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4615 East Elwood Street
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Dear Mr. Nelson:

This **Final Audit Report**, entitled *University of Phoenix's Processing of Return of Federal Student Aid for the Higher Education Act (HEA), Title IV Programs*, presents the results of our audit. The purpose of the audit was to determine whether the University of Phoenix (UOP) has policies and procedures that provide reasonable assurance that the institution properly processes the return of Title IV funds for withdrawn students. Our review covered Return of Title IV calculations performed during the period September 1, 2002 through March 31, 2004. We expanded our review through March 31, 2005 to evaluate UOP's methodology for determining the "percentage of Title IV aid earned" after issuance of Dear Colleague letter GEN-04-03 in February 2004.

BACKGROUND

UOP, a wholly owned subsidiary of Apollo Group, Inc. (Apollo), is a private, for-profit institution of higher education offering associate, bachelor, master, and doctoral degrees and professional certificate programs. UOP has 55 campuses and 102 learning centers located in 33 states, Puerto Rico, and Vancouver, British Columbia. Its educational programs are also offered worldwide via the Internet through University of Phoenix Online, a division of UOP. UOP is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools and is a participant in the U.S. Department of Education's (Department's) Distance Education Demonstration Program.

UOP uses a nonterm academic calendar and measures the length of its educational programs in credit hours. Students, including students at UOP Online, generally enroll in an educational program that encompasses a series of five to six-week courses. Typically, the courses are taken one at a time, sequentially, over the length of the program.

Apollo contracts with Affiliated Computer Services, Inc. (ACS), a third-party servicer, for the processing of financial aid for UOP's students. UOP primarily uses three electronic interactive Apollo systems in processing student financial aid: the Student Record, Financial Aid, and Accounting systems.¹ UOP's annual audit, for the period ending August 31, 2004, reported over \$1.7 billion of Title IV aid disbursed to over 160,000 students. UOP's records show that from September 1, 2002 through December 7, 2004, it performed about 154,500 Return of Title IV calculations for students who received about \$759 million in Title IV funds during the related payment period.

AUDIT RESULTS

We concluded that UOP had policies and procedures that provided reasonable assurance that the institution properly identified withdrawn students, appropriately determined whether a Return of Title IV calculation was required, returned Title IV funds for withdrawn students in a timely manner, and used appropriate methodologies for most aspects of calculating the return of Title IV aid. However, UOP applied inappropriate methodologies to determine the "percentage of Title IV aid earned" for calculations performed from September 1, 2002 through December 7, 2004. As a result, UOP may have understated the amount of Title IV funds to be returned by over \$10 million (\$6.3 million from September 1, 2002 through February 29, 2004 and \$3.7 million from March 1, 2004 through December 7, 2004).

Our conclusions on the adequacy of UOP's policies and procedures are based on our understanding and limited tests of the system of internal control that existed during the audit period for calculating and returning Title IV funds for withdrawn students. The projection of this evaluation of the system of internal control to future periods is subject to the risk that procedures may become inadequate because of changes in conditions, or that the degree of compliance with the procedures may deteriorate.

UOP did not concur with our finding and recommendations. UOP's comments are summarized at the end of the finding and the full text of the comments is included as an attachment to the report.

FINDING – UOP Did Not Use Appropriate Methodologies for Calculating the "Percentage of Title IV Aid Earned"

UOP did not always use appropriate payment period end dates when it calculated the percentage of Title IV aid earned. Prior to its implementation of Dear Colleague letter (DCL) GEN-04-03, issued in February 2004, UOP did not have a policy to review the accuracy of the payment period end dates for the purpose of calculating the return of Title IV aid. When the Department issued guidance for determining payment period completion dates, UOP did not implement the guidance for over nine months.

¹ UOP uses the software platform names to refer to these systems. The respective names used by UOP are OSIRIS (an in-house developed platform), PeopleSoft, and Oracle.

Section 484B of the HEA specifies the action that an institution needs to take when a recipient of Title IV student aid withdraws from an institution without completing the payment period or period of enrollment. Section 484B(a)(3)(B) specifies the amount of Title IV assistance earned when a student withdraws—

[T]he percentage of grant or loan assistance under this title that has been earned by the student is—

- (i) equal to the percentage of the payment period or period of enrollment for which assistance was awarded that was completed . . . as of the day the student withdrew, provided that such date occurs on or before the completion of 60 percent of the payment period or period of enrollment; or
- (ii) 100 percent, if the day the student withdrew occurs after the student has completed 60 percent of the payment period or period of enrollment.

For determining the percentage of the payment period or period of enrollment that was completed, the HEA differentiates between programs measured in credit hours and programs measured in clock hours. For programs measured in credit hours, Section 484B(d)(1) states—

[I]n the case of a program that is measured in credit hours, by dividing the total number of calendar days comprising the payment period or period of enrollment for which assistance is awarded into the number of calendar days completed in that period as of the day the student withdrew . . .

The regulation at 34 C.F.R. § 668.22(e)(5)(ii)(A) states—

The treatment of title IV grant or loan funds if a student withdraws may be determined on either a payment period basis or a period of enrollment basis for a student who attended a non-term based educational program or a nonstandard term-based educational program.

UOP, which offers nonterm based educational programs, uses payment periods to calculate the return of Title IV aid.

UOP's Methodology Prior to Implementation of Dear Colleague Letter GEN-04-03

When ACS staff determined the total number of calendar days in the payment period for the Return of Title IV calculations, they used the dates that had been established as of the student's most recent "certification."² However, as students progress through their educational programs, the students do not always complete their coursework within the established time frames, and as a result, the end dates for their payment periods change. UOP should have ensured that the payment period end dates used for the Return of Title IV calculation reflected a realistic projection for the student's remaining coursework for the payment period. For example,

² "Certification" is the term used by ACS to describe the process of determining eligibility for Title IV funding and processing loan and grant disbursements. When a Title IV recipient is "certified," ACS determines the dates for the student's academic year. This process includes determining the start and end dates for the two payment periods that compose the academic year.

students who failed to earn credits for attempted courses needed to retake courses in order to complete their required number of credits for the payment period. For these students, the payment period end date should have been extended to include the additional courses. By failing to make this adjustment when reviewing the student's files to perform the Return of Title IV calculation, UOP was not using the student's actual payment period to determine the amount of unearned aid that should be returned.

At UOP, a student's academic year begins with the first eligible course of the student's degree program and ends when the student has completed a defined number of weeks and credits.³ The academic year has no calendar time constraints and continues until both the credit and week requirements are met. Despite having procedures for reviewing and revising the dates for a student's academic year, and corresponding payment periods, under certain circumstances, UOP did not have a policy to review the appropriateness of the payment period end date before performing Return of Title IV calculations. For example, ACS reviewed and re-established dates when it recertified students who returned from a leave of absence or students who did not start their initial course as scheduled (i.e., "no shows"). In its procedures, UOP also recognized that the dates established by certification or re-certification could become inaccurate when students withdrew from courses, failed courses, or repeated courses. When students had not completed the number of credits and weeks required for the first payment period, ACS staff usually rescheduled the date for the second disbursement by reviewing the student's schedule and projecting when the student would likely meet the credits and weeks requirement.⁴ Although UOP acknowledged the need and had the capability of adjusting payment period end dates in these circumstances, UOP failed to review or make similar adjustments when making Return of Title IV determinations.

By failing to use appropriate payment period end dates for withdrawn students, UOP understated the number of total days used for the Return of Title IV calculation. Since the number of total days in the payment period is used as the denominator for calculating the percentage of the payment period completed, an understated number of total days results in a higher percentage of completion. Consequently, a higher percentage of completion increases the amount of Title IV aid calculated as earned by the student.

We identified a category of students who were at a higher risk of having an incorrect Return of Title IV calculation.⁵ The following examples from that group demonstrate the unreasonableness of UOP's Return of Title IV calculations:

- Student A attempted 8 of the 12 credits required for the payment period, but earned only 3 credits. UOP calculated the percentage of completion at 60.3 percent, which resulted in the student earning 100 percent of the Title IV aid disbursed for the payment period (\$8,972).

³ The defined number of weeks and credits depends on the student's degree program and the date the student was certified.

⁴ UOP refers to this process as "remapping."

⁵ Footnote 10 explains our criteria for determining the higher risk population.

- Student B attempted 9 of the 12 credits required for the payment period, but earned no credits. UOP calculated his percentage of completion at 63.6 percent, which resulted in the student earning 100 percent of the Title IV aid disbursed for the payment period (\$3,247).

For Return of Title IV calculations performed by UOP for students in this higher risk category between September 1, 2002 and February 29, 2004, UOP's records show over \$13 million of Title IV aid disbursed to these students for the related payment periods. If our sample for March 2004 was representative of the universe of students in the category, the potential unearned funds that were not identified and returned because of UOP's failure to use appropriate payment period end dates during this time period could be over \$6.3 million.⁶

UOP's Methodology After Issuance of Dear Colleague Letter GEN-04-03

Section 484B(d) of the HEA differentiates between credit-hour and clock-hour programs, but does not distinguish between credit-hour term programs and credit-hour nonterm programs. The Department provided additional guidance on the proper application of § 484B(d) by institutions offering credit-hour nonterm programs in DCL GEN-04-03 issued February 2004.

DCL GEN-04-03 addresses a number of issues regarding the Return of Title IV aid when a student withdraws from an institution. One of the issues discussed is the methodology for determining the "percentage of Title IV aid earned", a component of the Return of Title IV calculation, for students who withdrew from a credit-hour nonterm program. Since UOP's Title IV eligible programs are credit-hour nonterm programs, this part of the DCL applied to UOP's procedures for Return of Title IV calculations. Under the DCL guidance, the institution needs to determine an appropriate date for when the student would be expected to complete the period in order to determine how much of the period was completed at the point the student withdrew. For programs where the ending date for a period is dependent on the pace at which an individual student progresses through the program, the institution must project the completion date based on the student progress.

DCL GEN-04-03 states—

We recognize that in a credit-hour nonterm program, the ending date for a period and, therefore, the total number of calendar days in the period, may be dependent on the pace at which an individual student progresses through the program. Therefore, for a student who withdraws from a credit-hour nonterm program where the completion date of the period is dependent on an individual student's progress, an institution must project the completion date based on the student's progress as of his or her withdrawal date to determine the total number of calendar days in the period.

⁶ The \$6.3 million was calculated by multiplying the \$13.3 million of disbursed Title IV aid by the percent of underpayment of Return of Title IV derived from our sample (47 percent). As described on the following page of this report, this percentage was derived using the methodology described in DCL GEN-04-03 and currently used by UOP. The methodology was solely used for estimating purposes for the time period prior to March 2004.

Since the guidance provided in the DCL addresses the weakness we identified in UOP's prior procedures, we reviewed Return to Title IV calculations made after the issuance of the letter. We concluded that UOP implemented the methodology described in DCL GEN-04-03, but the implementation was not timely. The letter stated that the guidance was provided to assist schools with Return of Title IV calculations made after the date of its issuance (February 2004). UOP did not begin using the revised methodology for Return of Title IV calculations until December 8, 2004.

The Dear Colleague letter states—

This guidance is provided to assist schools with Return of Title IV Aid calculations and procedures that are made after the date of this letter. Schools are not expected to attempt to apply this guidance retroactively. For any student who withdrew prior to the release of this letter and its guidance, we expect that an institution would have complied with the requirements of the law, the regulations, and any prior guidance we have issued on the topics covered in this letter.

Apollo's Vice President for Student Financial Aid informed us that UOP did not disagree with the philosophy of the DCL, but that implementation of the change was a massive undertaking. He explained that portions of the guidance required manual workarounds that were implemented as soon as reasonably possible, but other requirements, such as revising the payment periods, required technological solutions. Apollo's Vice President also stated that he was aware that the Department was reconsidering the guidance and perhaps might even recall the DCL.

We concluded that the reasons given did not justify the delay in correcting UOP's Return of Title IV procedures. As mentioned above, UOP had the capability and did review and revise academic year and payment period dates in other circumstances. Although the DCL was reissued in November 2004, the change from the February 2004 issuance did not affect the guidance cited in this report.

We assessed the financial impact of UOP's delayed implementation of DCL GEN-04-03. Using the methodology described in the DCL, we recalculated the Title IV aid earned by 25 students randomly selected from 158 students for whom UOP performed Return of Title IV calculations in March 2004 who were at higher risk of having an incorrect Return of Title IV calculation. For these 158 students, UOP had determined that each student had earned all of the Title IV aid disbursed for the payment period and that no Title IV funds needed to be returned to the Department or lenders. Based on our recalculations, we determined that, for 19 of the 25 calculations, \$62,715 (47%) of the \$133,289 of Title IV funds disbursed for the related payment periods should have been returned to the Department or lenders. Based on the sample results, we estimate that \$419,761 of the \$892,127 of Title IV aid disbursed to the 158 students should have been returned to the Department or lenders. We project, with a 90 percent confidence level, that the actual amount that should have been returned for the 158 students is at least \$335,555 or as much as \$503,967.

The Return of Title IV calculations for the 158 students were a subgroup of the 5,709 Return of Title IV calculations that UOP performed in March 2004. This subgroup was considered at higher risk of having an incorrect Return of Title IV calculation because the 158 students were the students who attended at least one course in their payment period for which they did not earn

credit and for whom UOP determined had completed more than 60 percent, but 75 percent or less of the period. We determined that the Return of Title IV calculations for these students were the calculations most impacted by the DCL guidance. The impact of the DCL on the individual calculations for the other 5,551 Return of Title IV calculations would be less significant, but the sum of the impact of the individual calculations could be significant given the large number of calculations. Thus, the actual financial impact of the delayed implementation for Return of Title IV calculations in March 2004 would be higher than the estimate of \$419,761, which only represented 158 calculations out of the 5,709 calculations UOP made for that one month. If the Return of Title IV calculations performed in March 2004 are representative of the calculations performed in the other months prior to UOP's implementation of the DCL guidance (i.e., April - November 2004), the potential financial impact of the delayed implementation for Return of Title IV calculations could be over \$3.7 million (9 months times \$419,761).

Recommendations

We recommend that the Chief Operating Officer for Federal Student Aid require UOP to—

- 1.1 Recalculate all the Return of Title IV calculations it performed between September 1, 2002 and February 29, 2004. UOP should use either the methodology described in DCL GEN-04-03, or another methodology that appropriately calculates the total number of calendar days in the payment period as of the student's withdrawal date, to recalculate and return the Title IV funds to the applicable programs or lenders.
- 1.2 Recalculate all the Return of Title IV calculations it performed from March 1 through December 7, 2004. UOP should use either its current methodology (i.e., DCL methodology), or another methodology acceptable to the Department, to recalculate and return the Title IV funds to the applicable programs or lenders.
- 1.3 Engage an independent public accountant to attest to the accuracy of the Return of Title IV recalculations.

We are not recommending a specific amount for repayment since it is necessary to recalculate the return of Title IV aid for each student. Our report discusses a financial impact of over \$10 million in understated Return of Title IV funds that could have been used to provide student financial aid to other students. However, students may have re-enrolled and become eligible for the reinstatement of their Title IV funds. When determining the amount that UOP will need to return, the understated funds to be returned will need to be divided between the amount UOP is responsible for returning and the amount the student is responsible for returning. UOP will also need to determine the allocation of the returned funds between the various Title IV programs in which it participates.

UOP Comments and OIG Response

UOP disagreed with the finding and recommendations. In its response to the draft report, UOP compared the methodology described in the February 2004 DCL for determining the percentage of Title IV aid earned for withdrawn students (referred to in UOP's comments as the "rate of progression") with the Title IV regulations. UOP stated that the "rate of progression" methodology cannot be applied to either the timeframe prior to issuance of the DCL or the

timeframe after the February 2004 issuance of the DCL. UOP also stated that the DCL is non-binding guidance that conflicts with Federal statutory and regulatory provisions. In addition, UOP stated that the draft report substantially overstated the financial impact of the finding.

“Rate of Progression” Methodology
(Section III of UOP Comments)

UOP Comments. UOP compared the language of 34 C.F.R § 668.22, which uses elapsed calendar time without any reference to credit hours completed or earned, with the DCL methodology, which uses the rate of a student’s academic progress through the program. UOP concluded that the number of calendar days completed by the student is “read out” of the regulation and has no impact on the calculation when the DCL methodology is applied, because the DCL methodology resets the number of days in the payment period in a manner that ensures that the totals equal the percentage of credit hours completed. UOP stated that the DCL methodology constitutes a new component to, and a departure from, the regulation, discounts the institutional charges incurred by a student for credits that they attempt but do not complete, and is inconsistent with the Department’s satisfactory academic progress requirements that recognize that students may attempt and fail courses without losing their Title IV aid.

In Footnote 8, UOP stated that the DCL does not limit credit-hour schools to one specific method for calculating the length of a payment period and quoted the DCL as suggesting that a school must have a “reasonable procedure for projecting the completion date of the period based on the student’s progress prior to withdrawal.” UOP also stated that the draft audit report effectively conceded that the DCL methodology collapses when confronted with the two non-term students in its sample who attempted, but did not earn credits.

OIG Response. Any concerns that UOP has related to the guidance, including whether it is a new component to, and a departure from, the regulation, or is unfair to students, should be addressed to the Department. UOP did not provide documentation that it had previously expressed any such concerns to the Department, and, as noted in the report, Apollo’s Vice President for Student Financial Aid informed us that UOP did not disagree with the philosophy of the DCL. As a point of clarification, the DCL does specify the methodology to be used for students who withdraw from a credit-hour nonterm program where the completion date of the period is dependent on an individual student’s progress, as is the case at UOP. It states that an institution must project the completion date based on the student’s progress as of his or her withdrawal date to determine the total number of calendar days in the period. Although the guidance is not mandatory, it presents the Secretary’s view of a reasonable procedure.

