



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL

The Inspector General

April 21, 2008

Memorandum

TO: David Dunn
Chief of Staff
Office of the Secretary

FROM: John P. Higgins, Jr. /s/

SUBJECT: Final Inspection Report
Inspection to Evaluate the Adequacy of the Department's Procedures in Response to Section 306 of the Fiscal Year 2008 Appropriations Act – Maintenance of Integrity and Ethical Values Within the Department (ED-OIG/I13I0004)

This final inspection report presents the results of our inspection to evaluate the adequacy of the Department of Education's (Department) procedures in response to Section 306 of the Fiscal Year 2008 Appropriations Act – Maintenance of Integrity and Ethical Values Within the Department (Section 306).

INSPECTION RESULTS

The objective of our inspection was to evaluate the adequacy of the procedures developed by the Department to comply with the requirements of Section 306. Specifically, Section 306 required the Department to implement procedures to assess and disclose whether an individual or entity has a potential financial interest in, or impaired objectivity towards, a product or service involving Department funds. These procedures apply to Department officers and professional employees; contractors, subcontractors, and their employees; consultants and advisors; and peer reviewers.

Section 306 requires the OIG to evaluate the Department's procedures and report on their adequacy along with any recommendations for modifications within 60 days of implementation. The Department issued a notification to all Department managers titled, "Procedures to Comply with Section 306 of the 2008 Appropriations Act" on February 22, 2008. Our work was limited to reviewing the written procedures. We did not review the implementation of the procedures. If an individual fails to disclose an item, those responsible for assessing potential financial interests and impaired objectivity are not in a position to determine if the item presents any actual or potential conflict.

We found that the Department's procedures, if fully implemented as planned, are adequate to comply with the requirements of Section 306; however, we did find that one aspect of the Department's procedures for peer reviewers could be misinterpreted. As a result, we recommend that the Department modify its peer reviewer certification procedure to clarify the issue.

We summarized the Department's procedures using the following three categories: 1) Department employees; 2) contractors, subcontractors, and individuals hired by the contracted entity; and 3) peer reviewers. According to the Department, an individual serving as a consultant or an advisor is considered either a Department employee or a contractor and would be subject to the applicable conflict of interest procedures.

1. Procedures for Department Employees

The Department implements the Executive Branch-wide financial disclosure reporting system required by the Ethics in Government Act of 1978 and U.S. Office of Government Ethics regulations. Approximately 400 Department employees are required to file the Standard Form 278, also known as the Public Financial Disclosure Report; and approximately 400 Department employees are required to file the Office of Government Ethics (OGE) Form 450, also known as the Confidential Financial Disclosure Report. The Department currently has approximately 4,500 employees.

The employees required to file public financial disclosure reports, which include senior officials and political appointees, are specifically defined in 5 C.F.R. § 2634.202 and the employees required to file confidential disclosure reports are specifically defined in 5 C.F.R. § 2634.904. The definition in 5 C.F.R. § 2634.904 provides that the Department will determine that an employee is a confidential filer by concluding whether the employee's duties and responsibilities require participation in a decision or the exercise of significant judgment, without substantial supervision and review, in government actions further specified in the section. Thus, the Department is required to assess the responsibilities of all employees to determine their level of involvement in the decision-making process. The Department has the discretion to determine which employees are in a position that would require filing a confidential financial disclosure report.

While both the public and confidential reports are primarily designed to disclose and assess an employee's financial interests, both reports contain sections that address whether an employee has impaired objectivity. The sections require disclosure of positions held outside of government; agreements or arrangements with former or future employers; and gifts, reimbursements, and travel arrangements.

The Department also reaches out to employees through the Ethics Division of the Office of the General Counsel (OGC), which provides training and guidance on ethics requirements to all Department employees. The Ethics Division also encourages all employees to seek advice and counsel on any ethics-related issues. These efforts provide employees with significant guidance and education on a variety of ethics-related issues. Additionally, the efforts provide opportunities for employees to disclose any potential connections that may impair their objectivity.

