UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

MEMORANDUM

SEP 28 2001

TO: Maureen McLaughlin
Deputy Assistant Secretary
Policy, Planning, and Innovation
Office of Postsecondary Education

FROM: Lorraine Lewis

SUBJECT: FINAL AUDIT REPORT
Indiana Wesleyan University, Adult and Professional Studies Administration of Title IV Programs, Marion, Indiana
Control Number ED-OIG/A05-B0004

Attached is our subject report presenting our findings and recommendations resulting from our audit of the Title IV programs administered by Indiana Wesleyan University's Adult and Professional Studies, Marion, Indiana.

You have been designated as a collateral action official for this report. The Chief Operating Officer for Student Financial Assistance has been assigned as the primary action official. Please coordinate with him regarding any actions in connection with 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 Richard J. Dowd, Regional Inspector General for Audit, at 312-886-6503.

Please refer to the above audit control number in all correspondence relating to this report.

Attachment

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

MEMORANDUM

SEP 28 2001

TO: Greg Woods
Chief Operating Officer
Student Financial Assistance

FROM: Lorraine Lewis

SUBJECT: FINAL AUDIT REPORT
Indiana Wesleyan University, Adult and Professional Studies Administration of Title IV Programs, Marion, Indiana
Control Number ED-OIG/A05-B0004

Attached is our subject report presenting our finding and recommendations resulting from our audit of Olivet Nazarene University, School of Graduate and Adult Studies. The report identifies noncompliance with the Higher Education Act and Title IV regulations in the area of commissioned sales and course length.

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

If you have any questions or wish to discuss the contents of this report, please contact Richard J. Dowd at (312) 886-6503.

Please refer to the above audit control number in all correspondence relating to this report.

Attachment

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

MEMORANDUM

SEP 28 2001

TO: Eugene W. Hickok
Under Secretary
Office of the Under Secretary

FROM: Lorraine Lewis

SUBJECT: FINAL AUDIT REPORT
Indiana Wesleyan University, Adult and Professional Studies Administration of Title IV Programs, Marion, Indiana
Control Number ED-OIG/A05-B0004

Attached is a copy of the final audit report referenced above. We are furnishing this report to you because it may contain information of interest to you. No response on your part is necessary.

In accordance with the Freedom of Information Act (5 U.S.C. §552), reports issued by the Office of Inspector General are available, if requested, to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act.

If you have any questions or wish to discuss the contents of this report, please contact Richard J. Dowd, Regional Inspector General for Audit, at 312-886-6503.

Attachment

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

MEMORANDUM

TO: William D, Hansen
Deputy Secretary
Office of the Deputy Secretary

SEP 28 2001

FROM: Lorraine Lewis

SUBJECT: FINAL AUDIT REPORT
Indiana Wesleyan University, Adult and Professional Studies Administration of Title IV Programs, Marion, Indiana
Control Number ED-OIG/A05-B0004

Attached is a copy of the final audit report referenced above. We are furnishing this report to you because it may contain information of interest to you. No response on your part is necessary.

In accordance with the Freedom of Information Act (5 U.S.C. §552), reports issued by the Office of Inspector General are available, if requested, to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act.

If you have any questions or wish to discuss the contents of this report, please contact Richard J. Dowd, Regional Inspector General for Audit, at 312-886-6503.

Attachment

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

MEMORANDUM

TO: Terry Abbott
Chief of Staff
Office of the Secretary

SEP 28 2001

FROM: Lorraine Lewis

SUBJECT: FINAL AUDIT REPORT
Indiana Wesleyan University, Adult and Professional Studies Administration of Title IV Programs, Marion, Indiana
Control Number ED-OIG/A05-B0004

Attached is a copy of the final audit report referenced above. We are furnishing this report to you because it may contain information of interest to you. No response on your part is necessary.

In accordance with the Freedom of Information Act (5 U.S.C. §552), reports issued by the Office of Inspector General are available, if requested, to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act.

If you have any questions or wish to discuss the contents of this report, please contact Richard J. Dowd, Regional Inspector General for Audit, at 312-886-6503.

Attachment

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

MEMORANDUM

SEP 28 2001

TO: Laurie Rich
Assistant Secretary
Office of Intergovernmental
and Interagency Affairs

FROM: Lorraine Lewis

SUBJECT: FINAL AUDIT REPORT
Indiana Wesleyan University, Adult and Professional Studies Administration of Title IV Programs, Marion, Indiana
Control Number ED-OIG/A05-B0004

Attached is the above subject final audit report. We are furnishing this report to you because it may contain information of interest to you.

In accordance with the Freedom of Information Act (5 U.S.C. §552), reports issued by the Office of Inspector General are available, if requested, to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act.

If you have any questions concerning the audit report, please contact Richard J. Dowd at (312) 886-6503.

Attachment

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

CONTROL NUMBER
ED-OIG/A05-B0004

SEP 28 2001

Dr. James B. Barnes, President
Indiana Wesleyan University
4201 S. Washington Street
Marion, Indiana 46953-5279

Dear Dr. Barnes:

This **Final Audit Report** presents the results of our Audit of Commissioned Sales and Course Length at Indiana Wesleyan University (Wesleyan). Our objectives were to determine whether Wesleyan complied with the Higher Education Act (HEA) and applicable regulations pertaining to (1) the prohibition against the use of incentive payments for recruiting activities, and (2) course length.

AUDIT RESULTS

We found that Wesleyan was not in compliance with the statutory prohibition on the use of incentive payments for recruiting based on success in securing student enrollments when it paid the Institute for Professional Development (IPD) a percentage of tuition for all students enrolled in seven Adult and Professional Studies (APS) programs. As a result of incentive payments made to IPD, Wesleyan is liable for $31,682,782 in Title IV funds awarded to students in the APS programs who were improperly recruited.

We also found that Wesleyan's documentation supporting the actual number of instructional hours spent in study groups used in the definition of an academic year for its seven APS programs did not provide the number of instructional hours required to meet the statutory definition of an academic year. The study group meetings were not regularly scheduled, nor were they held at locations monitored by the University. The statutory definition of an academic year 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. An institution's academic year and the credit hours that a student is enrolled in are used, in part, to determine the amount of funds a student is eligible to receive from the Title IV programs. We estimated that Wesleyan overawarded and disbursed $5,642,000 in Title IV funds during the period July 1, 1997, through June 30, 2000.

Finding No. 1. Institutions Participating in the Title IV Programs Must Not Provide Payments Based on Success in Securing Enrollments to Any Person or Entity Engaged in Recruiting

Sections 487(a) and 487(a)(20) of the HEA require that:

> In order to be an eligible institution for the purposes of any program authorized under this title, an institution . . . shall . . . enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirements:
>
> . . . The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance . . . .

The regulations at 34 CFR § 668.14(b)(22) codify the statutory prohibition on incentive payments based on success in securing enrollment.

> By entering into this program participation agreement, an institution agrees that . . . [i]t will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the awarding of student financial assistance.

IPD Recruited Students and Received Payments Based on Student Enrollment in the APS Programs

Wesleyan entered into a contract with IPD that provided for incentive payments to IPD based on success in securing student enrollments for its APS programs. The contract stated that "IPD is a recruiting service organization assisting Indiana Wesleyan University in recruiting students for the programs." The contract included the following specific responsibilities for IPD:

- IPD shall recruit students to enroll in the courses of study in the APS programs.
- IPD shall provide representatives to recruit students for the programs covered under the agreement.
- IPD shall collect, on behalf of Wesleyan, all tuition, application fees, book and material fees, and other fees applicable to the programs.
- IPD shall maintain the official program accounting books and records.

IPD remitted book, material, and computer fees in full to Wesleyan. Tuition fees were divided between the parties on a weekly basis. During the period of our audit, in accordance with the contract, the division was 75 percent to Wesleyan and 25 percent to IPD. Refunds were paid according to these percentages. In contracting with IPD to provide recruiting services, Wesleyan violated the statutory and regulatory provisions quoted above by paying IPD a percentage of tuition for each enrolled student IPD recruited.

Wesleyan Violated the HEA by Paying IPD Based on Success in Securing Enrollments for the APS Programs Which Resulted in $31,682,782 of Improperly Disbursed Title IV Funds

Because Wesleyan did not comply with the HEA and regulations by paying incentives to IPD based on success in securing enrollments for its APS programs, Wesleyan must return all Title IV funds that were disbursed on behalf of students enrolled in the APS programs who were improperly recruited. Because Wesleyan paid incentives for each student enrolled in the APS programs, all students in the APS programs were improperly recruited. Our audit covered the period July 1, 1997, through June 30, 2000. For that period, Title IV funds totaling $31,682,782 were disbursed on behalf of students enrolled in the APS programs, consisting of $3,268 in Federal Supplemental Educational Opportunity Grants (FSEOG), $1,656,963 in Pell Grant (Pell), and $30,022,551 in Federal Family Education Loan (FFEL) funds.

IPD Recruiters Received Salary and Bonuses Based on the Number of Students Enrolled in the APS Programs

Our review of IPD's compensation plans for fiscal years (FY) 1997-1999 disclosed that IPD provided incentives to its recruiters through salary levels that were based on the number of students recruited and enrolled in the programs. According to the plan, IPD assigned recruiters a salary within the parameters of performance guidelines (i.e., knowledge of basic policies and procedures, organization and communication skills, and working relationships). IPD assessed recruiter performance on a regular basis, comparing it to the established goals for the fiscal year. The plan stated that IPD would complete formal evaluations biannually and, after the first 6 months of employment, determine salary on an annual basis. The plan showed that recruiter's success in enrolling students determined whether IPD adjusted the salary upward, downward, or kept it the same. In addition, the FY 1998 and 1999 compensation plans called for the payment of bonuses to recruiters hired before September 1, 1998. The bonuses increased as the number of students increased, and ranged from $1,344 for 100-149 students to $29,600 for over 200 students. The FY 1999 plan indicated that recruiters hired on or after September 1, 1998, who achieved 100 or more starts by the end of the fiscal year were entitled to a one-time bonus of $1,500. In contracting with IPD, Wesleyan was not in compliance with 34 CFR § 668.14(b)(22) because IPD paid its recruiters incentive compensation based on success in securing enrollments.

Recommendations

We recommend that the Chief Operating Officer for Student Financial Assistance (SFA) require Wesleyan to:

1.1. Amend and/or terminate immediately its present contractual relationship with IPD to eliminate incentive payments based on success in securing enrollments.

1.2. Return to lenders $30,022,551 of FFEL disbursed on behalf of students enrolled in the APS programs during the period July 1, 1997, through June 30, 2000, and repay the Department for interest and special allowance costs incurred on Federally subsidized loans.

1.3. Return to the Department $3,268 of FSEOG and $1,656,963 of Pell disbursed to students enrolled in the APS programs during the period July 1, 1997, through June 30, 2000.

1.4. Determine the amount of FSEOG, Pell, and FFEL funds improperly disbursed to or on behalf of students since the end of our audit period and return the funds to the Department and lenders.

University Comments and OIG Response

The University did not agree with our conclusions and recommendations. The following is a summary of the University's comments and our response to the comments. The full text of the University's comments is enclosed.

University Comments. The Allocation of Revenue Under the IPD Contract Does Not Violate the Incentive Compensation Rule. The University stated that:

- The IPD contract compensates IPD based on the volume of a broad range of professional services provided to Indiana Wesleyan University, many of which have variable costs dependent on the number of students enrolled in the APS programs.
- The Incentive Compensation Rule does not apply to the IPD contract because (1) the Department is without legal authority to use the rule as a basis for regulating routine contracts for professional, non-enrollment related services; and (2) the rule cannot apply to service contracts where the cost of providing services necessarily varies depending on the number of students.
- The Department has published no regulation or other public guidance supporting the interpretation of revenue-sharing arrangements advanced by the OIG in the draft audit report.