The portion of the DCL that UOP quoted in Footnote 8 of its comments (i.e., that the institution must have a reasonable procedure for projecting the completion date of the period) applies only when the student failed to earn credits or complete lessons as he or she progressed through the program. This is the situation for the two students that UOP cited as examples showing that the draft report conceded that the DCL methodology collapses. In the procedures UOP developed for its December 2004 implementation of the DCL, UOP had a procedure applicable to students who had not completed any credits in the payment period. Since we considered the procedure reasonable, we used it for the two students in our sample.

Application of “Rate of Progression” Methodology Prior to Issuance of the DCL
(Section IV of UOP comments)

UOP Comments. UOP presented six arguments to support its position that the audit report cannot recommend implementation of DCL methodology prior to February 2004. UOP stated—

- The pre-DCL regulations and guidance did not provide for a “rate of progression” methodology based on academic progress.
- The Department declined to provide guidance regarding the calculation despite repeated requests from UOP and other institutions as far back as 1999, and did not propose a “rate of progression” methodology prior to issuance of the February 2004 DCL.
- When the Department issued the guidance, it acknowledged that the DCL’s “rate of progression” methodology did not exist prior to February 2004 and that the methodology did not apply retroactively.
- The Department had previously reviewed and approved UOP’s Return of Title IV calculations without applying a “rate of progression” methodology.
- The “rate of progression” methodology was not reasonably ascertainable from the Title IV regulations and therefore, cannot be enforced prior to February 2004 as a matter of law.
- The audit report’s reliance upon UOP’s remapping procedures (rescheduling of the date for the second disbursement) for complying with disbursement rules is misplaced because the disbursement rules do not apply to the Return of Title IV calculation. UOP claimed that the payment period for disbursement purposes, as discussed in 34 C.F.R. § 668.4, is distinct from and has no bearing on the Return of Title IV calculations under 34 C.F.R. § 668.22. While the definition of a payment period in § 668.4 uses both calendar time and academic credits, the definition in § 668.22 is measured solely on the basis of calendar days. UOP states that similar to the treatment of institutional charges, the days in the payment period should be measured as of the beginning of the payment period. UOP states that its procedure conforms to the statute requirements.

OIG Response. With respect to the first five bullets, the draft report does not propose retroactive enforcement of the DCL methodology. As stated in Footnote 6 to the report, for the time period prior to March 2004, the draft report uses the DCL rate of progression methodology solely for the purpose of estimating the potential financial impact of UOP’s failure to use appropriate payment period end dates. Recommendation 1.1, which addresses the period prior to March 2004, states that “UOP should use either the methodology described in DCL GEN-04-03, or another methodology that appropriately calculates the total number of calendar days in the payment period as of the student’s withdrawal date.” For Return of Title IV calculations UOP performed prior to its implementation of the DCL methodology in December 2004, UOP did not use the number of calendar days in the payment period as of the student’s withdrawal date, as required by the HEA § 484B(d)(1) and reiterated in 34 C.F.R. § 668.22(e)(2)(i) and (f)(1)(i).

Regarding the last bullet, in its discussion of Return of Title IV Funds, the 2002-2003 SFA Handbook states on page 2-103 “The definition of a payment period is the same definition used for other Title IV program purposes. This definition is found in 34 CFR 668.4.” On pages 2-35 through 2-38, SFA Handbook explains that for nonterm credit hour programs, the first payment period of a full academic year is the period of time in which the student completes the first half of the academic year, as measured in credit hours. The second payment period is the period of time in which the student completes the second half of the academic year as measured in credit or clock hours. The Return of Funds calculation uses the institutional charges as determined at the beginning of the payment period because the amount of aid awarded is based in part upon the charges for the credits the student is required to complete in the payment period. For students who attempt courses, but fail to earn credits, the number of credits required for the payment period does not change; therefore, the institutional charges are not adjusted. However, for these same students, the period of time in which the student may be expected to complete the payment period usually does change from the date projected at the beginning of the payment period. The report does not specify that UOP use the same remapping procedures that it uses for the disbursement process. However, it does state that UOP should have a policy to review, and revise, as necessary, the payment period end dates before performing Return of Title IV calculations, as provided in the HEA § 484B(d)(1) and 34 C.F.R. § 668.22(e)(2)(i) and (f)(1)(i).

Application of “Rate of Progression” Methodology After Issuance of February 2004 DCL
(Section V of UOP comments)

UOP Comments. UOP stated that it worked diligently to implement the DCL timely, but immediate implementation was a practical impossibility. UOP stated—

- To maintain reliability of UOP’s customized and extensive automated systems, even small policy changes can present large implementation challenges.
- UOP implemented the DCL as soon as practically possible, given the complexity of its systems and necessary multi-stage implementation process.
- UOP was in the midst of a PeopleSoft conversion which could not be delayed and which occupied a significant amount of time and effort from UOP’s technology staff. UOP was also in the process of implementing software changes in response to the Department’s annual issuance of regulatory updates to financial aid processes.
- UOP does not believe the Department expected schools to implement all aspects of the DCL instantaneously after its issuance, because 1) the DCL guidance was not mandatory, 2) the Department did not expect that one institution would be affected by the full scope of the guidance provided in the DCL (although this was the case for UOP), 3) the Department still has not revised its own Return of Title IV software to accommodate the DCL changes, 4) the Department did not hold training on the DCL until at least six months after it was issued, and 5) the specific guidance in the DCL relevant to the audit report was developed by the Department over a period of two years and reversed prior Departmental guidance and practice.

OIG Response. We recognize that UOP faced hurdles in its implementation process, but the DCL contained no provision for delayed implementation. It states that the guidance is provided to assist schools with Return of Title IV Aid calculations made after the date of its issuance (February 2004). Also, it appears that UOP had not considered correcting the Return of Title IV calculations it performed in the time period between the February 2004 issuance of the DCL and UOP's December 2004 implementation.

Enforceability of DCL
(Section VI of UOP comments)

UOP Comments. UOP stated that the DCL is non-binding guidance and was an attempt to revise a legislative rule without following required notice and comment procedures. UOP stated—

- The OIG concedes that the DCL is not mandatory and that the Department typically has characterized “Dear Colleague” letters as interpretive guidance. UOP stated that the DCL guidance conflicts with Federal statutory and regulatory provisions, and that amending statute through an interpretive rule, or the issuance of guidance, is beyond the authority of the Department.
- The DCL guidance establishes a standard for which there is no statutory or regulatory authority, constitutes a change from prior agency practice, and attempts to amend prior regulatory standards. Therefore, it meets all of the established definitional criteria of a regulation for which notice and comment rulemaking was required.
- The DCL did not comply with master calendar requirements, which provides entities with the time to implement changes in a reasonable and organized fashion.
- No school could implement the new “rate of progression” method immediately upon its publication since institutions are required to develop an official withdrawal and refund policy that must be communicated to enrolled and prospective students.

OIG Response. As noted above, we agree that the DCL guidance is not mandatory. But, given that UOP implemented the DCL methodology, our review necessarily evaluated the implementation, including its timeliness. Any challenges to the guidance presented in the DCL, as well as to the timeframe, or lack thereof, allowed for implementation must be presented to the Department.

Financial Impact of the Finding
(Sections VII and VIII of UOP comments)

UOP Comments. UOP stated that the total financial impact described in the Finding is based upon inaccurate figures and mistaken assumptions that are contradicted by the Department's guidance and the audit work papers. UOP stated—

- The methodology used by the OIG to estimate the projected end of a payment period significantly overestimates the impact of a failed course upon the timeframe for a student's completion of the remaining courses within a scheduled payment period. The DCL guidance anticipated, and the 2004-2005 FSA Handbook reiterated, that the

projection would be based upon how a student was progressing through the program, not just through one isolated payment period.

- No liabilities are owed for students who returned within 180 days and earned the Title IV funds disbursed to them for the payment period. The 2003-2004 Federal Student Aid Handbook states that a student who reenters a program within 180 days of the withdrawal is immediately eligible to receive all Title IV funds that were returned when the student ceased attendance. UOP noted that the OIG work papers disclosed that 7 of the 19 students cited for questioned costs in the sample of 25 students had reenrolled within 180 days of their respective withdrawal dates. Three of the seven students completed the payment period and earned 100 percent of funds disbursed for the period. Two students completed additional courses in the payment period, thus, increasing the percentage of Title IV earned.
- Nearly two-thirds of the total financial impact cited in the draft audit report is premised upon the theory that UOP should have followed a “rate of progression” methodology between September 2002 and February 2004. The audit report does not, and can not, identify any published guidance, regulation, fact, or rationale to substantiate the theory that UOP was required to apply the “rate of progression” methodology before issuance of the DCL.
- The 25 students in the sample had withdrawal dates prior to the DCL issuance date. The DCL states “[f]or any student who withdrew prior to the release of this letter and its guidance, we expect that an institution would have complied with the requirements of the law, the regulations, and any prior guidance we have issued on the topics covered in this letter.” Based on this guidance, none of the Return of Title IV calculations for the 25 students were subject to the “rate of progression” methodology.
- The draft audit report did not segregate out the portion of the funds to be returned by the student and inaccurately characterizes dollars that fall within the student portion of the return calculation as excess amounts that UOP may have retained.
- The auditor’s conclusion on OIG work paper G.1.16 contradicts the conclusion in the draft audit report for the sampled 25 students. The OIG work paper concluded that the percentage calculations were not reasonable for only 4 of the 25 students sampled, and that for 3 of the 4 students, there was no impact on the refunds. In contrast, the draft audit report based the financial impact on recalculation of 19 of the 25 calculations.
- The methodology did not consider the regulatory flexibility that allows institutions to calculate the Return of Title IV funds based on the midpoint of the payment period for those students who unofficially withdrew. Title 34 C.F.R. § 668.22(c)(iii) states that, for participating institutions such as UOP that are not required to take attendance, the withdrawal date for students who “cease attendance without providing official notification to the institution of his or her withdrawal ... is the mid-point of the payment period (or period of enrollment, if applicable).”

UOP also stated that the draft report penalized UOP for using a conservative methodology (i.e., the last date of attendance) to determine the withdrawal date of a student who unofficially withdrew. UOP claimed that the amount of aid that it could have retained would have increased if UOP had used the midpoint of the payment period.

OIG Response.

- UOP is correct regarding the statements in the DCL and Handbook. However, the example immediately following the cited statements demonstrates that only the progress in the payment period is used for calculation purposes. When UOP implemented the DCL guidance, it also used the progress in the payment period for the calculation.
- The students' later status was irrelevant to our assessment of the accuracy of UOP's calculations since UOP had no knowledge of students' eventual return to enrollment at the time it performed the calculations. We added a statement to the report to acknowledge that our quantification of the potential financial impact was not adjusted for students who returned within 180 days and later earned the Title IV funds disbursed for the payment period. We also removed the statement from Recommendation 1.2 stating that UOP should specifically return the estimated questioned costs for the calculations that UOP performed in March 2004 for the 158 students that we identified as a higher risk population.
- The DCL methodology was used to demonstrate the financial impact of the finding since it is a methodology that is acceptable to the Department. As we noted in the recommendations, UOP could use the DCL methodology or another methodology that appropriately calculates the percentage of payment period completed, based on the actual end of the payment period at the point the student withdrew.
- UOP is correct that the students in our sample did have withdrawal dates prior to the issuance of the February 2004 DCL. However, our sample was selected on the basis of calculations performed by UOP. The DCL stated that it was issued to assist schools with "calculations" performed after the date of the letter. Since UOP did not implement the DCL methodology until December 2004, UOP had an obligation to demonstrate that its calculations were otherwise reasonable and appropriate. UOP's response did not demonstrate how the calculations it performed for the 25 students in our sample were a reasonable application of the regulations and prior guidance. Regardless of the implementation date for the DCL, the results of our sample are representative of the financial impact of UOP's failure to review and adjust the payment period end dates.
- Our review was designed to assess the overall financial impact of the finding. We included a statement in the report to acknowledge that our quantification of the potential financial impact did not segregate out the portion of funds to be returned by the student.
- There is no contradiction in the work papers. As noted in the "Objective, Scope, and Methodology" section of the report, the 25-student sample was used for two purposes. It was used to evaluate whether UOP's refund policies and procedures were in place and working as described (i.e., work paper G.1.16), and it was used to assess the financial

impact of UOP's delayed implementation of DCL GEN-04-03 (i.e., work paper G.1.20.) Our conclusions for these two audit work papers were different.

- We acknowledge that UOP was eligible to use 50 percent as the percentage of Title IV aid earned for students who withdrew without notification. However, since UOP's procedures for calculating the Return of Title IV opted to use the student's last day of attendance to calculate the percentage of Title IV aid earned, that is the process we audited.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of the audit was to determine whether UOP has policies and procedures that provide reasonable assurance that the institution properly calculates and returns Title IV funds for withdrawn students. Our review covered return calculations performed during the period September 1, 2002 through March 31, 2004. We expanded our review through March 31, 2005 to evaluate UOP's methodology for calculating the "percentage of Title IV aid earned" after the issuance of DCL GEN-04-03.

The initial audit objective was to determine whether UOP was administering the Title IV programs in compliance with the HEA and applicable regulations and program guidance. After performing preliminary fieldwork, we refined the audit objective to focus on two areas: Title IV disbursements and the return of Title IV funds for withdrawn students. The final audit report on our review of Title IV disbursements was issued on August 24, 2005.

We relied on data from Apollo's Student Record, Financial Aid, and Accounting systems to identify return of Title IV calculations performed during the audit period (audit universe) and to evaluate the effectiveness of UOP's policies and procedures. Apollo provided us with electronic files containing selected system tables extracted from backup files created on May 10, 2004 from the Student Record, Financial Aid, and Accounting systems. To assess the reliability of the data, we compared selected data in the extracted system tables to data in Apollo's active system for 11 students randomly selected from the audit universe. We also compared selected data for 11 students randomly selected from Apollo's active system to data in the extracted system tables. In addition, we confirmed the total funds for Title IV programs included in the extracted tables with the total amounts shown in the Department's National Student Loan Data System. We traced attendance data in the institution's Campus Tracking system to attendance data in the Student Record system. We also compared hardcopy rosters at the Sacramento Valley Campus and attendance data for UOP Online to the Campus Tracking system. After we expanded our audit period, Apollo provided us with additional electronic files containing selected system tables extracted on July 9, 2005 from the Financial Aid system. We compared data in the additional files to data contained in the initial electronic files and Apollo's active systems. Based on our understanding of Apollo's systems and the results of tests performed on the data, we concluded that the data were sufficiently reliable to be used in meeting the audit objective.

To evaluate internal controls relevant to our objective, we reviewed written policies and procedures applicable to UOP's student financial aid processes and interviewed Apollo, UOP, and ACS officials and staff who were involved in the administration of the Title IV programs. We gained an understanding of the electronic processes used by the Student Record, Financial Aid, and Accounting systems in making determinations related to return of Title IV calculations. We also gained an understanding of the Campus Tracking System used to track student attendance for campus-based locations and UOP Online.

We reviewed UOP's policies and procedures for identifying withdrawn students.⁷ For procedures for students who officially withdrew, we reviewed student notification documentation for 12 students judgmentally selected from the extracted system tables.⁸ For procedures for students who had unofficially withdrawn, we used data from the extracted system tables to assess the reasonableness of the time elapsed between the student's last date of attendance and the date on which UOP determined that they had withdrawn.⁹ We also gained an understanding of the situations where a student was listed on the Exit Report, but was, in fact, still in attendance, such as when a student was on an approved leave of absence. Our review of the completeness of the Exit Reports was limited to gaining an understanding of the process used to create the reports.

To assess whether ACS performed required Return of Title IV calculations for withdrawn students, we reviewed information contained in UOP's systems for students listed on Exit Reports for whom ACS determined that a calculation was not necessary. During the period from September 1, 2002 through March 31, 2004, ACS made 81,405 such determinations. We stratified the determinations into five groups based on one or more of the nine reason codes (i.e., basis for the conclusion that a Return of Title IV calculation was not needed) and determinations without a reason code. We reviewed student information for 90 determinations randomly selected from the groups.

To determine if UOP's refund policies and procedures were in place and working as described, we reviewed Return of Title IV calculations performed in March 2004 for students who had completed more than 60 percent, but 75 percent or less, of the payment period and who had attended at least one course for which the student failed to earn credit.¹⁰ From the initial extracted system tables, we identified 2,768 out of 75,254 Return of Title IV calculations

⁷ The Return of Title IV process is initiated when an institution determines that a student has withdrawn. At UOP, students may withdraw officially by notifying the institution or they may withdraw unofficially by failing to attend for 29 days without an approved leave of absence (21 days for students in the State of Georgia).

⁸ The 12 students represented withdrawn students from different campuses who had withdrawn during various months of the audit period.

⁹ Students who had not attended class for 29 days are identified weekly on UOP's system-generated Exit Report. ACS staff reviewed records for student listed on the Exit Report to determine whether the student had unofficially withdrawn.

¹⁰ We considered students who failed to progress according to their schedules as a higher risk population for improper Return of Title IV calculations. The 60 percent of completion is significant because students who complete more than 60 percent of the payment period earned the entire amount of the awarded Title IV aid. The 75 percent of completion was used because the financial impact of recalculations of the percentage of Title IV aid earned by the student would be zero unless the recalculated percentage fell below 60 percent. For students in this group, UOP determined that the student had earned 100 percent of the Title IV aid awarded for the payment period. Thus, no funds needed to be returned to lenders or the Department.

performed during the period September 1, 2002 through March 31, 2004 that met the above criteria.¹¹ We identified 158 Return of Title IV calculations performed in March 2004 that met the above criteria. We randomly selected 25 of the 158 calculations for review of student information. For each selected calculation, we (1) reviewed the payment period dates used, 2) confirmed the last date of attendance with information in attendance records, 3) confirmed the amount and type of financial aid received against disbursement records, 4) assessed the reasonableness of institutional charges, and 5) verified that the automated calculation process was mathematically sound. We also judgmentally selected an additional nine return calculations to ensure that our review included UOP's treatment of post withdrawal disbursements. We also used the 25 randomly selected Return of Title IV calculations to assess the financial impact of UOP's delayed implementation of DCL GEN-04-03. We recalculated the percentage of payment period completed for the 25 calculations using the methodology described in DCL GEN-04-03 and determined the Title IV funds to be returned to lenders or the Department.

