UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL

CONTROL NUMBER
ED-OIG/A05-B0003

December 13, 2001

Dr. William J. Carroll, President
Benedictine University
5700 College Road
Lisle, Illinois 60532-0900

Dear Dr. Carroll:

This **Final Audit Report** presents the results of our Audit of Commissioned Sales and Course Length at Benedictine University (University). Our objectives were to determine whether the University 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 the University 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 revenues for all students enrolled in the Associate of Arts in Business Administration (AABA) program. As a result of incentive payments to IPD, the University is liable for $221,988 in Title IV funds awarded to students in the AABA program who were improperly recruited.

We also found that the University's documentation supporting the actual number of instructional hours spent in study groups used in the definition of an academic year for its AABA program did not provide the number of instructional hours required to meet the statutory definition of an academic year. The statutory definition of an academic year is set forth in Title 34 C.F.R. § 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 the University overawarded and disbursed $12,700 in Pell Grant (Pell) funds to its AABA students. (This amount is included in our finding on incentive compensation).

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 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 C.F.R. § 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 AABA Program

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

- IPD shall recruit students to enroll in the AABA program, and any other program developed under the agreement.

- IPD shall provide representatives to recruit students for the programs covered under the agreement.

- IPD will submit to the University a sufficient number of qualified applicants for admission to the AABA program to ensure a minimum of 50 and a maximum of 1,500 students are enrolled in the programs covered in the agreement during each academic year.

- IPD shall collect, on behalf of the University, all tuition, application, registration, assessment and other applicable fees, including book and material fees applicable to the programs.

- IPD shall maintain the official program accounting books and records.

IPD remitted tuition, registration, application, and deferred payment processing fees to the University on a semimonthly basis. During the period of our audit, 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 those percentages. In contracting with IPD to provide recruiting services, the University violated the statutory and regulatory provisions quoted above by paying IPD a percentage of tuition for each enrolled student IPD recruited.

The University Violated the HEA by Paying IPD Based on Success in Securing Enrollments for the AABA Program Which Resulted in $221,988 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 AABA program, the University must return all Title IV funds that were disbursed on behalf of students enrolled in the AABA program who were improperly recruited. Because the University paid incentives for each student enrolled in the AABA program, all students in the AABA program were improperly recruited. Our audit covered the period July 1, 1999 through June 30, 2000. For that period, Title IV funds totaling $221,988 were disbursed on behalf of students enrolled in the AABA program, consisting of $13,060 in Federal Supplemental Educational Opportunity Grants (FSEOG), $25,521 in Pell, and $183,407 in Federal Family Education Loan (FFEL) funds.

IPD's Recruiters Received Salary Based on the Number of Students Enrolled in the AABA Program

Our review of IPD's compensation plan for fiscal year 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. 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 semiannually and, after the first 6 months of employment, determined 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.

Recommendations

We recommend that the Chief Operating Officer for Student Financial Assistance (SFA) require the University 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 $183,407 of FFEL disbursed on behalf of students enrolled in the AABA program during the period July 1, 1999 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 $13,060 of FSEOG and $25,521 of Pell disbursed on behalf of students enrolled in the AABA program during the period July 1, 1999 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 [the] University, many of which have variable costs dependant on the number of students enrolled in the AABA program.
- 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 IPD Contract provides that IPD receives decreasing percentages of revenues as more students enrolled in AABA program (sic).
- The University's compensation to IPD does not constitute a "commission, bonus, or other incentive payment based directly or indirectly on success in securing student enrollments."
- 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 Benedictine 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 AABA programs.

- Management consultation and training regarding:
  - Program administration and evaluation.
  - Faculty recruitment, assessment and development.
  - Ongoing curriculum review and revision.
  - Student admissions and advisement procedures.
  - Student record management.
  - Prior college-level learning assessment center organization and management.
  - Financial aid systems.
- Program development, including:
  - Preparation of courses of study.
  - Establishing required student competencies of specified criterion levels.
  - Student performance evaluation mechanisms.
- Maintenance of accounting records, and financial planning and budgeting; and
- Comprehensive academic quality control, including instructor evaluations, student evaluations, and evaluations of courses of study related to the AABA program.

