



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

MAY 15 2001

ED-OIG/A07-90035

Dr. Thomas F. Boyd, President
William Penn University
201 Trueblood Avenue
Oskaloosa, Iowa 52577

Dear Dr. Boyd:

This *Final Audit Report* (Control Number ED-OIG/A07-90035) presents the results of our Audit of Commissioned Sales at William Penn University (the University). Our objectives were to determine whether the University complied with the Higher Education Act's prohibition against the use of incentive payments for recruiting activities and to review the University's compliance with requirements for calculation and timely payment of Title IV refunds.

AUDIT RESULTS

We found that the University violated 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 its College for Working Adults (CWA) programs.

William Penn University entered into a contract with IPD. The contract called for IPD to receive payments based on the number of students enrolled in the CWA programs. The Higher Education Act (HEA) expressly prohibits any type of incentive payment based directly or indirectly on success in securing enrollments. As a result of incentive payments to IPD, the University is liable for all Title IV funds awarded to students in the CWA since the inception of the contract (the contract was signed by the President of the University on January 12, 1996).

Institutions Participating in the Title IV Programs Must Not Provide Payments for Securing Enrollments

The HEA, Sections 487(a) and 487(a)(20) 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 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 Received Payments Based on Student Enrollment in CWA programs

The University entered into a contract with IPD that provided for incentive payments to IPD based on success in securing student enrollments for its CWA programs. The contract included the following specific responsibilities for IPD:

- IPD shall recruit students to enroll in the courses of study in the [CWA] programs.
- IPD shall provide representatives to recruit students for the programs covered under this Agreement.
- IPD will submit to William Penn University a sufficient number of qualified applicants for admission to the programs such that a minimum of 75 and a maximum of 1,500 students are enrolled in courses of study during each academic year.
- IPD shall collect, on behalf of William Penn University, 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.

Book, material, and computer fees were remitted in full to the University. Tuition fees were divided between the parties on a weekly basis—during the scope of our review, in accordance with the contract, the division was 50 percent to the University and 50 percent to IPD. Refunds were paid from the joint account according to these percentages.

The University Violated the HEA by Paying IPD Based on Success in Securing Enrollments for the CWA Programs Which Resulted in \$5,023,447 of Improperly Disbursed Title IV Funds

Because the University did not comply with the HEA and regulations by paying incentives to IPD based on success in securing enrollments for its CWA programs, the University must return all Title IV funds that were disbursed on behalf of students enrolled in the CWA programs. Since the University paid incentives for each student enrolled in the CWA programs, all students in the CWA programs were improperly recruited. The University must return all Title IV funding that it disbursed for the CWA programs since the inception of its contract with IPD (January 12, 1996). We determined that the amount of Stafford loan funds from the first disbursement made by the University on November 27, 1996 through June 30, 1999, was \$4,438,539 and the amount of PLUS loans was \$121,150. In addition, we determined that the amount of Pell Grant funds disbursed for the same period was \$463,758.

IPD's Compensation Plan for Recruiters Based Salary and Bonuses on the Number of Students Enrolled in CWA Programs

Our review of IPD's compensation plans for fiscal years 1998-2000 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. Recruiters were assigned a salary within the parameters of performance guidelines (i.e., knowledge of basic policies and procedures, organization and communication skills, and working relationships). An annual goal of at least 100 students was established for each fiscal year, and performance was assessed on a regular basis throughout the year. Formal evaluations were completed biannually and, after the first six months of employment, salary was determined on an annual basis. The recruiter's success in recruiting students who enrolled in the CWA programs determined whether the salary was adjusted upward, downward, or remained the same. In addition, the FY 1998 and 1999 compensation plans called for the payment of bonuses, based on the number of students recruited, for recruiters hired prior to September 1, 1998. The bonuses increased as the number of students recruited 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.