The IPD Contract Compensates IPD Based on the Volume of a Broad Range of Professional Services Provided to Indiana Wesleyan University. The University stated that the contract commits IPD to provide the following list of services, which it performed, with respect to the operation of the APS programs.

- Management consultation and training, upon request, regarding:
  - Program administration and evaluation.
  - Assessment center organization and management.

    - Student tracking systems development and implementation.
    - Marketing research and management.
    - Student tuition and financial aid accounting.
    - Needs analyses.
    - Compliance with laws and regulations pertaining to adult education.
    - Resources available for use in adult programs.
    - Discount purchasing agreements.
    - Development of resource distribution systems.
    - Orientation of new administrative personnel to the APS programs' format.
    - Maintenance of an exchange forum for institutions with similar programs.
- Academic system design and development consulting, including:
    - Development of systems for Prior Learning Assessed Credit evaluation and award.
    - Systems for articulation agreements with two-year college programs and business training systems.
    - Academic program design issues.
    - Regional accreditation compliance issues and measures.
    - Faculty recruitment, loading, and evaluation issues related to the APS programs.
    - Comprehensive academic quality control in adult programs.
    - Assistance with actual instructor evaluations in key courses.
    - Analyses of proposed programs of study.
- Maintenance of accounting records, and financial planning and budgeting.

The University stated that the OIG implied that IPD only provided recruiting and tuition collection services and the OIG either overlooked or ignored other services provided by IPD under the agreement with the University.

OIG Response. The OIG did not overlook or ignore the fact that IPD provided other services to the University under the terms of the agreement. In the draft audit report, we acknowledged that IPD provided additional services, such as accounting. Because it was not within the scope of our audit, we did not determine the extent of additional services under the agreement that IPD actually provided at the request of the University and at IPD's cost. We did verify that the revenue to IPD was generated only by the success in securing enrollments for which IPD was performing recruiting services. This constitutes a statutory violation of providing a commission, bonus, or other incentive payment based directly or indirectly on the success in securing enrollments.

While we recognize that IPD logically had to incur expenses to provide the program accounting services and any additional services that it may have provided, these expenses are irrelevant in determining whether the structure of the revenue allocation is a violation of the HEA. No compensation was to be provided to IPD unless IPD was successful in recruiting and securing student enrollments. The agreement also included a minimum enrollment guarantee that, if not achieved, would result in a reduction in revenue to be allocated to IPD, despite other services that might have been provided. This further emphasizes that the revenue stream is completely generated by, and dependent on, student enrollment.

The University does not dispute that the payments it made to IPD were based on a percentage of the tuition and fees paid by students enrolled in the APS. Likewise, the University does not dispute that IPD was responsible for recruiting students. Nor does the University dispute that some portion of the amount it paid to IPD was directly related to IPD's success in securing enrollments for the University's APS. Our audit report did not focus on what other services may have been provided by IPD because once IPD became responsible for recruiting students, even among other activities, and received compensation from the University based on the number of students enrolled in the program, the University was in violation of the HEA.

The HEA at § 487(a)(20) states:

> The Institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting ... [Emphasis added.]

Once recruiting was added to the services to be provided under the contract, compensation based on enrollment was no longer permitted. IPD had sole responsibility for recruitment and enrollment, and was paid under the contract only on the basis of its success in securing student enrollment regardless of what other services it may have been providing. Whether or not the revenue allocation was intended to provide compensation for other services is irrelevant because the allocation violates the law.

The University's response regarding the services performed by IPD does not always agree with the contract.

Where the University puts forward that IPD was responsible for program administration and evaluation, the contract actually provided that "[the University] retains full and ultimate responsibility to third parties for the educational content, instruction, and presentation of the courses of study offered in the programs." Section III.D. of the contract stated that IPD shall provide, at IPD's expense, reasonable consulting services to train University personnel in program administration and evaluation.

The University, in its response, stated that IPD is responsible for student services and academic services procedures. As explained below, these services were to be provided at the University's request and IPD's expense, or under separate agreement.

The University stated that IPD was involved with curriculum development. The contract at Section III.E., Curriculum Delivery System actually stated that "IPD may advise Indiana Wesleyan University in the preparation of full descriptions of curricula ..." The contract stated that all faculty and student curriculum materials developed or revised with funding provided solely by the University shall remain the sole property of the University, but IPD may purchase the materials with the consent of the University. Any curriculum materials provided exclusively through funding from IPD shall remain the property of IPD but shall be available to the University. The University shall be responsible for the acquisition, printing, and distribution of all curricula and textbooks.

The University's response asserted that IPD was responsible for faculty recruitment and assessment. The contract actually stated that "Indiana Wesleyan University shall exercise total authority for the services of instructional personnel for the programs including all costs as determined and approved."

As provided for in the contract, Section III.G., IPD may offer suggested class sites; however, the University was to determine actual sites, and shall procure and be responsible for these sites.

We had previously reported that IPD maintained the official accounting records of the program. In its response, the University stated that IPD is also responsible for financial planning and budgeting. We find no reference to these duties in the contract.

The contract did require IPD to provide all program promotion and advertising. Successful program promotions, advertising and market research by IPD would have the effect of increasing its success in securing enrollments for which it was compensated. We had previously included this in the background section of our report.

The University stated that many of the services offered by IPD were highly volume sensitive. We could only identify three items from the contract that appear to be volume sensitive: recruiting, marketing, and maintenance of accounting records. The array of consulting services would not necessarily be volume sensitive.

University Comments. The Incentive Compensation Rule Does Not Apply to the IPD Contract Because (a) the Department Has No Legal Authority For Using the Incentive Compensation Rule as a Basis for Regulating Routine Contracts for Professional, Non-Enrollment Related Services; and (b) the Incentive Compensation Rule Cannot Apply to Service Contracts Where the Cost of Providing Services Necessarily Varies Depending on the Number of Students. The University stated that the Incentive Compensation Rule was intended to prevent schools from using commissioned salespersons to recruit students, not to regulate business arrangements. When Congress enacted the statute, and the Department promulgated the implementing regulation, both emphasized their intention to halt the use of commissioned salespersons as recruiters.

OIG Response. The HEA does not excuse or permit incentive payments depending on the type of contractual arrangement that creates them. Any incentive payment based directly or indirectly on success in securing enrollment is prohibited. The contract with IPD included recruiting activities with compensation determined by IPD's success in securing students for enrollment on a per student basis.

University Comments. The Department Has Published No Regulations or Other Public Guidance Supporting the OIG's Interpretation of the Incentive Compensation Rule to Restrict Routine Revenue Sharing Arrangements. The University stated that the draft report cites no regulatory guidance, case law, nor other published guidance to support the proposition that the revenue allocation formula violates the Incentive Compensation Rule. The University did not know, and could not have known, that the revenue allocation formula would be construed as a violation of the Incentive Compensation Rule, because no such pronouncement or interpretation had ever been published and disseminated to Title IV participating institutions. The University stated

that revenue received by IPD did not meet the definition of commissions or bonuses, and was not paid to any individual agent or employee.

OIG Response. The HEA prohibition, § 487(a)(20), on incentive payments is clear.

> The Institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting. . . . [Emphasis added.]

The University signed a program participation agreement committing it to comply with the HEA and regulations. The contract clearly indicated that IPD was to be an entity engaged in student recruiting on behalf of the University. The contract also clearly showed that compensation to IPD was a percentage of the tuition revenue based on IPD's success in securing student enrollments for the University.

University Comments. The OIG's Recommended Sanction – Disallowance of All Title IV Funds Received by the University for All Enrollees – Is Unwarranted and Inconsistent With Applicable Law and Regulations. The University stated that no basis exists to support that a violation of any of the innumerable program participation agreement requirements warrants a wholesale disallowance of all Title IV funds.

OIG Response. The University incorrectly characterized our recommendation for monetary recovery as a sanction. We are not proposing that the University be fined. We are recommending that the Department recover funds disbursed in violation of the HEA.

University Comments. IPD's Recruiter Salaries Do Not Violate the Incentive Compensation Rule Because (1) the Incentive Compensation Rule Does Not Prohibit Salary Based on Success in Securing Enrollments; (2) the Legislative History of the Incentive Compensation Rule Makes Clear That Congress Intended to Permit Recruiter Salaries to be Based on Merit; and (3) the Secretary has Not Published Any Interpretation of the Incentive Compensation Rule That Would Prohibit Recruiter Salaries Based on Merit. IPD stated that its compensation plans based recruiter salaries on factors or qualities that are not solely related to success in securing enrollments. It also stated that the prohibition in § 487(a)(20) did not extend to salaries. Even if salaries were included, IPD stated that salaries could be based on merit or success in securing enrollment as long as enrollment was not the sole factor.

OIG's Response. Contrary to IPD's representation, the compensation plan we reviewed did not include factors other than enrollment to adjust recruiter salaries. According to the compensation plan, recruiters' salary and bonuses were determined annually by how many students they enrolled in the programs. Annual salary and bonuses would increase, decrease, or remain the same in accordance with predetermined tables that directly tied students enrolled to particular salary and bonus amounts. The salary and bonus tables did not include factors other than enrollment. The requirements of § 487(a)(20) cannot be avoided by labeling improper incentive compensation as salary.

Finding No. 2. Nonterm Institutions Must Provide a Minimum of 360 Hours of Instructional Time in an Academic Year

Section 481(a)(2) of the HEA states that the term academic year shall:

> [R]equire 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 credit hours ....

The regulations at 34 CFR § 668.2(b) clarify what constitutes a week of instructional time:

> [T]he Secretary considers a week of instructional time to be any week in which at least one day of regularly scheduled instruction, examinations, or preparation for examinations occurs ... 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 ....

These regulations, commonly known as the 12-Hour Rule, require the equivalent of 360 instructional hours per academic year (12 hours per week for 30 weeks). Institutions were required to comply with the 12-Hour Rule as of July 1, 1995.

In the preamble to the 12-Hour Rule regulations published on November 29, 1994, 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 result in the required instructional hours. For example, if an institution decided to establish an academic year for a program with classes that met for 10 hours per week, the classes would need to be held for 36 weeks to result in 360 hours.

Wesleyan measured its APS educational programs in credit hours, using a non-traditional academic calendar. The APS programs consisted of a series of courses for which a student generally received 3 credit hours per course. Wesleyan defined its academic year as 24 credit hours in 45 weeks. To comply with the 12-Hour Rule, Wesleyan would need to provide 8 hours of instruction per week for each week in its 45-week academic year to equal 360 hours per year.

Wesleyan Did Not Maintain Documentation to Show That Study Group Meetings Were Scheduled and Occurred

Management controls are the policies and procedures adopted and implemented by an organization to ensure that it meets its goals which, as applicable to this situation, are compliance with laws and regulations. According to the APS student handbook and Wesleyan officials, students were required to meet in class for four hours per week, and were expected to meet an additional four hours per week in study groups. Wesleyan counted the study group time for purposes of the 12-Hour Rule. We found that Wesleyan did not establish and implement management controls to ensure that the study groups were regularly scheduled and occurred.

Wesleyan's policy was that an instructor be present at regular class, but it did not have a policy regarding scheduling and tracking study group meetings. In addition, it did not require instructors to be present at study group meetings. Our review of Wesleyan's written policies and procedures, and the lack of study group records showed that Wesleyan had no assurance that study groups were taking place to meet the requirements of the 12-Hour Rule. Wesleyan officials informed us that beginning in Summer 2000, Wesleyan established the policy that faculty shall monitor study group attendance and turn in attendance forms to the administrative office on a weekly basis. The administrative center inputs the attendance into a database, which is updated weekly.