The University stated that 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 our scope of 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 of 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 made to IPD were based on a percentage of the tuition and fees paid by students enrolled in the AABA program. Likewise, the University does not dispute that IPD was responsible for recruiting students. Nor does the University dispute that some portion of the amount paid to IPD was directly related to IPD's success in securing enrollments for the University's AABA program. 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 agree with the contract. The University stated IPD agreed to provide program development services. However, the contract stated IPD would **assist** the University in preparing objectives that support the overall mission of the institution. This included providing information and consultation to the Institution with respect to program development. Therefore, program development was the responsibility of the University, and not IPD.

<u>University Comments</u>. **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.

<u>OIG Response</u>. 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.

<u>University Comments</u>. **The IPD Contract Provides that IPD Receives Decreasing Percentages of Revenues as More Students Enrolled in the AABA Program.** The University allocates to IPD a decreasing percentage of overall AABA revenues as the number of enrollments increases. This contradicts the OIG's claim that IPD's compensation rights were linked to increased enrollment. The declining payment percentages indicate the revenue allocation is tied directly to IPD's increased costs of providing various non-enrollment services,

which due to economy of scale, rise in smaller increments as the AABA student population passes certain threshold levels. As the number of AABA students increases, IPD is able to perform its responsibilities at a lower per-capita cost, enabling it to share such savings with the University. Those savings are not attributable to the recruitment and marketing functions. If the allocation of revenue were intended to pay IPD for recruiting and enrollment services, and for nothing more, the IPD Contract would not have required a decreasing percentage share.

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.

University Comment. **The University's Compensation to IPD Does Not Constitute a "Commission, Bonus, or Other Incentive Payment Based Directly or Indirectly on Success in Securing Student Enrollments," Because (1) the Allocation of Revenue to IPD Does Not Constitute Commissions or Bonuses Tied to Enrollments, and (2) the Allocation of Revenue to IPD Does Not Constitute Incentive Payments.** The University provided the definitions of "bonus and "commission" from Blacks Law Dictionary (6^{th} ed. 1990), and the definition of "incentive" from Webster's 3^{rd} New International Dictionary (1981). It stated the allocation of revenue between the University and IPD was not a bonus because those payments constitute sole compensation to IPD for services performed pursuant to the IPD Contract. The revenue allocation is not supplemental compensation. The allocations do not constitute commissions because (a) IPD is compensated for the wide variety of services it performs in regard to the AABA program in addition to marketing, (b) the allocation of revenues pays for the full scope of services provided under the IPD contract and not any specific transaction, and (c) the revenue is allocated to IPD as a corporate entity, not to any individual "agent or employee." The University also states there is no incentive because IPD's percentage share of AABA revenues actually decreases as enrollment increases. Thus, the revenue allocation does not motivate or incite enrollments.

OIG Response. The audit report stated that the University paid IPD based on success in securing enrollments. Because the prohibition extends to any "other incentive payment," the definitions of "bonus" and "commission" cited by the University are irrelevant. The HEA prohibits institutions from providing incentive payments based directly or indirectly on success in securing enrollments to any **persons or entities** [emphasis added] engaged in any student recruiting or admission activities. Although the percentage of total revenues IPD was entitled to decreased after specified recruitment thresholds were met, there is still the incentive to enroll students to increase total revenues.

University Comment. **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.** 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.

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

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 Comment. **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.** The University stated that IPD's 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, the University 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 the University's representation, the compensation plan we reviewed did not include factors other than enrollment to adjust recruiter salaries. According to the compensation plan, recruiters' salaries were determined annually by how many students they enrolled in the programs. Annual salaries would increase, decrease or remain the same in accordance with predetermined tables that directly tied students enrolled to particular salary amounts. The salary 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

HEA Section 481(a)(2) 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 C.F.R. § 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, examination, or preparation for examination occurs...For an additional 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.

The University measured its AABA program in credit hours, using a nontraditional academic calendar. The AABA program consisted of a series of courses for which a student generally received three credit hours per course. The University defined its academic year as 25 credit hours in 45 weeks. To comply with the 12-Hour Rule, the University would need to provide eight hours of instruction per week for each week in its 45-week academic year to equal 360 hours per year.

The University 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 in compliance with laws and regulations. According to the AABA Student Handbook, students were required to meet in class for four hours per week, and expected to meet an additional four hours per week in study groups. The University counted the study group time for purposes of the 12-Hour Rule. We found the University did not establish and implement management controls to ensure that the study group meetings were regularly scheduled and occurred.