Recommendations

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

1. Immediately amend and/or terminate its present contractual relationship with IPD to eliminate incentive payments based on student enrollment.
2. Return to lenders the Stafford loan funds of \$4,438,539 and PLUS funds of \$121,150 disbursed from November 27, 1996 through June 30, 1999. Also, the University should repay the interest and special allowance costs incurred on Federally subsidized loans.
3. Return to the Department the Pell Grant funds of \$463,758 disbursed from November 27, 1996 through June 30, 1999.
4. Determine the amounts of Stafford loan, PLUS, and Pell Grant funds improperly disbursed since the end of our audit period and return the funds to lenders and the Department.

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.

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

- The OIG implied that recruitment and tuition collections constituted IPD's sole functions with respect to the CWA programs and concludes that any compensation paid to IPD was for securing student enrollments.
- The revenue allocation agreement was designed to equitably compensate IPD for a broad range of academic, administrative, and student services, and not merely for securing student enrollments.
- The revenue allocation formula uses a sliding scale that adjusts IPD's percentage allocation downward as enrollments increase.
- Congress never contemplated that the prohibition would cause the U.S. Department of Education or the OIG to interfere with broad-scope service contracts between colleges and outside vendors.
- The OIG's proposed sanction is unexplained and without support in existing law and regulations.

The Revenue Allocation Agreement Is Designed To Equitably Compensate IPD for a Broad Range of Academic, Administrative, and Student Services, and Not Merely for Securing Student Enrollments. The University stated that Article III of the contract commits IPD to provide the following list of services, which it performed, with respect to the operations of the CWA programs.

- Program Administration and Evaluation.
- Management Consultation, Training and Review, Performed Upon Request.
- Program Development.
- Faculty and Student Curriculum Material Development.
- Instructional and Administrative Facilities Lease Management.
- Maintenance of Accounting Records Database, and Financial Planning and Budgeting.
- Account Collections.
- Learning Outcomes Assessment.
- Program Promotion and Advertising, Including Market Research.

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 William Penn University under the terms of the agreement. In our draft audit report, we acknowledged that IPD provided additional services, such as accounting. Since it was not within the scope of our audit, we did not determine the extent of additional services under the agreement that were actually provided by IPD at the request of William Penn 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 the statutory violation of providing a commission, bonus or other incentive payment based directly or indirectly on the success in securing enrollment.

While we recognize that IPD logically had to incur expenses to provide the program accounting services, and any additional services that may have been provided by IPD, 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 enrollment. 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.

William Penn 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 College for Working Adults. William Penn likewise does not dispute that IPD was responsible for recruiting students. Nor does William Penn dispute that some portion of the amount it paid to IPD was directly related to IPD's success in securing enrollment for William Penn's College for Working Adults. 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 William Penn based on the number of students enrolled in the program, William Penn 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 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 since the allocation violates the law.

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

Where William Penn 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. A. of the contract stated that IPD shall provide, at the University's request and IPD's expense, reasonable consulting services to train University personnel in program administration and evaluation.

William Penn included an item in its response under management consulting that is not contained in the contract, namely, student services and academic services procedures. The contract did not require IPD to provide all of the management consulting services. As explained above, these services were to be provided at the University's request and IPD's expense, or under separate agreement.

William Penn stated that IPD was responsible for program development. The contract at Section III. B., Program and Curriculum Development actually stated that "IPD, in its role as consultant shall assist William Penn College in the preparation of program objectives...."

The contract stated that all faculty and student curriculum materials shall be provided by University faculty with payment made to faculty members by IPD in accordance with preexisting payment schedules or additional agreements.

As provided for in the contract, Section III.E., 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, William Penn stated that IPD is also responsible for financial planning and budgeting. We find no reference to these duties in the contract.

William Penn stated that IPD was responsible for learning outcomes assessment. The contract actually stated that “IPD shall, if requested, provide William Penn College with an Academic Quality Control System for obtaining regular program evaluations including course content evaluations, student evaluations, and instructor evaluations related to the programs.”

