursor to the 12-hour rule, the Secretary engaged in the following dialogue with commenters:

Comments: A number of commenters suggested that instructional time should include internships. Some commenters suggested including other activities, such as periods of orientation, cooperative education, independent study, special studies, and research.

Discussion: The Secretary agrees that internships, cooperative education programs, independent study, and other forms of regularly scheduled instruction can be considered as part of an institution's academic year. ...

59 Fed. Reg. 22362 (Apr. 29, 1994) (emphasis added). The emphasized language reflects an explicit understanding that regularly scheduled instruction may include off-campus educational activities such as internships, cooperative education programs, and independent study. The Secretary reaffirmed this statement when he adopted the 12-hour rule in lieu of the 5-day rule:

Comments: One commenter observed that many external degree and adult learning programs are trying to reduce the number of days spent in the classroom. One commenter requested that the Secretary utilize the diversity and plurality of the education system by recognizing the amount of time the student spends in different educational settings. ...

Discussion: The Secretary agrees that internships, cooperative education programs, independent study, and other forms of regularly scheduled instruction can be considered as part of an institution's academic year. ...

59 Fed. Reg. 61148 (Nov. 29, 1994) (emphasis added). Significantly, the Secretary's comments responded to an inquiry regarding the 12-hour rule's accommodation of programs like those of the University (i.e., adult learning programs designed to reduce the number of days spent in the classroom). The Secretary reaffirmed that an institution may consider off-campus educational activities such as internships, cooperative education programs, and independent study as part of an institution's academic year.

- c. The ED definition of full-time student, which encompasses the academic year definition, explicitly encompasses off-site instruction, research and "special studies that the institution considers sufficient."

The Department's regulations credit off-site educational activity not only in the context of the 12-hour rule, but also in the definitions of a full-time student and an educational program. These definitions explicitly treat external, off-site educational activity, such as off-campus SCGS activity, as part of a student's academic workload. As detailed below, the Department based the definitions of an academic year and of the 12-hour rule on the definition of a full-time student. Thus, the recognition of off-site activity within the scope of a full-time student's workload further supports and justifies the inclusion of off-site instruction within the scope of the 12-hour rule.

The regulations define a "full-time student," in relevant part, as follows:

Full-time student: An enrolled student who is carrying a full-time academic workload (other than by correspondence) as determined by the institution under a standard applicable to all students enrolled in a particular educational program. The student's workload may include any combination of courses, work, research, or special studies that the institution considers sufficient to classify the student as a full-time student. However, for an undergraduate student, an institution's minimum standard must equal or exceed one of the following minimum requirements ...

34 C.F.R. § 668.2 (emphasis added); see also 34 C.F.R. § 682.200. The emphasized language demonstrates the Department's recognition that a student's workload may consist of off-site activity such as "work," "research," and "special studies that the institution considers sufficient." The regulation confirms an institution's discretion to determine whether educational activity is sufficient to constitute a portion of the student's workload. See also 59 Fed.Reg. 9530 (Feb. 28, 1994).¹⁶ The content and demands of the SCGS component of the University's programs support the University's decision to treat SCGS as part of the student's workload.

¹⁶ The Secretary stated in proposing the full-time student definition:

Generally, the Secretary proposes to define a *full-time student* as an enrolled student who is carrying a full-time academic workload (other than by correspondence) as determined by the institution under a standard applicable to all students enrolled in a particular educational program. In determining a student's workload, an institution would be permitted to include combinations of courses, work, research, or special studies that the institution considers sufficient to classify the student as a full-time student.

Moreover, the full-time student definition goes on to provide that:

...(6) The work portion of a cooperative education program in which the amount of work performed is equivalent to the academic workload of a full-time student.

34 C.F.R. § 668.2(6).¹⁷ The above quoted section provides further regulatory proof that off-campus educational activity, such as work, may constitute a portion of the student's workload.

The full-time student definition bears heavily on the interpretation of the 12-hour rule because the Secretary has explicitly stated that the definition of an academic year (which encompasses the 12-hour rule) is based on the workload requirements of a full-time student. The Secretary stated:

A definition of *full-time student* is needed because the definition of *academic year* is based, in part, on the workload of a full-time student, and because the term is used elsewhere for other purposes in part 668.

59 Fed. Reg. 9530 (Feb. 28, 1994). Because the 12-hour rule arises out of the definition of a full-time student, the inclusion of off-campus educational activity within the scope of a full-time student's workload further justifies its inclusion within the scope of the 12-hour rule.

Similarly, the definition of an "educational program" confirms that the concept of instruction can include off-site educational activity. The pertinent regulation defines "educational program" as follows:

Educational program: A legally authorized postsecondary program of organized instruction or study that leads to an academic, professional, or vocational degree, or certificate, or other recognized educational credential. However, the Secretary does not consider that an institution provides an educational program if the institution does not provide instruction itself (including a course of independent study), but merely gives credit for one or more of the following: instruction provided by other institutions or other schools; examinations provided by agencies or organizations; or other accomplishments such as "life experience."

34 C.F.R. § 600.2 (emphasis added). The emphasized language reflects yet another regulatory affirmation that instruction may include off-site educational activity, such as independent study.

59 Fed.Reg. 9530 (Feb. 28, 1994).

¹⁷ For cooperative education programs, an undergraduate student could be considered a full-time student if the work portion of a cooperative education program in which the amount of work performed is equivalent to the academic workload of a full-time student. 59 Fed. Reg. 9530 (Feb. 28, 1994).

The commentary accompanying the promulgation of the educational program definition confirms that instruction is not limited to activity taking place on-campus:

Educational program.

Comment: Several commenters expressed concern that the proposed definition of an educational program limits eligibility to schools providing instruction, while eliminating the eligibility of schools that utilize assessment of external course work and life experience. The commenters stated that non-traditional, innovative institutions provide a much-needed educational function of assessing students' knowledge and skills relative to specific educational programs. ...

Response: A change has been made. The Secretary has modified the proposed regulations by adding the phrase "including a course of independent study" to clarify that the term "instruction," as used in the definition of an "educational program," includes programs of independent study. ...

53 Fed. Reg. 11218 (Apr. 5, 1988) (emphasis added). The above commentary provides yet another example of the Secretary's recognition that instruction may encompass external course work such as independent study and other off-campus educational activity. The educational program definition and the commentary accompanying its promulgation support the inclusion of external course work in the computation of instructional time under the 12-hour rule.