To assess UOP's implementation of the methodology described in DCL GEN-04-03 and confirm the implementation date, we reviewed 24 of the 28,226 Return of Title IV calculations performed between December 8, 2004 and March 31, 2005. Ten calculations were randomly selected from calculations performed during the period December 8, 2004 to January 8, 2005. The other 14 calculations were judgmentally selected from the period January 3, 2005 to March 31, 2005 based on the percentages of completion used in the calculations and dates the calculation was performed.

To assess whether UOP returned Title IV funds timely, we reviewed Return of Title IV calculations for students who had completed zero to 60 percent of the payment period and had attended courses for which the student failed to earn credit. From the 75,254 Return of Title IV calculations performed during the period September 1, 2002 through March 31, 2004, we identified 6,586 calculations that met the above criteria. This is one subgroup of calculations where ACS determined that the return of Title IV funds was required. For 40 randomly selected calculations, we evaluated the number of days between the date the institution determined that the student had withdrawn and the date the funds were wired and verified that the amount returned to the lender or Department equaled the amount that ACS had calculated as due.

We performed fieldwork at the Apollo and UOP administrative offices and UOP Online in Phoenix, Arizona, and the UOP Sacramento Valley Campus in Sacramento, California. We held an exit briefing with Apollo officials on September 19, 2005. We performed the audit in accordance with generally accepted government auditing standards appropriate to the review as described above.

¹¹ The total excludes calculations for students who had more than one Return of Title IV calculation during their enrollment at UOP. The calculations were excluded to simplify our selection of calculations for review.

ADMINISTRATIVE MATTERS

Statements that managerial practices need improvements, as well as other conclusions and recommendations in this report, represent the opinions of the Office of Inspector General. Determinations of corrective actions to be taken will be made by the appropriate Department officials.

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 Education Department official who will consider them before taking final Departmental action on this audit.

Theresa S. Shaw
Chief Operating Officer
Federal Student Aid
U.S. Department of Education
Union Center Plaza, Room 112G1
830 First Street, NE
Washington, D.C. 20202

It is the policy of the U.S. Department of Education 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 to members of the press and general public to the extent information contained therein is not subject to exemptions under the Act.

Sincerely,

/s/

Gloria Pilotti
Regional Inspector General for Audit

ATTACHMENT

UOP Comments to the Draft Report



APOLLO GROUP, INC.

UNIVERSITY OF PHOENIX
INSTITUTE FOR PROFESSIONAL DEVELOPMENT
COLLEGE FOR FINANCIAL PLANNING
WESTERN INTERNATIONAL UNIVERSITY

November 30, 2005

Ms. Gloria Pilotti
Regional Inspector General for Audit
United States Department of Education
Office of Inspector General
501 I Street, Suite 9-200
Sacramento, CA 95814

Re: Draft Audit Report titled, *University of Phoenix's Processing of Return of Federal Student Aid for the Higher Education Act (HEA), Title IV Programs*; Control Number ED-OIG/A09F0008

Dear Ms. Pilotti:

This responds to the above-referenced draft audit report dated September 30, 2005 (the "Draft Audit Report"). Enclosed please find written comments by which Apollo Group, Inc., and the University of Phoenix ("UOP") respond to the findings and recommendations in the Draft Report.¹

The Draft Audit Report includes the following statement:

"We concluded that UOP had policies and procedures that provided reasonable assurance that the institution properly identified withdrawn students, appropriately determined whether a Return of Title IV calculation was required, returned Title IV funds for withdrawn students in a timely manner, and used appropriate methodologies for most aspects of calculating the return of Title IV aid." Draft Report at page 2.

These audit results reflect the confirmation by OIG that UOP's policies and procedures are generally sound and compliant. The Draft Audit Report also includes Finding 1 pertaining to UOP's determination of the percentage of Title IV aid earned in the calculation of the return of Title IV aid. As is detailed in the enclosed comments, UOP does not concur with Finding 1.

¹ By your email transmittal dated November 10, 2005, the OIG extended our deadline for submitting written comments to November 30, 2005. Therefore this response is timely filed.

On behalf of the Apollo Group, Inc. and the University of Phoenix, we extend our appreciation to you and the other OIG personnel for our cooperative efforts towards resolution of this audit, and we look forward to continued work together towards conclusion of this matter.

Sincerely Yours,

\s\

Robert T. Collins
Vice President of Student Financial Aid

UNIVERSITY OF PHOENIX COMMENTS IN RESPONSE TO FINDING ONE

I. INTRODUCTION: THE OIG AUDIT AFFIRMS THAT UOP'S DISBURSEMENT AND RETURN OF TITLE IV FUNDS GENERALLY COMPLIED WITH THE TITLE IV, HEA PROGRAM REGULATIONS.

The University of Phoenix (UOP) disagrees with Finding No. 1 in the Draft Audit Report issued by the United States Department of Education Office of Inspector General (the OIG) entitled, "*University of Phoenix's Processing of Return of Federal Student Aid for the Higher Education Act (HEA)*." Therefore, UOP also disagrees with the recommendations that are predicated upon the finding. UOP's reasons for disagreement with Finding 1 and its recommendations are summarized and then detailed below.

At the outset, Finding 1 should be read in the appropriate context. After more than a year of close cooperation between UOP and the OIG, during which multiple OIG field personnel devoted significant time and effort over many months auditing UOP, the OIG repeatedly concluded that UOP's administration of the Title IV, HEA programs was generally compliant and effective throughout the audit period. Such conclusions were reached in the August 24, 2005 OIG Final Audit Report issued after the first audit phase (ED-OIG/A09E0015), entitled, "*University of Phoenix's Processing of Student Financial Aid Disbursements for the Higher Education Act, Title IV Programs*" and in the Draft Audit Report that is the subject of the comments which follow.

The first affirmation that UOP's administration of the Title IV programs is generally compliant was presented in the August 2005 OIG Final Audit Report, which stated as follows:

"[e]xcept for two areas, we concluded that UOP had policies and procedures that provide reasonable assurance that the institution properly makes initial and subsequent disbursements to students enrolled in Title IV eligible programs. We found that UOP used an automated process for checking eligibility prior to making Title IV disbursements that placed a hold on disbursements that failed the eligibility checks. We also found that the staff, who reviewed disbursements that failed the eligibility checks, generally made proper decisions regarding student eligibility for released disbursements."

Final Audit Report at page 2.

Only two minor exceptions were cited in that report, one of which was contested and remains under review.

The Draft Audit Report reflects the results of the second and final phase of the same OIG audit, and focuses upon UOP's processing of the return of Title IV funds for withdrawn students. This Draft Report once again concludes that UOP was generally compliant throughout the audit period. The Draft Report affirms that UOP's Return of Title IV methodologies were timely and appropriate, as follows:

“We concluded that UOP had policies and procedures that provided reasonable assurance that the institution properly identified withdrawn students, appropriately determined whether a Return of Title IV calculation was required, returned Title IV funds for withdrawn students in a timely manner, and used appropriate methodologies for most aspects of calculating the return of Title IV aid.”

Draft Audit Report at page 2.

UOP has worked cooperatively with the OIG throughout the audit and is proud and pleased to have earned and received the OIG’s positive findings affirming UOP’s success in achieving compliance with the program regulations. The two foregoing quotations provide powerful affirmation of the University’s effective and compliant role as an important participant in the federal student aid programs.

The sole finding cited in the Draft Audit Report arises out of the OIG’s assertion that “UOP applied inappropriate methodologies to determine the ‘percentage of Title IV aid earned’ for calculations performed from September 1, 2002 through December 7, 2004.” Before detailing the reasons why UOP disagrees with that conclusion, it is important to place this narrow finding, which is focused solely upon the one referenced component of the Return of Title IV calculation, in the proper context. The finding does not suggest that UOP’s Return of Title IV processes were deficient or untimely. Instead, Finding 1 is focused upon a technical debate concerning one step in the return calculation. The finding does not negate the expressly stated OIG conclusions, based upon the audit fieldwork, that UOP properly identified withdrawn students, that UOP appropriately determined whether a Return of Title IV calculation was required for those students, that UOP returned Title IV funds to withdrawn students in a timely manner, and that UOP used appropriate methodologies for most aspects of calculating the Return of Title IV aid. The Draft Audit Report generally affirms that UOP’s Return of Title IV procedures and processes were compliant, appropriate, effective, and timely.

II. SUMMARY OF RESPONSE

The sole finding in the Draft Audit Report asserts that UOP “applied inappropriate methodologies to determine the ‘percentage of Title IV earned’ for withdrawn students.” The finding refers to recent guidance from the U. S. Department of Education announcing a new “rate of progression” methodology, and interprets that new methodology with respect to students attending UOP. This new percentage calculation methodology was first made known to the financial aid community in a Dear Colleague Letter published on February 13, 2004 (the “DCL”), and it departs from the method that is set forth in the Department’s governing regulations. Whereas the governing regulations specify that the percentage is calculated based upon elapsed calendar time, the Department’s new guidance, as interpreted in the Draft Report, effectively substitutes an academic progress measure in lieu of the calendar time standard. We respectfully believe that the OIG interpretation, and the resultant draft finding, are in error and should be excluded from any final audit report.

Finding 1 in the Draft Audit Report (“Finding 1”) applies the new DCL Rate of Progression methodology to Return of Title IV calculations performed by UOP for students who withdrew during the seventeen-month period prior to the DCL’s February 2004 issuance date. Finding 1 also applies the new methodology to the nine-month period from the DCL date through December 7, 2004.

UOP vigorously disagrees with the timeframes applied by the Draft Audit Report, with the substance of Finding 1, with the analysis and methodologies applied by the finding, and with the asserted financial impact of the finding. The reasons supporting this position are detailed in the comments below, and can be summarized as follows:

- The new rate of progression methodology cannot be applied to the pre-DCL timeframe because:
 - The financial aid community never received any notice regarding a new rate of progression requirement prior to the DCL.
 - The DCL expressly states that it is not to be applied retroactively.
 - The new rate of progression method is a stark departure from the calculation methodology promulgated and published by ED.
 - The new methodology is contrary to the statutory and regulatory scheme, and was not ascertainable from any source.
 - Despite multiple opportunities and requests from the financial aid community, the Department declined to provide any guidance regarding the percentage earned calculation or to propose a new methodology prior to the DCL.
 - The Finding’s reliance upon separate UOP “remapping” procedures that complied with disbursement rules is misplaced. Those disbursement rules do not apply to the return of funds calculation.

- The new rate of progression methodology cannot be applied to the timeframe from February until December 2004 because:
 - UOP worked diligently to implement the DCL given the massive scope and complexity of its automated systems and the multiple interrelated Return of Title IV revisions.
 - The timing of the issuance of the DCL made it impractical for UOP to implement the suggested changes immediately.
 - ED did not and could not reasonably have expected participating institutions to implement all aspects of the DCL immediately upon issuance.
 - No liabilities or questioned costs can lawfully be imposed under the DCL. Because the new rate of progression methodology is a stark departure from the existing statutory and regulatory scheme, the DCL is either non-binding guidance, or a legislative rule requiring advance notice and comment.

- As a legislative rule or HEA-defined regulation, the DCL is not enforceable absent application of the Master Calendar requirements.
- The Draft Audit Report substantially overstates the financial impact of Finding 1 because:
 - The finding relies upon an inaccurate and misleading projection methodology that arbitrarily minimizes student progression rates, overextends student payment periods, and understates the percentage of Title IV aid earned.
 - Finding 1 ignores the fact that a substantial number of the cited students returned to UOP within 180 days and earned all of the aid questioned in the Draft Report.
 - The Draft Report arbitrarily triples its purported financial impact by applying the rate of progression methodology to the pre-DCL period. By the Department's own published statements, the methodology did not apply during that timeframe.
 - The 25-student sample relied upon as the sole basis for the asserted financial impact supports zero liabilities, because all of those students were withdrawn before the DCL was issued; the DCL expressly states that it does not apply to prior withdrawals.
 - The financial impact analysis arbitrarily omits a crucial required component of the Department's Return of Title IV calculation formula, thereby overstating financial impact.
 - The OIG's fieldwork, work papers, and written analysis contradict Finding 1 and its purported financial impact.
 - Finding 1 arbitrarily fails to account for the midpoint rule and its impact upon any recalculation of Title IV returns at UOP.

For all of these reasons, Draft Audit Report Finding 1 should be stricken from any final audit report.

III. FINDING ONE CENTERS AROUND THE DEPARTMENT'S IMPLEMENTATION OF A NEW "RATE OF PROGRESSION" METHODOLOGY FOR DETERMINING THE PERCENTAGE OF TITLE IV AID EARNED FOR WITHDRAWN STUDENTS.

Before discussing UOP's reasons for disagreement with Finding 1 and its recommendations, this section describes the governing regulation and its methodology for determining the percentage of Title IV aid earned for withdrawn students. This section also describes the February 2004 Dear Colleague Letter (DCL) which introduced a new and different calculation methodology. As discussed in section IV, Finding 1 inexplicably recommends the retroactive application of the new DCL methodology to periods prior to February 2004 notwithstanding explicit statements in the DCL that the Department would not apply the methodology retroactively. As discussed in section V,

the recommendation in Finding 1 that the Department also enforce the new and previously unannounced DCL methodology immediately after February 2004 is also arbitrary, unreasonable, and unlawful.

A. The Governing Regulation Bases The Percentage of Aid Earned For Withdrawn Students on Elapsed Calendar Time.

Section 668.22 of the Code of Federal Regulations establishes the rule for determining the amount of Title IV funds a school and student must return to the Title IV programs when the student withdraws from the institution. The regulation bases the amount of funds that must be returned on the amount of Title IV funds the student has “earned” during the payment period in which he or she withdrew from the school.¹ The amount of Title IV funds “earned” is premised on the percentage of the payment period that the student completed.²

The regulation explicitly states that the percentage of the payment period that the student completed should be determined in accordance with the terms of subsection 668.22(f).³ That subsection contains two definitions of “the percentage of the payment period ... completed,” one for credit hour programs such as UOP’s and one for programs measured in clock hours. The credit hour calculation is based on calendar days:

“[T]he percentage of the payment period or period of enrollment completed is determined—

(i) in the case of a program that is measured in credit hours, by dividing the total number of calendar days in the payment period or period of enrollment into the number of calendar days completed in that period as of the student’s withdrawal date; ...”⁴

The calculation by its terms turns on elapsed calendar time – specifically, the number of calendar days completed in the payment period as of the student’s withdrawal date. The regulation is expressed solely in terms of days completed. There is no reference of any kind to credit hours completed or earned as of the student’s withdrawal date.

By way of example, Student 1 in the 25 Return of Title IV students drawn from the March 2004 “high risk” sample, completed 95 out of 155 days in the payment period. The student attempted two 3-credit courses during those 95 calendar days and successfully completed one 3-credit course. Under the regulation, this student would have earned 61.3% of the Title IV funds (95 divided by 155). Since Student 1 completed more than 60% of the payment period as determined under subsection 668.22(f), he

¹ 34 CFR § 668.22(e).

² Id.

³ Id.

⁴ 34 CFR § 668.22(f).

earned 100% of the Title IV aid in the payment period.⁵ Thus, neither the student nor UOP were required to return any of the funds provided for that payment period.

B. The February 2004 Dear Colleague Letter Proposes A New Rate of Progression Methodology Premised On Academic Progress, Rather Than The Regulatory Methodology Of Elapsed Calendar Time.

In February 2004, ED issued a new Dear Colleague Letter addressing a multitude of issues including the calculation of the percentage of payment period completed. The DCL seeks to establish a new “Rate of Progression” methodology for the calculation of Title IV aid earned in a payment period for credit hour programs. In a departure from the terms of the regulation, this new methodology is based on the rate of a student’s academic progress through the program instead of the calendar time methodology prescribed by the regulations.

After describing the definition of the percentage of a payment period completed, the DCL suggests that “the total number of calendar days in the period, may be dependent on the pace at which an individual student progresses through the program.”⁶ Therefore, to calculate the length of a payment period, the DCL proposes that “an institution must project the completion date based on the student’s progress as of his or her withdrawal date to determine the total number of calendar days in the period.”⁷ Thus, the DCL adds a component to the regulation that requires a school to guess the number of days a student might take to complete the payment period and calculate the return of funds accordingly.

The new methodology would result in a different calculation for Student 1 (referenced above). As noted above, this student completed one out of two three-credit courses during a 12-credit payment period measuring 155 days. Student 1 took 95 calendar days to earn the 3 credits. The DCL methodology assumes that the student would need 95 calendar days to complete each additional 3 credit course, or 285 days, to earn the remaining 9 credits in the payment period. The DCL thus would reset the length of the payment period to 380 days. Using 380 days and applying the calculation for the percentage of Title IV aid earned in a payment period described above, Student 1 would be credited with earning only 25% of the Title IV aid provided for that payment period (95 divided by 380).⁸

⁵ This percentage of days completed by the student in the payment period is considered the percentage of Title IV aid earned in the period, unless the student completed 60% or more of the days, in which case he or she will have earned the entire amount of aid given in the period. See 34 CFR § 668.22(e).

⁶ *GEN-04-03*, “Subject: Return of Title IV Aid” (February 2004, revised November 2004).

⁷ *Id.*

⁸ The DCL does not limit credit-hour schools to one specific method for calculating the length of a payment period. Instead, the DCL suggests a school must have a “reasonable procedure for projecting the completion date of the period based on the student’s progress prior to withdrawal.” *GEN-04-03*. Finding 1 adopts the same procedure for projecting the length of a payment period as the example provided in the DCL: using the rate of credits completed per day to project the length of a payment period. As discussed in section VI.A, this methodology actually understates student rates of progression.