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.

William Penn 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.

The Sliding Scale Refutes the Assertion That the Revenue Allocation Formula Provides for Incentive Payments To IPD Based on Success in Securing Student Enrollments. The University stated that even with the broad range of services to be performed by IPD, economies of scale justified allocation of a lesser percentage once the CWA programs reached various participation thresholds. The University stated that economies of scale enabled IPD to perform the wide-range of services at a lesser cost and pass this savings on to the University in the form of a reduced percentage of revenue at a larger volume of work performed.

OIG Response. The reduction in the incentive percentage upon reaching certain enrollment levels does not negate the conclusion that the revenue allocation (at whatever percentage) is an improper incentive. The incentive does not become proper by being reduced below a certain percentage amount. Regardless of the percentage amount, IPD was paid additional compensation directly tied to each additional enrollment.

The Incentive Compensation Rule Was Never Intended to Regulate Routine Academic and Administrative Service Contracts Between Colleges and Outside Vendors. 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 ED 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.

ED Had Published No Regulation or Other Public Guidance Supporting the Interpretation of Revenue-Sharing Arrangements Advanced by the OIG in the Draft Report. Monies Payable Under the Revenue Allocation Formula Do Not Constitute a Commission, Bonus, Or Other Incentive Payment. 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 (PPA) 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.

The OIG's Recommended Sanction – Disallowance of All Title IV Funds Received for CWA Enrollees – Is Unexplained and Inconsistent With Governing Law and Regulations. The University stated that no basis exists to support that a violation of any of the innumerable PPA 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.

IPD Recruiters' Salaries Do Not Violate the Incentive Compensation Rule. 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 a salary.

OTHER MATTERS

During our audit work, we also identified issues relating to (1) the University's definition of an academic year for its undergraduate CWA programs under the 12 Hour-Rule, which will be addressed in a separate report, and (2) improper policies and procedures for the calculation and payment of Title IV refunds.

Our review of a random sample of ten refunds revealed that the financial aid staff did not verify the total amount of aid disbursed before calculating refunds. Title 34 of the Code of Federal Regulations § 668.14(b)(4), Program Participation Agreement, specifies that:

An institution agrees that . . . it will establish and maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received from the Secretary.

Since the total aid disbursed was not verified with the student account record, the University may not have included second disbursements in the calculation of some refunds. Specifically, the CWA Financial Aid Staff verified disbursements to guaranty agency documentation that did not always contain the most recent disbursements. Our random sample of ten refunds noted one case where an additional amount of \$1,514.62 should have been refunded. The University subsequently repaid the entire \$1,514.62 to the lender after we notified them of the error in the calculation of the refund. Financial aid officials informed us that the University has amended its CWA financial aid policies and procedures to include verification of disbursements with the student account record. As a result of corrective action taken, and due to lack of overall materiality, we did not expand our sample and no further audit work was performed in this area.

BACKGROUND

William Penn University is a comprehensive liberal arts university founded in 1873 by the Quakers. The main campus is located in Oskaloosa, Iowa. The University was fully accredited in 1960 by the North Central Association of Colleges and Secondary Schools, and is also accredited by the Iowa State Board of Education. The State Approving Unit for Veterans Education has also approved the University. In March 1996, the North Central Association of Colleges and Secondary Schools conducted a focused visit at the University and recommended approval of the CWA program. The focused visit included review of the contract and an evaluation of the relationship between the University and the Institute for Professional Development, a subsidiary of the Apollo Corporation. In 1997, the University opened its first branch campus in West Des Moines, Iowa. This campus served adult students enrolled in the CWA. The CWA also served students in Oskaloosa and Ames, Iowa. An additional focused visit was conducted by the accrediting agency in March 1999. At that time, it recommended approval of up to three new CWA sites per year in Iowa and Nebraska, and approval of the Associate of Arts in Leadership Studies degree under the CWA. During the scope of our review, the University offered two CWA programs at its three locations—the Bachelor of Arts in Business and Gateway studies.