- d. Similarly, nowhere in the governing statute, regulations, or subregulatory guidance is the scope of qualified instructional activity conditioned by any requirement of institutional "control" over the situs of such activities.

Although draft Finding One is premised on the purported requirement that instructional activity must occur at a site under the control of an institution, the Draft Audit Report fails to point to any statute, regulation, published guidance, or case law which sets forth such a requirement. As detailed below, the authority cited by the Report does not contain any requirement that instructional activity occur at a site under the control of an institution or at a site owned or leased by the institution. Indeed, as discussed above, the existing regulatory authority and guidance explicitly extends the scope of instructional time to include off-campus educational activity.

First, the draft Report cites the HEA definition of an academic year. Draft Report at 3. The HEA defines an academic year as follows:

...the term "academic year" shall require a minimum of 30 weeks of instructional time, and with respect to an undergraduate course of study, shall require that during such minimum period of instructional time a full-time student is expected to complete at least 24 semester or trimester hours or 36 quarter hours at an institution that measures program length in clock hours. ...

20 U.S.C. § 1088(d). The definition does not require instructional time to occur on-campus, nor does it prohibit the inclusion of off-campus educational activity in the computation of instructional time. Indeed, the statute does not even impose a 12-hour rule nor any minimum weekly amount of instructional activity. The Draft Report does not cite to any language in the statutory definition of an academic year (or to any other statutory provision) that imposes a control requirement on the computation of instructional time.

Second, the Draft Report cites to the regulatory definition of an "academic year," including the 12-hour rule for non-term, credit-hour schools. Draft Report at 4. Yet, as previously discussed, the regulatory definition of an "academic year" does not impose a control requirement for the inclusion of educational activity in the 12-hour rule computation. Instead, the regulatory definition explicitly acknowledges that instructional time may include off-site educational activity. The Draft Report does not cite to any language in the definition of an "academic year," nor in any other regulation, that requires instruction to occur at a site under the control of the institution. Moreover, the Draft Report does not account for the above-described regulatory definitions of full-time student and educational program that further confirm the inclusion of external coursework and off-campus educational activity in the 12-hour rule computation.

Third, the Draft Report cites to commentary accompanying promulgation of the 12-hour rule. Yet, the passages cited by the Draft Report from the November 29, 1994 Federal Register do not set forth any requirement that educational activity occur at a site under the control of the institution. Report at 4. Moreover, the Draft Report fails to account for other commentary from the same November 29, 1994 *Federal Register* that confirms that instructional time may include off-campus educational activity and external course work. See Section II.B.2.b. above.

Draft Finding One does not cite to any other statutes, regulations, published guidance, or case law in support of the alleged requirement that instruction take place at a site under the control of the institution. Instead, the Draft Report cites only to the PDD staff letter as authority for the assumption that instructional time must occur at a site under the control of the institution.¹⁸ Yet, the PDD staff letter also fails to identify any statute, regulation, published Departmental guidance, or administrative decision¹⁹ setting forth a requirement that instructional time occur at a site under the control of the institution. Like draft Finding One, the letter is contradicted by the regulations and guidance discussed above, which explicitly confirm that

¹⁸ As detailed in Section II.B.3. below, that letter does not provide independent legal authority for draft Finding One.

¹⁹ Specifically, there is no evidence that the Department has ever sought to impose any such requirement upon any of the many other institutions offering programs of study similar to SCGS. The absence of any prior enforcement of the purported "control" standard in the 12-hour rule, coupled with the absence of any publication of such a standard, suggests that such a standard does not exist. Moreover, even if such a standard somehow existed, the Department's failure to uniformly apply this standard violates, among other things, the General Education Provisions Act as detailed in Section II.C.2 below. See 20 U.S.C. § 1232(c).

instructional time may include external course work and other off-site educational activity. Given their failure to account for or even to address the impact of the clear regulatory authority discussed throughout these comments, draft Finding One and the PDD staff letter upon which it relies must be rejected.

3. *If The PDD Staff Letter Opined That UOP Should Conduct SCGS On-Campus, That Opinion Was Not Binding or Enforceable.*

For at least two reasons, OIG must premise draft Finding One on more than just the PDD staff letter, which constitutes merely unpublished correspondence authored by an agency subordinate. First, the letter does not constitute final agency action enforceable in a court of law. Second, the letter is merely the opinion of an ED employee, rather than a rule properly promulgated in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 500-596, or even an official pronouncement of the agency. Even if the letter were an official statement of agency policy, it still would not bind UOP.

a. The PDD staff letter is not enforceable agency action.

To qualify as final agency action enforceable in a court of law, the PDD staff letter must meet the requirements set forth in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). There, the U.S. Supreme Court held that agency action is final if: (1) it is a definitive statement of the agency's policy; (2) it has a direct and immediate effect on the day-to-day business of the complaining party; (3) it has the status of law; and (4) it creates the expectation of immediate compliance with the terms of the action. See id. at 151-53. If an agency action, such as a reply to a request for policy guidance, does not meet the above criteria, then it does not constitute final agency action and, therefore, is neither binding nor reviewable by a court of law. See Air California v. United States Dep't of Transportation, 654 F.2d 616, 622 (9th Cir. 1980); Sabella v. United States, 863 F. Supp. 1, 5-6 (D.D.C. 1994) (finding that an opinion letter was part of the "mass of interpretive correspondence," rather than final agency action). Moreover, "[a]dministrative orders are not final and reviewable 'unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.'" Air California, 654 F.2d at 621 (quoting Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 112-113 (1948)).

The PDD staff letter does not meet the requirements set forth in Abbott and its progeny. First, it is not a definitive statement of agency policy as no evidence suggests that ED previously has taken the position outlined in the letter. Additionally, PDD's director, rather than the Secretary or some other high-level official, authored the letter. Because Congress has delegated the authority to set policy only to the head of the agency, this novel opinion issued by an agency subordinate cannot qualify as a definitive, binding statement of ED's position on the matter. See Sabella, 863 F. Supp. at 5; American Land Title Association v. Clarke, 743 F. Supp. 491 (W.D. Tex. 1989) (stating that letters "do not represent a definitive statement of the [agency's] position as they were written by subordinate officials in response to hypothetical questions. . .").