The University'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 the University's written policies and procedures, and the lack of study group records showed that the University had no assurance that study groups were scheduled to meet the requirements of the 12-Hour Rule.

Failing to Comply with the 12-Hour Rule Resulted in the University Overawarding $12,700 of Pell to its AABA Students

Because the University did not ensure that study group meetings were scheduled as required once a week for four hours, the meetings do not qualify for inclusion in the 12-Hour Rule calculation. Consequently, the University's defined academic year of 45 weeks only provided 180 hours of the required minimum of 360 hours of instructional time (four hours of instruction per week for 45 weeks equals 180 hours of classroom hours). In order to meet the 360-hour requirement, the University's academic year would need to be 90 weeks in length. By using an academic year of 45 weeks rather than the 90 weeks for awarding Title IV funds, the University disbursed amounts to students that exceeded the maximum amounts for an academic year allowed under the Pell program. We estimated that the University overawarded $12,700 of Pell to AABA students during the period July 1, 1999 through June 30, 2000.

Pursuant to Title 34 C.F.R. § 690.62(a) specifies that the amount of a student's Pell Grant for an academic year is based upon schedules published by the Secretary for each award year. The payment schedule lists the maximum amount a student could receive during a full academic year. We estimated that $12,700 in Pell Grant disbursements exceeded the maximum amount allowed.

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

Recommendation

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

2.1. Immediately develop an academic year for its undergraduate AABA program 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. The AABA program complies 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 any given week.
   E. Additional hours spent by students in preparation for examinations are 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 programs.

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

<u>University Comments</u>. **The University's AABA Program Complies 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 the AABA program 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.

<u>OIG Response</u>. 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 AABA program 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 requirement (34 C.F.R. § 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 an 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 students to attend study group meeting in order to discuss course material and prepare graded assignments, and share learning resources. Each student was expected to contribute to the completion of all study group assignments, which include oral and written presentations. The

University informed students that attendance in the study groups was mandatory and played a critical role in the overall education program. The students, in the first week of the program, completed a "Study Group Constitution" listing the names of all group members, and stating the day, time, and location of their weekly study group meeting. Each study group submitted its Constitution to a faculty member, who reviewed whether the proposed meeting location and time was conducive to learning.

Several other factors indicate the study group meetings were "regular," "scheduled," and under the supervision of University faculty. Specific tasks were specified in the course module, and all students enrolled in the course were required to participate in study group activities. During study group meetings, students completed rigorous team assignments, often preparing specified projects that were presented during the next faculty-led workshop. The faculty exerted control over the study group meetings by reviewing and grading the designated team assignments and projects.

<u>OIG Response</u>. While the University stated that the Study Group Constitutions listed the day, time and location of their weekly study group meetings, it did not provide us with these constitutions during our fieldwork or with their response. We agree that the course modules spelled out the requirements for study group assignments as the University has stated. However, we disagree that a record of graded assignments supports a conclusion that group study meetings were regularly scheduled for the required number of hours. . On August 10, 2000, the Department issued an 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.

<u>University Comment</u>. **The University Adequately Monitored Study Group Meeting Attendance.** The University stated there is no legal authority for the statement in the draft audit report that the University must "ensure" that study groups actually "occurred." All the 12-Hour Rule requires is that study group meetings were regularly scheduled. The more reasonable interpretation, tracking actual text of the regulation, is consistent with the 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 12 hours of instructional activity in any given week.

<u>OIG Response</u>. The University's assertion that there is no requirement that it ensure the study group meetings actually occurred is not correct. As a fiduciary, the University must exercise the highest standard of care and diligence in administering the Title IV programs, including compliance with the 12-Hour Rule. 34 C.F.R. § 668.82(a). In addition, the regulations at 34

C.F.R. § 668.24(a)(3) provide that the institution must "establish and maintain on a current basis . . . program records that document . . .[i]ts administration of the Title IV, HEA programs in accordance with all applicable requirements." The University must ensure that the study groups occur in order to confirm the validity of the schedule, the hours assigned, and the amounts of Title IV disbursed for those meetings. If the study groups did not meet as supposedly scheduled, then the University would be disbursing Title IV funds on the basis of instructional hours that it does not in fact provide.