The University contracted with IPD for marketing and accounting support for its CWA programs while William Penn provided curriculum, facilities, and faculty. Prior to September 1, 1999, IPD and William Penn split revenue for tuition and fees equally. However, books, materials, and computer fee revenue was remitted in full to William Penn. The following chart depicts the revenue division during the scope of our review.

	July 1, 1997 – June 30, 1998 Division of Revenue	July 1, 1998 – June 30, 1999 Division of Revenue
William Penn	\$1,262,924.67	\$1,820,031.22
IPD	\$742,529.60	\$1,100,171.90

The revenue information above is presented after deducting refunds and bank fees, and was derived from accounting reports and bank statement information provided by IPD. The average enrollment for the IPD fiscal year ended August 31, 1999, exceeded 500 students. As a result, for each new student enrolled on or after September 1, 1999, the division of revenue was 55 percent to the University and 45 percent to IPD. As of July 1999, approximately 500 students were enrolled in the CWA, and total enrollment at all William Penn University locations and programs was over 1,100 students. Overall student enrollment at William Penn University has increased significantly in recent years—40 percent in academic year 1997-98, and 39 percent in academic year 1998-99.

Students enrolled in CWA programs received assistance under the Federal Stafford Loan Program, PLUS Program, and the Pell Grant Program. The U.S. Department of Education reported a 12.8 percent default rate for William Penn University for fiscal year 1998.

AUDIT SCOPE AND METHODOLOGY

The objective of the audit was to determine compliance with the HEA and Title IV regulations in the areas of recruitment and incentive-based payments, and refunds. We focused our review on the following areas.

- The University's contract with IPD.
- Calculation and timely payment of Title IV refunds.

To accomplish our objectives, we reviewed the University's policies and procedures, accounting and bank records, and student financial assistance and academic files for the CWA programs. We reviewed the University's contract with IPD, and IPD's compensation plans for its recruiters. We reviewed the most recent Title IV audit reports prepared by the University's Certified Public Accountants, and the program review report prepared by the U.S. Department of Education's Student Financial Assistance. We also reviewed the two most recent reports on the CWA prepared by the University's accrediting agency. We interviewed University and IPD management officials and staff.

We relied extensively on computer-processed data extracted by the University from its database of Title IV academic records and on computer-processed data extracted by IPD from its database of Title IV student payment data. We used an extract of payment and award data from the National Student Loan Data System (NSLDS) to corroborate information obtained from the University's and IPD's systems. We found that the University's data was sufficiently reliable for our audit purposes.

The audit covered the 1997-98 and 1998-99 financial aid award years (July 1, 1997 through June 30, 1999). In addition, we reviewed disbursements under the University's CWA programs from the first disbursement on November 27, 1996 through June 30, 1999. We performed fieldwork on-site at the University's offices in West Des Moines and Oskaloosa, Iowa, during the periods August 2-4, 1999, March 6-10, 2000, and April 17-20, 2000. We conducted the audit in accordance with government auditing standards appropriate to the scope of review described above.

Methodology Used to Determine the Title IV Funds Improperly Disbursed by the University

The University provided electronic files containing information on CWA students who received disbursements for Stafford loans, PLUS program, and/or Pell Grants with loan/grant periods beginning with the inception of the CWA programs through June 30, 1999. We used the information contained in these files and corroborating information extracted from NSLDS to determine the improperly disbursed funds.

We identified total disbursements of \$4,438,539 for FFEL, \$121,150 for PLUS, and \$463,758 for Pell Grant funds during the period of the first disbursement under the CWA on November 27, 1996 through June 30, 1999. Since the University was in violation of the statutory prohibition against incentive-based payments from the inception of the contract with IPD on January 12, 1996, the total amount of Title IV funds disbursed by the University for its CWA programs during our audit period—\$5,023,447—should be returned to the lenders and the U.S. Department of Education.