Furthermore, the PDD staff letter does not constitute final agency action because, under the standards set in Abbott, it does not have the force and effect of law. See Abbott, 387 U.S. at 151-153. It does not "impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process" but merely provides the opinion of an ED employee. Air California, 654 F.2d at 621. Because the letter does not set forth a definitive statement of the agency's position or have the force and effect of law, it does not meet the requirements of Abbott and, therefore, does not amount to final agency action.

Although the U.S. Court of Appeals for the District of Columbia Circuit has found that a letter written by an agency subordinate may constitute legally binding final agency action under certain circumstances, that case is distinguishable on its facts. In Student Loan Marketing Association v. Riley, 104 F.3d 397 (D.C. Cir. 1997), the court held that a letter drafted by ED's Acting General Counsel was reviewable by the court as final agency action, even though an agency subordinate authored it. The court found that the Acting General Counsel's interpretation of law was final and, therefore, reviewable because: (1) it was approved by the head of the agency, (2) it was the product of informed agency deliberation, and (3) it was stated unequivocally. Id. at 405.

While Riley demonstrates that a letter from an agency subordinate occasionally may constitute final agency action, which presumably has the binding authority of law, the PDD staff letter does not fall within Riley's requirements. Even if the statements made in the letter had been unequivocal,²⁰ the letter still cannot meet the other two criteria.

First, no evidence suggests that the PDD staff letter represents the views of the Secretary. The letter is written in the first-person singular form, implying that it is merely the PDD Director's opinion, rather than that of the agency as a whole. Furthermore, the letter does not state that the Secretary certifies its contents. Accordingly, the letter provides no basis for implying that the head of the agency approved its content.

Second, nothing indicates that the letter is the culmination of agency deliberations. No evidence suggests that the PDD Director's opinion is anything more than the isolated judgment of its author. Once again, the use of the "I" pronoun implies that the letter does not represent the culmination of informed agency deliberation. Therefore, Riley is not applicable, and the PDD staff letter does not amount to enforceable final agency action.

b. The PDD staff letter is not binding on UOP

An agency's reply to an individual request for policy guidance, like the PDD staff letter, typically is not binding on the requestor. See Sabella v. United States, 863 F. Supp. 1 (D.D.C. 1994). In Sabella, the plaintiffs had requested a "definitive statement" from the National Oceanic and Atmospheric Administration ("NOAA") regarding certain fishing practices. Id.

²⁰ In fact, the phrase "site under control of the institution" utilized in the PDD staff letter was both equivocal and ambiguous.

NOAA's General Counsel replied to this inquiry, and plaintiffs subsequently disagreed with her statutory interpretation. As a result, plaintiffs sought declaratory and injunctive relief against the agency. *Id.* at 2. The court held that:

[a] pragmatic interpretation of the NOAA General Counsel's letter leads the Court to hold that 'final agency action' has not yet occurred in this matter. The letter does not reflect a definitive agency position. . . . The majority of the one-page letter simply quotes the statute. There is no legal analysis except for the General Counsel's opinion"

Id. at 5. The court further stated that, "[t]hough the General Counsel can probably provide a highly educated guess as to the decisions an agency will make, she is not a decision-maker at the highest level and therefore, her opinion does not create any law or bind the Administrator [of the agency]." *Id.* Thus, the court found that the letter was merely part of the "mass of interpretive correspondence" and did not rise to the level of a definitive statement of the agency's position on the issue. *See id.* at 6.

Similarly, in L'Enfant Plaza North, Inc. v. District of Columbia Redevelopment Land Agency, 437 F.2d 698 (D.C. Cir. 1970), the court held that an agency letter was not binding. In that case, the plaintiff sought declaratory and injunctive relief regarding an opinion letter from the D.C. Redevelopment Land Agency ("RLA") construing a usage restriction found in an Urban Renewal Plan. *Id.* at 699. The lower court treated RLA's letter, which cautioned that its contents "merely represent[ed] the Agency's opinion alone," as an agency determination. *Id.* at 701-02. The D.C. Court of Appeals, however, disagreed with the district court and found instead that:

[the letter] was not an agency decision arrived at pursuant to a statutory or otherwise established procedure for hearing and decision. There was no record compiled in adversary proceedings, designed to formulate issues and to resolve factual disputes, upon which the agency rendered a decision. Instead, after informal discussions and correspondence, the agency merely expressed its opinion as to the correct reading of language in the Plan, disclaiming in the same breath that its action constituted a binding decision.

Id. at 702. This holding sets forth the procedural requirements that distinguish an informal agency opinion from a binding agency determination.

The PDD staff letter's treatment of the group study location issue is analogous to the letter issued by the NOAA's General Counsel in Sabella. Both cases involve letters drafted by a subordinate of an administrative agency expressing that individual official's opinion. Under Sabella, the PDD staff letter cannot bind either party or represent final agency action. Because

that opinion was merely part of the overall correspondence, it is neither reviewable agency action nor a definitive binding statement of the agency's position. *Id.* at 6.

Moreover, the PDD's response to UOP's inquiry is not the culmination of a formal agency decision-making process, i.e., adjudication or rulemaking. See L'Enfant Plaza North, 437 F.2d at 702. The PDD merely expressed its opinion after discussion on the matter between the two parties. The most significant difference between L'Enfant Plaza North and UOP's situation is that the agency in the former case explicitly stated that it was merely providing an opinion. While ED made no such disclaimer here, that difference in no way changes the nature of the correspondence. The PDD staff letter to UOP still was only an opinion and, therefore, cannot constitute the sole legal basis for the OIG's draft audit finding.

OIG cannot lawfully rely upon an agency subordinate's opinion that is inaccurate, non-binding, and unenforceable as the primary basis for a finding that is inconsistent with the governing regulations. Moreover, the "site under the control" aspect of the PDD staff letter conflicts with the governing regulations and established ED guidance.²¹ See Section II.B.2 of these Comments. For these reasons, the prevailing regulations and other official statements of agency policy take precedence over the PDD staff letter.

- c. Even if the policy constitutes the agency's official position, it still is not binding authority.