Further, on December 4, 2007, the Department issued an internal directive to all employees titled, “Improving Administration and Management of Department Programs.” Through the directive, the Department emphasizes the importance of objectivity and professionalism; provides guidance on identifying and disclosing conflicts of interest; stresses compliance with the prohibitions against controlling and directing curriculum and instruction; strongly encourages early and ongoing consultation with OGC; emphasizes the importance of cooperation with OIG; and informs employees that they are required to participate in annual internal control training.

On March 12, 2008, OIG issued the final inspection report, *Review of the Department’s Public Financial Disclosure Reports for Employees Responsible for Oversight of the Federal Family Education Loan Program (ED-OIG/I13H0005)*. We found that the Department’s process for reviewing public financial disclosure reports was adequate to identify and address financial conflicts of interest or the appearance of conflicts of interest among employees responsible for oversight of the FFEL program. Additionally, we found that the Department informs, trains, and counsels all employees on all federal conflict of interest statutes and standards of ethical conduct.

The Office of Government Ethics’ most recent published program review of the Department’s ethics program, dated February 12, 2004, found that the ethics program is “essentially sound and appears to be appropriately tailored to the needs of agency employees.” OGE found that some of the strong parts of the program include the ethics training, the provision of useful ethics advice, and an enforcement process that promptly and effectively deals with employee ethical breaches. On February 23, 2007, OGE announced that the Department was one of its ethics training award recipients. OGE stated in the announcement: “The award recipients successfully met the challenge of developing creative, innovative educational programs and tools. Their products serve as models of programs that can be adapted for use by other agencies.”

Based on our analysis of the procedures and evidence that the ethics program has and continues to adhere to all applicable ethics program requirements, we conclude that the Department’s procedures, if fully implemented as planned, are adequate to assess and disclose the existence of any potential financial interest or impaired objectivity with regard to Department employees.

2. Procedures for Contractors, Subcontractors, and Individuals Hired by the Contracted Entity

Since August 2007, the Department has included a requirement that organizations responding to contract solicitations submit conflict of interest plans and disclose all potential conflicts as part of their proposals. In the conflict of interest plan, the organization is required to provide details on its policies and procedures to identify and avoid potential organizational or personal conflicts of interest (or apparent conflicts of interest). The organization’s plan should also address procedures taken to neutralize or mitigate such conflicts, if they have not been or cannot be avoided.

As part of a contract proposal, an organization must certify that it has disclosed all information related to potential conflicts of interest for itself, any subcontractor, and any individual hired by the contracted entity. The certification specifically addresses impaired objectivity, which includes but is not limited to: financial interests or reasonably foreseeable financial interests; significant connections to teaching methodologies; and significant identification with pedagogical or philosophical viewpoints.

Department employees are required to use the Department's Contract Monitoring Internal Directive and associated procedures when reviewing the conflict of interest plans and certifications. Additionally, the Department addresses Federal Acquisition Regulations Subpart 9.5, which concerns organizational conflict of interest, through specific procedures for identifying and addressing conflicts of interest when planning acquisitions, soliciting proposals, and awarding and administering contracts. These procedures explain the roles and responsibilities of the heads of contracting activities, contracting officers, contract specialists, contractors, program managers, contracting officer's representatives, and other members of the acquisition team in identifying and addressing conflicts of interest. The three specific steps are to: 1) identify and avoid, neutralize, or mitigate potential conflicts during acquisition planning and other pre-award activity, 2) identify, evaluate, and resolve conflicts during contract administration, and 3) brief subsequent acquisition team members.

The Department's internal directive, "Improving Administration and Management of Department Programs," emphasizes the need for early and ongoing consultation with OGC. If a contract official is unsure of a conflict of interest issue, the directive encourages that official to seek advice from OGC.