Failing to Comply With the 12-Hour Rule Resulted in Wesleyan Overawarding $5,642,000 of Title IV Funds to Its APS Students

Because Wesleyan did not ensure that study group meetings were scheduled and occurred as required, once a week for 4 hours, the meetings do not qualify for inclusion in the 12-Hour Rule calculation. Consequently, Wesleyan's defined academic year of 45 weeks only provided 180 hours of the required minimum of 360 hours of instructional time (4 hours of instruction per week for 45 weeks equals 180 hours of classroom hours). In order to meet the 360-hour requirement, Wesleyan'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, Wesleyan disbursed amounts to students that exceeded the maximum amounts for an academic year allowed under the FFEL and Pell programs. We estimated that Wesleyan overawarded $5,642,000 of Title IV funds to APS students. The students included in this amount had FFEL and Pell with loan/grant periods from July 1, 1997, through June 30, 2000.

- FFEL Limits. Title 34 CFR § 682.603(d) stipulates that an institution may not certify a loan application that would result in a borrower exceeding the maximum annual loan amounts specified in 34 CFR § 682.204. We estimated that $4,814,000 in FFEL disbursements exceeded the annual loan limits.

- Pell Maximum. Title 34 CFR § 690.62(a) specifies that the amount of a student's Pell 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. We estimated that $828,000 in Pell disbursements exceeded the maximum amount allowed.

Institutions were required to comply with the 12-Hour Rule as of July 1, 1995. Because Wesleyan's academic year for its APS programs did not meet the requirements of the 12-Hour Rule, Wesleyan improperly disbursed FFEL and Pell awarded during the audit period.

Recommendation

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

2.1. Immediately develop an academic year for its undergraduate APS programs that satisfies the 12-Hour Rule as a condition for continued participation in the Title IV programs.

The dollars we estimated as overawarded due to violating the statutory course length requirements are duplicative of the dollars we determined as overawarded due to violating the statutory prohibition against the use of incentive payments for recruiting activities. Only those amounts not recovered in Finding No. 1 should be recovered by SFA as a result of Finding No. 2.

University Comments and OIG Response

The University did not agree with our conclusions and recommendations. The following is a summary of the University's comments and our response to the comments. The full text of the University's comments is enclosed.

In summary, the University stated that:

I. Indiana Wesleyan University's Adult and Professional Studies programs comply with the 12-Hour Rule, and the University has adequately documented its compliance with the 12-Hour Rule.

   A. Study group meetings constitute instructional activity.
   B. Study group meetings were regularly scheduled.
   C. The University adequately monitored study group meeting attendance.
   D. Study groups are part of an integrated curriculum module, and faculty members were aware of which students did not attend the study group meetings in a given week.
   E. Additional hours spent by students in preparation for examinations is includable under the 12-Hour Rule.
   F. There is no statutory or regulatory basis for the OIG's requirement that the University "ensure that study group meetings were taking place."

II. The 12-Hour Rule is widely acknowledged to be unworkable and ill-suited for nontraditional educational programs.

III. The recommended liability is based on an erroneous methodology and excludes significant amounts of time that count toward compliance with the 12-Hour Rule.

University Comments. Indiana Wesleyan University's Adult and Professional Studies Programs Comply With the 12-Hour Rule, and the University Has Adequately Documented Its Compliance With the 12-Hour Rule. The University stated that the Department has already concluded that "[t]here is no meaningful way to measure 12 hours of instruction" for nontraditional education programs like those questioned by the draft audit report. The University implemented various policies and procedures to ensure that the APS programs provided the requisite amount of regularly scheduled instruction, examinations or preparation for examinations required by the 12-Hour Rule. The University also stated that the OIG had established a documentation rule that exceeded statutory and regulatory requirements.

OIG Response. The Report to Congress on the Distance Education Demonstration Programs quoted by the University refers to distance education classes that allow students to move at their own pace. Students in the APS programs were required to attend weekly study group meetings which the University did not consider as homework. The following excerpt from the report expands the quotation provided by the University to include additional clarifying information.

> It is difficult if not impossible for distance education programs offered in nonstandard terms and non-terms to comply with the 12-hour rule. The regulation would seem to require that full-time distance education students spend 12 hours per week "receiving" instruction. There is no meaningful way to measure 12 hours of instruction in a distance education class. Distance education courses are typically structured in modules that combine both what [sic] an on-site course might be considered instruction and out-of-class work, so there is no distinction between instructional time an[d] 'homework.' In addition, when they are given the flexibility to move at their own pace, some students will take a shorter time to master the material, while others might take longer.

On August 10, 2000, the Department issued a Notice of Proposed Rulemaking (NPRM) concerning, among other items, changes to the 12-Hour Rule. In the NPRM, the Department stated, "[i]t was never intended that homework should count as instructional time in determining whether a program meets the definition of an academic year, since the 12-hour rule was designed to quantify the in-class component of an academic program."

We have not established a documentation rule. An institution participating in the Title IV, HEA programs is required to establish and maintain on a current basis records that document the eligibility of its programs and its administration of the Title IV programs in accordance with all applicable requirements (34 CFR § 668.24(a)). Our audit procedures included reviewing any documentation that demonstrated the University's compliance with the 12-Hour Rule. We did not require any specific documentation as part of our audit. We found that the available documentation and the University's internal control system did not support a conclusion that the University complied with the 12-Hour Rule.

University Comments. Study Group Meetings Constitute Instructional Activity. The University stated that study group meetings fall within the scope of "regularly scheduled instruction, examinations, or preparation for examinations." The study group meetings clearly relate to class preparation, and the regulations imply that activities relating to class preparation qualify as instructional time.

OIG Response. We determined that the University did not establish and implement adequate internal controls to ensure that study group meetings were actually scheduled and occurred as required by the University. On August 10, 2000, the Department issued a NPRM concerning, among other items, changes to the 12-Hour Rule. In the NPRM, the Department stated, "[i]t was never intended that homework should count as instructional time in determining whether a program meets the definition of an academic year, since the 12-hour rule was designed to quantify the in-class component of an academic program."

University Comments. Study Group Meetings Were Regularly Scheduled. The University required that study groups complete a study group plan listing the names and addresses of all group members, and stating the day, time, and location of their weekly study group meeting. Other factors that indicated that study teams were both regular and scheduled were: (i) weekly tasks to be completed were specified in the course module, (ii) all team members were required to participate in team activities, (iii) assignments and projects were required to be completed between classes in order for students to progress academically in the course, and (iv) faculty reviewed the team assignments and projects.

OIG Response. During the on-site fieldwork, the University did not inform us that this document existed. In addition, the University did not provide us with any completed study group plans applicable to our audit period to accompany its response to the draft audit report. We found no reliable evidence to support the University's statement that meetings were regularly scheduled for all study groups.

University Comments. The University Adequately Monitored Study Team Meeting Attendance. The University required students to complete end-of-course surveys. These surveys contained questions regarding the regularity and length of study group meetings. The OIG either failed to review, rejected, or ignored them. The draft report also ignores the time faculty spent responding to requests for assistance from the study groups. The OIG concluded that "the University did not ensure that study group meetings were scheduled and occurred as required." There is no statutory or regulatory basis for this claim. The regulation does not require the minimum 12 hour of study to occur under direct faculty supervision. The course module indicates that study group meetings are for the development of group projects. The University stated that the focus of the rule is on whether instructional time is regularly scheduled and not on whether an institution can document that students actually completed 12 hours of instructional activity in any given week.

OIG Response. We are not attempting to establish an attendance requirement. The regulations at 34 CFR 668.24(a)(3) state:

> (a) An institution shall establish and maintain on a current basis, any application for title IV, HEA program funds and program records that document–
> (3) Its administration of the title IV, HEA programs in accordance with all applicable requirements;…

The University's assertion that there is no requirement that it ensure that the study group meetings actually occurred is not accurate. The University is required to document compliance with the 12-Hour Rule. We examined whether study group meetings occurred in order to corroborate whether those meetings were regularly scheduled. We reviewed the student and faculty handbooks, and we held discussions with University officials to obtain an understanding of the University's policies and procedures as they related to its attendance policy. During the on-site fieldwork, the Vice President for APS informed us that the University does not track the occurrence of study group meetings. However, it did begin tracking attendance after the audit period. The University did not inform us about the existence of the end-of-course surveys during the on-site fieldwork. Nor did it provide us with any completed surveys applicable to the audit period to accompany its response to the draft

report. In the absence of study group attendance reports that reflected the occurrence of study group meetings or some other effective control, we have no basis to conclude that the University adequately monitored study group meeting occurrence or compliance with the 12-Hour Rule.

University Comments. Study Groups Are Part of an Integrated Curriculum Module, and Faculty Members Were Aware of Which Students Did Not Attend the Study Group Meetings in Any Given Week. The University contends the OIG's position is that an instructor must be present at study group meetings in order for study groups to count as instructional time under the 12-Hour Rule. The 12-Hour Rule expressly states that time spent in preparation for examinations is included in the overall calculation of instructional activity. Faculty presence is not required when students prepare for examinations, nor is it required for the faculty member to assess whether a student adequately participated in the weekly meetings because the required work is reviewed and graded.

OIG Response. Our objective was to determine whether the University complied with the requirements of the 12-Hour Rule. The University defined its academic year to comply with the 12-Hour Rule, and this definition required that students attend four hours per week in study groups. Any time that students spent in preparation for examinations outside of study groups was not applicable to our review. Our determination that an instructor was not present at study group meetings was a result of our review of the University's overall internal control over study groups. If an instructor had been present at study group meetings, we would have considered this as evidence of a strong control.

University Comments. Additional Hours Spent By Students in Preparation for Examinations is Includable Under the 12-Hour Rule. Some APS courses utilize traditional examinations, in addition to the study group presentations and other graded activities. The draft audit report ignores the additional hours spent by students in those courses preparing for examinations, although the 12-Hour Rule explicitly permits time spent in preparation for examinations to be counted towards compliance.

OIG Response. The University defined its academic year as consisting of eight hours of instruction per week for 45 weeks. This definition provided the minimum 360 hours of instruction as required by the 12-Hour Rule. University policy required that 4 hours per week be spent in classroom workshops and 4 hours per week be spent in study team meetings. Whether or not students spent additional time preparing for exams is not relevant to the University's definition of an academic year. On August 10, 2000, the Department issued a NPRM concerning, among other items, changes to the 12-Hour Rule. The Department stated that "the only time spent in 'preparation for exams' that could count as instructional time was the preparation time that some institutions schedule as study days in lieu of scheduled classes between the end of formal class work and the beginning of final exams." The APS program had no study days scheduled in lieu of scheduled classes.

University Comments. There is No Statutory or Regulatory Requirement for the OIG's Requirements That the University "Ensure That Study Group Meetings Were Taking Place." The University stated that the APS programs were nontraditional, lifelong learning programs that have a minimum amount of regularly scheduled instruction. The University implied that to some degree the APS programs consisted of internships, cooperative education programs, or independent

study. There is no basis in statute, regulation, published guidance, or case law that establishes a requirement that the University must specifically monitor all educational activity in order to be counted under the 12-Hour Rule.

OIG Response. During our review, we considered the University's monitoring of study group attendance as one possible element of the University's internal control system, and we determined that this control was weak because the University did not maintain documentation regarding attendance. University officials did not inform us during the on-site field work that study groups participated in any cooperative educational-type activities at employers within the community, and did not provide any evidence to support this implication as part of its response to the draft report. In addition, the University's catalog contained no indications that this was part of the students' curriculum.