Even assuming arguendo that this new requirement regarding instructional activity is the official position of the agency, it still is not binding on UOP, or any other institution. The Department certainly has the authority to adopt and to apply internal guidelines and procedures, but, because they are not subject to notice and comment procedures under the Administrative Procedure Act, they do not have binding effect. See, e.g., In re Denver Paralegal Institute, Dkt. Nos. 92-86-SP, 92-87-SA, U.S. Dep't of Educ. (Mar. 14, 1994) at 4-5, final decision (Feb. 24, 1995) (holding that a Dear Colleague Letter may not serve as a basis for substantive rules upon which the Department can rely); In re Baytown Technical School, Inc., Dkt. No. 91-40-SP, U.S. Dep't of Educ. (Jan. 13, 1993) at 26, affirmed by the Secretary (Apr. 12, 1994), motion for reconsideration denied (Nov. 14, 1994) (establishing that "a statement of policy may assist the tribunal in interpreting the law, policies and procedures, [but that] it, without more, cannot carry the weight of law"); In re MBTI Business Training of Puerto Rico, Dkt. No. 93-147-SA, U.S. Dep't of Educ. (Apr. 14, 1994) at 5-6, certified by the Secretary (Jun. 9, 1995) (finding that a comment by the Secretary in the Preamble to a Federal Register notice has no binding effect).

²¹ Incidentally, recently proposed regulations regarding the return of Title IV funds are at odds with the policy position taken in draft Finding One. 64 Fed. Reg. 43024 (Aug. 6, 1999). The proposed regulations allow an institution to use a student's "last date of attendance at an academically related activity. . . in lieu of the withdrawal date[]" for purposes of determining the refund obligation for that student. See *id.* at 43029. "An example of 'academically-related activity' given in the proposed regulation is attendance at 'a study group that is assigned by the institution.'" *Id.* at 43040. The relevant provision makes no mention of a site "leased or owned" by the institution.

As such, if a court later determines that OIG's application of the "policy" that served as the basis of draft Finding One is incorrect or unfair, it still has the authority to reject its position.

The Department's administrative tribunal has firmly established that pronouncements of this sort are not binding, and even the Department itself has advanced a similar argument. See *id.*; *In re Southeastern University*, Dkt. Nos. 92-142-SP, 93-40-ST, U.S. Dep't of Educ. (Sept. 20, 1996) at 5-6, dismissed with prejudice by the Secretary (Oct. 9, 1997). In *Southeastern University*, SFAP argued that an IRB memorandum served only as internal policy guidance that provided direction to the Department's regional offices and that it was an even lower level of communication than a Dear Colleague Letter or a Preamble to regulations. *Southeastern University* at 6. The tribunal agreed with SFAP and likened this situation to Federal court cases holding that the provisions of an Internal Revenue Service agency procedures manual are "directory rather than mandatory. . . and clearly do not have the force and effect of law." *Id.* (citations omitted).

Similarly, OIG cannot rely almost exclusively upon an informally adopted policy to support its contention that off-campus time spent in SCGS does not qualify as "instructional activity" for purposes of the 12-hour rule. Considering that the scant regulatory and sub-regulatory authority already published on this issue conflicts with the policy stated in draft Finding One, a court may evaluate OIG's and UOP's differing interpretations, rather than just accept that offered by OIG, and choose the most reasonable one. See *Linoz v. Heckler*, 800 F.2d 871, 877-78 (9th Cir. 1986) (finding an agency manual provision invalid because it was inconsistent with the governing regulation and was not adopted in accordance with the APA's notice and comment procedures); *Duggan v. Bowen*, 691 F. Supp. 1487, 1515 & n. 44 (D.D.C. 1988) (noting that a policy adopted in a letter from an agency official to regulated parties was invalid under the APA because it had the effect of creating new law).

4. *The Department Failed To Give UOP Proper Notice Of The Policy Interpretation Upon Which Draft Finding One Was Premised.*

As previously discussed, OIG impermissibly broadened the parameters of the 12-hour rule with draft Finding One by announcing, for the first time, that study groups must meet at sites "leased or owned" by the institution. Even assuming *arguendo* that the PDD staff letter constitutes the agency's official position on the issue, it still is neither binding nor enforceable because the agency failed to give UOP proper notice of the new requirement.

The relevant portion of the PDD staff letter is, at best, ambiguous. Although the letter stated that SCGS should take place at "a site under the control of the institution," it failed to elaborate on the meaning of this pivotal element of the staff opinion. See Draft Report at 5. Considering that even OIG had to consult the PDD for an interpretation of this phrase, and that PDD continues even now to deliberate on the question,²² OIG certainly cannot contend that UOP should have known, since the time that it received the PDD staff letter, that "a site under control

²² The Department told the University that the Office of Student Financial Assistance will be submitting written commentary to OIG on the matter.

of the institution" meant one "leased or owned" by UOP. See Draft Report at 5. Moreover, if the PDD had intended the phrase to encompass locations "leased or owned" by UOP, then it could have stated that intention in more precise terms.

In addition, UOP's confusion is heightened by the fact that this interpretation is at odds with the substance of discussions that occurred during meetings between UOP and ED officials. Unlike the portion of the PDD staff letter agreeing that SCGS constitutes instructional activity under the regulations, the statements concerning the "site" issue were not the product of any inquiry from, or discussions with, UOP. As pointed out in the April 1998 correspondence from Apollo to OIG, the University informed ED at those meetings that SCGS activity may occur off-site. Yet during those discussions, ED never indicated that such off-campus sessions were controversial. To UOP's knowledge, neither the PDD, nor any other relevant program office, has made a final determination on this issue.

OIG's application of this new requirement to UOP unquestionably raises due process concerns. "Those regulated by an administrative agency are entitled to 'know the rules by which the game will be played.'" Alaska Professional Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (quoting Holmes, Holdsworth's English Law, 25 Law Quarterly Rev. 414 (1909)). Here, UOP could not have known, before receiving the PDD staff letter, that study groups must meet at a "site under the control of the institution." More importantly, it had no reason to assume that the Policy Development Division defined this phrase to mean a site "owned or leased" by the institution.

The interpretation of the 12-hour rule adopted by OIG is "so far from a reasonable person's understanding of the regulations that [it] could not have fairly informed [UOP] of the agency's perspective." General Electric Co. v. EPA, 53 F.3d 1324, 1330 (D.C. Cir. 1995). Imposition of a multi-million dollar liability under this dubious, unofficial policy interpretation violates traditional notions of due process and fair play because UOP did not have "fair warning of the conduct it prohibits or requires." Id. at 1328 (quoting Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986)).