C. The DCL Rate of Progression Effectively Replaces The Percentage of Calendar Days Completed In The Payment Period With An Entirely New Calculation Based On The Percentage of Credit Hours Completed In The Payment Period.

Although the DCL and the Draft Audit Report characterize the above-described projection as based on calendar days, a careful review of the calculation demonstrates otherwise. In reality, the methodology ignores calendar days altogether and instead bases the calculation on the percentage of credits earned in the payment period. The regulation itself makes no reference to credits earned or credits in the payment period, or to using the percentage of credits earned in lieu of calendar days if it yields a lower percentage. The net effect is a brand new and different calculation methodology that does not appear in the regulation itself.

The effect is readily apparent in the Draft Audit Report Workpaper summarizing the Finding's recomputations of the return calculations for each of the 25 students in the audit sample of "high risk" students. The spreadsheet demonstrates that, for each of the 23 students that successfully earned at least 1 credit during the payment period, the Finding calculated the percentage of the payment period completed in exact proportion to the percentage of credits earned during the payment period.⁹ Specifically, the percentage calculated in column M consistently equals Column I (Credits Earned for PP) divided by Column H (Credits Req'd for PP).¹⁰

Thus, the calendar days completed by the student is read out of the regulation and has no impact on the calculation when the DCL Methodology is applied. The number of calendar days completed (i.e., the numerator) has no impact on the calculation because the DCL methodology resets the number of days in the payment period (i.e., the denominator) in a manner that ensures that the totals equal the percentage of credit hours completed. Once the number of credit hours earned in the period is determined, the percentage of payment period completed will always remain the same regardless of the number of calendar days the student actually completed.¹¹ This is directly contrary to the

⁹ As discussed below, for the other 2 students, no credits were earned in the payment period, thus the IG could not use credits to project the length of the payment periods, as the periods would have no end.

¹⁰ Audit Team *Electronic w/p* G.1.20.

¹¹ Returning to the example of Student 1, the student withdrew after completing 95 days in the payment period and completing 3 out of 6 credits attempted in a 12-credit payment period. According to the DCL, the number of days in the payment period would be reset to the 380 days purportedly needed to complete the payment period. This is based on the assumption that he will need 95 days to complete every 3 credits. If the calendar days had any impact on the calculation, the percentage would change if Student 1 withdrew earlier (e.g., after 85 days) or later (e.g., after 100 days) even if credits earned remained the same. But the percentage doesn't change under the DCL methodology because the DCL always resets the length of the payment period in proportion to the percentage of credits completed. For example, if Student 1 completed 85 days, the payment period would be reset to 340 days and the percentage earned would remain 25% even though he would have withdrawn earlier. If he completed 100 days, the payment period would be reset to 400 days and the percentage would still be 25%. In fact, the percentage would only change if the credits

regulation's instruction to base the calculation on calendar days completed, not credits earned.

For these "high risk" students, the DCL (and Finding 1) calculate the percentage of Title IV earned using credits completed whenever the percentage of aid earned is lower than the result received by performing the calculation using number of days completed. As a result, the IG has effectively recast the governing regulation to define the percentage of a payment period completed to equal the lesser of the percentage of credits completed or the percentage of calendar days completed in the payment period. But, the regulation contains no such requirement or references to credits earned or completed. Thus, the DCL Methodology constitutes a new component to, and a departure from, the regulation.

D. The New DCL Methodology Arbitrarily Prohibits Certain Students From Earning Title IV Funds For Credits Attempted While Simultaneously Allowing Other Students To Earn Such Funds.

The practical impact of the DCL Rate of Progression methodology is that it arbitrarily prohibits students attending non-term institutions like UOP from earning Title IV funds for credits that they attempt but do not complete. The methodology discounts the institutional charges incurred by a student in attempting these credits. Moreover, it is also inconsistent with ED satisfactory academic progress requirements that recognize that students may attempt and fail courses without losing their Title IV aid.

According to the regulations on Satisfactory Academic Process (SAP), students are permitted to earn Title IV funds even in the event they fail or do not complete a course. The regulations list the elements of a reasonable SAP policy, including in relevant part:

[a] quantitative component that consists of a maximum timeframe in which a student must complete his or her educational program. The timeframe must— ... For an undergraduate program, be no longer than 150 percent of the published length of the educational program measured in academic years, terms, credit hours attempted, clock hours completed, etc. as appropriate;...”¹²

Thus, the student may remain Title IV eligible for up to 150 percent of the length of the student's program. The regulations thereby build in the assumption that students may be unsuccessful in attempting certain credits, but will not immediately lose their Title IV eligibility. Stated differently, the regulations provide that, if a student requires more time than originally scheduled to complete a program, the student will not lose Title IV eligibility during the extra time required to complete the program. The notion that

earned changed. The regulation contains no such requirement. Consequently, the DCL methodology is new and different from the regulatory methodology.

¹² 34 CFR § 668.16(e).

students do not earn funds while attempting credits is antithetical to SAP principles. While it is understood that a non-term student does not qualify for new disbursements until the student earns the credits in the payment period, the regulation does not prohibit the student from earning the disbursements already made for attempting credits during the payment period.

The Draft Audit Report effectively concedes that the DCL methodology collapses when confronted with non-term students who have attempted but not earned credits. As noted above, 2 of the twenty-five “high risk” students in the audit sample failed to earn any credits during the payment period in which they withdrew. Finding 1 could not reasonably conclude under the regulation that the students had not earned any Title IV funds because the students had completed calendar days during the payment period. In these two instances, Finding 1 counted all of the calendar days attended; thereby, acknowledging that the students had earned a portion of Title IV funds notwithstanding the absence of any earned credits.¹³

IV. THE DRAFT AUDIT REPORT CANNOT LAWFULLY RECOMMEND THAT UOP APPLY THE RATE OF PROGRESSION METHODOLOGY PRIOR TO FEBRUARY 2004: THE METHODOLOGY DID NOT EXIST THEN AND THE DEPARTMENT EXPLICITLY STATED SCHOOLS NEED NOT APPLY THE METHODOLOGY RETROACTIVELY.

A. The Pre-DCL Regulations and Guidance Did Not Provide For A Rate of Progression Methodology Based on Academic Progress, Rather Than Elapsed Calendar Time.

As discussed above in section III, the pre-DCL regulations and guidance called for the use of elapsed calendar days in calculating the percentage of a payment period completed. Both the pre-DCL regulations and guidance lacked any requirement to base the return calculation on an academic Rate of Progression methodology. The regulation is premised on calendar days completed, not credit hours earned.¹⁴ The regulation repeatedly references “calendar days” without any reference to a Rate of Progression

¹³ Specifically, Finding 1 did not use the same methodology for these 2 students as it had for the other 23 because it would have resulted in a payment period with no end (i.e., the student withdrew at a pace of completing no credits). Instead, Finding 1 determined the length of the payment period by taking the number of days the student completed and adding those days to the number of days in the scheduled payment period. The Finding then calculated percentage of the payment period completed by dividing the number of days the student actually attended by the recalculated payment period. For example, Student 12 of the OIG sample attended 64 days in a 98 day payment period yet earned no credits. To come up with the percentage of the payment period completed by that student, Finding 1 simply divided 64 by 162 (64 plus 98) to come up with a 39.5% result. Thus, the Finding concluded that the student had earned nearly 40% of the Title IV funds in the payment period without earning any credits. Interestingly, a similarly situated student who had earned 3 credits in the same 64 days in the same payment period would have earned only 25 % of the Title IV funds in the payment period. The difference between the two results underscores the arbitrary nature of the DCL Methodology.

¹⁴ 34 CFR § 668.22(f).

methodology or any requirement to guess or project the number of calendar days in the payment period.

The Department's pre-DCL guidance contains no indication of a Rate of Progression methodology based on credits completed. For example, the 2003-2004 Federal Student Aid Handbook, the last Handbook published prior to the DCL, contains more than 125 pages of guidance on the return of funds calculation. Yet, the Handbook fails to provide any notice to schools of any purported obligation to recalculate the number of calendar days in the payment period. The entire discussion on calculating the percentage of payment period completed for a credit hour, non-term program is encapsulated in the following text:

[f]or a credit-hour program, the percentage of the period completed is determined by dividing the number of calendar days completed in the payment period or period of enrollment, as of the day the student withdrew, by the total number of calendar days in the same period. The total number of calendar days in a payment period or period of enrollment includes all the days within the period, except for institutionally scheduled breaks or five or more consecutive days. Days on which the student was on an approved leave of absence would also be excluded. The days the student withdrew is counted as a complete day."¹⁵

The exact same text appears in the 2002-2003 Handbook. Like the regulation, both editions of the FSA Handbook express Title IV aid earned in terms of calendar days completed in the payment period.¹⁶

Significantly, when the Department added reference to the DCL Rate of Progression methodology to the 2004-2005 Handbook,¹⁷ the Department explicitly classified the new language as a "major change" from prior guidance.¹⁸ Moreover, as explained in section IV.D below, the 2005-2006 Handbook designated the change as "New" rather than a mere "Clarification" of existing policy. These classifications confirm that the DCL guidance constituted a significant departure from prior practice and that prior guidance did not notify institutions of any purported Rate of Progression methodology. These classifications also explain why Finding 1 fails to mention any pre-

¹⁵ 2003-2004 *Federal Student Aid Handbook*, Vol. 2, Chapter 6 – Return of Title IV Funds, p.2-125.

¹⁶ The Rate of Progression methodology is also absent from and contradicted by the regulatory history of the return of funds regulations. In the final comments to the rules promulgated in 1999 which define the percentage of payment period for credit-hour nonterm programs, ED stated that "the basis for earning Title IV, HEA program funds is the time that the student was in attendance at the institution..."¹⁶ Here, ED clearly states that Title IV aid is earned by time in attendance. Any attempt to read credits completed in the definition of Title IV aid earned is contrary to ED's intent in issuing the regulation.

¹⁷ 2004-2005 *Federal Student Aid Handbook*, Vol. 5, Chapter 2 – Overawards, Overpayments, and Withdrawal Calculations, p.5-64.

¹⁸ 2004-2005 *Federal Student Aid Handbook*, Vol. 5, Chapter 2 – Overawards, Overpayments, and Withdrawal Calculations, p.5-ii.

DCL guidance requiring institutions to utilize such a methodology in the return of funds calculation: there was none.

B. The Draft Audit Report’s Reliance Upon UOP “Remapping” Procedures For Complying With Disbursement Rules Is Misplaced: The Disbursement Rules Do Not Apply To The Return of Funds Calculation.

The Draft Audit Report relies on UOP “remapping” practices designed to comply with disbursement-related rules to erroneously conclude that UOP should have used these “remapping” procedures in the return of funds context as well. Finding 1 is incorrect. As confirmed by prior case law, those disbursement-related rules are distinct from and inapplicable to return of funds calculations and do not require institutions to recalculate their payment periods using a Rate of Progression. Consistent with the statute and in step with related Departmental guidance, UOP relied on the separate return of funds regulations that measure the percentage of a payment period completed based on elapsed calendar time in the scheduled payment period when performing its return calculations.

Finding 1 contends that UOP had procedures for revising the start and end dates of payment periods because “students do not always complete their coursework within the established time frames and as a result, the end dates for their payment periods change.”¹⁹ While this is correct, those procedures address the *disbursement*, not the *return*, of Title IV funds. The regulations require schools to disburse Title IV funds on a payment period basis. The definition of a “payment period” in Section 668.4 provides that a new payment period does not begin until the student completes both one-half the weeks and one-half the credits in the academic year. If a student takes longer than originally scheduled to complete the credits, then the scheduled date for the student’s *next* disbursement would be delayed. Accordingly, UOP rescheduled the date for a student’s next disbursement by reviewing the student’s schedule and projecting when the student would likely meet the credits and weeks requirement of the student’s current payment period.

Finding 1 incorrectly contends that UOP should have reviewed and used these revised dates for the return of funds calculation as well.²⁰ This argument is unavailing for multiple reasons. First, the payment period definition in section 668.4 is distinct from the definition of percentage of a payment period completed in section 668.22. As discussed above, the latter is a separately defined term in the regulations that does not refer back to section 668.4 or any predecessor payment period definition. As also discussed above, the definition in section 668.22 is measured solely on the basis of calendar days, not academic credits. In contrast, section 668.4 is measured using both calendar time and academic credits. It is the academic credit component that calls for UOP’s “remapping” procedures. That component is nowhere to be found in section 668.22.

¹⁹ OIG *Draft Audit Report*, p.3 (September 30, 2005).

²⁰ OIG *Draft Audit Report* at p.4.

Second, both the Department and an administrative judge confirmed in a prior administrative decision the distinction between disbursement and return of funds regulations and the inapplicability of one to the other. In that decision, the Department challenged the school's disbursement of Title IV funds at the calendar midpoint of the program. Because the regulation required the school to make the disbursement only after the student had reached the midpoint of the program in credit hours, the ALJ deemed the school's disbursement methodology impermissible.²¹

The school argued that section 668.22 supported its position that the midpoint of an academic program can be determined on a calendar basis, rather than a credit hour basis. Significantly, the Department itself argued in its brief that section 668.22 did not apply because it dealt with the distribution of refunds after a student withdraws from an academic program. The ALJ agreed that the two rules were distinct and that section 668.22 was inapposite to the disbursement matter.²² This conclusion applies equally here: the payment period for disbursement purposes is distinct from and has no bearing on the determinations under section 668.22.

Third, the use of calendar days in the payment period as of the beginning of the payment period is entirely consistent with the Department's explicit instructions with respect to other components of the return of funds calculation. For example, the Department requires institutions to measure the amount of institutional charges incurred by the student for the payment period as of the beginning of the payment period, not as of the withdrawal date.²³ Some schools argued during promulgation of the rule that institutional charges incurred should be adjusted at the time of withdrawal to reflect charges for which the student is held responsible by the school at the time of withdrawal.²⁴ The Department rejected this argument and concluded that the allocation of repayment responsibilities is based upon the institutional charges that were initially assessed.²⁵ Similarly, the days in the payment period for purposes of section 668.22 are measured as of the beginning of the payment period.

Fourth, the measurement of days in the payment period as of the beginning of the payment period is consistent with the underlying language in the statute. The statutory definition of percentage of the payment period completed provides:

the percentage of the payment period ... for which assistance was awarded that was completed, is determined –

²¹ *In the Matter of Colorado School of Travel*, Dkt. No. 94-174-SP (June 14, 1995).

²² This decision was overturned by the Secretary in 1995 on factual grounds not affecting the legal conclusion asserted by the Department and adopted by the ALJ. *In the Matter of Colorado School of Travel*, Dkt. No 94-174-SP (Oct. 2, 1995).

²³ 64 FR 59033 (1999).

²⁴ 64 FR 59033 (1999).

²⁵ 64 FR 59033 (1999).

(1) in the case of a program that is measured in credit hours, by dividing the total number of calendar days comprising the payment period or period of enrollment *for which assistance is awarded* into the number of days completed in that period as of the day the student withdrew;...²⁶

The italicized language refers to the period “for which assistance was awarded.” Finding 1 alleges that UOP used the number of days that had been established as of the student’s most recent certification – i.e., the point in time when the student’s eligibility was determined and aid was disbursed. This is precisely what the statute calls for: as with institutional charges incurred, the number of days in the payment period is measured as of the beginning of the payment period at the time Title IV assistance was awarded.

C. The Department Declined To Provide Guidance Regarding The Calculation (Despite Repeated Requests From UOP and Other Institutions) And Did Not Take The Opportunity To Propose A Rate of Progression Methodology Prior To February 2004.

In contrast to the unsupported suggestions in Finding 1, the Department never issued any notice through regulations or guidance of any pre-DCL Rate of Progression methodology applicable to UOP. Indeed, from the outset, the Department declined to provide guidance to schools like UOP with non-term and non-traditional programs notwithstanding the Department’s acknowledgement that such guidance might be needed. During the Notice and Comment period prior to the publication of the return of funds regulations in 1999, the Secretary specifically asked credit-hour nonterm, and other non-traditional schools if the regulation would create problems:

The Secretary specifically requests comments on whether the proposed definitions of the percentage of the payment period or period of enrollment completed create problems for non-term credit hour programs, correspondence programs, or non-traditional programs.²⁷

In response, one commenter suggested that ED work with the financial aid community to identify the best way to measure the period used in Return of Title IV calculations for non-traditional programs.²⁸ If ED had established a Rate of Progression methodology at this stage, it certainly would have announced it in response to this question. It proposed no such methodology and offered no further guidance in the preamble to the final regulations.²⁹

In 2002, the Department again received requests for additional guidance on return of funds calculations and payment periods from multiple parties, including UOP. The

²⁶ 20 USC § 1091(b)(d)(2) (emphasis added).

²⁷ 64 FR 43035 (1999).

²⁸ 64 FR 59030 (1999).

²⁹ *Id.*

Department again declined the opportunity to provide guidance or to suggest the purported existence of a Rate of Progression methodology. Specifically, UOP and others submitted comments to the proposed regulations, including the aforementioned section 668.4 definition of a payment period. UOP in particular requested clarification from the Department regarding conflicts in regulatory references to payment periods and noted that the conflicts “create significant issues with other provisions such as the Return of Title IV Funds (ROTIV), which is based on the completion of one half of an academic year, as measured in calendar time, not instructional time.”³⁰

In response to this and other comments, ED declined to offer any guidance or clarifications:

Comments: A couple of commenters asked for further clarification of the payment period provisions as they relate to the Return of Title IV Funds provisions and various Title IV program provisions.

Discussion: We will provide additional clarification on the applicability of these changes through appropriate Department publications after publication of these final regulations.