University Comments. The 12-Hour Rule is Widely Acknowledged To Be Unworkable and Ill-Suited for Nontraditional Education Programs. The University stated that the underlying basis for the 12-Hour Rule and its continued applicability to the Title IV programs are presently in serious doubt. The HEA requires a minimum of 30 weeks of instructional time; however, the 12-hour per week requirement was added by regulation and therefore does not have any statutory basis. The appropriateness of the 12-Hour Rule, and the immeasurable burden it has created for institutions, has recently come under increased scrutiny. Despite the due date of March 31, 2001, the Department did not issue its report on the 12-Hour Rule until July 2001. The Department has not yet complied with a legislative mandate to report to Congress on the 12-Hour Rule. The recently introduced Internet Equity and Education Act of 2001 effectively eliminates the 12-Hour Rule.

OIG Response. The University was required to comply with the HEA and the regulations in effect during our audit period. The 12-Hour Rule was a regulatory complement to the statutory definition of an academic year, and the University acknowledged it was required to comply with it. As with any other regulation, the University must be able to document that it is in compliance. Accordingly, the University must be able to document that its academic year provided 360 hours of instruction for full-time students.

University Comments. The Recommended Liability is Based on an Erroneous Methodology and Excludes Significant Amounts of Time That Count Toward Compliance With the 12-Hour Rule. The OIG fails to consider instructional activity includable under the 12-Hour Rule occurs outside of the classroom and study group meetings. Students' grades are determined through traditional examinations, graded individual presentations and papers, graded group projects, or a combination thereof. No legal authority requires the time spent on these activities to be monitored or measured under the 12-Hour Rule, but it must be assumed that students spent additional time preparing for these examinations and graded activities.

OIG Response. The University defined its academic year as consisting of a minimum of four hours per week in classroom workshops, and four hours per week in study group meetings. If individual students spent additional time in preparation for examinations or homework-type activities, it would not be relevant to the University's compliance with the 12-Hour Rule. Students were required to spend four hours per week in study group meetings. As previously noted, the Department has stated that "[i]t was never intended that homework should count as instructional time in determining

whether a program meets the definition of an academic year, since the 12-hour rule was designed to quantify the in-class component of an academic program."

BACKGROUND

Founded in 1890, Wesleyan is a liberal arts university with its main campus in Marion, Indiana. The North Central Association of Colleges and Schools accredits it to offer Associate, Baccalaureate, and Masters degrees. In 1985, Wesleyan founded the Leadership Education for Adult Professionals (LEAP) program to meet the needs of adult students. Since that time, it combined the LEAP program with other programs to form the Division of Adult and Professional Studies.

In February 1985, Wesleyan contracted with IPD, a subsidiary of the Apollo Group, Inc., to help improve its Division of Adult and Professional Studies. Wesleyan contracted with IPD for marketing, recruiting and accounting support, while it provided the curriculum, facilities, and faculty. During the audit period, Wesleyan and IPD split tuition revenue so that Wesleyan received 75 percent and IPD received 25 percent, but Wesleyan received 100 percent of book, material, computer, and other miscellaneous fees.

During the period July 1, 1997, through June 30, 2000, Wesleyan participated in the FSEOG, Pell, and FFEL programs. Wesleyan or Department records indicated that, during the period, Wesleyan or lenders disbursed $31,682,782 on behalf of students in the APS programs. Specifically, Wesleyan's records indicated that it disbursed FSEOG totaling $3,268. The Department's records (Student Payment Summary (SPS) and National Student Loan Data System (NSLDS)) indicated Wesleyan disbursed Pell totaling $1,656,963 and lenders disbursed FFEL of $30,022,551. Title IV of the HEA of 1965, as amended, authorizes these programs, and they are governed by regulations contained in 34 CFR Parts 676, 682, and 690, respectively. In addition, these programs are subject to the provisions contained in the Student Assistance General Provisions regulations (34 CFR Part 668), and Wesleyan must comply with the Institutional Eligibility regulations (34 CFR Part 600) to participate in these programs. Regulatory citations in the report are to the codifications revised as of July 1, 1997, 1998, and 1999.

AUDIT SCOPE AND METHODOLOGY

The objectives of the audit were to determine whether Wesleyan complied with the HEA and Title IV regulations concerning the prohibition on making incentive payments based on success in enrolling students and course length. We specifically focused our review on Wesleyan's contract with IPD and programs of study related to that contract, and the area of required hours of instruction in an academic year under the 12-Hour Rule.

To accomplish our objectives, we reviewed Wesleyan's written policies and procedures, accounting and bank records, and student financial assistance reports. We reviewed Wesleyan's program participation agreement with the Department, its contract with IPD, and IPD's compensation plan for its recruiters. In addition, we reviewed single audit reports prepared by Wesleyan's Certified Public Accountants.

We relied on computer-processed data Wesleyan extracted from its financial assistance database. We used award and disbursement data from the Department's SPS and NSLDS to corroborate information obtained from Wesleyan. We did this by comparing Wesleyan data with Pell and loan disbursements for all students in the Department's records. We held discussions with Wesleyan officials to gain an understanding of the processes for requesting and drawing down Federal funds, and for its accounting for revenue from the APS programs. Based on these tests and assessments, we concluded that the data Wesleyan provided were sufficiently reliable to use in meeting the audit's objectives.

The audit covered the period July 1, 1997, through June 30, 2000. We performed the on-site field work in Marion, Indiana, during the period October 31 – November 8, 2000. We had our exit conference on November 7, 2000. We conducted the audit in accordance with government auditing standards appropriate to the scope of audit stated above.

Methodology Used to Determine the Title IV Funds Improperly Disbursed for Finding 2

The University's academic year would need to be 90 weeks in length 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 programs and (2) disburse FFEL funds to students who were enrolled less than half-time during a 90-week academic period.

FFEL Disbursements in Excess of Annual Limits. 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, as described below, we estimated $4,814,000 of disbursements that exceeded the annual limits.

For the FFEL estimates, we analyzed disbursements for two separate groups of students identified from the University-provided files. For students in each group, we analyzed loan period start dates and the loan disbursements covering a 90-week academic period.

The first group consisted of students who received disbursements for loans with loan start dates in the period July 1, 1997, through June 30, 1998, AND disbursements for loans with loan start dates in the period July 1, 1998, through June 30, 1999.

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 July 1, 1998, through June 30, 1999, AND disbursements for loans with loan start dates in the period July 1, 1999, through June 30, 2000.

Pell Disbursements in Excess of Annual Limits. We identified the Pell funds awarded to students who started between July 1, 1997 and June 30, 1998, and the Pell funds awarded to students who started between July 1, 1998 and June 30, 1999. To determine the amount of Pell 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. Because the University used the credit hours for a 45-week academic year rather than a 90-week academic year as the denominator, the Pell award was overstated by one-half, or 50 percent. We estimated $828,000 in Pell disbursements exceeded the maximum amount allowed.

STATEMENT ON MANAGEMENT CONTROLS

As part of our review, we gained an understanding of Wesleyan's management control structure, as well as its policies, procedures, and practices applicable to the scope of the audit. We identified applicable significant controls related to institutional eligibility, student enrollment, and contract payments. We did not test to determine the level of control risk, but instead, compared Pell and loan transactions for all students in the APS programs.

Due to inherent limitations, a study and evaluation made for the limited purpose stated above would not necessarily disclose all material weaknesses in the management controls. However, our assessment disclosed significant management control weaknesses that adversely affected Wesleyan's ability to administer the Title IV programs. These weaknesses include inadequate controls over incentive-based payments for student enrollment and the amount of time spent in instruction. The Audit Results section of this report fully discusses these weaknesses and their effects.

ADMINISTRATIVE MATTERS

If you have any additional comments or information that you believe may have a bearing on the resolution of this audit, you should send them directly to the following Department of Education official, who will consider them before taking final action on the audit:

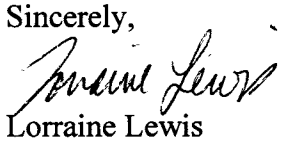
Greg Woods, Chief Operating Officer
Student Financial Assistance
Regional Office Building, 7th and D Streets, S.W.
ROB Room 4004, Mail Stop 5132
Washington, DC 20202

Office of Management and Budget Circular A-50 directs Federal agencies to expedite the resolution of audits by initiating timely action on the findings and recommendations contained therein. Therefore, receipt of your comments within 30 days would be greatly appreciated.

In accordance with the Freedom of Information Act (5 U.S.C. §552), reports issued by the Office of Inspector General are available, if requested, to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act.

If you have any questions or wish to discuss the contents of this report, please contact Richard J. Dowd, Regional Inspector General for Audit, Chicago, Illinois, at (312)886-6503. Please refer to the control number in all correspondence relating to this report.

Sincerely,



Lorraine Lewis

INDIANA
WESLEYAN
university

Office of the President

VIA OVERNIGHT DELIVERY

September 20, 2001

Mr. Richard J. Dowd
Regional Inspector General for Audit - Region V
U.S. Department of Education
Office of the Inspector General
111 North Canal Street, Suite 940
Chicago, Illinois 60606

RE: Draft Audit Report; Indiana Wesleyan University (Control Number ED-OIG/A05-B0004)

Dear Mr. Dowd:

Attached please find Indiana Wesleyan University's response to the Draft Audit Report issued on July 30, 2001, by the United States Department of Education, Office of Inspector General, Division of Audit. For all of the reasons presented therein, the University does not concur with the Findings and Recommendations set forth in the Draft Report.

We appreciate the opportunity to comment on the Draft Report, and the University reserves the right and opportunity to respond further to any final report as may be issued.

Respectfully submitted,

James B. Barnes
President

Attachment

4201 South Washington
Marion, Indiana 46953-4974 ▲ e-mail: jbarnes@indwes.edu ▲ (765) 677-2100
FAX: (765) 677-2499

INDIANA WESLEYAN UNIVERSITY'S RESPONSE TO THE DRAFT AUDIT REPORT OF THE U.S. DEPARTMENT OF EDUCATION OFFICE OF INSPECTOR GENERAL (Control Number ED-OIG/A05-B0004)

Indiana Wesleyan University (the "University, or "IWU") is a private, not-for-profit, Christian liberal arts institution founded in 1920. The University's main 150-acre campus is located in Marion, Indiana, and it also offers courses on campuses in Fort Wayne and Indianapolis, and at several other locations throughout the State of Indiana. Affiliated with The Wesleyan Church, which has about 300,000 members worldwide, the University is currently comprised of approximately 8000 students from 45 states and 25 countries. The University is accredited by the North Central Association of Colleges and Schools, the National Association of Schools of Music, the National Council for the Accreditation of Teacher Education, the National Accrediting Agency for Clinical Laboratory Science, the Council for the Accreditation of Counseling and Related Educational Programs, and the Council on Social Work Education, among others. The University's has consistently maintained very low cohort default rates: 3.8 percent in Fiscal Year ("FY") 1996, 2.8 percent in FY 1997, 1.2 percent in FY 1998, and 1.9 percent in FY 1999. The University has also achieved remarkably high graduation rates in its adult programs: 75 percent in Bachelor-level programs as opposed to a national average among private colleges of 53 percent; 84 percent in Masters-level programs as opposed to a national average of 47 percent at "liberally selective" universities. In addition, in a state with a minority population of approximately 6 percent, 15 percent of the University's adult program enrollment consists of minority students. Clearly, through the unique distributed format of its adult programs, the University has for over 15 years addressed the needs of students who might not otherwise have completed college programs.