In addition to the fact that the Department failed to give UOP notice of this "policy," UOP also points out that, to its knowledge, neither OIG nor the Department previously has applied this rule to any other institution, and it has offered no explanation for its selective enforcement. Such action is arbitrary and capricious because "an agency must provide an adequate explanation before it treats similarly situated parties differently." Chadmoore Communications, Inc. v. FCC, 113 F.3d 235, 242 (D.C. Cir. 1997) (citing Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (citations therein omitted)); see also Hooper v. NTSB, 841 F.2d 1150, 1151 (D.C. Cir. 1988) (holding that administrative rules must be applied uniformly).

C. OIG LACKS THE AUTHORITY TO PROCEED WITH DRAFT FINDING ONE.

1. The General Education Provisions Act Prohibits The Department From Interfering With UOP's Curriculum.

In the 1960s, Congress enacted 20 U.S.C. § 1232a to prevent the Federal Government from acting as a national school board. See *Wheeler v. Barrera*, 417 U.S. 402, 94 S.Ct. 2274, 2283 (1974), judgment modified, 95 S.Ct. 2625 (1975) (finding that Section 1232a limits not only agencies but also courts from playing an "overly active role" in local elementary and secondary education matters). Section 1232a states, in applicable part, as follows:

[n]o provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system.

Id. (emphasis added). While most cases involving Section 1232a have arisen in connection with elementary and secondary education issues, courts have applied it in the higher education context as well. See *Spark v. Catholic Univ.*, 510 F.2d 1277 (D.C. Cir. 1983)²³; see also *In re Modern Hairstyling Institute, Inc.*, Dkt. No. 94-189-SA (Sept. 19, 1995), cert. by the Sec'y (Jan. 26, 1996). Section 1232a, therefore, prohibits the Department from interfering with an institution's management and curriculum decisions, areas which accrediting agencies traditionally have monitored. See *Modern Hairstyling Institute* (finding that SFAP and OIG's interference with the accrediting agency's decision in an area in which it had sole responsibility violated 20 U.S.C. § 1232a).

Even assuming arguendo that the policy upon which OIG premised draft Finding One is an official statement of the agency's position, the policy still would not be lawful because it improperly interferes with UOP's right to control its own programs and curriculum. Although OIG may contend that Section 1232a does not apply here because the Secretary has express statutory authority under 20 U.S.C. § 1088(d) to define the term "academic year," that argument is misplaced.

First, the "policy" requiring SCGS to take place at sites "leased or owned by the institution" exceeds the scope of the Department's power to define the academic year. By

²³ In *Spark*, a teacher at Catholic University argued that the institution's receipt of federal funds converted it from a private institution to an agency of the Federal Government and, therefore, that his employment case against it should be heard in federal court. *Spark*, 510 F.2d at 1281. Because the statutes under which the institution received federal funds (the Higher Education Act of 1965, as amended, and others) specifically prohibited the Federal Government from controlling the institution's activities, the court rejected this argument and refused to grant federal jurisdiction in the case. *Id.* at 1282 (citing 20 U.S.C. § 1232a).

imposing this overly burdensome, highly restrictive requirement on UOP's delivery of its educational programs, the Department is improperly "exercis[ing] . . . direction, supervision, . . . [and] control over the curriculum, program of instruction, [and] administration" of UOP, in violation of Section 1232a. The fact that the Department has imposed an excessive, intrusive requirement outside the scope of its authority is underscored by the absence of any published regulatory provision or policy statement in this area.

Moreover, when two statutory provisions are "capable of coexistence," a court must consider each of them effective, absent a clear expression of congressional intent to the contrary. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995) (citing Morton v. Mancari, 417 U.S. 535, 551 (1974) (other citations omitted)); see also Detweiler v. Pena, 38 F.3d 591, 594 (D.C. Cir. 1994) (citing Morton). As such, notwithstanding the Department's statutory authority to define the term "academic year," section 1232a still precludes ED from adopting a definition of academic year that unduly intrudes upon UOP's right to make curriculum decisions. Draft Finding One unlawfully encroaches upon UOP's authority to establish its own curriculum and academic practices in a manner that extends far beyond the realm of the statutory academic year definition²⁴ and thereby defies the prohibition against interference with curriculum.

If allowed to stand, draft Finding One would violate Section 1232a. OIG's mandate that UOP provide SCGS at a site "leased or owned" by the institution interferes with UOP's curriculum and programs of instruction and, moreover, has no support in the regulations or other statements of Department policy.

2. *If Made Final, The Proposed Finding Would Violate The GEPA Provisions Requiring ED To Uniformly Apply Its Rules And Regulations.*

As detailed in Section II.A.5 above, the 12-hour rule is not uniformly applied. Draft Finding One proposes to retroactively impose upon UOP only a new and different site criteria that has never been formatted, determined, published, or disseminated by ED, even though such a standard, if properly promulgated and enforced, would apply to a broad array of higher education institutions. At the same time, it would appear that neither OIG nor the Department currently applies any 12-hour rule standard to the broad array of covered programs.

The unexplained and unjustified differential treatment of UOP violates the General Education Provisions Act ("GEPA"). See 20 U.S.C. § 1221 et seq. GEPA provides, in relevant part, that "[a]ll regulations shall be uniformly applied and enforced throughout the 50 States." 20 U.S.C. § 1232(c).²⁵ The OIG and the Department do not appear to have applied the 12-hour

²⁴ See Section II.B.2 of these Comments.

²⁵ GEPA defines a regulation as "any generally applicable rule, regulation, guideline, interpretation, or other requirement that - (1) is prescribed by the Secretary or the Department; and (2) has legally binding effect in connection with, or affecting, the provision of financial assistance under any applicable program." 20 U.S.C. § 1232(a). As detailed in section II.B.3, UOP's position is that the PDD staff letter which sets forth the purported "control" requirement and provides the sole basis for Draft Finding One does not have any legally binding effect.

rule standard to numerous covered institutions and programs, yet the finding inexplicably seeks to apply the 12-hour rule to UOP's similar SCGS model. If upheld, draft Finding One's arbitrary and capricious application of the 12-hour rule to UOP would violate 20 U.S.C. § 1232(c), be contrary to law, and subject to reversal under 5 U.S.C. § 706. *In re Blair Junior College*, Dkt. No. 93-23-SP, U.S. Dep't of Educ (Nov. 11, 1993) at 26 (citation omitted).²⁶ Accordingly, draft Finding One should be withdrawn.