Contrary to the University's assertion, we are not attempting to establish a requirement to document every hour of student attendance. We examined whether the study group meetings occurred in order to corroborate compliance with the 12-Hour Rule. Evidence of attendance, if it existed, would help support a conclusion that the study group meetings were regularly scheduled and that the study group hours supported the amount of Title IV aid disbursed. 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. The University's own policy was that study group attendance was to be monitored. University officials could not provide us with evidence to show this was actually done. In the absence of study group attendance reports or some other effective control selected by the University, we have no basis to conclude that the University adequately monitored study group meeting occurrence or compliance with the 12-Hour Rule.

University Comment. **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 strong control.

University Comment. **Additional Hours Spent By Students in Preparation for Examinations is Includable Under the 12-Hour Rule.** Some AABA courses utilize traditional examinations, in addition to 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 8 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 an 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 AABA program had no study days scheduled in lieu of scheduled classes.

University Comment. **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 AABA program was a nontraditional, lifelong learning program that had a minimum amount of regularly scheduled instruction.. 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. University officials did not inform us during the on-site fieldwork 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, none of the University's publications pertaining to the AABA program contained indications that this was part of the students' curriculum.

University Comment. **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 to Congress on the 12-Hour Rule until July 2001. The Internet Equity and Education Act of 2001, adopted by the House of Representatives Committee on Education and the Workforce, 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 Comment. **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 1887, the University is a non-public institution with its campus located in Lisle, Illinois. It is accredited by the Commission on Institutions of Higher Education of the North Central Association of Colleges and Schools, and is licensed by the Illinois State Board of Education. It offers both undergraduate and graduate degrees.

On March 21, 1999, the University entered into an agreement with IPD, a subsidiary of the Apollo Group, Inc., to expand its instructional programs for adult students. As a result, the University developed its AABA program. The University contracted with IPD for marketing and accounting support, while it provided the curriculum, facilities, and faculty. The University and IPD split tuition, registration, application, and deferred payment-processing fees equally.

During the Pell award period of July 1, 1999 through June 30, 2000, the University participated in the FSEOG, FFEL and Pell programs. The Department's records (National Student Loan Data System (NSDLS) for FFEL, and Student Payment Summary (SPS) for Pell) indicated that, during the period, the University or lenders disbursed $208,928 on behalf of students enrolled in the AABA program, consisting of $183,407 in FFEL, and $25,521 in Pell. The University's records indicated that it disbursed $13,060 in FSEOG and $23,223 in Pell, and lenders disbursed $152,286 in FFEL. Title IV of the HEA of 1965, as amended, authorizes these programs, and they are governed by regulations contained in 34 C.F.R. Parts 676, 682, and 690. In addition, these programs are subject to the provisions contained in the Student Assistance General Provisions regulations (34 C.F.R. Part 668), and the University must comply with the

Institutional Eligibility regulations (34 C.F.R. Part 600) to participate in these programs. Regulatory citations in this report are to the codification revised as of July 1, 1998.

AUDIT SCOPE AND METHODOLOGY

The audit's objectives were to determine if the University complied with the HEA and applicable regulations pertaining to (1) the prohibition against the use of incentive payments for recruiting activities, and (2) course length. We specifically focused our review on the University's contract with IPD and the program of study related to that contract.

To accomplish our objectives, we reviewed the University's written policies and procedures and student financial assistance records. We reviewed the University's program participation agreement with the Department, its contract with IPD, and IPD's compensation plan for its recruiters.

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

The audit covered the period July 1, 1999 through June 30, 2000. We performed the on-site fieldwork in Lisle, Illinois during the period February 12-16, 2001. We conducted the audit in accordance with government auditing standards appropriate to the scope of audit stated above.

STATEMENT ON MANAGEMENT CONTROLS

As a part of our review, we gained an understanding of the University's management control structure, as well as its policies, procedures, and practices applicable to the scope of the audit. 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 FFEL and Pell transactions for all students in the AABA program for the period of July 1, 1999 through June 30, 2000.

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, we identified a significant weakness over incentive-based payments for student enrollment that violated the statutory prohibition against commissioned sales, and a significant weakness pertaining to course length that violated the 12-Hour Rule. 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 call Mr. Richard J. Dowd, Regional Inspector General for Audit, Chicago, Illinois at (312) 886-6503. Please refer to the control number in all correspondence related to the report.