Changes: None.³¹

Thus, as in 1999, the Department explicitly declined to provide guidance at this stage despite multiple requests to do so. Moreover, the Department did not suggest the existence of a Rate of Progression methodology, nor take issue with UOP’s (correct) statement that return of funds calculations are premised on calendar time alone. Finding 1 fails to point to any pre-DCL statement from the Department that UOP and other schools were required to calculate returns in this fashion.

D. When The Department Issued Its Guidance, It Acknowledged That The DCL Rate of Progression Methodology Did Not Exist Prior To February 2004 And That The Methodology Did Not Apply Retroactively.

The Department’s statements upon and after issuance of the February 2004 DCL explain the absence of any prior mention of a Rate of Progression methodology dating back to 1999. Specifically, the Department explicitly and repeatedly acknowledged that the DCL methodology was new and had not existed previously.

First, as discussed earlier, the Department indicated in the Federal Student Aid Handbook that the DCL methodology was new. The 2004-05 Handbook identifies the

³⁰ see University of Phoenix’s comments dated October 4, 2002, submitted to ED in response to August 8, 2002 Proposed Rules.

³¹ 67 FR 67053 (2002).

DCL methodology in a list of “Major Changes” from previous guidance. In the 2005-06 Handbook, the Department inserted the label “New” next to its discussion of the DCL methodology. The introduction to the Handbook underscores the significance of this label in distinguishing the label “New” from the label “Clarification.” The Handbook states that the label “New” refers to new information in the volume, whereas it states with respect to the label “Clarification”: “[w]hen the text represents a clarification rather than a change, it is indicated with this symbol.” The identification of the methodology as a “major change” and “new” rather than a mere “clarification” confirms the Department’s view of the methodology as brand new.

Second, as Finding 1 itself must acknowledge, the Department explicitly stated that the DCL methodology should not be applied retroactively. The DCL states:

This guidance is provided to assist schools with Return of Title IV Aid calculations and procedures that are made after the date of this letter. Schools are not expected to attempt to apply this guidance retroactively. For any student who withdrew prior to the release of this letter and its guidance, we expect that an institution would have complied with the requirements of the law, the regulations, and any prior guidance we have issued on topics covered in this letter.³²

The Department’s decision not to apply the methodology retroactively makes sense: it had not notified schools of this methodology which, by the Department’s own classification, constituted a major change from, rather than a clarification of, past guidance. The Draft Audit Report’s recommendation to retroactively apply the methodology in the face of Department instructions to the contrary is inexplicable and contrary to law.

E. The Department Previously Reviewed And Approved UOP’s Return of Funds Calculations Without Applying A Rate Of Progression Methodology.

The Department’s findings in its 2001 program review of UOP further demonstrate the absence of any purported pre-DCL Rate of Progression methodology. The program reviewers analyzed a sample of return of funds calculations and conducted its own return of funds calculations. They found only nominal discrepancies between the two sets of calculations:

“[t]here is a nominal difference in the actual refund UOP calculated due to the institution’s policy of adding an extra 6 days to the attendance of telecommunications students pursuant to UOP’s policy for calculating refunds.”³³

³² GEN-04-03, “Subject: Return of Title IV Aid” (February 2004, revised November 2004); see also Audit Team *Electronic w/p* G.1.2.

³³ U.S. Department of Education *Final Program Review Determination dated December 17, 2001*, p 2, n.2. w/p HC B.3.5-3.

The program review finding effectively ratifies UOP's calculations under the return of funds rules. The Department did not impose a Rate of Progression methodology with respect to these students, nor suggest that UOP should analyze credits earned as part of its return of funds calculations. The finding constitutes an explicit affirmation by the Department through the program review process of UOP's calculation of Title IV earned based on days attended and justification for the University's continued use of that methodology under the regulations during the pre-DCL period.

F. The Rate of Progression Methodology Was Not Reasonably Ascertainable From The Governing Regulations And, Therefore, Cannot Be Enforced Prior To February 2004 As A Matter Of Law.

As demonstrated above, UOP had no notice of the DCL Rate of Progression methodology prior to February 2004. This new methodology is contrary to methods described in the existing regulations and guidance. The Department acknowledged as much by classifying the new methodology as a "major change" and distinguishing it from a mere clarification of existing rules. Consequently, the University had no reasonable way to ascertain, with any certainty, that such a calculation was suggested in the regulations or guidance.

An agency may not penalize a private party for violating a rule without first providing adequate notice of the substance of the rule."³⁴ When there is no pre-enforcement warning by an agency of a particular interpretation of law and the regulated party acting in good faith cannot identify with ascertainable certainty the standards with which the agency expects parties to conform, the regulated party cannot be punished for noncompliance with the agency's ultimate interpretation.

Where ... the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished."³⁵

Here, UOP's interpretation of the regulation is reasonable: the regulation clearly calls for the return calculation to be based on calendar time, not academic progress. The Department struggled with the text of the regulation: it acknowledged in 1999 that guidance was needed, yet deferred on providing guidance in 1999 and again in 2002. When UOP and other parties explicitly sought guidance, the Department provided none. When the Department reviewed UOP return calculations in 2001, it did not impose or mention any purported Rate of Progression methodology. In short, UOP was not on

³⁴ *Satellite Broadcasting Co. v. Federal Communications Commission*, 824 F.2d 1, 3 (D.C. Cir. 1987).

³⁵ *Id.* at 1333-34.

notice as to any such pre-DCL methodology and cannot be punished retroactively for noncompliance with the methodology.³⁶

This conclusion is in line with established precedent within the Department. An administrative judge held that where the Department fails to provide guidance on a rule and the institution requests guidance from the Department on that matter, the Department cannot retroactively punish the institution for noncompliance with the Department's later adopted interpretation.³⁷ That holding is equally applicable to the facts here.

The Draft Audit Report's recommendation that UOP apply the DCL methodology retroactively is particularly inexplicable in view of the Department's express instructions to the contrary. The DCL states on its face that the methodology and other aspects of the DCL need not be applied retroactively. The Draft Audit Report acknowledges that instruction, yet proceeds to ignore it and propose the retroactive enforcement of the DCL methodology anyway. The DCL cannot lawfully apply to periods prior to its issuance. Moreover, the DCL should not be applied to periods during which UOP and other non-term schools sought and did not receive guidance from the Department on this very matter. The recommendation with respect to the pre-DCL period should be withdrawn.

V. UOP WORKED DILIGENTLY TO IMPLEMENT THE DCL IN A TIMELY MANNER BUT IMMEDIATE IMPLEMENTATION WAS A PRACTICAL IMPOSSIBILITY.

The Draft Audit Report alleges that UOP did not implement the rate of progression aspects of the DCL in a "timely" manner because UOP did not immediately revise its methodology for Return of Title IV calculations when the DCL was issued in February 2004. UOP could not reasonably or practically immediately adopt the new "Rate of Progression" methodology described in the DCL because UOP was required to significantly alter its software systems in order to accommodate all of the changes described in the DCL. Further, the timing of the issuance of the DCL conflicted with major software systems projects already in progress at UOP.

³⁶ For the reasons discussed in this section IV.F., Finding 1 could not be sustained during the pre-DCL period even if the DCL were viewed as a clarification of the regulation. However, for the reasons discussed in section III, UOP's position is that the regulation unambiguously required the calculation to be based on elapsed calendar time and that the DCL rewrote, rather than clarified, the regulation. Therefore, for the reasons discussed in section VII, the Rate of Progression methodology could not be sustained for the post-DCL period either.

³⁷ *In the Matter of Travel University International*, Dkt. No. 94-99-SP. Following the adoption of the Higher Education Act Amendments of 1992, the definition of an academic year was changed to require at least 30 weeks of instruction time. To comply with the law, schools like TUI, who had academic years less than 30 weeks, would be required to reduce their Pell Grant awards. An extended period elapsed before the Department issued regulations on the topic. In the interim, TUI sought clarification from the Department on the effect of the statutory change on its disbursement of Pell Grants. When the Department eventually adopted guidance, it attempted to sanction TUI because TUI's method of disbursing Pell Grants differed from the Department's prescribed method. The administrative judge dismissed the case.

A. UOP Maintains Automated Computer Systems In Order To Accurately And Timely Process Title IV Funds For Thousands Of Students.

UOP currently enrolls over 200,000 students in 34 states, Puerto Rico, and Canada, as well as online. Several years ago, UOP determined that it could not, consistent with its fiduciary obligations, rely solely upon the individual talents of several hundred financial aid processors in order to ensure consistency and accuracy in its administration of the Title IV programs. UOP therefore developed complex automated federal student aid processing systems to accurately and timely process the massive amount of information required to administer Title IV aid programs for tens of thousands of students.

As referenced earlier in this document, the benefit and reliability of UOP's automated systems is evident from the OIG's audit work papers. Over a period of a year, the OIG tested and retested UOP's systems for awarding, disbursing and returning Title IV funds, and with negligible exceptions, found UOP's systems to be extremely reliable. In particular, the OIG work papers consistently reflect "no exceptions" to the various compliance tests conducted by the OIG. The OIG work papers reflect that UOP's systems processed aid with exceptional reliability, referencing only two minor calculation issues with respect to two student files that were addressed before the Draft Audit Report was issued.³⁸

UOP believes that few other schools' systems are as transparent or automated as UOP's systems so as to allow the detailed testing conducted by the OIG. And yet, the OIG's well planned and rigorous testing demonstrated that UOP's systems are exceptionally reliable.

The benefit of having such extensive and reliable customized financial aid systems is that UOP is accountable for every dollar of Title IV funding disbursed to its students, and as a result, UOP students receive only the aid to which they are entitled. This eliminates waste in UOP's administration of the Title IV programs. The cost of having such extensive and reliable systems is that UOP cannot "turn on a dime" to implement changes to its Title IV processing systems. Even small policy changes can present large implementation challenges.

³⁸ See the following OIG Work papers, all of which indicate no exceptions found: A.3.1 Exit Conference & Point Sheets, Phase I Disbursements.; A.3.2 Exit Conference & Point Sheets, Phase II R2T4; D1, Data Reliability (attendance in on-line), (disbursements), (LDA); G.S.1.3 (Test regarding student accounts balancing); G.S.1.4 (R2T4 Calculation Arithmetically Sound); G.S.I.7. (Post withdrawal Disbursements); G1, Ex. 5 (No systemic post-DCL errors in refund calculations) (2 erroneous calculations); G.1.5 Policy & Procedures Review Withdrawal Procedures (acceptable); G.1.6 - Post Withdrawal Procedures (acceptable); G.1.8. R2t4 Calculation accurate; G.1.12 (To Determine if policies and procedures for determining whether a refund calculation required, acceptable); G.1.15 (Timely Return of Title IV funds); G.1.16 (Procedures working as intended); G.1.19 (UOP making appropriate decisions refund not required).

B. UOP Implemented The DCL As Soon As Practically Possible Given The Complexity Of UOP’s Automated Systems And Pre-Existing Obligations To Institute Unrelated Systems Changes.

At the time the DCL was published, the University, in conjunction with its third party servicer, processed on average approximately 15,000 certifications of aid eligibility, 35,000 aid disbursements, and 12,000 Return of Title IV calculations each month. Even a small change to a policy impacting any of these processes requires thorough analysis and careful implementation. If UOP was not this conscientious in implementing changes to its system, it could easily find itself in the position of correcting thousands of transactions each year.

Because of the number of UOP offices that must be involved in financial aid systems changes, such changes generally are effected through committees. The University undertakes a multi-stage implementation process for each proposed financial aid system change. The University must review the proposed change to determine if it involves financial aid policy; coordinate with its financial aid servicers to determine the process implications of implementing the proposed change; work with multiple departments to determine the best implementation method possible; communicate with the appropriate technology staff to determine the technical viability of the change; assure communication among the education, policy and operating divisions to determine the effect the changes may have on existing policies and procedures; draft the technological changes required, considering both short and long term solutions; ensure implementation does not have unintended negative consequences on any other UOP processes for administering the Title IV programs; implement the changes in the system; test the changes; develop training for staff; and train staff.

C. UOP’s DCL Implementation Process

Although the DCL posed significant implementation challenges for UOP, particularly given its issuance date, UOP sought to implement the policy changes as soon as those changes reasonably could be implemented. Beginning on the day the DCL was issued, the University began analyzing the impact the new policies would have on its systems and processes and began to develop solutions for implementation. The implementation of each section of guidance was accomplished under the following process:

- UOP and its servicer undertook an initial review of each provision in the DCL to determine the impact of ED “guidance”
- Draft of initial working chart setting out systems changes that UOP believed would have to be made in order to address all of the changes required by the DCL

- Input on this working chart and initial assumptions from various departments including UOP's third-party servicer and the business and IT departments
- Ongoing legal research to determine the applicability to UOP of certain DCL provisions and the statutory and regulatory support for other provisions
- Regular committee meetings to discuss the DCL and determine the best possible implementation methods to meet ED requirements
- Testing of various implementation scenarios (on paper)
- Regular revisions to working chart reflecting changes in implementation strategy
- Agreement as to "best methods" implementation of each change
- IT development of necessary software
- Review of IT proposals by all affected departments
- Draft memorandum explaining policy and procedural changes
- Testing of software changes
- Training
- Implementation of Software changes

UOP followed this process for each change it was required to make under the DCL, with some changes requiring months of discussion and others requiring very little discussion. UOP's process for implementing each DCL change is outlined in greater detail in Attachment A.

D. The Timing Of The Issuance Of The DCL Made It Impractical For UOP To Implement The Suggested Changes Immediately.

At the time the DCL was published in February 2004, the University was engaged in a very significant financial aid systems upgrade. As is customary for software vendors, UOP's financial aid software vendor, PeopleSoft, had informed its customers in 2002-03 that it would be issuing a new version of financial aid software which would be an upgrade of the current system. PeopleSoft also presented its customers with an "upgrade window" during which PeopleSoft would support a software upgrade. At the end of the window, PeopleSoft would no longer support the old software system. The University planned to upgrade its system toward the end of the permitted window (July 2004) in order to give PeopleSoft ample time to work out many of the software bugs that customarily accompany software upgrades. This is consistent with UOP's general philosophy of waiting until all systems are thoroughly tested before implementing systems changes. The upgrade in question required an entirely new hardware infrastructure, a major database upgrade, transition from a client server architecture to browser based functionality, and the design of new interfaces.

The upgrade was planned and implemented over a 12 month period (June 2003-June 2004) and occupied a significant amount of time and effort from UOP's technology staff. The conversion could not be delayed once the DCL was issued in February 2004 because no support would be available for the old software after July 2004. Therefore,

UOP had no choice but to continue to focus on its systems upgrade as well as its ongoing responsibilities to administer the Title IV programs.

During this same February to July timeframe, UOP also was in the process of implementing software changes in order to respond to ED's annual issuance of regulatory updates to financial aid processes (UOP calls these updates "regulatory releases"). Each year, ED announces changes regarding the calculation, awarding and disbursement of Title IV funds for the upcoming award year (i.e., changes to the Pell table, the FISAP, the ISIR layout and needs analysis calculations). In response to these announcements, which typically are made at least six months before the changes become effective, PeopleSoft releases regulatory software updates to UOP. These updates typically are provided to UOP in February, April and June after PeopleSoft has had a chance to upgrade its software systems consistent with ED's pronouncements. Once the University receives the PeopleSoft updates, UOP's IT department works with the University's financial aid servicer to customize the updates for its systems and roll them out by the July 1 effective date. These systems changes are substantial, affecting all aid to be disbursed during the upcoming award year, and as such, typically take priority over all other IT systems projects during the February – July period. Each update takes the University approximately six weeks to complete. Obviously, the February DCL was issued at the exact same time UOP was scheduled to begin its routine customization of the regulatory updates for the 2004-05 award year.

Due to the complexity of the ongoing software upgrade and the added burden of complying with the routine regulatory updates required in order to prepare for the 2004-2005 award year, the University's staff could not immediately focus exclusively, or even predominantly, on the best methods for updating its financial aid systems as a result of the previously unannounced "assistance" provided in the DCL. Although UOP staff did review the DCL immediately after issuance and began the lengthy process of analyzing the effect of each provision of the DCL on UOP systems, the University's technology staff was not able to dedicate substantial time to the analysis until the PeopleSoft upgrade was completed and the annual financial aid changes instituted (in July 2004).

E. UOP Does Not Believe That ED Expected Schools To Implement All Aspects Of The DCL Instantaneously After Its Issuance.

The OIG notes in its report that UOP was required to implement the changes required in the DCL for all returns calculated immediately after the issuance of the DCL. To support its position, the OIG relies on ED's statement in the DCL that the DCL guidance "is provided to assist schools with Return of Title IV aid calculations and procedures that are made after the date of this letter." DCL, page 2. ED's reference to implementing the DCL changes "after the date of this letter" must be placed in context: ED made this statement directly after a statement that schools were NOT expected to attempt to apply the DCL guidance retroactively. As a result, ED's statement regarding the calculations and procedures made after the date of the DCL does not so much state

that schools were required to institute all changes described in the DCL instantaneously upon issuance of the DCL, as much as it states that schools would not be held responsible for adopting the DCL guidance retroactively. Further, ED does not state that the DCL guidance is mandatory, but states that it is provided to “assist schools” with Return of Title IV calculations. This belies any notion that the policy or guidance stated in the DCL was mandatory and subject to immediate implementation.

We also believe that ED understood the magnitude of the guidance provided in the DCL, but apparently assumed that no one institution would be affected by the full scope of this advice. Thus, ED states in the DCL that “[a]lthough it is unlikely that all the situations addressed in this letter will occur at any one institution, we feel it is important to share the guidance with all institutions. In this way, we hope to encourage the consistent administration of Title IV programs.” In fact, the most substantial advice in the DCL did affect UOP and was implemented at UOP. As a nonterm university, UOP probably is one of the only schools in the country required to make nearly all of the changes anticipated in the DCL.