3. *OIG's Issuance of Draft Finding One Also Exceeds Its Authority Under the Inspector General Act of 1978.*

By announcing a new policy that study groups must meet at sites "leased or owned" by UOP and by seeking to enforce it in draft Finding One, OIG has usurped the Secretary's policymaking authority, in violation of the Inspector General Act of 1978 ("IG Act"). The IG Act specifically states that an agency may not delegate "program operating responsibilities" to an OIG. See 5 U.S.C. App. 3 § 9(a)(2). If OIG continues to pursue draft Finding One, it will, in effect, have attempted to "seize" the statutory and regulatory obligation to regulate the academic year — one that is strictly a program operating responsibility — away from the Department.

With the IG Act, Congress established an OIG in virtually every federal agency, with the intention that such offices would:

(1) conduct and supervise audits and investigations. . . ;

(2) [] provide leadership and coordination and recommend policies for activities designed (A) to promote efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and (3) [] provide a means for keeping the head of the [agency] and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action. . . .

Id. § 5. The IG Act also sets forth the duties and responsibilities given to the Inspectors General. *Id.* § 4. While each IG has the authority "to provide policy direction" and "to recommend policies," the statute prohibits an agency from transferring "program operating responsibilities" to an OIG. *Id.* §§ 4(a), 9(a)(2).

However, even if that letter did have some legally binding effect, the failure of the Department and the OIG to uniformly apply the "control" standard set forth in that letter would violate 20 U.S.C. § 1232(c).

²⁶ In *Blair*, the tribunal reversed a program review finding based in part on the Department's failure to comply with 20 U.S.C. § 1232(c). The institution demonstrated that it had elected to treat itself as a non-term institution. The Department sought to treat Blair as a term school. The institution contended that the Department had permitted every institution other than Blair (and other schools under the same ownership) to define their own academic terms and that the Department's attempt to prevent the school from exercising this same discretion to define its own academic terms violated, among other things, 20 U.S.C. § 1232(c). The tribunal agreed, adopting Blair's initial brief as its opinion and thereby dismissing the program review finding in part on the Department's noncompliance with 20 U.S.C. § 1232(c). *Blair* at 1 and 26; see also *In re Nettleton Junior College*, Dkt. No. 93-29-SP, U.S. Dep't of Educ. (June 8, 1994).

At least one court has considered, and limited, the parameters of OIG authority. See Burlington Northern v. Office of Inspector General, 983 F.2d 631 (5th Cir. 1993); see also Opinion of the Office of Legal Counsel, Inspector General Authority to Conduct Regulatory Investigations, 1989 OLC LEXIS 70 (Mar. 9, 1989). In Burlington, the court held that an OIG cannot "... conduct, as part of a long-term, continuing plan, regulatory compliance investigations or audits." Id. at 643. Because the plaintiffs in that case did not receive federal funds pursuant to the statute granting regulatory jurisdiction, the court ruled that such investigations or audits would constitute an improper delegation of "program operating responsibilities." Id. at 642 (citing to 5 U.S.C. App. 3 § 9(a)(2)); see also 1989 OLC LEXIS *17.

Here, OIG proposes to unlawfully usurp the Secretary's program operating responsibilities, in violation of the IG Act. OIG premises draft Finding One almost solely upon the PDD staff letter, which merely constitutes the position of an agency subordinate, rather than official Department policy. In fact, even the PDD has conceded that the agency's policy regarding on-site and off-site instructional activity is still in flux. If OIG allows draft Finding One to stand, it, in effect, will have engaged in unauthorized policy making in an area over which the Department clearly has program operating responsibility.

Unlike the investigation at issue in Burlington, OIG's audit of UOP concerned the use of federal funds. Even so, Burlington still offers instructive guidance on how a court likely would view OIG's unauthorized policymaking in draft Finding One. If regulatory investigations are outside the OIG's authority, as held in Burlington, then policymaking by the OIG certainly would constitute an unlawful transfer of "program operating responsibilities." See 5 U.S.C. App. 3 § 9(a)(1)(2).

D. THE UNIVERSITY DISPUTES THE ESTIMATED ASSESSMENTS PRESENTED IN DRAFT FINDING ONE.

Draft Finding One presents "estimates" referring to roughly \$50.6 million in FFEL disbursements that purportedly exceeded annual loan limits and \$4 million in purported Pell Grant overawards. The University's position is that even if there existed some basis in law or regulation to support the underlying draft finding – and there is none – OIG's draft estimates are unproven, arbitrary, incorrect, and grossly overstated. The University disputes the estimates for reasons that include the following:

- Although the Draft Audit Report presents some very general information regarding the methodology utilized in arriving at the estimated assessments, no data or detailed information has been supplied. The estimates are arbitrary and capricious because they are unsubstantiated and unsupported. By issuing its estimates without supplying even basic supporting data or calculations, OIG has failed to sustain the threshold burden of production. Absent further substantiation, the estimates are arbitrary and capricious.

- In the absence of detailed supporting information to substantiate the estimated assessments, the University cannot present a detailed response to the figures presented. The University reserves the right to respond in more detail to the estimates upon receipt of detailed information concerning the data, basis, and methodology utilized by OIG in arriving at its estimates. More specifically, the University reserves the right to respond to that information in advance of inclusion of any estimate of assessments in a Final OIG Audit Report.
- By its general statements describing the information that it analyzed in performing the estimates, OIG identifies two separate groups of students that apparently served as the basis for the \$50.4 million FFEL estimate. Draft Report at 18. Yet, by OIG's own description, the second of those two groups of students falls outside the audit period because it encompasses disbursements "for loans with loan start dates in the period October 1, 1997 through September 30, 1998." The OIG audit period terminated on September 30, 1997. Hence, this component of the analysis, which apparently gave rise to the bulk of the potential liabilities mentioned in the draft finding, is improper and should not be included in the estimates.
- With respect to application of the "estimated actual loss formula" (see Draft Report at 9), the University cannot respond to the precise data, calculation methodology, and actual loss estimates relied upon by OIG in applying that formula because none of that information is included in the Draft Report. Again, the University reserves and preserves its right and opportunity to respond to that information in advance of inclusion of any such estimates in a Final Audit Report.
- Lastly, in response to the Draft Report's reference to potential assessments in connection with "periods not covered by our estimate" (see Draft Report at 9), the University objects to any such extension of the audit period. On April 17, 1998, Apollo wrote a detailed letter to OIG explaining why study groups are properly included within the academic year and arguing strenuously that OIG should not proceed with any draft finding on that subject. Apollo did so with the understanding that the draft report was immediately forthcoming. Instead, the Draft Report was not issued until July 28, 1999 - 15 months later - and it presented, for the first time, a new "owned or leased" parameter that had never previously been articulated. That 15-month period encompasses the bulk of the "periods not covered by our estimate" now being referenced for inclusion in a potential assessment. The University should not be saddled with additional potential assessments based upon OIG's extended delay in issuance of a draft report.