We conclude that the Department's procedures, if fully implemented as planned, are adequate to assess and disclose the existence of any potential financial interest or impaired objectivity with regard to contractors, subcontractors, and individuals hired by the contracted entity.

3. Procedures for Peer Reviewers

In its *Handbook for the Discretionary Grant Process*, the Department provides detailed guidance and procedures for Department staff to identify and assess possible conflicts of interest among peer reviewers for discretionary grant competitions. The Department's internal directive, "Improving Administration and Management of Department Programs," sets forth similar guidance and procedures for the use of peer reviewers in formula grant programs.

We conclude that the guidance and procedures in the Department's handbook and internal directive, if properly implemented, are adequate to assess the existence of any potential financial interest or impaired objectivity with regard to a member of a peer review panel.

With regard to the disclosure of potential conflicts of interest, the Department requires peer reviewers to certify that they do not have a conflict of interest with respect to any of the applications being considered as part of their review. The certification requires the reviewer to agree to the following statement: "I understand that I will be considered to have a 'conflict of interest' when I, or certain individuals and entities with whom I have a relationship, have a financial interest in the outcome of this competition." The certification provides examples of direct financial conflicts and examples of relationships with certain entities and individuals that would create financial conflicts for the reviewer.

The certification also requires reviewers to agree that the examples provided are not exhaustive and to agree that they will promptly notify the appropriate Program Official if they become aware of any other circumstances that might cause someone to question their impartiality in

serving as a reviewer for the competition. OGC officials informed us that this statement is meant to apply to all other aspects of impaired objectivity, not only financial interests.

We conclude that the procedures requiring the certification from peer reviewers are adequate to disclose financial conflicts of interest; however, the statement in the certification on impartiality could be misinterpreted as applying only to financial conflicts because of the context of the examples given in the certification. If the certification does not provide clear examples of impaired objectivity, the Department cannot be sure that reviewers are disclosing all circumstances that could impact objectivity.

Recommendations:

We recommend that the Department:

1. Clarify the statement regarding impartiality in the peer review certification by adding language that specifically identifies the types of non-financial interests that would impair objectivity so that non-financial interests, such as significant connections to teaching methodologies and significant identification with pedagogical or philosophical viewpoints, are disclosed; and
2. Define the terms “significant connections to teaching methodologies” and “significant identification with pedagogical viewpoints.”

DEPARTMENT COMMENTS

On April 4, 2008, we provided the Department with a copy of our draft report for comment. We received the Department’s comments to the report on April 16, 2008.

Department Comment

The Department agreed with the findings but expressed concern that using the terms mentioned in the draft report recommendation – “teaching methodologies” and “significant identification with pedagogical or philosophical viewpoints” – would be too vague and may cause confusion and concern. The Department further stated that it believes the recommendation should not include those terms. The Department stated that it does intend to develop additional guidance about non-financial interests that will include specific examples. The Department’s response, in its entirety, is attached.

OIG Response

In the Department’s internal directive, *Contracting Monitoring For Program Officials (OCFO: 2-108)*, “significant connections to teaching methodologies” and “significant identification with pedagogical or philosophical viewpoints” are specifically cited as types of impaired objectivity that would cause a reasonable person with knowledge of the relevant facts to question a person’s objectivity. In our draft report recommendation, we used these terms as types of impaired objectivity that should be addressed when clarifying the statement regarding impartiality. We did not recommend that these terms be specifically included in the peer review certification. It is incumbent upon the Department to ensure that these types of impaired objectivity are addressed

in the certification so that non-financial interests are completely disclosed. We have added language to clarify the recommendation. We have also added a recommendation based on the Department's comment that the terms "teaching methodologies" and "significant identification with pedagogical or philosophical viewpoints" are vague.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of our inspection was to evaluate the adequacy of the procedures developed by the Department to comply with the requirements of Section 306.