UOP believes that ED well recognizes the difficult technological issues that policy and rule changes present for schools. This is why ED routinely announces changes to financial aid data processing well in advance of their required implementation.³⁹ Indeed, ED still has not revised its Return of Title IV software to accommodate the DCL changes. If a school uses ED’s Return of Title IV software today to calculate its returns, and the return calculation in question considers a student to whom an inadvertent overpayment was made, ED’s software will conclude that a post withdrawal disbursement should be issued. The school that is using ED’s software must know to ignore the conclusion reached by the software and issue a return to ED. As a result, ED’s current software cannot be used in an automated system.

Given that the DCL was issued to “assist” schools in their Return of Title IV funds calculations, ED routinely announces system changes months before they are required to be adopted, ED has not yet revised its software to address the DCL changes, and ED did not hold training on the DCL until at least six months after the DCL was issued (see DCL ID: ANN-04-08), UOP believes that ED did not expect UOP, or any other school to implement the DCL changes within days or even weeks of the publication of the DCL.

The DCL must be placed in further context. ED issued guidance regarding the Return of Title IV funds in 1998. It then issued comments respecting Return of Title IV funds calculations in the preamble to the Notice of Proposed Rulemaking of August 6, 1999, and the preamble to the Final Regulations, in November 1999. ED issued further guidance to institutions in December 2002 (GEN-00-24) and further commented on

³⁹ See, for example, ED Electronic Announcement published September 1, 2005, titled “2006-2007 Software Developers Specifications;” see also, Announcements of Annual Updates, published at 70 Fed. Reg. 30425 (May 26, 2005)

Return of Title IV funds calculations in the notice of proposed rulemaking issued in August 2002.

In February 2004, approximately 2 years after ED said it would provide additional guidance regarding various Return of Title IV issues, ED issued a detailed, 10 page DCL addressing several aspects of the Return of Title IV formula. ED received several comments to this DCL, but in the end, reconsidered only whether schools that are required to take attendance must determine that a student had withdrawn within 7 days, or whether that deadline should be extended by a week. ED issued a revised DCL in November 2004.

As such, ED's Return of Title IV guidance has been 6 years in the making. The specific guidance in the DCL relevant to the Draft Audit Report was developed by ED over a period of two years and reversed prior ED guidance and practice. Given the period of time in which ED developed the Return of Title IV funds rule and the related guidance, it is improbable that the February 2004 DCL required urgent implementation. Schools had been calculating their returns in reliance on the existing regulations and guidance for six years, and there is no reason to assume that schools were required to urgently implement the latest round of "assistance" on this topic from ED.

VI. THE DCL EITHER QUALIFIES AS NON BINDING GUIDANCE, OR IT IS ULTRA VIRES BECAUSE IT ATTEMPTS TO REVISE A LEGISLATIVE RULE WITHOUT FOLLOWING REQUIRED NOTICE AND COMMENT PROCEDURES.

The Draft Audit Report would assess substantial liability against UOP for not implementing the DCL guidance immediately upon issuance. However, the DCL is either nonbinding guidance which cannot form the basis for a substantial liability or it is a failed attempt to pass a legislative rule without meeting notice and comment requirements, and therefore, ultra vires. Further, UOP believes that even if the "Rate of Progression" portion of the DCL had been issued under notice and comment procedures, it would not be accorded any deference by the federal courts because Congress did not authorize ED to regulate the HEA's reference to "calendar days completed" and ED's interpretation of this provision has a practical effect that is contrary to the language of the statute.

A. The OIG Concedes That The DCL Is Not Mandatory.

According to the OIG's work papers, "the guidance in the DCL is not mandatory," but the OIG counsel has informed the OIG that "if a school chooses not to implement the guidance, it has a 'tougher row to hoe' to defend the methodology it

chooses to use.” See OIG work paper G.1.17. This implies that the OIG views the DCL to constitute a statement of ED policy or an interpretive rule.⁴⁰

Typically, the Department has characterized ‘Dear Colleague’ letters as interpretive guidance. See e.g., *In re Denver Paralegal Institute*, 92-86-SP (A Dear Colleague Letter cannot serve as a basis for a substantive rule upon which ED can rely); *In re Baytown Institute*, 91-40-SP (Dear Colleague Letters may be useful as a “backdrop of published policy statements ... but these indicia of policy cannot stand alone as the basis for regulatory violation”).

As discussed in greater detail elsewhere in these Comments, the HEA and applicable federal regulations specify the formula for calculating a Return of Title IV funds, and the DCL guidance conflicts with these federal regulatory and statutory provisions. Where the policy established in a Dear Colleague letter is inconsistent with statutory or regulatory provisions, ED will not enforce the Dear Colleague letter interpretation. See e.g. *In re Mount Wachusett Community College*, 94-102-SP (Despite FSA Handbook restrictions on an institution’s ability to generate a cost of attendance figure, school proved practice not prohibited by statute or regulation and not improper expenditure of Federal funds); *In re MBTI Business Training Institute of Puerto Rico*, 93-147-SA (Interpretation of clock hour measurement was contrary to definition in regulation and therefore position was rejected).

Moreover, 34 C.F.R. § 668.22 was promulgated as a legislative rule following required negotiated rulemaking and notice and comment procedures, and already states ED’s position that a Return of Title IV calculation should consider the “number of calendar days” completed in a payment period (and not a student’s academic rate of progression in that payment period). The federal courts have consistently held that an agency may not amend a legislative rule through any method other than the promulgation of a revised legislative rule.⁴¹ Therefore, if ED wishes to amend the Return of Title IV funds calculation under 34 C.F.R. § 668.22, it may do so only by following required negotiated rulemaking and notice and comment procedures. Any attempt to amend a legislative rule through an interpretive rule or the issuance of “guidance” is ultra vires.

⁴⁰ A general statement of policy, exempt from the rulemaking requirements of APA (and hence GEPA), is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. “A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.” *Pac. Gas and Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974); *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987) (Where agency retains discretion to enforce, policy statements are nonbinding).

⁴¹ *Nat’l Family Planning and Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992) “It is a maxim of administrative law that: ‘If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.’” *Id.* at 235 (quoting Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 396).

B. The DCL's Statements Regarding The Proper Calculation Of The Percentage Of The Payment Period Completed Constitute An Invalid Attempt To Revise A Legislative Rule Without Complying With Required Notice And Comment Procedures.

Pursuant to the HEA, a regulation is (a) any generally applicable rule, regulation, guideline, interpretation, or other requirement that is (b) prescribed by the Department and (c) has a legally binding effect in connection with, or affecting, the provision of financial assistance under any applicable program.⁴² Under the Administrative Procedure Act as interpreted by the federal courts, regulations which intend to bind regulated entities must be promulgated under the APA's notice and comment provisions.⁴³ Further, according to 20 U.S.C. § 1098a (2005), the Secretary of Education must engage in negotiated rulemaking in order to obtain public involvement in the development of regulations under the Title IV programs.

Pursuant to the OIG's Draft Audit Report, the new 'Rate of Progression' methodology announced in the DCL satisfies the general requirements of a regulation. First, the OIG interprets the DCL to issue guidance that is of general applicability. (And, indeed, ED does state in the DCL that "it is important to share the guidance with all institutions...to encourage the consistent administration of the Title IV programs." See DCL, p. 1.) Second, the DCL clearly issues guidance prescribed by ED. Third, according to the OIG, the guidance in the DCL is legally binding.

The federal courts have determined that agency pronouncements, like guidance letters, can qualify as regulations with full legal binding effect when those pronouncements:

- Establish standards for which there is no statutory or regulatory authority; or
- Amend prior statutory or regulatory standards;
- Have a practical binding effect on regulated entities; or otherwise
- Constitute a change from prior agency practice and have a substantial impact on regulated entities.⁴⁴

⁴² 20 U.S.C. § 1234(a) (2005). The definition of a regulation applies to all 'applicable programs' governed by the General Education Procedures Act, including any program for which the Secretary of the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law. See 20 U.S.C. § 1221(c)(1).

⁴³ See 5 U.S.C. § 553 (2005); see also 20 U.S.C. § 1221e-4 (2005) GEPA requires that "no regulations affecting institutions of higher education can become effective unless such agency requires to be published in the Federal Register a copy of such proposed regulation together with an educational impact assessment." 20 U.S.C. § 1221e-4 (2005).

⁴⁴ *N. Y. City Employees' Retirement Sys. v. Sec. and Exch. Comm'n*, 45 F.3d 7, 12-13 (2d Cir. 1995) (Definition of legislative rule); *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110-12 (D.C. Cir. 1993) (Definition of legislative rule); *Nat'l Retired Teachers Ass'n v. United States Postal Serv.*, 430 F. Supp. 141, 147 (D.D.C. 1977) (Substantial Impact Formulation).

The DCL is a regulation because it satisfies each of the foregoing elements as follows:

1. The DCL Guidance Establishes A Standard For Which There Is No Statutory or Regulatory Authority.

As noted in section IV.B. of this submission, the HEA states that, in the case of a program that is measured in credit hours, a school can determine the percentage of the payment period or period of enrollment for which assistance was awarded that was completed, by “dividing the total number of calendar days comprising the payment period ... for which assistance is awarded into the number of calendar days completed in that period as of the day the student withdrew.” This is purely a measure of time passed.

Congress understood the difference between measuring a student’s progress on the basis of the amount of time the student remained enrolled at an institution prior to the date of the student’s withdrawal, versus and the amount of academic work that the student successfully completed as of the date of the student’s withdrawal because Congress specifically authorized ED to distinguish between time passed and work completed as these measurements relate to Return of Title IV calculations to be performed by clock hour schools. In particular, 20 U.S.C. § 1091b (2005) states in subsection (d)(2):

In the case of a program that is measured in clock hours, [the percentage of the payment period or period of enrollment for which assistance is awarded that was completed is determined] by dividing the total number of clock hours comprising the payment period or period of enrollment for which assistance is awarded into the number of clock hours –

- (A) completed by the student in that period as of the day the student withdrew; or
- (B) scheduled to be completed as of the day the student withdrew, if the clock hours completed in the period are not less than a percentage, to be determined by the Secretary in regulations, of the hours that were scheduled to be completed by the student in the period.

Thus, Congress specifically authorized ED in subsection (d)(2) to issue regulations governing when, for clock hour programs, the percentage of the payment period completed should be measured based on passage of time (scheduled hours) and when the percentage of the payment period completed should be based on the amount of academic work completed by the student (hours completed). Significantly, Congress did not authorize ED to make this distinction between academic work scheduled and academic work completed for students attending credit hour institutions. Instead, for credit hour institutions, the standard clearly is based on the “number of calendar days completed in the [payment period] ... as of the day the student withdrew.”

In the case that Congress specifically authorizes ED to consider academic work completed when calculating the percentage of the payment period completed for some schools, and does not, in the same subsection of the statute provide this authorization with respect to the calculation for other schools, ED cannot read this authorization into the statute. Instead, the lack of authorization to apply the “work completed” analysis to credit hour schools must be viewed as intentional under statutory construction principles.⁴⁵

Similarly, in 1999, ED promulgated legislative rules implementing the Return of Title IV provisions of the HEA. These rules were properly based on negotiation with, notice to and comment from the public, and, similar to the statute, state clearly that an institution must determine the amount of Title IV funding a student has earned based on the number of calendar days the student has completed in the payment period. ED acknowledged during the rulemaking process that the relevant inquiry was the number of days in the payment period that had elapsed before the student withdrew, noting at the time that “[t]he amount of earned title IV, HEA program funds is based *on the amount of time that the student spent in attendance . . .*”⁴⁶

⁴⁵ See *Rusello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300 (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate including or exclusion.”); See also, *id.* (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.”); *Chevron U.S.A., Inc. vs. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”)

⁴⁶ Fed. Reg. 43025 (Aug. 6, 1999); 64 Fed. Reg. 59019 (Nov. 1, 1999).

If ED interpreted 20 U.S.C. § 1091b to require institutions to take a student's academic performance into consideration when determining the percentage of a payment period completed, ED had the opportunity to issue a regulation which stated this requirement. ED had previously distinguished between measuring student progress on the basis of calendar days completed and measuring student progress on the basis of academic work successfully completed when it wanted to, as described in 34 C.F.R. § 668.164(f). According to section 66.164(f), students are required to complete a first payment period (i.e., half the number of credits hours in a scheduled academic year) in order to receive funding for a subsequent payment period. Where ED instructs institutions to determine a student's progress based on academic work completed by the student in one regulation, and does not use the same standard in a second regulation (i.e., section 668.22), but instead refers to "calendar days completed," ED cannot subsequently state that it intended the second regulation to impose the same standard as the first regulation, which clearly uses different language to state a different standard.⁴⁷

2. The DCL Guidance Regarding The Percentage Of The Payment Period Completed Constitutes A Change From Prior Agency Practice And Attempts To Amend Prior Regulatory Standards.

It is indisputable that ED previously read the HEA and its regulations to require an institution to determine the amount of Title IV funding a student had earned based on the number of calendar days the student completed within a payment period as originally scheduled by the institution. This is the manner in which ED represented and enforced its regulations during the 1999-2004 period, including when ED conducted a program review at UOP in 2001. As described in section IV.E above, after reviewing a number of Return of Title IV funds calculations performed by UOP during the 2000-01 award year, the Department determined that UOP's calculation methodology was consistent with applicable law.

UOP is not aware of a single OIG audit or ED program review report in which ED refused to accept a calculation of the percentage of the payment period completed as measured against the student's originally scheduled payment period and without regard to the student's academic performance during that period.

ED's currently published rules clearly instruct schools to calculate the amount of Title IV funds a student has earned based on the number of days in the payment period that the student was enrolled before the student's withdrawal date. Under the OIG's

⁴⁷ If ED wanted to revise its interpretation of 20 U.S.C. § 1091b and its own regulations, ED should have published proposed regulations to this effect and permitted public comment as required under the HEA and the APA. This process has the intended benefit of allowing ED to discuss its proposed rule with the community and obtain relevant feedback. It has the additional benefit of informing the community of prospective rules with which the community may need to comply in the future, and, under the Master Calendar requirements, allowing the community a reasonable period in which to comply.

interpretation of the DCL, the student's date of withdrawal is irrelevant. The only fact that the OIG takes into consideration in determining the percentage of the payment period completed by a withdrawn UOP student is the number of credit hours the student has completed. ED (including the OIG) cannot lawfully enforce one interpretation of a legislative rule from 1999 through 2004, and then claim that the rule actually means something else in 2004. In this manner, ED's proposed new interpretation of the "percentage of payment period completed" is an improper amendment to the existing legislative rule at 34 C.F.R. § 668.22.⁴⁸ A valid statutory or regulatory requirement can be repealed, amended, or modified, only by another statute or regulation.⁴⁹ Agency guidance cannot expand, amend or repudiate the requirements of a statute or regulation.

In summary, there is no question that if enforced as a regulation, the DCL constitutes a change from prior agency practice and an attempt to amend current regulations, and will have a substantial impact on regulated entities. Therefore, the DCL meets all of the established definitional criteria of a regulation for which notice and comment rulemaking was required.

C. The DCL Did Not Comply With Master Calendar Requirements.

Under the HEA, the Secretary of Education must comply with a statutory schedule to implement "any regulatory changes initiated by the Secretary" affecting Title IV programs (authorized under 20 USCA § 1070 et seq.) to assure adequate notification and timely delivery of student aid. 20 U.S.C. § 1089 (2005). With few exceptions,⁵⁰ those regulatory changes affecting the Title IV programs that have not been published in final form by November 1 prior to the start of an award year (i.e., eight months prior to presumed implementation), cannot become effective under the statute until the beginning of the second award year after such November 1 date. 20 U.S.C. § 1089(c). Thus, if the DCL does in fact state mandatory rules of general applicability as the OIG assumes, the DCL should have been issued in the form of regulations prior to November 1, 2003 in

⁴⁸ Any argument that the new ED guidance is somehow mandated by the revised definition of a payment period promulgated in 2002 is illogical. Prior to the 2002 revision to the definition of a payment period, a payment period was measured according to the number of credits a student must complete in one-half of an academic year. Students attending nonterm institutions were required to complete all of the credits in a payment period before the students could progress to a subsequent payment period. The change implemented in 2002 merely noted that a student also needed to attend school for half the number of weeks within a defined academic year in order to complete a payment period. This change would have no logical impact on the Return of Title IV rule which already required schools to calculate a Return of Title IV on the basis of the number of days a student was enrolled during a payment period, and by its terms did not consider the number of credit hours a student had completed. *See* 34 C.F.R. § 668.4 (2001), 34 C.F.R. § 668.4 (2002) and 34 C.F.R. § 668.22(f).

⁴⁹ *Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992) (Regulation, sustained in prior case by the Supreme Court, prohibited abortion counseling or referral in specific programs. HHS announced a policy statement that would allow doctors to counsel on abortion. Court ruled that HHS could not announce new "interpretation" repudiating announced meaning of regulation, without going through notice and comment period.)

⁵⁰ (With the exception of adoption of certain forms and eligibility requirements related to Pell grant and campus-based financial aid programs) 20 U.S.C. § 1089(a).

order to be effective for the 2004-05 award year. Because the DCL was not published until February 2004, the rules stated in the DCL would not be effective under the HEA until the 2005-06 award year, well after UOP implemented the DCL changes.

Even if one does not agree that the DCL contains rule changes, or that it was subject to master calendar requirements under the law, the practical aspect of the “master calendar” requirement should not be lost. Congress instituted the master calendar law based on its determination that ED and regulated entities need time to implement changes to the law in a reasonable and organized fashion. The master calendar provision is a nod by Congress to the enormous number of students and schools that participate in Department of Education programs and the complexity of those programs. The fact that ED has attempted to initiate rule changes through a DCL statement of guidance instead of through a rulemaking does not change the substantial nature of those changes or the need for ED to afford schools adequate notification and an opportunity to implement the required changes in a deliberate and organized manner.

Even if the OIG does not agree with the substance of the remainder of UOP’s comments in this response, the OIG should revise its Draft Audit Report to reflect that UOP had at least eight months, plus an adequate notice and comment period,⁵¹ to implement the DCL provisions, consistent with the spirit of the master calendar rule.