For all of these reasons, the University denies the underlying basis and accuracy of the estimated assessments set forth in the Draft Audit Report.

III. RESPONSE TO DRAFT FINDING TWO: CDE COURSES ARE NOT CORRESPONDENCE COURSES.

OIG draft Finding Two proposes to disallow Title IV funding for students that enrolled in the University's Center For Distance Education ("CDE") programs because those programs purportedly consisted of "correspondence courses" as defined at 34 C.F.R. § 600.2. For reasons that are apparent from the draft finding itself, and for other reasons pertaining to the CDE

delivery mode and program substance, draft Finding Two is incorrect and should be omitted from any Final Report.

A. CDE IS OFFERED VIA INDEPENDENT (DIRECTED) STUDY, NOT CORRESPONDENCE.

At the outset, the University objects to draft Finding Two because the OIG's reasoning in support of its conclusion is unexplained and contradictory. The draft finding acknowledges that the unique CDE "directed study" delivery system has been characterized by the University's regional accreditor as "very similar to correspondence courses or independent study courses at other universities." Draft Report at 11. UOP's accreditor's conclusion leaves open the question of which category — correspondence or independent study — is correctly attributable to CDE. Yet, nowhere does the draft finding explain its assumption that the CDE directed study model should be classified as correspondence instead of independent study.

The regulations distinguish independent study from correspondence. The general definition of an "educational program" at 34 C.F.R. § 600.2 indicates that a course of independent study may be considered Title IV-eligible. That definition states that "the Secretary does not consider that an institution provides an educational program if the institution does not provide instruction itself (including a course of independent study), but merely gives credit for one of the following: instruction provided by other institutions or schools; examinations provided by agencies or organizations; or other accomplishments such as 'life experience.'" 34 C.F.R. § 600.2. In commentary accompanying the 1988 promulgation of this rule, the Department explained that "the Secretary has modified the proposed regulations by adding the phrase 'including a course of independent study' to clarify that the term 'instruction' as used in the definition of an 'educational program,' includes programs of independent study." 53 Fed. Reg. 11218 (April 5, 1988). Although the rules fail to explain what constitutes independent study or how this category is distinguished from correspondence or telecommunications, the regulation and accompanying clarification clearly indicate that the definition of educational program, which has remained intact since 1988, includes independent study and that such programs are eligible for Title IV funding.

The CDE directed study modality is independent study, not correspondence study. As explained in the April 1998 correspondence from the Apollo President to OIG:

[t]he University's CDE programs are virtually identical in structure, course content, and academic rigor to our resident programs. All CDE courses have begin and end dates. All courses are part of degree-granting programs. One class is taken at a time and courses are taken sequentially. CDE utilizes the same faculty and the same admissions standards, curricula, grading systems, and graduation requirements as the resident programs. CDE students are required to manifest weekly student-instructor contact to maintain good standing, and quality control processes are conducted to verify compliance with University policies. These are indicia of an independent (directed) study version of our resident programs.

The described features demonstrate that CDE courses are not correspondence courses, and the Department's regulations confirm that view. The Department defines the term "correspondence course" as follows:

a 'home-study' course provided by an institution under which the institution provides instructional material, including examinations on the materials, to students who are not physically attending classes at the institution. When students complete a portion of the instructional materials, the students take the examinations that relate to that portion of the materials, and return the examinations to the institution for grading.

34 C.F.R. § 600.2 (emphasis added).

As the underlined components of the definition make clear, the Department views correspondence to mean home study programs, i.e., courses that are administered without any direct faculty supervision, where student accountability is achieved by having the student take tests at home and send them back to the school for grading. The Department's definition of correspondence does not apply to CDE. As was stated by the University in its April 1998 correspondence to OIG, CDE utilizes the same faculty and the same admissions standards, curricula, grading systems, and graduation requirements as the University's resident programs, and ensures via mandatory weekly student-instructor contacts so that students are subject to meaningful and direct ongoing faculty instruction. Indeed, OIG's own characterization of the program, which notes that "the students completed weekly assignments and either mailed, faxed or e-mailed the work to the instructor for grading," (see Draft Report at 10, emphasis added) confirms that CDE students work under the direct supervision of instructors and that CDE courses are not "home-study" or "correspondence." Instead, as the University has previously stated, CDE offers independent/directed-study versions of the on-ground, resident programs. OIG has not, and cannot, point to any regulation that restricts the availability of Title IV funding for students enrolled in independent study programs.

Because the Department has not defined "independent study" by regulation, the definition adopted by another federal agency, the Department of Veterans Affairs ("VA"), is instructive. The VA defines "independent study" in regulations governing the availability of benefits for veterans. Those rules state that:

- (b)(1) [the] VA considers a course to be offered entirely by independent study when –
- (i) It consists of a prescribed program of study with provision for interaction between the student and the regularly employed faculty of the institution of higher learning. The interaction may be personally or through use of communications technology, including mail, telephone, videoconferencing, computer technology (to include electronic mail) or other means;
 - (ii) It is offered without any regularly scheduled, conventional classroom or laboratory sessions ...

38 C.F.R. § 21.4267(b)(1). The VA regulations approve independent study only where:

- (1) The course is offered by a college or university.
- (2) The course leads to or is fully creditable towards a standard college degree.
- (3) The course consists of a prescribed program of study with provision for interaction between the student and regularly employed faculty of the university or college by mail, telephone, personally, or class attendance.
- (4) The university or college evaluates the course in semester or quarter hours or the equivalent and prescribes a period of completion.

38 C.F.R. § 21.128. The VA regulations elsewhere specify that the VA does not consider a "course approved as a correspondence course" to be independent study, but do not define a correspondence course. 38 C.F.R. § 21.4267(c)(3). However, the regulations define a "home study" course, the very term that is explicitly incorporated by reference into the ED definition of correspondence. The VA defines a home study course as:

a course conducted by mail, consisting of a series of written lesson assignments furnished by a school to the student for study and preparation of written answers, solutions to problems, and work projects which are corrected and graded by the school and returned to the trainee.