Sincerely,

/s/

Lorraine Lewis

Enclosure

Benedictine University
Informing today—Transforming tomorrow

Office of the President

VIA OVERNIGHT DELIVERY

September 27, 2001

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

RE: Draft Audit Report; Benedictine University (Control Number ED-OIG/A05-B0003)

Dear Mr. Dowd:

Attached please find Benedictine University's response to the Draft Audit Report issued on August 7, 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,

William J. Carroll
President

Attachment

5700 College Road, Lisle, Illinois 60532-0900 (630) 829-6005

BENEDICTINE UNIVERSITY'S RESPONSE TO THE DRAFT AUDIT REPORT OF THE U.S. DEPARTMENT OF EDUCATION OFFICE OF INSPECTOR GENERAL (Control Number ED-OIG/A05-B0003)

Benedictine University (the "University) is a private, not-for-profit institution of higher education, founded in Chicago as St. Procopius College by the Benedictine monks of St. Procopius Abbey in 1887. It secured a charter from the State of Illinois in 1890. In 1901 the College moved to the more congenial atmosphere of Lisle, Illinois, approximately 25 miles west of Chicago. The College became fully coeducational in 1968 and was renamed Illinois Benedictine College in 1971. In response to community needs, it added graduate, doctorate and adult learner programs. The College became Benedictine University in 1996. Currently attended by approximately 2000 undergraduates and 1100 graduate students, the University is accredited by the North Central Association of Colleges and Secondary Schools, the Illinois State Board of Education Teacher Certification Section and the National League for Nursing. The University's low cohort default rate has steadily declined over the last three years: 6.2 percent in Fiscal Year ("FY") 1997, 3.9 percent in FY 1998, and 1.5 percent in FY 1999.

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 the University's Associate of Arts in Business Administration ("AABA") program. The University maintains a contract with an independent outside entity, the Institute for Professional Development ("IPD") for various services related to this program. The issues raised by the Draft Audit Report pertain both to the "Agreement between Benedictine University and Institute for Professional Development," dated February 11, 1999 (the "IPD Contract"), and to the structure of AABA program courses. The AABA program uses 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 AABA program is 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 "ED") require the University to return all Title IV funds disbursed for the AABA program between July 1, 1999 and June 30, 2000. The Draft Audit Report further claims that the University's "documentation supporting the actual number of instructional hours ... for its AABA program 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 AABA students.[1] 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.

---

[1] 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.

I. NEITHER BENEDICTINE 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 AABA program 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 AABA program." 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 Benedictine University, many of which have variable costs dependant on the number of students enrolled in the AABA program.
- 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 IPD Contract provides that IPD receives <u>decreasing</u> percentages of revenues as more students enrolled in AABA program.
- The University's compensation to IPD does not constitute a "commission, bonus, or other incentive payment based directly or indirectly on success in securing student enrollments."
- 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 Benedictine University.

In the present case, IPD agreed to perform the following broad range of non-recruitment and non-enrollment services related to the operation of the AABA program:

- Management consultation and training regarding:
  - Program administration and evaluation;
  - Faculty recruitment, assessment and development;
  - Ongoing curriculum review and revision;
  - Student admissions and advisement procedures;
  - Student record management;
  - Prior college-level learning assessment center organization and management;
  - Financial aid systems;
- Program development, including:
  - Preparation of courses of study;
  - Establishing required student competencies of specified criterion levels;
  - Student performance evaluation mechanisms;
- Maintenance of accounting records, and financial planning and budgeting; and
- Comprehensive academic quality control, including instructor evaluations, student evaluations, and evaluations of courses of study related to the AABA program;

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 AABA program, 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 program. 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.[2]

Based on an erroneously narrow view of IPD's responsibilities and a summary rejection of the somewhat obvious concept that additional AABA 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 AABA program," and for no other functions whatsoever. Id. The IPD Contract, however, reflects that the allocation of AABA

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

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 AABA 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.

2. <u>The Incentive Compensation Rule does not apply to the IPD Contract.</u>

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 the University and IPD.[3]

---

[3] 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.

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 AABA students. The magnitude of IPD's various functions and obligations under the contract depends in substantial part upon how many students enroll in the AABA program. 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 AABA program.