D. No School Could Implement The New Rate Of Progression Method Immediately Upon Its Publication.

Pursuant to 20 USC §1092 institutions are required to develop an official withdrawal and refund policy. Institutions must make this information available to enrolled and prospective students through appropriate publications, mailings, and electronic media on at least an annual basis. 20 U.S.C. §1092(a)(1)(F), 34 CFR §668.23(k), 34 CFR §668.43(a)(2), (a)(3), and (a)(4).

An institution’s obligation to provide students with this information is supported by the FSA Handbook, which states that:

A school may change the basis for its Return calculations for new students as they begin classes. However, for continuing students, since the institution’s Return policy must be included in the published materials the school provides to students as part of the consumer information requirement, the school would have to change its catalogue, its written policies and procedures, and its enrollment agreements (if any), and allow sufficient time for those continuing students who would be governed by the new policy to receive and review the materials.

2005-2006 FSA Handbook Volume 5, p. 5-34.

⁵¹ See section VI.B above.

These provisions again demonstrate that ED would not expect UOP or any other school to revise its Return of Title IV policies or practices overnight. Such changes are anticipated to be implemented in an orderly fashion.

VII. FINDING ONE IS CONTRADICTED BY THE OIG’S OWN WORK PAPERS AND OVERSTATES ITS ESTIMATED FINANCIAL IMPACT BASED UPON INACCURATE ASSUMPTIONS.

UOP disagrees with the Draft Audit Report’s assessment of the financial impact of Finding 1. The entirety of the financial impact analysis set forth in the Draft Audit Report is based upon 25 Return of Title IV students drawn from a March 2004 “high risk” sample. Draft Audit Report at 6. The report concludes that \$62,715 in questioned costs exist for 19 of the 25 students, characterizes those costs as 47 percent of funds disbursed for the related payment periods, and attempts to extrapolate that 47 percent benchmark to the universe of this narrow category of high-risk students as the premise for the total financial impact figures cited throughout the Report. As is detailed below, because the \$62,715 and 47 percent figures are plainly incorrect and fundamentally flawed for multiple reasons, the estimates that flow from those numbers are also incorrect and fundamentally flawed. The total financial impact described in Finding 1 is inaccurate and is based upon inaccurate figures and mistaken assumptions that are contradicted by the Department’s guidance and by the audit work papers.

A. The Report’s “Progression” Methodology Overstates Financial Impact by Understating Student Rates of Progression.

The OIG "progression methodology" used in Finding 1 to restate and estimate the projected end of a payment period significantly overestimates the impact of a failed course upon the timeframe for a student's completion of the remaining courses within a scheduled payment period. This mistaken premise causes the percentage of Title IV earned to be understated, and distorts and exaggerates the financial impact of the finding.

The OIG methodology mistakenly presumes that once a student fails one course during a payment period, that student will continue to fail courses at the same rate for all courses attempted in the same payment period, and it makes this presumption even for students whose academic record proves that assumption to be false. To illustrate this point, consider the following example substantiated by the OIG work papers with respect to the Return of Title IV calculation for the very first student listed in the 25-student OIG sample, who shall be referenced henceforth as “Student 1.”⁵²

The scheduled academic year during which Student 1 withdrew dated from 4/28/2003 to 3/22/2004. Notably, prior to the commencement of that academic year, Student 1 had completed all required courses with passing grades, and had done so within

⁵² All of the information presented below concerning Student 1 is derived from the OIG’s work papers at G.1.9.

the time allotted for those courses. During the first payment period of the academic year at issue (4/28/2003 - 10/13/2003), Student 1 took and timely completed five courses, thereby successfully earning 15 credits within the time projected by UOP. During the second payment period (10/20/2003 - 3/22/2004), Student 1 was scheduled to complete 12 credits. Student 1 passed one course and failed one course in 95 calendar days. Student 1 was withdrawn from UOP as of 1/22/2004, which was his last date of attendance.

UOP completed a Return of Title IV calculation for Student 1 on March 9, 2004. The calculation determined that Student 1 had completed 95 days of a total of 155 scheduled days or 61.3% of the payment period, and therefore had earned 100% of the Title IV awarded for that period.

In contrast, the OIG determined that Student 1 had completed only 25% of the payment period. To reach this result, the OIG relied exclusively upon the current payment period (during which the student had taken two courses, passing one and failing the other), while ignoring the fact that the student previously had taken and successfully completed all 5 courses he had taken. Viewing the current payment period in isolation, the OIG “projected” that Student 1 would henceforth continue to complete courses at a pace of only one credit every 31.67 days (3 credits in 95 days), and that, accordingly, it would have taken Student 1 an additional 285 calendar days to complete the nine remaining credits. Finding 1 made this projection even though, during the immediately preceding payment period, this same student had earned 15 credits in only 165 days.

The student’s actual academic experience prior to his withdrawal proves that the OIG method of attempting to predict when his payment period “really” might have ended is arbitrary and inconsistent with the facts. Student 1 had never failed a course before his withdrawal; yet the OIG “projection” is predicated upon the assumption that, henceforth, Student 1 will fail one course for every course he passed.

The OIG projection that Student 1 would have required another 285 days to complete his remaining coursework is further contradicted by the fact that after having been withdrawn, Student 1 later returned to UOP as of 6/22/2004 and proceeded to complete the 9 scheduled remaining credits in 98 calendar days – three times faster, and 192 days sooner, than the OIG projection, and a faster pace than the student had achieved during the payment period that predated his withdrawal. The academic record for Student 1 – both before and after this student’s interim withdrawal – proves that the OIG methodology arbitrarily overstated Student 1’s payment period, and that it thereby understated the percentage of Title IV earned, by a wide margin.

The progression methodology illustrated by the Student 1 example is illustrative of the methodology applied by the OIG for all 19 students cited in the sample. The cited work papers – and the parallel paperwork for other students reflecting how Finding 1 derived purported “financial impact” from the other students in the sample – establish

that the dollar figures cited in Finding 1 are overstated because they rely upon projected payment period extensions that are unduly lengthy and that are based solely upon this “worst case scenario” for student coursework completion. Financial impact is overstated, because percentage of Title IV earned is understated, and because the projected lengths of the students’ payment periods are overstated.

The Draft Audit Report contends that it is simply applying the DCL methodology to these students. Draft Report at 5. However, even setting aside the fundamental point that the DCL did not apply to these calculations because these students’ withdrawal dates predated the publication and effective date of the DCL guidance (see section VII.D. below), the method that the OIG used is in fact contrary to the guidance published by the Department. The DCL’s description of the new rate of progression methodology stated that “the total number of calendar days in the period may be dependent on the pace at which an individual student progresses through the program.” Hence, the guidance anticipated that the projection would be based upon how a student was progressing through the program – not just through one payment period taken in isolation.

The new guidance later published in the FSA Handbook reiterated this point. The new guidance published in the 2004-2005 Handbook stated as follows:

In a credit-hour nonterm program, the ending date for a period and, therefore, the total number of calendar days in the period, is dependent on the pace at which an individual student progresses through the **program**. Therefore, for a student who withdraws from a credit-hour nonterm program in which the completion date of the period is dependent on an individual student’s progress, an institution must project the completion date based on the student’s progress as of his or her withdrawal date to determine the total number of calendar days in the period.

A school that offers credit-hour nonterm **programs** in which the student does not earn credits or complete lessons as s/he progresses through the **program**, the institution must have a reasonable procedure for projecting the completion date of the period based on the student’s progress before withdrawal.

2004-2005 FSA Handbook, Volume 5 at 5-64.

This guidance was properly focused upon the student’s progress through the program – not just one isolated payment period – in its instruction to schools on how best to go about making an educated guess on when the student’s payment period might have ended. The OIG assumption to the contrary is arbitrary, contrary to the published guidance, and the source of skewed and overstated financial impact figures that should be excluded from any final report.

The arbitrariness of the OIG projection methodology is further evident in that, according to the Finding 1 projection methodology, Student 1 actually would have earned a larger percentage of the Title IV funds disbursed if he had earned zero credits during the payment period instead of three credits. As discussed previously, for students in the sample who had earned no credits, the OIG calculated the percentage of payment

period using the ratio of days actually completed to days actually completed plus the number of days originally scheduled in the payment period.⁵³ Hence, if Student 1 had earned zero credits during his payment period, his percentage of completion would have been calculated using a numerator of 95 days completed, and a denominator of 95 days plus 155 scheduled days, yielding a percentage completed of 38% instead of 25%. The OIG projection methodology is contradicted by the facts, internally inconsistent, and arbitrary.

B. A Substantial Number of the Cited Students Returned to UOP Within 180 Days and Earned All of the Disbursed Aid Within the Payment Period. The Dollar Figures Cited in the Financial Impact Analysis Ignore That Fact.

The purported financial impact cited throughout the Draft Audit Report is premised entirely upon the audit analysis with respect to nineteen students drawn from a 25-student sample. Yet, Finding 1 ignores the fact that seven of those nineteen students returned to UOP and resumed their programs of study within 180 days. The Title IV regulations and guidance clearly establish that no liabilities exist with respect to those students. Therefore, the dollar figures drawn from the student sampling, and the financial impact estimates derived from those figures, are plainly incorrect.

The Federal Student Aid Handbook effective for the 2003-04 award years stated as follows:

For credit-hour nonterm-based programs, a student who withdraws and then reenters the same program at the same school within 180 days is considered to be in the same payment period he or she was in at the time of the withdrawal. The student retains his or her original eligibility for that payment period, and is treated as though he or she did not cease attendance.

A student who reenters a credit-hour-nonterm-based program or a program that measures progress in clock hours within 180 days of his or her withdrawal is immediately eligible to receive all Title IV funds that were returned when the student ceased attendance. Thus, upon the student's return, the school must restore the types and amount of aid that the student was eligible for before the student ceased attendance, and schedule the appropriate disbursements.

2003-2004 FSA Handbook Vol. 2 p. 2-134 (emphasis added).

Hence, UOP can owe no liabilities in connection with sampled students who returned within 180 days and earned the Title IV funds disbursed to them for that payment period. The OIG work papers expressly state that seven of the nineteen students cited for questioned costs from the sample of 25 for March 2004 reenrolled in UOP within 180 days of their respective withdrawal dates.⁵⁴ In fact, 3 of the 7 students

⁵³ See work paper G.1.20.

⁵⁴ See, OIG work paper in the form of an excel spreadsheet titled "March 04 Strata 1.xls", tab labeled "Recalc % of PP", which lists each of the 25 sampled students by LDA and includes under column heading, 'P the calculated field, "How many days between LDA and student's return to enrollment?".

(students 1, 3, and 21) completed the payment period and eventually earned 100% of funds disbursed for the period. UOP made no additional disbursements of federal funds to these students for the completion of the payment period. Two other students (16 and 23) reenrolled within 180 days and completed additional courses in the payment period, thus increasing the percentage of Title IV earned.

The Draft Report's failure to account for these re-enrollments in determining the percentage of Title IV earned for the payment period is fatal to Finding 1 and further establishes that the cited financial impact is erroneous. Moreover, such failure is inexplicable inasmuch as the work papers expressly acknowledge that these students returned to UOP within 180 days. The Draft Audit Report offers no explanation as to why the return of those students was not taken into account or as to why liabilities should be imposed for Title IV funds that were earned in their entirety, by students who completed the subject payment period. Correspondingly, the Report offers no explanation of how or why liabilities can properly be extrapolated to the "high risk strata" students based solely upon data and percentages inaccurately derived from students who had returned to UOP and earned all of the funds at issue. The financial impact analysis set forth in the Draft Report is arbitrary and should be excluded from any final report.

C. The Draft Report Triples the Estimated Financial Impact of Finding 1 by Erroneously Applying the Rate of Progression Methodology to a Seventeen Month Period that Predates the Department's Announcement of the New Methodology.

Nearly two-thirds of the total purported financial impact cited in the Draft Audit Report is premised upon the theory that UOP should have followed a "Rate of Progression" methodology between September 2002 and February 2004, before the new methodology first appeared in the February 2004 DCL.

The OIG has not identified and can not identify any published guidance, any regulation, or any fact or rationale to substantiate the theory that UOP was required to apply the new rate of progression methodology before it was announced in the DCL. Section IV above of these comments establishes that the new methodology was not applicable prior to the issuance of the DCL.⁵⁵ Yet, the Draft Audit Report speculates concerning pre-DCL disallowances on the basis that the DCL requirements predated its issuance. The OIG contention is flatly contradicted by the effective date language in the DCL, which states:

"Schools are not expected to attempt to apply this guidance retroactively." DCL at page 1.

The Draft Audit Report's reference to purported consequences predicated upon the retroactive application of the DCL rate of progression methodology to periods prior to

⁵⁵ Similarly, sections V and VI above contest the Report's contention that the DCL was self-executing and automatically effective with its February 2004 publication.

February 2004 is unsupportable. For this reason alone, two-thirds of the purported financial impact cited in the Draft Audit Report is unsupportable, and the financial impact described in Finding 1 should be deleted from any final report.

D. The Cited Financial Impact Is Clearly In Error Because It Is Based Upon Twenty Five Student Withdrawals That Occurred Before The DCL And That Were Not Subject To Its Requirements.

Finding 1's erroneous retroactive application of the DCL is further evident in the fact that all of the students relied upon had withdrawal dates that predated the DCL. As is proven by the OIG work papers, all 25 of the students were assigned withdrawal dates that preceded the DCL's February 13, 2004 publication.⁵⁶ With respect to students who withdrew before that date, the DCL states as follows:

For any student who withdrew prior to the release of this letter and its guidance, we expect that an institution would have complied with the requirements of the law, the regulations, and any prior guidance we have issued on the topics covered in this letter.

DCL at page 1 (emphasis added).

Hence, prior withdrawals such as the 25 cited in Finding 1 were subject to the "requirements of the law, the regulations, and any prior guidance we have issued" before the DCL. Plainly, schools were not expected to apply the DCL guidance retroactively to such students. As was previously detailed in section IV.A of these Comments, the pre-DCL law, regulations and guidance contained no instruction or requirement with respect to the rate of progression methodology. Inexplicably, the financial impact cited in Finding 1 is predicated exclusively upon application of the new rate of progression methodology to those 25 students.

Therefore, the liabilities associated with the impact of the rate of progression method for the 25 students in the sample are zero. All of these students withdrew before the DCL issuance date, and based upon the Department's published guidance, none of their Return of Title IV calculations were subject to the new rate of progression methodology. Finding 1 and the financial impact cited therein is unsubstantiated and arbitrary, and should be removed from the Report.

E. The Draft Report Misstates and Overstates the Financial Impact of Finding 1 by Ignoring a Crucial Component of the Department's Required Return of Title IV Calculation.

The Draft Report's assertions regarding the total potential questioned costs that UOP "may have retained" is based upon incomplete and inaccurate Return of Title IV calculations. In a table titled "Treatment of Title IV Funds When a Student Withdraws

⁵⁶ See, for example, G.1.20, the excel spreadsheet work paper referenced previously and titled "March 04 Strata 1.xls", tab labeled "Recalc % of PP", which lists data for each of the 25 sampled students.

from a Credit Hour Program,” the Federal Student Aid Handbook spells out eight steps that an institution must follow to properly perform the Return of Title IV calculation. 2005-06 Handbook, Volume 5 at 5-106. The Finding 1 calculations omitted the last four of those required eight steps.⁵⁷

The omitted component of the calculation takes into account the institutional charges for the payment period and determines the respective amounts to be returned by the school and the student. By ignoring this element of the calculation, Finding 1 fails to segregate out the portion of the funds to be returned by the student and inaccurately characterizes dollars that fall within the student portion of the return calculation as excess amounts that UOP “may have retained.” Because these flawed calculations serve as the sole predicate for the potential financial impact estimates cited in the Draft Audit Report, those estimates are arbitrary and should be removed from the Report.

F. The OIG’s Fieldwork and Analysis of the 25 Sampled Students Contradicts Finding 1 and Its Estimated Financial Impact.

The OIG work papers contradict the conclusions cited for the 25-student sample. Because those contradicted conclusions in turn are relied upon in the Draft Audit Report as the basis for Finding 1 in its entirety, the finding and its purported financial impact should be eliminated from any final report.

The work paper’s contradiction of the Draft Audit Report is both stark and irreconcilable. The following are pertinent excerpts from the OIG’s operative electronic work paper G.1.16:

Electronic w/p G.1.16

Title: Tracing Source Data for the R2T4 Calculation Through UOP’s Electronic Systems

Purpose: To determine if UOP refund policies and procedures are in place and working as described.

Scope: The universe for the 25 sample refund calculation is March 04 refunds extracted from Strata 1 ordered randomly.

Conclusion: UOP’s refund policies and procedures are in place and working as documented and described.

There are 3 source areas for the Return to Title IV calculation:

- a. “Student’s Title IV Aid Information”: For conclusion that the P&P for “Student’s Title IV Aid Information” were adequate, see w/p G.1.10.
- b. “Institutional Charges for the Payment Period”: For conclusion that the P&P for “Institutional Charges for the Payment Period” were adequate, see w/p G.a.10
- c. “Percentage of Title IV Aid Earned”; UOP’s policy and procedures are working as described, however, we do not agree with their procedure of using

⁵⁷ See work papers at G.1.20.

the total days as calculated at the date of certification in the refund percentage calculation.

We noted in 4 of the 25 sample refunds that the total days used in UOP's percentage calculation were not reasonable. In one of the four we estimated that the refund was overstated by about \$3315. In the other three we concluded there was no impact to the amount of the refund.

(emphasis added).