38 C.F.R. § 21.129(a). The regulations place limitations on the inclusion of home study courses in a rehabilitation plan funded by the VA. 38 C.F.R. § 21.129(b).

Hence, the VA definition of independent study places special emphasis upon collegiate-level instruction, degree-granting authority, and interaction between the student and the instructor. The regulations make clear that the mere fact that the institution and the student "correspond" by use of the mails or other means does not signify that the program is correspondence instead of independent study. These rules contrast with the VA's home study definition, which focuses upon unsupervised study. The definitions and distinctions promulgated by the VA parallel the distinctions that the University has drawn between CDE and correspondence courses, and they confirm the University's contention that CDE constitutes independent study, not correspondence.

B. OIG FAILED TO ADEQUATELY CONSIDER WHETHER CDE COURSES ARE TELECOMMUNICATIONS COURSES.

The OIG's reasoning is equally inconsistent and incomplete on the question of whether CDE can properly be classified as telecommunications rather than correspondence. Draft Finding Two observes that, under CDE's directed study methodology, "the students completed weekly assignments and either mailed, faxed, or e-mailed the work to the instructor for grading." Draft Report at 10. Without explanation, the finding then proceeds to state that "[i]n our

opinion, the CDE courses do not meet the requirement that telecommunications courses be 'principally offered' through computer transmission." Draft Report at 11.

OIG states that, when it considered whether CDE courses are "telecommunications" or correspondence, it reviewed the ED telecommunications definition referring to courses "offered in an award year principally through the use of television, audio, or computer transmission..." 34 C.F.R. § 600.2. However, the Draft Report presents no data, information, or analysis to explain how or why OIG reached its stated conclusion that CDE courses were not "'principally offered' through computer transmission..." Draft Report at 11.

Moreover, because OIG refers in its conclusion only to "computer transmission" (and not to audio), it appears that OIG failed to consider the full scope of the definition of telecommunications, which refers to courses "offered ... principally through the use of television, audio, or computer transmission..." 34 C.F.R. § 600.2 (emphasis added). This omission is significant because, as the draft finding puts it, "the students completed weekly assignments and either mailed, faxed, or e-mailed the work to the instructor for grading." Draft Report at 10. By referring only to "computer transmission" in its conclusion, OIG affirms that it examined only the utilization of e-mail, without considering whether the frequent use of facsimile transmittals, in combination with the e-mails, sufficed to qualify CDE as coursework "offered ... principally through the use of television, audio, or computer transmission..." *Id.* (emphasis added).

Facsimile transmissions qualify as telecommunications transmittals. The above-quoted regulatory definition of telecommunications includes audio transmissions, and the word, "audio," when used as an adjective, means:

Audio, *adj.* 1. *Electronics.* Designating an electronic apparatus using audio frequencies.

The Random House Dictionary of the English Language, © 1979 at 97.

Facsimiles are sent via telephone lines. A telephone is "an electronic apparatus using audio frequencies." Therefore, the term "audio transmission," as utilized in the definition of telecommunications, encompasses facsimiles. Even while acknowledging that CDE routinely relied upon facsimile transmissions, the Draft Report considered only computer transmissions in formulating the "opinion" that serves as the sole predicate for draft Finding Two. OIG applied an inaccurate regulatory standard and failed to conduct a complete or accurate examination of whether CDE constituted a telecommunications program. The draft finding is arbitrary and capricious, and should not be incorporated into any Final Report.

For all of these reasons, the University respectfully disagrees with draft Finding Two.

IV. RESPONSE TO OTHER MATTERS CITED IN THE DRAFT AUDIT REPORT.

The section of the Draft Audit Report titled, "Other Matters," at page 13 focuses exclusively upon topics already addressed by the ED Institutional Participation and Oversight Service ("IPOS"). OIG acknowledges in its Draft Report that IPOS is handling each of these "other matters". Accordingly, the Draft Report presents no proposed recommendations.

In view of the fact that these other matters are under the jurisdiction of the ED program office rather than OIG, and OIG recommends no action on these items, detailed comments are not warranted. Accordingly, the University will refrain from presenting any detailed substantive responses, and instead will limit its comments to providing updated information with respect to the status of IPOS' disposition of these issues. UOP reserves the right to comment further or to otherwise respond to any of these "other matters" at a later date.

The principal "other matter" cited in this section of the Draft Report pertains to the program review conducted by IPOS with respect to the University's administration of the Title IV programs during the 1994-95, 1995-96, and 1996-97 award years. As stated in the Draft Report at page 14, Apollo Group, Inc. cooperated fully with the program review and provided detailed information in accordance with the program review instructions set forth in the initial program review report issued April 22, 1998. The response included voluminous and comprehensive data pertaining to program review findings referring to the late payment of refunds. The Draft Report states that IPOS "is in the process of finalizing the program review."

On July 28, 1999, simultaneous with issuance of the OIG Draft Report, IPOS issued its Final Program Review Determination Letter (the "FPRD") finalizing the program review. The FPRD states that "UOP has completed a satisfactory response to all findings in the 4/22/98 program review report." The FPRD's closure of all the April 1998 findings encompassed each of the program review items referenced in the Draft OIG Audit Report, thereby reflecting that the Apollo Group, Inc. had demonstrated its administrative capability with respect to the Title IV programs. The FPRD required UOP to repay to ED \$280,732 in interest and special allowance payments. That amount has since been paid in full. The program review is now closed.

V. CONCLUSION.

The foregoing Comments demonstrate the following:

- Draft Finding One has no basis in law, regulation, or fact and should not be included in any Final Audit Report.
- Draft Finding Two is incorrect and internally inconsistent and should not be included in any Final Audit Report.
- The "Other Matters" cited in the remainder of the Draft Audit Report have been addressed by the appropriate ED program office. OIG has recommended no action in regard to those matters.

For all of these reasons, the draft findings set forth in the OIG's Draft Audit Report dated July 28, 1999 should be **rescinded and closed**. No Final Audit Report should issue, and the Office of Inspector General, U.S. Department of Education, should instead affirm in writing that the audit identified as Audit Control Number A0970022 is now closed.

Respectfully submitted,

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