In contrast, the OIG would apparently disallow any payment arrangement between an institution and professional service provider that reflects indefinite quantities, which vary based on the number of students receiving services. 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, providing the vendor with greater compensation to offset the greater workload and need for more employees is not a "bonus." Rather, it is 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.[4]

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.

[4] The OIG's interpretation creates a situation whereby small 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.

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 1.5 percent. This extraordinarily low default rate is conclusive proof that the University did not admit unqualified students into its AABA program. The Incentive Compensation Rule has absolutely nothing to do with the parties' revenue-sharing agreement, and the finding should be rescinded.

3. The IPD Contract provides that IPD receives decreasing percentages of revenues as more students enrolled in the AABA program.

The Draft Audit Report fails to consider that the University allocates IPD a decreasing percentage of overall AABA revenues as the number of enrollments increases.[5] This fact contradicts the OIG claim that IPD's compensation rights were linked to increased enrollment. In fact, the declining payment percentages indicate that the revenue allocation is tied directly to IPD's increased costs of providing various non-enrollment services, which due to economy of scale, rise in smaller increments as the AABA student population passes certain threshold levels. As the number of AABA students increases, IPD is able to perform its administrative, academic, and other contractual responsibilities at a lower per-capita cost, enabling it to share such savings with the University. Those savings are not attributable to the recruitment and marketing functions. If the allocation of revenue was intended to pay IPD for recruiting and enrollment services, and for nothing more, the IPD Contract would not have required a decreasing percentage share.

4. The University's compensation to IPD does not constitute a "commission, bonus, or other incentive payment based directly or indirectly on success in securing student enrollments."

a. The allocation of revenue to IPD does not constitute commissions or bonuses tied to enrollments.

Blacks Law Dictionary (6th ed. 1990) defines "bonus" as "an extra consideration given for what is received, or something given in addition to what is ordinarily received by, or strictly due, the recipient." 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 the allocation of revenue between the University and IPD because those payments constitute the sole compensation to IPD for services performed pursuant to the IPD Contract. The revenue allocation is not supplemental compensation. Similarly, the allocations do not

[5] During the audit period, the IPD Contract allocated 50 percent of AABA revenues to IPD. However, that percentage share would decrease to 45 percent in any academic year following an academic year in which AABA enrollment exceeded 500 students, and 40 percent when enrollments pass 1000 students. See IPD Contract at 24-25.

constitute enrollment-based commissions because (a) as has been shown, IPD is compensated for the wide variety of services it performs in regard to the AABA program, not merely for marketing; (b) the allocation of revenues does not compensate IPD for any specific transaction, but instead pays for the full scope of services provided under the IPD Contract; and (c) the revenue is allocated to IPD as a corporate entity; there are no payments under the IPD Contract to any individual "agent or employee" based upon specific transactions or recruitment activities.

b. The allocation of revenue to IPD does not constitute incentive payments.

The statute and regulations forbid payment of "any commission, bonus, or other <u>incentive</u> payment based directly or indirectly on success in securing enrollments" (emphasis added).[6] 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 described above, IPD's percentage share of AABA revenues actually <u>decreases</u> as enrollment increases. Moreover, the revenue allocation is a means of achieving equitable compensation for a broad array of professional services. The revenue allocation does not motivate or incite enrollments.

5. <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 the University 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.[7] Indeed, for all of the reasons presented in this submission, this

---

[6] By inserting the word, "other," before "incentive payment," Congress and ED made clear that only those commissions, bonuses, or other payments that constitute <u>incentive</u> payments are prohibited.

[7] 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. <u>See, e.g.,</u> *William Penn University, College for Working Adults' Administration of Title IV Programs – Commissioned Sales*, Audit Control Number ED-OIG/A07-90035 (May 15, 2001) at page 13. 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.

University and many others like it reasonably believed the opposite.[8] 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 any 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 AABA Students -- Is Unwarranted and Is Inconsistent With Applicable Law and Regulations.

The Draft Audit Report erroneously asserts at page 3 that "because the University did not comply with the HEA and regulations by paying incentives to IPD based on success in securing student enrollments for its AABA program, the University must return all Title IV funds that were disbursed on behalf of students enrolled in the AABA program." On these grounds, the OIG asserts that an unjustified amount -- $221,988, representing the principal amount of all Title IV loans and grants received by AABA enrollees -- should be returned to lenders and to the U.S. Department of Education.