The Draft Audit Report by the Office of Inspector General ("OIG") focuses upon federal student financial aid funds ("Title IV funds") received by students who enrolled in IWU's Business and Management programs offered in the College of Adult and Professional Studies ("APS programs"). The University maintains a contract with an independent outside entity, the Institute for Professional Development ("IPD") for various services related to these programs. The issues raised by the Draft Audit Report pertain both to the "Agreement between Indiana Wesleyan University and Institute for Professional Development" (the "IPD Contract"),[1] and to the structure of the APS programs in question. The APS programs use a "cohort model" of learning in which small groups of students progress together through the academic program on a course-by-course basis. The curriculum relies on peer-based learning teams, in-class instruction, individual projects and group activities. The APS courses are offered in a structured sequence with students completing one course at a time, allowing complete focus in each topic area.

The Draft Audit Report first erroneously claims that the University "was not in compliance with the statutory prohibition on the use of incentive payments" (the "Incentive Compensation Rule") when it contracted with IPD. Draft Audit Report at 1, 3. Based on this conclusion, the OIG recommends that the U.S. Department of Education (the "Department" or

[1] The University has contracted with IPD since 1985. However, the contract between IWU and IPD covering the matters and years involved in this audit was executed on June 16, 1997.

"ED") require the University to return all Title IV funds disbursed for the APS programs between July 1, 1997 and June 30, 2000. The Draft Audit Report further claims that the University's "documentation supporting the actual number of instructional hours ... for its seven APS programs did not provide the number of instructional hours required" under the so-called 12-Hour Rule. Id. Following this conclusion, the OIG incorrectly asserts that the University overawarded Title IV funds to APS students.[2] Draft Audit Report at 1, 5. The University strenuously disagrees with both of these findings and the OIG's recommendations, for the reasons set forth herein.

I. NEITHER INDIANA WESLEYAN UNIVERSITY NOR THE INSTITUTE FOR PROFESSIONAL DEVELOPMENT VIOLATED THE INCENTIVE COMPENSATION RULE.

The University disagrees with the Draft Audit Report's assertion that the IPD Contract's revenue allocation provisions violate the Incentive Compensation Rule. In addition, the OIG's recommendation that the University return all Title IV funding disbursed for the APS programs is an extreme, unjustified, and arbitrarily proposed sanction without support in applicable law or regulations. Finally, IPD maintains that its recruiter salaries do not violate the Incentive Compensation Rule.

A. The Allocation of Revenue Under the IPD Contract Does Not Violate the Incentive Compensation Rule.

The Draft Audit Report erroneously claims that the revenue allocation provision of the IPD Contract is prohibited. This claim is based on the OIG's allegation that the contract "provided for incentive payments to IPD based on success in securing student enrollments for its APS programs." Draft Audit Report at 2. The University vigorously disagrees with both the draft finding and recommendation, for each of the following reasons:

- The IPD Contract compensates IPD based on the volume of a broad range of professional services provided to Indiana Wesleyan University, many of which have variable costs dependant on the number of students enrolled in the APS programs.
- The Incentive Compensation Rule does not apply to the IPD Contract because (1) the Department is without legal authority to use the rule as a basis for regulating routine contracts for professional, non-enrollment related services; and (2) the rule cannot apply to service contracts where the cost of providing services necessarily varies depending on the number of students.

---

[2] As the Draft Audit Report notes on page 6, the Title IV funds at issue under the 12-Hour Rule finding are duplicative of amounts covered by the Incentive Compensation Rule issue.

- The Department has published no regulation or other public guidance supporting the interpretation of revenue-sharing arrangements advanced by the OIG in the Draft Audit Report.

For each of the foregoing reasons, as discussed in greater detail below, the University strenuously disagrees with the Draft Audit Report's findings and recommendations pertaining to the IPD Contract.

1. The IPD Contract compensates IPD based on the volume of a broad range of professional services provided to Indiana Wesleyan University.

In the present case, IPD performed the following broad range of non-recruitment and non-enrollment services, all of which are not specifically referenced in the IPD Contract but nonetheless occurred regarding the operation of the APS programs:

- Management consultation and training regarding:
  - Program administration and evaluation;
  - Assessment center organization and management;
  - Student tracking systems development and implementation;
  - Marketing research and management;
  - Student tuition and financial aid accounting;
  - Needs analyses;
  - Compliance with laws and regulations pertaining to adult education;
  - Resources available for use in adult programs;
  - Discount purchasing agreements;
  - Development of resource distribution systems;
  - Orientation of new administrative personnel to the APS programs' format;
  - Maintenance of an exchange forum for institutions with similar programs;
- Academic system design and development consulting, including:
  - Development of systems for Prior Learning Assessed Credit evaluation and award;
  - Systems for articulation agreements with two-year college programs and business training systems;
  - Academic program design issues;
  - Regional accreditation compliance issues and measures;
  - Faculty recruitment, loading, and evaluation issues related to the APS programs;
  - Comprehensive academic quality control in adult programs;
  - Assistance with actual instructor evaluations in key courses;
  - Analyses of proposed programs of study; and
- Maintenance of accounting records, and financial planning and budgeting.

The OIG ignores the many non-enrollment related services performed by IPD under the contract, and instead treats the contract as if it covered only recruitment and student accounting functions. See Draft Audit Report at page 2-3. The OIG wrongly implies that recruitment and tuition collections constituted IPD's only functions with respect to the APS programs, id., when in fact IPD performed many and varied functions other than recruitment, under its contract with the University, that are essential to the success of the programs. In addition, the OIG ignores the fact that the overall cost to any vendor of providing many of the above services is highly dependent on the volume required, which is, in turn, dependent on the numbers of students at the institution. The IPD Contract therefore simply allocates revenues to reimburse IPD for additional services provided to the University as its demand for services increases.[3]

Based on an erroneously narrow view of IPD's responsibilities and a summary rejection of the somewhat obvious concept that additional APS students create additional expenses, the Draft Audit Report incorrectly concludes that any amounts paid by the University to IPD were in consideration for "securing student enrollments for its APS programs," and for no other functions whatsoever. Id. The IPD Contract, however, reflects that the allocation of APS revenues is based upon a wide range of non-enrollment related academic and administration functions, in addition to the limited items identified in the Draft Audit Report. If the OIG auditors unintentionally overlooked these additional IPD responsibilities in the course of the their review, the audit procedures were incomplete and therefore flawed. However, if the auditors were aware of these additional IPD services and chose to ignore them, the Draft Audit Report is flawed in a manner that raises questions about the impartiality of the audit process.

Beyond its failure to examine the broad range of IPD's non-enrollment related academic and administrative functions, the Draft Audit Report's reliance upon certain marketing-oriented functions similarly fails to demonstrate any violation of the Incentive Compensation Rule. IPD had no authority or control with respect to the University's criteria, standards, procedures or decisions respecting the admission or enrollment of students. Moreover, it was the University, and not IPD, that awarded Title IV funds to those APS students participating in the federal student financial aid programs. Accordingly, IPD did not and could not secure enrollments within the meaning of the Incentive Compensation Rule. The Rule's prohibition extends solely with respect to payments based upon "success in securing enrollments or financial aid." The prohibition therefore does not apply to IPD, which could not and did not secure enrollments or financial aid for the University.

---

[3] This aspect of the IPD Contract is discussed in greater detail infra.

2. The Incentive Compensation Rule does not apply to the IPD Contract.

a. The Department has no legal authority for using the Incentive Compensation Rule as a basis for regulating routine contracts for professional, non-enrollment related services.

Section 487(a) of the Higher Education Act of 1965, as amended (the "HEA"), requires institutions participating in the Title IV programs to enter into a Program Participation Agreement ("PPA") that provides for such institutions to comply with a long laundry list of requirements. The twentieth item on the list states:

> The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance.

20 U.S.C. § 1094(a)(20). The implementing regulation promulgated by the U.S. Department of Education ("the Department" or "ED") in turn requires Title IV, HEA participating institutions to agree as follows:

> [The institution] will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the awarding of student financial assistance.

34 C.F.R. § 668.14(b)(22). It is plain from the express language of both provisions that the Incentive Compensation Rule was intended to prevent schools from using commissioned salespersons to recruit students, not to regulate business arrangements such as the one described in this Draft Audit Report, which pay for a wide array of professional services based on the volume of services received by the University. The legislative and regulatory histories clearly emphasize the intent to halt the use of commissioned salespersons as recruiters. Congress explained:

> The conferees note that substantial program abuse has occurred in the student aid programs with respect to the use of commissioned sales representatives. Therefore this legislation will prohibit their use.

Conf. Rep. No. 102-630, 102d Cong., 2d Sess. 499 (1992). Similarly, the Secretary's

published commentary on the final regulation stated:

> The Secretary believes that this provision is necessary to implement more rigid restrictions than were seen in the past on the practices of "commissioned salespersons."

59 Fed. Reg. 9539 (February 28, 1994). There is simply nothing in either legislative and regulatory history to support the Incentive Compensation Rule as a basis for the Department to regulate institutions' routine business arrangements with outside vendors where services are contracted for at a set rate of compensation based on the volume of services provided, such as the contract between IWU and IPD.[4]

b. The Incentive Compensation Rule cannot apply to service contracts where the cost of providing services necessarily varies depending on the number of students.

The array of professional services delineated in the IPD Contract, and performed accordingly, demonstrates that the partial allocation of revenues to IPD does not constitute incentive compensation attributable to enrollments, but instead is simply an equitable payment mechanism designed to account for the amount of work required of IPD in serving APS students. The magnitude of IPD's various functions and obligations under the contract depends in substantial part upon how many students enroll in the APS programs. Indeed, many of the tasks assigned to IPD by the IPD Contract are highly volume sensitive. Because the parties could not predict how many students would enroll, they similarly could not predict how much work the IPD contract would entail. To account for this uncertainty in their business arrangement, the IPD Contract allocates revenue in a manner that compensates IPD on a basis roughly parallel to the scope and quantity of the required services. IPD's compensation is premised on the full scope of work to be performed for the University, not on IPD's success in enrolling any students in the APS programs.

In contrast, the OIG would apparently disallow any payment arrangement between an institution and professional service provider that reflects indefinite quantities. This interpretation is flawed because the Incentive Compensation Rule applies to individual employees with a finite amount of time in which to perform job functions. However, for a professional services vendor that will employ more people and buy more resources to meet demand or increase productivity, there is no finite time resource as there is with individual employees. Therefore, if a vendor expands the level of services under a contract where demand is increasing, as in this case, providing the vendor with more total compensation to offset the greater workload and need for

[4] Notably, in contrast to the regulations later promulgated by ED, section 487(a) of the HEA makes no reference to contracts between educational institutions and outside entities.

more employees is not a "bonus" but rather an equitable compensation for services rendered. These economic precepts dictate that the Incentive Compensation Rule can apply only to the compensation of individuals employed by the institution or the vendor. The rule cannot apply to payments made by an institution to a vendor for professional services rendered pursuant to contracts of indefinite quantities.[5]

The Draft Audit Report promotes a strained and unwarranted extension of the scope and meaning of the Incentive Compensation Rule far beyond its meaning and intent. Congress sought to impose a ban on the use of commissioned salespersons or "bounty hunters" that secured unqualified enrollments to procure unwarranted financial aid dollars for their employers. In stark contrast, this case involves total compensation that was calculated and paid based upon the quantity of professional and administrative services performed by a third-party contractor that exercised no control over eligibility for admissions or enrollment. Moreover, the Department has just recently informed the University that its FY 1999 cohort default rate is only 1.9 percent. This extraordinarily low default rate is conclusive proof that the University did not admit unqualified students into its APS programs. The Incentive Compensation Rule has absolutely nothing to do with the parties' revenue-sharing agreement, and the finding should be rescinded.