STATEMENT ON MANAGEMENT CONTROLS

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

- Data Reliability
- Cash Management
- Refunds
- Institutional Eligibility and Student Enrollment

Because of inherent limitations, a study and evaluation made for the limited purpose described above would not necessarily disclose all material weaknesses in the management controls. However, our assessment disclosed significant management control weaknesses that adversely affected William Penn University, College of Working Adult's ability to administer the Title IV programs. These weaknesses included incentive-based payments for student enrollment that violated the statutory prohibition against commissioned sales. These weaknesses and their effects are fully discussed in the *Audit Results* section of this report.

ADMINISTRATIVE MATTERS

Subsequent to our fieldwork, the Department began internal meetings to discuss providing guidance to the education community on incentive compensation through a Dear Partner Letter. The outcome of these meetings and the final Dear Partner Letter, may have a bearing on the resolution of this audit.

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 Departmental action on the audit.

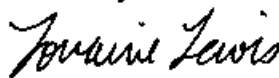
Mr. Greg Woods
Chief Operating Officer
U.S. Department of Education
Regional Office Building, Room 4004
7th and D Streets, SW
Washington, DC 20202

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 (Public Law 90-23), reports issued to the Department's grantees and contractors are made 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 if you wish to discuss the contents of this report, please contact William Allen at (816) 880-4024. Please refer to the control number in all correspondence related to the report.

Sincerely,



Lorraine Lewis



WILLIAM PENN
UNIVERSITY

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OFFICE OF THE PRESIDENT

February 1, 2001

*Mr. William Allen
Regional Inspector General for Audit
U.S. Department of Education
Office of Inspector General
10220 North Executive Hills Boulevard
Kansas City, MO 64153*

RE: Draft Audit Report: Control Number: ED-OIG/A07-90035

Dear Mr. Allen,

Attached please find William Penn University's response to the Draft Audit Report issued on November 20, 2000 by the United States Department of Education, Office of the Inspector General, Division of Audit. For all 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,

*Thomas F. Boyd
President*

Attachment

**WILLIAM PENN UNIVERSITY'S RESPONSE TO THE DRAFT AUDIT REPORT OF
THE U.S. DEPARTMENT OF EDUCATION OFFICE OF INSPECTOR GENERAL
(Control Number ED-OIG/A07-90035)**

William Penn University (the "University, or "WPU") is a not-for-profit comprehensive liberal arts university founded in 1873 by Quaker pioneers. The University's main campus is located in Oskaloosa, Iowa. The University is accredited by the North Central Association of Colleges and Secondary Schools, and is also approved by the Iowa State Board of Education and by the State Approving Unit for Veterans Education. The University has consistently maintained low cohort default rates: 12.8 percent in Fiscal Year ("FY") 1998, 11.9 percent in FY 1997, and 9.4 percent in FY 1996.

The Draft Audit Report focuses upon federal student financial aid funds ("Title IV funds") received by students who enrolled in the University's College for Working Adults ("CWA") programs. The University offers its CWA programs through a contract with an independent outside entity, the Institute for Professional Development ("IPD"). The issues raised by the Draft Audit Report all pertain to that "Agreement between William Penn College and Institute for Professional Development (December 15, 1995)" (the "IPD Contract").

As described herein, the University maintains that the IPD Contract's revenue allocation provisions do not violate the incentive compensation rule. Second, the OIG's recommendation that the University return all Title IV funding disbursed for the CWA programs is an extreme, unjustified, and arbitrary proposed sanction without support in applicable law or regulations. Finally, IPD maintains that its recruiter salaries do not violate the Incentive Compensation Rule.