---

[8] The issues raised herein do not challenge the authority of the Department, 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 wholesale disallowance that is recommended. The OIG offers neither legal authority nor analysis to justify or explain why disallowance of all AABA-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 nearly one-quarter million dollars, representing all federal funds received by students enrolled in the AABA program – 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 AABA students utilized all 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 the Department 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 AABA 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 AABA students.

- Nowhere does the Draft Audit Report allege or imply that the AABA 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 AABA 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 AABA 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 AABA program 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 AABA 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.[9]

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.

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 AABA students, making final determinations on AABA admissions, and establishing tuition and fees for programs. <u>See</u> IPD Contract, page 18. The University retained exclusive jurisdiction over curricula content and approval, and retained authority over instructional

---

[9] The Draft Audit report further overstates the value of Title IV funds awarded to AABA students by apparently failing to consider any amounts that may have been refunded, following the initial disbursement, because of changes in students' enrollment status. Although the University provided data to the OIG reflecting the "closeout balance" of Title IV funds awarded during the 1999-2000 year, the auditors apparently ignored this information and wrongly recommend a liability based on original disbursement amounts.

personnel for the AABA program. See id. at pages 3, 4, 11, 18. Under the contract, however, each party was responsible for paying its own "respective taxes, workers compensation, employee benefits (if any), and all similar obligations." Id. at page 36. The University therefore had no involvement with IPD's internal payroll or salary structure.

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. BENEDICTINE UNIVERSITY'S AABA PROGRAM COMPLIES WITH THE 12-HOUR RULE.

The University demonstrates that its AABA program 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 AABA program.

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

The AABA program delivers high-quality, accredited educational content to adult "lifelong learners" and other nontraditional students through two integrated instructional components. In general, 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 the AABA program includes 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 AABA 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 AABA program provided 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"[10] 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

[10] 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.

procedures to ensure that the AABA program 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 AABA 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.[11]

2. Study group meetings were regularly scheduled.

The AABA Student Handbook and the curriculum modules for each AABA course expressly require students to attend study group meetings in order to discuss course material and prepare graded assignments, and share learning resources.[12] Each student is expected to contribute to the completion of all study group assignments, which include oral and written presentations. During students' orientation to the AABA program, they were informed by the University of the mandatory nature of study group meetings, and the critical role they play in the overall educational program. Instructors also informed students of the study group meeting requirements during the first class, further stressing that study group participation is essential to successful completion of any AABA course. The students, in the first week of the program, completed a "Study Group Constitution" listing the names of all group members, and stating the day, time, and location of their weekly study group meeting. Each study group submitted its Constitution to a faculty member, who reviewed whether the proposed meeting location and time was conducive to learning.

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

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

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

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. <u>The University adequately monitored study group meeting attendance.</u>

The Draft Audit Report 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 <u>not</u> on whether an institution can document that students actually completed twelve hours of instructional activity in any given week.

4. <u>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.</u>

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.[13] However, the 12-Hour Rule expressly states that time spent

[13] "[S]tudents were required to meet in class for four hours per week, and expected to meet an additional four hours per week in study groups.... The University'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.

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.[14]

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

Some AABA 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

[14] 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 AABA program curriculum, such issues are plainly beyond the OIG's scope of authority.

> 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 AABA program, 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. 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 the University's AABA program. 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).[15] 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

[15] 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).

31, 2001, the Department did not issue its report on the 12-Hour Rule until July 2001.[16] 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 by the House of Representatives Committee on Education and the Workforce,[17] would uniformly define a "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.'"[18] The University's AABA 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 AABA program thereby exemplifies 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 Draft Audit Report completely overlooks any time spent by students completing various activities "related to class preparation."[19] The AABA Student Handbook states that a

---

[16] 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).

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

[18] 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.

[19] As discussed supra, "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.

total of fifteen to twenty hours of study per week outside of the class meeting time is expected of each student. There is no statutory or regulatory basis for the OIG to simply disregard this course preparation time.

The regulation also 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 AABA 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.

CONCLUSION

For all of the foregoing reasons, Benedictine 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,

BENEDICTINE UNIVERSITY
Dr. William J. Carroll, President