We began our fieldwork on February 29, 2008, and conducted an exit conference on April 11, 2008.

The scope of our review included the procedures and any documents referenced in the Department's notification to all Department managers titled, "Procedures to Comply with Section 306 of the 2008 Appropriations Act." Our work was limited to only reviewing the written procedures. We did not review the implementation of the procedures.

We reviewed the procedures identified in the Department's notification to managers and all applicable documents referenced in those procedures. We interviewed Department staff in OGC and in the Office of the Chief Financial Officer's Contracts and Acquisitions Management office. We also met with OGE officials who are responsible for performing ethics program reviews at the Department. Additionally, we referred to OIG's inspection report regarding the Department's public financial disclosure process and OGE's 2004 ethics program review.

Our inspection was performed in accordance with the *2005 President's Council on Integrity and Efficiency Quality Standards for Inspections* appropriate to the scope of the inspection described above.

ADMINISTRATIVE MATTERS

Corrective actions proposed (resolution phase) and implemented (closure phase) by your offices will be monitored and tracked through the Department's Audit Accountability and Resolution Tracking System (AARTS). Department policy requires that you enter your final corrective action plan (CAP) for our review in the automated system within 30 days of the issuance of this report.

In accordance with the Inspector General Act of 1978, as amended, the Office of Inspector General is required to report to Congress twice a year on the audits that remain unresolved after six months from the date of issuance.

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

Electronic cc: Kent Talbert, General Counsel, Office of the General Counsel
Lawrence Warder, Chief Financial Officer, Office of the Chief Financial Officer
Thomas Skelly, Director, Budget Services



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY

CHIEF OF STAFF

MEMORANDUM

DATE: April 16, 2008

TO: John P. Higgins, Jr.
Inspector General

W. Christian Vierling
Director, Evaluation and Inspection Services
Office of Inspector General

FROM: David L. Dunn

SUBJECT: Response to your draft Report for the Inspection to Evaluate the Adequacy of the Department's Procedures in Response to Section 306 of the Fiscal Year 2008 Appropriations Act - Maintenance of Integrity and Ethical Values Within the Department (ED-OIG/I13I0004).

On behalf of the Department, I thank you for the opportunity to comment on your draft Report for the "Inspection to Evaluate the Adequacy of the Department's Procedures in Response to Section 306 of the Fiscal Year 2008 Appropriations Act - Maintenance of Integrity and Ethical Values Within the Department" (ED-OIG/I13I0004). We appreciate the work that went into the draft, the professional manner in which the Inspection Team conducted their work, and the opportunity your office provided for a discussion of the findings at the exit conference held last Friday.

Based on the draft report and the discussion at the exit conference, we have the following comments:

We agree and generally have no problems with the findings, and found the draft to be well-written and useful. With regard to the third finding regarding "Procedures for Peer Reviewers," we concur that while the procedures requiring the certification from peer reviewers are appropriate and adequate to disclose financial conflicts of interest, the statement in the certification on impartiality could be improved by making it clearer that peer reviewers must disclose circumstances other than those arising from financial interests that could create "actual or apparent impaired objectivity."

We are concerned, however, that using terms in the proposed recommendation such as "teaching methodologies" and "significant identification with pedagogical or philosophical viewpoints" are too vague and may cause confusion and concern.

400 MARYLAND AVE., S.W., WASHINGTON, D.C. 20202
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Thus, while we agree that additional guidance about non-financial interests will be helpful, and we intend to develop additional guidance that will include specific examples, we believe the report recommendation should not include the terms noted above. In light of this, the recommendation could read as follows:

"We recommend that the Department clarify the statement regarding impartiality in the peer review certification by adding language that specifically identifies types of non-financial interests, including significant relationships not otherwise covered, that could give rise to actual or apparent impaired objectivity."

We hope you find these comments helpful. Please let me know if you have any questions about our comments. Thanks again for this opportunity to provide comments.