3. <u>The Department has published no regulation or other public guidance supporting the OIG's interpretation of the Incentive Compensation Rule to restrict routine revenue sharing arrangements.</u>

The Draft Audit Report cites no case precedent, regulatory or non-regulatory guidance, or other legal authority to support the proposition that the allocation of revenue under the IPD Contract violates the Incentive Compensation Rule. This attempt by the OIG to create and retroactively apply a new requirement to IWU raises serious due process concerns. Namely, parties that are regulated by the Department, or by any other administrative agency, are entitled to adequate notice of what rules are to be applied to them. In this case, the University did not know, and could not have known, that the allocation of revenue in the IPD Contract would be construed as a violation of the Incentive Compensation Rule, because no such pronouncement or interpretation had ever been published and disseminated to Title IV-participating institutions.[6]

---

[5] The OIG's interpretation creates a situation whereby small or medium sized institutions cannot contract with outside vendors to assist with developing innovative non-traditional educational delivery systems. Only larger institutions, with far more resources and internal capacity, will be able to effectively offer non-traditional programs of high quality.

[6] For several months prior to the issuance of the Draft Audit Report, Department officials made frequent public statements that new non-regulatory guidance was imminent. However, in a letter dated August 2, 2001, Mr. David Bergeron of the Department's Policy and Budget Development Unit informed Senator Charles Grassley that "the Department is not prepared to issue further guidance on incentive compensation at this time." The Department's silence on this important issue therefore continues despite the issuance of this and other Draft Audit Reports.

Indeed, for all of the reasons presented in this submission, this University and many others like it reasonably believed the opposite.[7] We further submit that the interpretation advanced by the OIG in the Draft Audit Report is so removed from a reasonable person's understanding of the regulations that the University cannot be deemed to have been fairly informed of any such agency perspective. Imposition of a multimillion dollar liability under this dubious, retroactively applied policy interpretation violates traditional notions of due process and basic fairness because the University did not have adequate notice that its conduct would be deemed prohibited.

Moreover, to the best of the University's knowledge, despite the emergence nationally of revenue sharing and similar type contractual understandings between higher education institutions and outside vendors, the Department has not previously applied this rule in this manner to any institution, and the OIG has provided no justification or legal authority for selectively enforcing its own internal policy interpretation against the University. We respectfully suggest that such action is arbitrary and capricious because a regulatory agency must provide an adequate explanation before it treats similarly situated parties differently.

For all of the foregoing reasons, the University vigorously disagrees with the Draft Audit Report's findings and recommendations with respect to the IPD Contract. We urge the OIG to rescind the draft finding and recommendation and to forego issuance of any final report, or to delete both from any final report.

B. The OIG's Recommendation -- Disallowance of All Title IV Funds Received by the University for All Enrollees -- Is Unwarranted and Is Inconsistent With Applicable Law and Regulations.

The Draft Audit Report erroneously asserts at page 3 that "because [Indiana] Wesleyan did not comply with the HEA and regulations by paying incentives to IPD based on success in securing student enrollments for its APS programs, the University must return all Title IV funds that were disbursed on behalf of students enrolled in the APS programs." On these grounds, the OIG asserts that an overwhelming amount -- $31,682,782, representing the principal amount of all Title IV loans and grants received by APS enrollees -- should be returned to lenders and to the U.S. Department of Education.

---

[7] The issues raised herein do not challenge the authority of ED, through notice-and-comment rulemaking, to promulgate regulations governing revenue-sharing agreements between Title IV participating institutions and other entities. Unlike regulations issued through that formal administrative process, which may be challenged but are entitled to deference, the regulatory interpretation at issue in this case was developed surreptitiously by the OIG and is therefore owed no deference. Moreover, the OIG's policymaking initiative falls outside the scope of the OIG's authority under the Inspector General Act of 1978, which precludes an agency from delegating "program operating responsibilities" to an OIG.

The University strenuously objects to the sanctions recommended by the Draft Audit Report. First, as has been previously stated, we disagree with the OIG's assertion that the allocation of revenue under the IPD Contract constitutes payment of prohibited incentives to IPD. Because the OIG cites that assertion as the basis for the recommended sanctions, we believe that no sanctions are warranted. Second, even if the OIG's allegations had merit, the violations asserted would not trigger the extreme wholesale disallowance that is recommended. The OIG offers neither legal authority nor analysis to justify or explain why disallowance of all APS-related financial aid funding would lawfully, logically, or reasonably result from the cited noncompliance.

In the absence of any OIG statement of reasons, or other detailed explanation, for the extreme sanction, the University cannot presently submit any comprehensive response to the Draft Audit Report's recommendations. We therefore reserve the right and opportunity to respond at a later date, if and when such a statement is presented. In the meantime, we offer the following preliminary statement of reasons why the recommended sanction is unjustified and should be deleted from any final audit report:

- The extraordinary recommended monetary sanction – wholesale disallowance of more than thirty million dollars, representing all federal funds received by students enrolled in the APS programs – is facially arbitrary and capricious because: a) the Draft Audit Report does not explain the basis for the recommendation; b) no statute, regulation, or other published guidance imposes wholesale disallowance based upon violation of the Incentive Compensation Rule; and c) various ED rules and precedents articulate a variety of lesser sanctions. The recommended sanction should be deleted because the Draft Audit Report does not and cannot explain any basis for a wholesale disallowance of aid to eligible students, and because the OIG has not considered, much less rejected with reasons, any of the available lesser alternatives.

- The University and its APS students utilized the Title IV program funds targeted by the OIG for disallowance for their lawful intended purposes, i.e., to pay the costs of attendance associated with these students' education. The Draft Audit Report presents no finding or allegation to the contrary; nor does it assert any instance where the audit fieldwork revealed that funds were misapplied or unaccounted for. Even though the OIG has pointed to no actual or presumptive harm suffered by ED or by any student, the Draft Report recommends that the University repay all the funds – including principal loan amounts already slated for repayment by the students themselves – that were long since spent to educate these students. The OIG can point to no statute, regulation, or principle of law to substantiate the disallowance sought. The OIG has not even explained why the University should repay funds that were duly applied to their lawful intended purposes, or explained why the University should repay loan principal amounts that the students themselves will repay.

- Nowhere does the Draft Audit Report allege or imply that any individual APS student lacked federal student financial aid eligibility, based upon alleged noncompliance with the Incentive Compensation Rule or with any other Title IV requirement. The Department's student eligibility rules do not include the Incentive Compensation Rule as a student eligibility requirement. Accordingly, no basis exists for the OIG to seek or recommend wholesale disallowance of all federal student financial aid funds received by all APS students.

- Nowhere does the Draft Audit Report allege or imply that any APS academic program lacked eligibility for Title IV participation, based upon alleged noncompliance with the Incentive Compensation Rule or with any other Title IV requirement. The Department's program eligibility rules do not include the Incentive Compensation Rule as a program eligibility requirement. Accordingly, no basis exists for the OIG to seek or recommend wholesale disallowance of all Title IV funds received by all APS students.

- The elements of institutional eligibility set forth in Title IV and ED's regulations do not include the Incentive Compensation Rule as an institutional eligibility requirement. Although Title IV formerly included a different eligibility provision prohibiting the use of commissioned salespersons to promote the availability of federal loans, Congress repealed that provision when it enacted the Incentive Compensation Rule. In fact, prior to enactment of the Rule, the Congress rejected a proposal that would have made the Rule a component of the definition of an eligible institution of higher education. Accordingly, no basis exists for the OIG to seek or recommend wholesale disallowance of all federal student financial aid funds received by all APS students.

- The Draft Audit Report quotes Title IV provisions and ED rules that identify the Incentive Compensation Rule as the twentieth of twenty-six mandatory terms to be included in the institutional Program Participation Agreement ("PPA") with the Department. However, the PPA terms collectively encompass hundreds of statutory and regulatory requirements prescribed under Title IV of the Higher Education Act. No basis exists to support the OIG's position that an alleged violation of <u>any</u> of these innumerable PPA requirements warrants a wholesale disallowance of all Title IV funds where no statutory or regulatory element of institutional, student, or program eligibility is at issue. The Draft Audit Report does not identify any basis for such an extreme sanction, and various ED administrative decisions support the view that the recommended sanction is both unreasonable and unwarranted. More specifically, the seventeenth PPA term requires institutions to "complete, in a timely manner and to the satisfaction of the Secretary, surveys conducted as part of the Integrated Postsecondary Education Data System." <u>See</u> 34 C.F.R.§ 668.14(b). The OIG's position would require a total disallowance of all Title IV funds for a violation of that ministerial requirement. If

however, the OIG's position differs regarding that PPA requirement from its position in this case, the OIG is assigning varying degrees of significance to the PPA requirements, thereby modifying a regulatory scheme without notice-and-comment as required by law.

- Given the absence of any factual allegations of actual harm, coupled with the absence of any basis for asserting that the University, its students, or its APS programs were ineligible for Title IV funds, it would appear that the OIG seeks to impose a wholesale disallowance to punish the University for purported noncompliance. The OIG cannot lawfully seek or recommend punishment in an audit report.

- The Draft Audit Report incorrectly and drastically overstates the amount of purported liabilities arising out of APS students' participation in the Title IV programs by erroneously recommending that the University be required to repurchase all Stafford and PLUS loans disbursed to such students. The Draft Report inexplicably ignores established rules limiting the scope and quantity of any audit disallowances of loan funds to the ED's actual losses. The Department's established policies and administrative precedent require the application of an actual loss formula that takes into account institutional default rates in lieu of repurchase of all loans. In recommending repurchase of the face amount of these loans, the Draft Audit Report simply ignores the actual loss formula.[8]

- The Draft Audit Report's omission of any reference to the Department's long-established actual loss formula, in conjunction with the unfounded and extreme sanctions cited, is highly unfair to the University because the institution has succeeded in achieving extraordinarily low cohort default rates for the last three years. The University's rates for fiscal years 1997, 1998, and 1999 were 2.8 percent, 1.2 percent, and 1.9 percent, respectively. These rates prove that the arbitrary and capricious disallowance figures set forth by the Draft Audit Report profoundly exaggerate any sanctions that could ever potentially result from the audit. Moreover, the IWU's rates prove that, in direct contrast to enrollment abuses targeted by Congress in enacting the Incentive Compensation Rule, the University's recruitment practices suffice to ensure that only qualified, responsible students enroll in its programs.

Even without the benefit of an OIG explanation seeking to justify the recommended wholesale disallowance, the foregoing preliminary responses establish that the Draft Audit Report's recommendation is unreasonable, unwarranted and arbitrary. The OIG should therefore remove the recommendation from any final report.

---

[8] The Draft Audit report further overstates the value of Title IV funds awarded to APS students by apparently failing to consider any amounts that may have been refunded, following the initial disbursement, because of changes in students' enrollment status.

C. Response To the Draft Audit Report's Assertions With Respect to IPD's Internal Salary Structure.

The Draft Audit Report further questions whether IPD's internal compensation plans were consistent with the Incentive Compensation Rule. The University is, however, unable to itself provide a specific response to the OIG's claim because the contract with IPD specified respective areas of responsibility. The University was responsible for maintaining the academic records of APS students, making final determinations on APS admissions, and establishing tuition and fees for programs. See IPD Contract, pages 12-13. The University also exercised exclusive jurisdiction over curricula content and approval, and retained authority over instructional personnel for the APS programs. Id. at page 14. Under the contract, however, IPD was responsible to "pay and be responsible for the cost, including but not limited to [IPD's] payroll, for all contract services to be rendered." Id. at page 24.