The bold-faced portion of the OIG conclusion quoted above – which is set forth in the OIG work paper on UOP's Return of Title IV calculations – directly contradicts the central premise of Finding 1. The OIG work paper concluded based upon its fieldwork that the percentage calculations were “not reasonable” for only 4 of the 25 students sampled, and that for three of those four students, there was “no impact” on the refund. In contrast, the Draft Audit Report now cites to questioned costs that UOP “may have retained” based upon recalculation of “**19** of the 25 calculations.” Draft Report at 6.

Hence, a stark differential exists between the four sampling exceptions cited in the work paper and the nineteen students cited in the Draft Audit Report. This differential is reflected in the student-by-student analysis that the OIG presented to support its conclusion questioning the percentage calculations for (only) 4 of the students sampled. For example, in the detailed discussion and analysis with respect to those four sampled students,⁵⁸ the OIG focused upon student #9. After analyzing her academic schedule, applying a rate of progression methodology, and extending her payment period, the OIG found that this particular student nonetheless had completed more than 60% of the payment period. On this basis, the OIG determined that under “either scenario” no Title IV funds were to be returned, and that there were no questioned costs.

Notwithstanding this detailed analysis and conclusion memorialized in back-up work papers, the Draft Audit Report contradicts the auditors' stated conclusion with respect to the student #9. That Report includes student #9 among the nineteen cited for questioned costs, and relies without explanation upon data in the excel spreadsheet⁵⁹ that lists student #9 as having completed, by the OIG's calculation, only 25% of the payment period.

The work papers contradict Finding 1 and the purported financial impact that is described in the Draft Audit Report. The finding should be removed from any final report.

⁵⁸ See OIG work paper G.1.16. This work paper presents lengthy and detailed explanations of the OIG's analysis and determination with respect to the four student's academic schedules, and the rationale for the OIG's conclusion that, while the percentage calculations for these four students were “not reasonable,” in any event there was “no impact” on the refund for three of the students.

⁵⁹ See excel spreadsheet work paper referenced previously and titled “March 04 Strata 1.xls”, tab labeled “Recalc % of PP”, which lists data for each of the 25 sampled students.

G. Finding 1 is Arbitrary in its Failure to Calculate the Percentage of Aid Earned Based Upon the Midpoint Instead of the Last Date of Attendance.

Finding 1 should be rescinded for the simple reason that it advocates recalculation of the percentage of Title IV funds earned on the basis of a formula that ignores the governing regulations, which provide that the calculation may be based upon the midpoint of the payment period for those students who unofficially withdraw. As has been shown by these comments, Finding 1 presents no justification for recalculation by UOP of its Return of Title IV calculations. But if such a recalculation were to be performed, any methodology that ignores the express regulatory flexibility afforded by the midpoint rule would be arbitrary and cannot be sustained.

The governing return of Title IV regulations state that, for participating institutions such as UOP that are not required to take attendance, the withdrawal date for students who “cease attendance without providing official notification to the institution of his or her withdrawal ... is the mid-point of the payment period (or period of enrollment, if applicable).” 34 C.F.R. § 668.22(c)(iii).

As is acknowledged in the Draft Audit Report and OIG work papers,⁶⁰ a substantial number of students who withdraw from UOP do so without presenting to the institution any official notification to that effect. Hence, many of the withdrawn students at issue in the Draft Audit Report are unofficial withdrawals who ceased attending UOP without providing official notification and for whom the regulations authorize a date of withdrawal (for return of funds purposes) at the mid-point of the payment period.⁶¹ For every such student, the regulations authorize utilization of the midpoint of the payment period as the withdrawal date that determines the percentage of Title IV aid earned in the return of funds calculation. Yet, by Finding 1, the Draft Report asserts that the percentage earned for many such unofficial withdrawals should be recalculated to less than 50 percent.⁶²

⁶⁰ The Draft Report recognizes the unofficial withdrawal status of students who fail to attend for 29 days at page 8, n. 6. The OIG work papers also confirm the status of such students as unofficial withdrawals. The fieldwork and analysis commenting on UOP’s unofficial withdrawal policies falls under the subheading, “‘Unofficial Withdrawal’ Policies & Procedures,” and states that “UOP uses the Exit Report or the ‘29-day Out of Attendance Report’ (29 day OOA Report) to identify students who have unofficially withdrawn ...” Work paper G.1.5.

⁶¹ There is no suggestion that the OIG ever tested the student files to determine which of these students could be given the benefit of the midpoint presumption. However, the data and work papers gathered during fieldwork contained ample proof of the students’ unofficial withdrawal status. See G.1.9 (APG TIV Refund Panel Grp. Printout).

⁶² Assuming for the sake of argument that recalculation is warranted, under the midpoint rule, the lowest percentage earned for any student who withdrew without providing official notification to UOP was 50%. Yet, Finding 1 routinely assigns percentages lower than 50% without regard to whether or not the students were unofficial withdrawals. The entire purported financial impact cited in the Draft Report is premised on this flawed disallowance methodology. Therefore the potential financial impact cited is flawed, arbitrary, and unfounded.

Finding 1 relies upon recalculations that ignore the regulatory mid-point presumption, thereby yielding inaccurate percentages. Therefore, the sample analysis, and the estimated financial impact figures flowing from that analysis, is inaccurate and should be excluded from any final report.

VIII. THE DRAFT REPORT WOULD PENALIZE UOP NOTWITHSTANDING ITS UNUSUALLY EFFICIENT AND CONSERVATIVE METHODOLOGY FOR PROCESSING AND CALCULATING RETURNS OF TITLE IV.

As stated in the immediately preceding section of these comments, Finding 1 fails to recognize that the University of Phoenix, in its own Return of Title IV calculations, utilized an unusually conservative methodology that expedited the processing of refunds while minimizing the percentage of Title IV aid earned and the amount of aid retained. Because UOP, like most universities, falls within the category of institutions that are not required to take attendance, UOP was entitled to avail itself of the Return of Title IV rule stating that the withdrawal date for students who “cease attendance without providing official notification to the institution of his or her withdrawal ... is the mid-point of the payment period (or period of enrollment, if applicable).” 34 C.F.R. § 668.22(c)(iii). UOP chose not to rely upon this “deemed” midpoint, a fact that is nowhere recognized or taken into account in the Draft Report.

As is acknowledged in the Draft Report and OIG work papers,⁶³ a substantial number of students who withdraw from UOP do so without presenting to the institution any official notification to that effect. When performing the return of funds calculation for each and every such “unofficial withdrawal,” UOP had the option of deeming the date of withdrawal to have been the midpoint of the payment period in accordance with the regulations and the calculation methodology stated in the Federal Student Aid Handbook.⁶⁴ Reliance upon the mid-point as a default would have yielded a calculation placing the student at the mid-point of the payment period, regardless of precisely when the student stopped attending class (or, ironically, how many credits the student would have completed), and would thereby have extended and expanded the percentage of Title

⁶³ The Draft Report recognizes the unofficial withdrawal status of students who fail to attend for 29 days at page 8, n. 6. The OIG work papers also confirm the status of such students as unofficial withdrawals. The fieldwork and analysis commenting on UOP’s unofficial withdrawal policies falls under the subheading, “‘Unofficial Withdrawal’ Policies & Procedures,” and states that “UOP uses the Exit Report or the ‘29-day Out of Attendance Report’ (29 day OOA Report) to identify students who have unofficially withdrawn ...” Work paper G.1.5.

⁶⁴ The FSA Handbook very clearly presents the mid-point option where students withdraw without notifying the school. In the section of the Handbook that spells out the precise steps required in performing Return of Title IV calculations, Step 2 (addressing the percentage of Title IV earned) states, “If school is not required to take attendance and student withdrew without notification, enter 50% in Box and proceed to Step 3 OR school may enter a last date of attendance...” 2005-2006 FSA Handbook, Volume 5, at 5-106 (emphasis added).

IV earned. If UOP had opted to retain federal funds through the mid-point as was its right under this flexible rule, it would have followed the path taken by most Title IV participating colleges and universities, a path that is expressly authorized by the regulations. Reliance upon this regulatory flexibility mechanism would have significantly increased the amount of aid that UOP could have retained.

UOP did not rely upon the mid-point for these unofficially withdrawn students as a means to retain a larger percentage of the federal funds disbursed. Unlike many other degree granting institutions, for academic monitoring and accountability purposes, UOP tracks the attendance status of each and every student.⁶⁵ With the benefit of this unremitting oversight mechanism, UOP is continuously in a position to identify promptly those students who have ceased or interrupted attendance and who may thereby be subject to the University's unofficial withdrawal policies. This capability enables UOP to identify and process such students for return of funds calculations expeditiously, in a manner that many traditional colleges and universities (many of which have informal and inconsistent attendance-taking policies) simply cannot achieve. These attendance tracking practices also enable UOP to calculate the percentage of Title IV earned based upon the withdrawn student's last date of attendance rather than the mid-point, even though in most cases the student will not have formally notified UOP of any intention to withdraw. In other words, rather than rely upon a "safe harbor" withdrawal date that is deemed to occur at the mid-point – and that artificially increases the percentage of the period a student has completed – UOP chooses to base the calculation upon the student's actual last date of attendance (LDA). In general, this adherence to the LDA in lieu of the mid-point as the basis for determining the student's withdrawal date yields an earlier date than the mid-point. Correspondingly, it also yields a percentage earned that is smaller than 50%, causing UOP to return more dollars to the federal programs.

UOP's reliance upon LDAs and attendance records further promotes fiscal conservatism by expediting the processing of any required Title IV returns resulting from unofficial withdrawals. For students who withdraw without notifying the institution, other colleges and universities would rely upon the regulatory "safe harbor" that allows them to wait until 30 days after the end of the payment period, academic year, or educational program, whichever is earlier, before determining that the student has withdrawn. 34 C.F.R. § 668.22(j)(2). This "safe harbor" enables institutions to wait until the academic term is over before the 30 day deadline for paying Title IV returns even begins to run. 34 C.F.R. § 668.22(j)(1). In contrast, as the OIG has confirmed in its work papers,⁶⁶ UOP consistently makes that determination weeks or even months in advance of this delayed "safe harbor" deadline that is routinely relied upon by other colleges and universities. UOP's practice enables it to calculate and process Title IV far in advance of

⁶⁵ UOP chooses to do so as a matter of internal operational procedure; no external requirements require UOP to take attendance.

⁶⁶ See Work Papers at G.1.5.

the timeframe for other institutions that wait until the end of the student's term before they realize and determine that a student has unofficially withdrawn from their school.

Throughout the audit period, UOP relied upon exacting attendance monitoring procedures and data in lieu of the more relaxed mid-point standard, and in lieu of the delayed determination date "safe harbor." These procedures ensured that UOP returned Title IV funds more quickly, and based upon a more conservative calculation, than other institutions. This fiscally conservative and responsible federal funds return practice and philosophy should be lauded and encouraged – not penalized. Yet, as was detailed in section VII.G above, Finding 1 proposes to penalize UOP by ignoring the midpoint option and by asserting that students who qualified for the midpoint completed less than 50% of their payment period. Finding 1 is arbitrary and inconsistent with the governing regulations, and should be excluded from any final report.

IX. CONCLUSION

For all of these reasons, UOP respectfully submits that Finding 1 should be stricken from any final audit report.

ATTACHMENT A

UOP's process for implementing the DCL changes is outlined briefly below.

a) Treatment of Credit Balances

The DCL advised institutions for the first time that when a student is subject to a Return of Title IV funds calculation, an institution must hold any applicable credit balance and perform the Return of Title IV calculation first, even if holding the balance would violate the 14-day credit balance payment rule. The new 14-day deadline for issuing the credit balance begins running from the date the school performs the Return of Title IV funds calculation rather than 14-days from the date the credit balance was created. Prior to the issuance of the DCL, the University used an automatic software trigger to issue a credit balance by the 14th day after the credit balance was created. The new guidance issued by ED required the school to:

- Develop a new tracking system (i.e., “flag”) that would determine whether a student for whom a credit balance was due had withdrawn
- Develop a process to put such a student's credit balance on hold until its servicer calculated a Return of Title IV funds for the student
- Develop a process to consider the credit balance as “funds disbursed” (UOP tested this aspect but decided this was already done by the school and servicer)
- Determine a preferred method for processing credit balances
- Pay authorized charges that are owed to the institution
- Include a new student authorization permitting UOP to pay a credit balance to a lender to reduce the student's loan debt.

b) Title IV Aid that Could Have Been Disbursed

The DCL requires a school to include any undisbursed Title IV as aid that could have been disbursed in the Return of Title IV funds calculation if conditions for a late disbursement were met. This was a change from prior practice in which aid that the school was prohibited from disbursing was not previously included as aid that “could have been disbursed.” In order to accommodate this change, the University was required to consider and implement the following changes to its automated systems and processes:

- Change categorization of funds subject to 30 day delay to funds that could have been disbursed
- Change undelivered Pell grant funds to funds that could have been disbursed
- Consider how to include Pell funds in the calculation when no ISIR was received by ED's deadline
- Change categorization of second or subsequent FFELP disbursements in the circumstance that a student did not successfully complete credit or

calendar/instructional midpoint of the loan period prior to LDA so that funds are considered funds that could have been disbursed

- Work around system problem that causes duplicate returns if funds are included as funds that could have been disbursed in the Return of Title IV funds calculation, and in the system's "gross refund panel" (where funds must be included to complete other processes).

c) Inadvertent Overpayments

For the first time, the DCL requires a school to determine if the school has made an "inadvertent overpayment" to a student for whom the school must calculate a Return of Title IV funds and to consider any such inadvertent overpayment as aid that "could have been disbursed."

UOP was required to develop major changes to its systems in order to comply with this revised guidance. In short, if inadvertent overpayment funds were considered not as funds disbursed (even though they were disbursed) but as funds that could have been disbursed, then UOP's system, as written, would calculate the Return of Title IV funds to show that a post withdrawal disbursement was due and this disbursement would automatically be issued. Because UOP's systems are automated, UOP needed to rework its software in order to have its systems distinguish between the Return of Title IV funds calculation required under the new guidance, and instructions for issuing a correct return amount to ED.

If a school uses ED's Return of Title IV funds software today to calculate its returns, and the return calculation in question considers a student to whom an inadvertent overpayment was made, ED's software will conclude that a post withdrawal disbursement should be issued. A school must know to ignore the conclusion and issue a return to ED. As a result, ED's current software is not accurate under certain circumstances and cannot be used in an automated system. UOP could not adopt such an approach to its software because the Return of Title IV funds calculations are not processed manually and the returns issued are not processed manually. The University therefore had to revise its systems to recognize that certain funds that were disbursed were not earned and should be categorized as funds that could have been disbursed (even if they weren't eligible for disbursement), and then calculate a return of Title IV funds instead of calculating a post withdrawal disbursement as ED's software currently does.

d) Verification

According to the DCL, if a student has not completed the verification process by submitting the required documentation within 30 days of the date of determination of a student's withdrawal, the school must perform a Return of Title IV funds calculation for that student including only those funds not subject to verification. Interim disbursements made by the institution must be repaid. If a student completes verification after the

Return of Title IV funds is calculated, but before the verification deadline, and the student would be eligible for a late disbursement within the post-withdrawal disbursement timeframe, the institution must perform another Return of Title IV funds calculation to include the Title IV funds for which the student established eligibility after completing the verification process. In order to accommodate this policy change, the University's corporate office and servicer had to implement a method for collecting verification data submitted to individual schools even after a student had withdrawn from the school. UOP also:

- Determined how it could, post withdrawal, consider unawarded Pell funds as funds that could have been disbursed
- Revised its systems to flag those students to whom funds were not disbursed because verification was not completed, in order to allow the student the opportunity to complete verification
- Revised its system to allow UOP to recalculate a student's Return of Title IV funds calculation once the verification process was completed
- Determined it would not change its systems to track anything other than the 120 post withdrawal disbursement deadline
- Trained its personnel to offer a post withdrawal disbursement between the 31st and 120th day.

e) Percentage of Title IV Aid Earned Prior to Withdrawal

According to the DCL, credit-hour nonterm programs must now calculate the amount of Title IV aid earned by a student in a payment period using a payment period end date this is different from the payment period dates for which aid originally was certified. Therefore, schools are required to determine a student's "rate or progression" in the original payment period, then calculate a new and fictional payment period end date which assumes that the student will progress at the same exact rate for the entire payment period. To accommodate this change, the University was required to:

- Determine whether there was any regulatory or statutory support for the DCL guidance
- Consider the best method to determine a hypothetical "rate of progress" (i.e., by looking at the student's entire academic history at UOP or by looking at the student's progress only during a specific payment period and modify its payment period calculation)
- Consider the best method to determine a "rate of progress" if a student did not earn any credit hours during the portion of the original payment period that the student attended and test various scenarios under the new calculation
- Train financial aid staff to manually calculate Return of Title IV funds calculations while UOP's technology department developed the appropriate systems changes

- Develop and implement changes to UOP's computer system to create a projected payment period end date based on the assumption that students would continue their study at the same exact rate as they began their studies within a particular payment period.
- Test the new changes.

f) Date of Determination for Schools that Take Attendance

Pursuant to the DCL issued in February 2004, a school that must take attendance has seven days to determine that a student unofficially withdrew from the school. Prior to the publication of the DCL, schools generally had read ED rules to provide that all schools had up to 30 days after the end of the earlier of the payment period (or enrollment period), the academic year, or the educational program to determine that a student had withdrawn. *See* 34 C.F.R. § 668.22(j) (2004). In order to determine the effect of this new "guidance" on UOP, UOP conducted a significant amount of legal research to confirm state regulatory requirements for taking attendance. Because the University operates in 33 states and several U.S. territories, this was a large undertaking. The University conducted this research between March and August of 2004 and determined that the rule was not applicable to the University.

g) Treatment of LEAP Funds

According to the DCL, schools must now consider all or a portion of a state grant as LEAP for purposes of its Return of Title IV funds calculations if the state grant includes LEAP funds. As this determination of the makeup of the State Grant would vary from state to state, the policy change required different system updates for each state. The University reviewed the rules of the various states in which its students received state grants and updated its system in April, 2004.