I. THE REVENUE ALLOCATION UNDER THE IPD CONTRACT DOES NOT VIOLATE THE INCENTIVE COMPENSATION RULE.

The Draft Report erroneously claims that the revenue allocation provision of the IPD Contract is prohibited. This claim is based on the Office of Inspector General's ("OIG") allegation that the University paid "incentives to IPD based on success in securing student enrollments for its CWA programs." The University vigorously disagrees with both the draft finding and recommendation, for each of the following reasons:

- The revenue allocation agreement is designed to equitably compensate IPD for a broad range of academic, administrative, and student services, and not merely for "securing student enrollments," as suggested by the Draft Report.
- The revenue allocation formula does not provide for "incentive payments to IPD based on success in securing student enrollments." As the OIG acknowledged, the formula uses a sliding scale that adjusts IPD's percentage allocation downward as enrollments increase.
- The revenue allocations do not constitute a "commission, bonus, or other incentive payment based directly or indirectly on success in securing student enrollments."

- Congress never contemplated that the prohibition would cause the U.S. Department of Education ("ED") or the OIG to interfere with broad-scope service contracts between colleges and outside vendors.
- ED has published no regulations or other public guidance supporting the interpretation of revenue-sharing arrangements advanced by the OIG in the Draft Report.

Each of the foregoing contentions is supported and discussed in greater detail herein.

1. **The revenue allocation formula compensates IPD for a broad range of services, and not merely for "securing enrollments" as suggested by the OIG.**

In support of its conclusion that compensation paid to IPD constituted "incentive payments ... based on success in securing student enrollments," the Draft Audit Report at page 2 isolates and describes recruitment and student accounting functions attributable to IPD under its contract with the University. The OIG implies that recruitment and tuition collections constituted IPD's sole functions with respect to the CWA programs, and then concludes that any compensation paid to IPD was in consideration for "securing student enrollments for [the] CWA programs." Draft Report at page 2. That incomplete recitation of IPD's role and responsibilities is incorrect and misleading; whereas a more complete review of the contractual arrangement detailing IPD's full-service role in developing and administering the CWA programs confirms that IPD was compensated for a broader scope of duties than mere recruitment. Article III of the IPD Contract commits IPD to provide the following services, which it performed, with respect to the operation of the CWA programs:

- Program administration and evaluation;
- Management consultation, training and review, performed upon request, with respect to:
 - Faculty recruitment, assessment, and development;
 - Ongoing curriculum development, review and revision;
 - Student admissions and advisement procedures;
 - Prior college-level learning assessment center organization and management;
 - Student services and academic services procedures;
 - Other training services deemed appropriate by the parties;
- Program development;
- Faculty and student curriculum material development;
- Instructional and administrative facilities lease management;
- Maintenance of accounting records database, and financial planning and budgeting;
- Account collections;
- Learning outcomes assessment; and
- Program promotion and advertising, including market research;

Mr. William Allen

February 1, 2001

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The OIG ignores each of these non-enrollment services performed by IPD under the contract and instead represents the IPD Contract as solely covering recruitment and tuition collection functions. On this basis, the Report erroneously concludes that revenue allocations compensated IPD for those functions and for those functions only. The IPD Contract, however, reflects that the revenue allocation formula covered a wide range of non-enrollment based academic and administration functions in addition to the limited items identified in the Draft Report. If the OIG auditors unintentionally overlooked these additional IPD responsibilities in the course of 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 process.

The full slate of IPD services delineated in the contract, and performed accordingly, demonstrates that the system of allocating a portion 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 CWA students. The magnitude of IPD's various functions and obligations under the contract depends in substantial part upon how many students enroll in the CWA programs that IPD designed, developed, and administered for the college. Indeed, many of the tasks assigned to IPD by the IPD Contract are highly volume sensitive. Therefore, 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, not on enrollments. In contrast, the OIG would apparently disallow any revenue sharing arrangement that reflects an economy of scale.