Because the subject of IPD's internal compensation structure is within the exclusive domain of IPD, and not within the control of the University, we asked IPD to prepare a statement for inclusion in this submission. IPD presented us with the following statement, which is included in its entirety as follows:

* * *

IPD Recruiter Salaries Do Not Violate The Incentive Compensation Rule

The Draft Report asserts at page 3 that IPD compensation plans "provided incentives to its recruiters through salary levels that were based on the number of students recruited and enrolled in programs." Yet, in describing the IPD salary plan, the Draft Report states "IPD assigned recruiters a salary within the parameters of performance guidelines (i.e., knowledge of basic policies and procedures, organization and communication skills, and working relationships)." The guidelines cited by the OIG are not related to a recruiter's success in securing enrollments – e.g., a recruiter may exhibit any or all of the aforementioned qualities without recruiting a threshold number of students. Thus, the Draft Report itself establishes that the cited IPD compensation plans based recruiter salaries in part on factors that are not based on success in securing enrollments.

To the extent that the Draft Report suggests that provisions for recruiter salaries under IPD compensation plans violate the Incentive Compensation Rule, that contention is incorrect and contrary to law. As detailed below, the cited provisions regarding recruiter salaries are fully consistent with the governing statute and regulation for each of the following reasons.

1. The Incentive Compensation Rule does not prohibit salary based on success in securing enrollments.

The terms of the Incentive Compensation Rule do not extend to "salary." Both the governing statute and regulation require a Title IV participating institution to agree that it will not provide:

> [A]ny commission, bonus or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons . . . engaged in any student recruiting or admissions activities.

20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(a)(22). Neither the statute nor the regulation makes reference to salary. The Incentive Compensation Rule only extends to certain "commission[s]," "bonus[es]," or "other incentive payment[s]," each of which are distinct from salary. Accordingly, the express language and plain meaning of the Incentive Compensation Rule signifies that these provisions do not prohibit an institution from basing recruiter salaries, in whole or in part, on success in securing enrollments.

2. The legislative history of the Incentive Compensation Rule makes clear that Congress intended to permit recruiter salaries to be based on merit.

Even if one erroneously presumed that the Incentive Compensation Rule could extend to certain recruiter "salaries," Congress made clear in enacting the 1992 amendments to the HEA that salary based on success in securing enrollments is not prohibited so long as it is not based solely on success in securing enrollments. Specifically, the Conference Committee that resolved the House and Senate differences in the 1992 HEA Amendments stated that the statute does not prohibit salary that is based on merit, even if measured, in part, by success in securing enrollments. The Committee's report states in pertinent part:

> The conferees note that substantial program abuse has occurred in the student aid programs with respect to the use of commissioned sales representatives. Therefore, this legislation will prohibit this use. The conferees wish to clarify, however, that the use of the term "indirectly" does not imply that the schools cannot base employee salaries on merit. It does imply that such compensation cannot solely be a function of the number of students recruited, admitted, enrolled or awarded financial aid.

Conf. Rep. 630, 102d Cong., 2d Sess. at 499 (1992) (emphasis added). As clarified by the Conference Report, the statute was not aimed at merit-based salaries for recruiters. The Committee instead stated that the Incentive Compensation Rule does not prohibit salary that is based on successful job performance, even if that success is measured, in part, by success in

securing enrollments.

Thus, the legislative history of the Incentive Compensation Rule contradicts any suggestion in the Draft Report that recruiter salary may not be based on merit. As noted above, the Draft Report itself concedes that the cited provisions for recruiter salaries set forth in the IPD compensation plans satisfy these criteria because they base salary on a variety of performance criteria that are not solely related to success in securing enrollment. Accordingly, the Draft Report acknowledges that the cited IPD compensation plans do not set recruiter salaries based solely on enrollments. The cited salary provisions are therefore consistent with both the text and the intent of the Incentive Compensation Rule.

3. The Secretary has not published any interpretation of the Incentive Compensation Rule that would prohibit recruiter salaries based on merit.

The Secretary has not published an interpretation of the Incentive Compensation Rule that explicitly prohibits basing recruiter salaries on success in securing enrollments. Neither the notice of proposed rulemaking nor the preamble to the final regulations address the issue of "salary" based on success in securing enrollments. 59 Fed. Reg. 22348 (Apr. 29, 1994); 59 Fed. Reg. 9526 (Feb. 28, 1994). Although the Secretary indicated that he might, at some point, publicly clarify what he considers acceptable under the statute and regulation (see 59 Fed.Reg. at 9539), he has not, as of yet, done so. Accordingly, the Secretary has not published any explicit prohibition with respect to recruiter salaries, nor any interpretation contrary to that set forth in the aforementioned Congressional Conference Report.

If the Draft Report is suggesting that the Department prohibits recruiter salaries based in part on enrollments, that suggestion is incorrect, contrary to law, contrary to rational policy, and must be rejected. As detailed above, the Department has not published such an interpretation of the Incentive Compensation Rule. Consequently, there is no basis for the Draft Report's suggestion.

If the Department sought to retroactively enforce the interpretation suggested by the Draft Report, its enforcement would be unlawful because it would contradict both the text of the Incentive Compensation Rule and the intent of Congress. Moreover, the Department has never given institutions advance notice through publication of the interpretation set forth in the Draft Report. An administrative agency must give the regulated public "fair notice" of its regulatory interpretations, or it violates the due process clause of the Fifth Amendment to the U.S. Constitution. Accordingly, the Draft Report's suggested retroactive interpretation of the Incentive Compensation Rule cannot lawfully be enforced.

Moreover, the Draft Report's suggested interpretation with respect to recruiter salaries is premised on an overly broad interpretation of the statute that is contrary to rational policy. The

Draft Report's approach would deprive schools of the ability to appropriately compensate their admissions personnel for what they are employed to do. Specifically, schools would be required in effect to ignore the employee's ability to recruit qualified students who apply for, are accepted, and enroll in school. The aforementioned Conference Report stated explicitly that the Incentive Compensation Rule "does not imply that the schools cannot base employee salaries on merit." Conf. Rep. 630, 102d Cong., 2d Sess. at 499 (1992). In short, the Draft Report's interpretation is contrary to the Incentive Compensation Rule, its history, and rational policy, and must be rejected.

* * *

This concludes the statement supplied by IPD with respect to the portion of the Draft Audit Report focusing upon IPD's internal compensation structure.

II. INDIANA WESLEYAN UNIVERSITY'S ADULT AND PROFESSIONAL STUDIES PROGRAMS COMPLY WITH THE 12-HOUR RULE.

The University demonstrates that its APS programs fully satisfied the 12-Hour Rule and that such compliance is fully and appropriately documented. The additional documentation sought by the OIG (hereinafter referred to as the "OIG's purported documentation rule") exceeds any level of documentation required by the applicable statutes and regulations. Additionally, the recommended liability is based on an erroneous methodology and excludes significant amounts of time that count toward compliance with the 12-Hour Rule and demonstrates a lack of familiarity with the APS programs.

A. The University Has Adequately Documented Its Compliance with the 12-Hour Rule.

The APS programs deliver high-quality, accredited educational content to adult "lifelong learners" and other nontraditional students through two integrated instructional components. All students meet once a week in large groups with a faculty member for four hours, and again each week in smaller "study groups. " The study groups generally consist of no more than five students, which meet at an agreed-upon location for four hours of additional instructional activities. Because all APS programs include at least eight hours of instruction per week, and the duration of the programs is 45 weeks, the University provides at least 360 instructional hours to all APS students. The Draft Audit Report, however, disallows all study group hours because they fail to satisfy the OIG's purported documentation rule. As a result, the OIG claims that the APS programs provide only one-half of the instructional time required by the 12-Hour Rule.

Although the Department has already concluded that "[t]here is no meaningful way to measure 12 hours of instruction"[9] for nontraditional education programs like those questioned by the Draft Audit Report, the OIG is now attempting to hold the University accountable to specific attendance tracking procedures and other documentation rules created through its audit process. This action is without any legal justification, and stands in stark contrast to the limited and vague regulatory guidance provided by the Department to date. Despite the vast confusion created by the Department about this issue, and contrary to the erroneous assertions contained in the Draft Audit Report, the University implemented various policies and followed specific procedures to ensure that the APS programs provided the requisite amount of "regularly scheduled instruction, examinations, or preparation for examinations" required by the 12-Hour Rule, published at 34 C.F.R. § 668.2(b)(2)(ii)(B).

1. Study group meetings constitute instructional activity.

The APS study group meetings fall within the scope of "regularly scheduled instruction, examinations, or preparation for examinations." The regulatory text confirms this conclusion, stating that "instructional time" excludes "activity not related to class preparation or examinations," 34 C.F.R. § 668.2(b)(2)(iii), implying that activity related to class preparation or examination is included. The study group meetings entail completing academically rigorous projects, learning course content, and engaging in-group tasks that develop and enhance problem-solving skills that are integral to the students' achievement of designated course outcomes. The study group meetings are, therefore, clearly related to class preparation, and qualify as instructional activity under the 12-Hour Rule.[10]

2. Study group meetings were regularly scheduled.

The curriculum module for each APS course expressly requires students to attend study group meetings, in order to discuss course material and prepare graded assignments, and share learning resources.[11] Each student is expected to contribute to the completion of all study group assignments, which include oral and written presentations. In the first course for all APS

---

[9] U.S. Department of Education, Office of Postsecondary Education, "Report to Congress on the Distance Education Demonstration Programs" (January 2001), at page 24. This report and its conclusions regarding the 12-Hour Rule and nontraditional educational programs are discussed in greater detail infra.

[10] The Draft Audit Report does not seem to dispute that study group meetings constitute instructional activity, however the OIG excludes all of the APS study group meetings from its 12-Hour Rule calculations because they fail to satisfy the OIG's purported documentation rule.

[11] Promotional materials, including written brochures, applications, and videotapes, also repeatedly emphasized the study group component of the APS programs, and that study group activities would comprise at least four hours of each week's total course time.

programs, instructors informed the students of the study group meeting requirements. The students, in the first week of the program, completed a "Study Group Plan" listing the names and addresses of all group members, and stating the day, time, and location of their weekly study group meeting. Each study group submitted its Study Group Plan to the faculty member in charge of the course. Faculty members verify each Study Group Plan, which is then kept on file with the APS Program Director in the appropriate IWU departmental office. In the event that a study group wishes to make changes to its plan, a new Study Group Plan must be submitted and approved. In all cases, the proposed study group meeting location must have been conducive to learning in order for the Study Group Plan to be approved by the University.

In addition to the obvious documentary evidence described above, several other factors clearly indicate that the study group meetings were "regular," "scheduled," and under the supervision of University faculty. The specific tasks to be performed and completed by the study group in a given week were specified in the course module, and all students enrolled in the course were required to participate in study group activities. Also, each designated study group session was, by curriculum design, slated to occur between specified meetings with the faculty instructor. During study group meetings, students completed rigorous team assignments, often preparing specified projects that were presented during the next faculty-led workshop, in order to progress academically in the course. Finally, the faculty exerted control over the study group meetings by reviewing and grading the designated team assignments and projects. The study group meetings were therefore "regularly scheduled" as required by the 12-Hour Rule, and the Draft Audit Report's conclusions to the contrary are simply wrong.

3. The University adequately monitored study group meeting attendance.

At the end of each APS course, students were required to complete End-of-Course surveys. These surveys contain questions specifically regarding the regularity and length of study group meetings. The OIG either failed to review these surveys, summarily and wrongly rejected them as insufficient documentation, or ignored them. The Draft Audit also ignores the fact that faculty spent a great deal of time responding to requests for assistance from members of study groups, either to resolve conflicts within the study group membership or to receive academic direction and guidance. After dismissing the course module statements describing study group projects, failing to consider the Study Group Plans submitted by the students and subject to change only with permission of the University, and then rejecting the End-of-Course surveys and faculty involvement with study group members, the OIG reaches the conclusion that "the University did not ensure that study group meetings were scheduled and occurred as required." Draft Audit Report at 5. This statement simply and wrongly ignores the available documentation.

In addition to demanding an unjustified amount of documentation, the OIG is fundamentally mistaken in its claim that the University must "ensure" that study groups actually

"occurred." There is simply no statutory or regulatory basis for this claim, and the report provides no legal authority for that interpretation of the rule. Rather, all that is required by the 12-Hour Rule is that study group meetings were "regularly scheduled," which they were as described above. This more reasonable interpretation, tracking the actual text of the regulation, is consistent with amendments to the 12-Hour Rule that took effect July 1, 2001. The revised 12-Hour Rule requires an institution to provide "[a]t least 12 hours of regularly scheduled instruction or examination" or "[a]fter the last scheduled day of classes for a payment period, at least 12 hours of study for final examinations." 34 C.F.R. § 668.2(b)(2) (2001). The regulation does not require the minimum 12 hours of study, after the last day of classes, to occur under direct faculty supervision or for the University to somehow document that each and every student actually studied at least 12 hours during the period between classes and exams. This revision makes clear that the focus of the rule, both before and after the regulatory change, is on whether instructional time is "regularly scheduled" and not on whether an institution can document that students actually completed twelve hours of instructional activity in any given week.

4. Study groups are part of an integrated curriculum module, and faculty members were aware of which students did not attend the study group meetings in any given week.

The Draft Audit Report also reflects the OIG's purported documentation rule in apparently requiring the physical presence of a faculty member for instructional time to count towards 12-Hour Rule compliance.[12] However, the 12-Hour Rule expressly states that time spent in "preparation for examinations" is included in the overall calculation of instructional activity. Clearly the regulation does not require a faculty member to be present whenever a student studies or prepares for examination, in order for such time to be included.

Likewise, faculty presence during study group meetings is not required for the faculty member to assess whether a student adequately participated in the weekly study group meetings. The course module indicates that study group meetings are devoted to the development of group projects and preparation of presentations for the next faculty-led course workshop. These projects and presentations are graded and comprise part of each student's final grade.[13]

---

[12] "[APS] students were required to meet in class for four hours per week, and were expected to meet an additional four hours per week in study groups.... [Indiana] Wesleyan's policy was that an instructor be present at regular class, but it did not ... require instructors to be present at study group meetings." Draft Audit Report at 5.

[13] The Department is statutorily barred from exercising any "direction, supervision, or control over the curriculum" of the University. 20 U.S.C. § 1232a. Therefore, to the extent this audit raises questions about the APS course curriculum, such issues are plainly beyond the OIG's scope of authority.

5. Additional hours spent by students in preparation for examinations are includable under the 12-Hour Rule.

Some APS courses utilize traditional examinations, in addition to the study group presentations and other graded activities. The Draft Audit Report ignores the additional hours spent by students in those courses preparing for their examinations, although the 12-Hour Rule explicitly permits time spent in "preparation for examinations" to be counted towards compliance. The OIG's purported documentation rule essentially requires all exam preparation to be strictly regulated by the University or supervised by a faculty member, in order for the time to be included. Because that level of supervision is not required by any legal authority, any calculation under the 12-Hour Rule must presume, by the simple fact the exams occurred, that students in those courses were expected to spend, and did spend, additional time preparing for the exams.

6. There is no statutory or regulatory basis for the OIG's requirement that the University "ensure that study group meetings were taking place."

The 12-Hour Rule requires only a minimum number of "regularly scheduled" instructional hours. The Draft Audit Report is a far-reaching attempt to expand the rule to require such hours be actually attended, and that the University specifically document such attendance. This action by the OIG ignores the Department's prior statements about the nature and scope of the rule. When promulgating the regulation and considering a variety of educational contexts, the Department published the following:

> *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 Department did not use a phrase such as "actually provided instruction" or "instruction with documented attendance" to explain the scope of the rule. The concern of the Department was simply that educational programs, particularly non-traditional, "lifelong learning" programs like the APS courses at issue in the present audit, have a minimum amount of "regularly scheduled instruction." In addition, the Department based the 12-Hour Rule on its definition of a full-time student (see Section II below). 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....

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 academic workload may consist of activities including "work," "research," and "special studies that the institution considers sufficient." There is no stated requirement, however, for an institution to specifically document each and every hour spent by a student on such activities, so long as they are "regularly scheduled."

The Draft Audit Report simply provides no basis in statute, regulation, published guidance, or case law to support its heightened requirement that the University monitor students' actual attendance for the "regularly scheduled instruction" to be counted under the 12-Hour Rule. Moreover, any attempt by the OIG to establish such a policy through this audit constitutes improper agency rulemaking and falls outside the scope of the OIG's authority under the Inspector General Act of 1978, which precludes an agency from delegating "program operating responsibilities" to an OIG. See 5 U.S.C. App. 3 § 8G(b).

B. The 12-Hour Rule Is Widely Acknowledged to be Unworkable and Ill-Suited For Nontraditional Educational Programs.

The underlying basis for the 12-Hour Rule and its continued applicability to the Title IV programs are presently in serious doubt, particularly as applied to nontraditional educational programs such as those offered in the University's Adult and Professional Studies programs. The section of the Higher Education Act ("HEA") concerning the minimum period of academic instruction for Title IV eligibility reads:

> [T]he 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 credit hours.

20 U.S.C. § 1088(a)(2). The HEA mandates nothing further regarding the length or structure of a traditional, four-year institution of higher education's period of undergraduate instruction. In

regulations implementing the above HEA provision, however, the Department created an additional requirement for educational programs that use credit hours but that do not use a semester, trimester, or quarter system. For such programs, "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)(2)(ii)(B).[14] This requirement was added by regulation without any statutory basis.

The appropriateness of the 12-Hour Rule, and the immeasurable burden it creates for institutions that wish to prove compliance, have recently come under increased scrutiny. The conference report to the Department's fiscal year 2001 appropriations act included the following:

> The conferees are aware of concerns in the higher education community about the so-called "12 hour rule" and its unsuitability to address the needs of institutions of higher education throughout the nation that serve non-traditional students engaged in lifelong learning. The conferees are concerned about the potential for enormous paperwork burdens being placed on institutions of higher education in their attempts to comply with the 12-hour rule. The conferees understand that the Department of Education has agreed to meet with the higher education community about this issue.... The Department is requested to report the results of the discussions and any anticipated action on the part of the Department with respect to the 12-hour rule to the relevant Congressional committees by March 31, 2001.

H.R. Conf. Rep. No. 106-1033, at 194 (2000) (emphasis added). Despite the due date of March 31, 2001, the Department did not issue its report on the 12-Hour Rule until July 2001.[15] This latest report, however, does nothing more than summarize the confusion created by the rule, and to acknowledge that some change to the rule is probably necessary. The University therefore objects to the issuance of the Draft Audit Report concerning the 12-Hour Rule, and having to respond to the OIG at this time, when the Department is obviously uncertain about its continued feasibility.

As this audit is pending, Congress is simultaneously considering legislation that would repeal the 12-Hour Rule. The "Internet Equity and Education Act of 2001" (H.R. 1992), adopted

---

[14] For educational programs that use a semester, trimester, or quarter system, "the Secretary considers a week of instructional time to be any week in which at least one day of regularly scheduled instruction, examinations, or preparation for examinations occurs." 34 C.F.R. § 668.2(b)(2)(ii)(A).

[15] U.S. Department of Education, Office of Postsecondary Education, "Student Financial Assistance and Nontraditional Education Programs (Including the "12-Hour Rule): A Report to Congress" (July 2001).

by the House of Representatives Committee on Education and the Workforce, [16] would uniformly define "week of instructional time" to be "a week in which at least one day of instruction, examination, or preparation for examination occurs," thus negating the regulation creating the 12-Hour Rule. The bill is a tacit acknowledgement of the Department's own findings that "[t]here is no meaningful way to measure 12 hours of instruction" for courses "typically structured in modules that combine both what [traditionally] might be considered instruction and out-of-class work, so there is no distinction between instructional time and 'home work.'"[17] The University's APS course modules – combining traditional, faculty-led "classes," mandatory "study groups" in which students worked on graded group projects, and individually assigned graded projects – fall within this category of educational programs. The APS courses thereby exemplify the regulatory dilemma created by the 12-Hour Rule and, to date, left unresolved by the Department.

C. The Recommended Liability Is Based On An Erroneous Methodology and Excludes Significant Amounts of Time That Count Toward Compliance with the 12-Hour Rule.

The OIG fails to consider that instructional activity includable under the 12-Hour Rule necessarily occurs outside of both the faculty-led classes and the study group meetings. For example, the regulation permits time spent in "preparation for examinations" to be counted. The OIG's purported documentation rule either ignores this portion of the regulation, or has wrongly adopted an interpretation requiring all preparation to be strictly regulated by the University, supervised by a faculty member, or take place in closely-monitored University facilities. Students' grades for APS courses are determined through traditional examinations, graded individual presentations and papers, graded group projects, or a combination thereof. Although it cannot be, nor is it required by any legal authority to be, monitored and measured by the University, any calculation under the 12-Hour Rule must presume that students spent additional time preparing for these examinations and graded activities. That additional time must be included in any calculation of course length, and the liability recommended by the Draft Audit Report is therefore based on a faulty methodology.

---

[16] The Committee reported H.R. 1992 favorably to the full House of Representatives on August 1, 2001.

[17] U.S. Department of Education, Office of Postsecondary Education, "Report to Congress on the Distance Education Demonstration Programs" (January 2001), at page 24. While the quoted statement was made in specific regard to "distance education" courses, the Report goes on to define such nontraditional courses in a manner that is equivalent to the educational programs at issue in this audit.

CONCLUSION

For all of the foregoing reasons, Indiana Wesleyan University disagrees with the preliminary findings and recommendations set forth in the Draft Audit Report, and we urge the Office of Inspector General to close the audit without a determination of liability. We reserve the right and opportunity to respond further to any final report as may be issued.

Respectfully submitted,

INDIANA WESLEYAN UNIVERSITY
Dr. James B. Barnes, President

Distribution Schedule

	Copies
Auditee	1
Action Officials	
Greg Woods, Chief Operating Officer Student Financial Assistance	1
Other ED Offices	
Deputy Secretary of Education, William D. Hansen	1
Chief of Staff, Terry Abbott	1
Under Secretary, Eugene W. Hickock	1
Assistant Secretary, Office of Intergovernmental and Interagency Affairs Laurie Rich	1
Office of General Counsel	1
Office of Postsecondary Education, Maureen McLaughlin	1
Supervisor Post Audit Group, Office of the Chief Financial Officer	1
General Manager for Schools, Student Financial Assistance	1
Chief Financial Officer, Student Financial Assistance	1
Director, Case Management & Oversight, Schools, Student Financial Assistance	1
Area Case Director, Chicago Case Team, Case Management & Oversight, Schools, Student Financial Assistance	1
Office of Public Affairs	1
Secretary's Regional Representative, Region V	1
OIG	
Inspector General	1
Deputy Inspector General	1
Assistant Inspector General for Investigation	1
Assistant Inspector General for Audit	1
Assistant Inspector General for Audit, Analysis and Inspection	1
Deputy Assistant Inspector General for Audit	1
Director, Student Financial Assistance, Advisory and Assistance Team	1
Regional Inspectors General	1 each