- 2. The compensation formula allocates a lesser percentage to IPD as more students enrolled. This "sliding scale" refutes the assertion that the revenue allocation formula provides for "incentive payments to IPD based on success in securing student enrollments."**

As the Draft Report itself explains at page 5, the revenue allocation formula allocates a lower percentage to IPD as the number of enrollments increase. This fact contradicts the OIG assertion that IPD's compensation rights were keyed to increased enrollment. Instead, under the allocation formula IPD's percentage share diminished as more students joined the CWA programs.

This sliding scale further confirms that the allocation formula compensated IPD for the full scope of its responsibilities under the subject contract, and not simply for enrollments. Even with the broad range of services to be performed by IPD, economies of scale justified allocation of a lesser percentage once the CWA programs reached various participation thresholds. As the

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number of CWA students increased, IPD was able to perform its aforementioned administrative, academic, and other responsibilities at a lesser per-capita cost, enabling it to share such savings with the University. Those savings were not attributable to the recruitment and marketing functions. If the allocation formula had been intended to pay IPD for merely recruiting students and for nothing more, the sliding scale feature would not have been included in the IPD Contract.

3. **Monies payable under the revenue allocation formula do not constitute a "commission, bonus, or other incentive payment based directly or indirectly on success in securing student enrollments."**

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

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 United States Department of Education ("ED") in turn requires Title IV, HEA participating colleges 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). We shall refer to the two above-quoted provisions collectively as the "Incentive Compensation Rule."

Identical language in both the statute and the regulation confirms that the Incentive Compensation Rule does not apply here, for at least two reasons. First, the revenue allocations do not constitute commissions or bonuses tied to enrollments. Webster's 3d New International Dictionary (1981) defines "bonus" as "money or an equivalent given in addition to the usual compensation." It defines "commission" as "a fee paid to an agent or employee for transacting a piece of business or performing a service." On its face, the bonus definition does not apply to

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monies payable by WPU pursuant to the revenue allocation formula because those monies constitute the sole compensation to IPD, not supplemental compensation. Similarly, the allocations do not constitute enrollment-based commissions because (a) as has been shown, IPD is compensated for the wide variety of services it performs, not merely for marketing; (b) the revenue allocations do not compensate IPD for any specific transaction, but instead pay for the full scope of services provided under the parties' contract; and (c) the monies are paid to IPD, not to any individual "agent or employee" based upon specific transactions or recruitment activities.

Furthermore, the allocations to IPD are not prohibited by the Incentive Compensation Rule because they are not incentive payments. The prohibition forbids payment of "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments" (emphasis added).¹ Webster's 3d New International Dictionary (1981), defines the word "incentive," when used as an adjective, as "serving to encourage, rouse, or move to action." As has been previously explained, the sliding scale allocation formula causes IPD's percentage share to decrease as enrollment increases. Moreover, revenue allocation is a means of achieving equitable compensation for a broad array of professional services. The revenue allocation formula does not motivate or incite enrollments.

4. The Incentive Compensation Rule was never intended to regulate routine academic and administrative service contracts between colleges and outside vendors.

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 letter, covering a wide array of professional services. That intention is plain from the express language of the prohibition itself. Moreover, when Congress enacted the statute, and ED promulgated the implementing regulation, both emphasized their intention 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 accompanying the final rules 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."

¹By inserting the word, "other," before "incentive payment," Congress and ED made clear that only those commissions, bonuses, or other payments that constitute incentive payments are prohibited.

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59 Fed. Reg. 9539 (February 28, 1994). Hence, the Incentive Compensation Rule was never designed or intended as a basis for the Department to oversee routine business arrangements, such as the one described in this letter, covering a wide array of professional services.²

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

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 OIG's attempt to retroactively create and apply a new requirement to WPU raises due process concerns because parties that are regulated by the Department, or, for that matter, any other administrative agency, are entitled to know in advance what rules are to be applied to them. 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. Indeed, for all of the reasons presented in this submission, this University and many others like it reasonably believed the opposite.³

We respectfully submit that the interpretation advanced by the OIG in the Draft 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 multi-million dollar liability under this dubious, retroactively applied policy interpretation violates traditional notions of due process and fair play because the University did not have fair warning 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, neither the OIG nor ED has previously applied this rule to any other institution, and it has offered no explanation for its selective enforcement. We respectfully suggest that such action is arbitrary and capricious because a regulatory agency must provide an

² Notably, in contrast to the regulations later promulgated by ED, HEA section 487(a) makes no reference to contracts between educational institutions and outside entities.

³ 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.

adequate explanation before it treats similarly situated parties differently.

For all of the foregoing reasons, the University does not concur with, and, indeed, vigorously disagrees with the Draft 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.

II. THE OIG'S RECOMMENDED SANCTION – DISALLOWANCE OF ALL TITLE IV FUNDS RECEIVED FOR CWA ENROLLEES – IS UNEXPLAINED AND INCONSISTENT WITH GOVERNING LAW AND REGULATIONS.

The Draft Report erroneously asserts at page 3 that "since the University did not comply with the law and regulations by paying incentives to IPD based on success in securing student enrollments for its CWA programs, the University must return all Title IV funding that it disbursed for the CWA programs since the inception of its contract with IPD." On these grounds, the Report later asserts that a staggering dollar figure -- \$5,023,447, representing the principal amount of all Title IV loans and grants received by CWA enrollees -- should be returned to lenders and to the United States Department of Education.

The University strenuously objects to the recommended sanctions presented in the Draft Report. First, as has been previously stated, we disagree with the OIG's assertion that the revenue allocation method constitutes the 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 CWA-related financial aid funding would lawfully, logically, or reasonably result from the cited noncompliance.

In the absence of any OIG statement of reasons, the University cannot presently submit any comprehensive response to the recommended sanction. 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 can offer the following preliminary statement of reasons why the recommended sanction is unjustified and should be deleted from any final audit report:

1. The extraordinary recommended monetary sanction – wholesale disallowance of more than five million dollars, representing all federal funds received by students enrolled in the CWA programs – is facially arbitrary and capricious because: a) the Draft 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 Report does

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not, and can not, 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.

2. The CWA program funds targeted by the OIG for disallowance were utilized by the University and its CWA students 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.
3. Nowhere does the Draft Report allege or imply that any CWA student lacked federal student financial aid eligibility, based upon alleged noncompliance with the Incentive Compensation Rule or with any other Title IV requirement. ED'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 CWA students.
4. Nowhere does the Draft Report allege or imply that any CWA program lacked federal student financial aid eligibility, based upon alleged noncompliance with the Incentive Compensation Rule or with any other Title IV requirement. ED'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 CWA students.
5. 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 Senate 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 CWA students.

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6. 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 ED. 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 any 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." See 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.
7. 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 CWA 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.
8. The Draft Report incorrectly and drastically overstates the amount of purported liabilities arising out of CWA 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 to ED's actual losses. The Draft Report itself notes at page 5 that the University's FY 1998 cohort default rate was only 12.8 percent, i.e., that more than 87 percent of the University's students are expected to repay their loans. Yet, the OIG proceeds to recommend that the University repurchase all of these loans. ED'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 Report simply ignores the actual loss formula.

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

III. RESPONSE TO THE DRAFT 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 CWA students, making final determinations on CWA admissions, and establishing tuition and fees for program. See IPD Contract, pages 14-15. The University also exercised exclusive jurisdiction over curricula content and approval, and was required to hire and pay instructional personnel for the CWA programs. *Id.* at page 15. Included among the costs for which IPD was exclusively responsible was "IPD staff payroll." *Id.* at page 23.

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 that "recruiters were assigned 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.

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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.

CONCLUSION

For all of these reasons, the 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. We reserve the right and opportunity to respond further to any final report as may be issued.

Respectfully submitted,

WILLIAM PENN UNIVERSITY
Dr. Thomas F. Boyd, President