Colorado Technical University's Administration of Title IV, Higher Education Act Student Financial Assistance Programs

FINAL AUDIT REPORT

ED-OIG/A09K0008
September 2012

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U.S Department of Education
Office of Inspector General
Sacramento, California

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL

Audit Services
Sacramento Region

September 21, 2012

Control Number
ED-OIG/A09K0008

Jack Koehn
Acting President
Colorado Technical University
4435 North Chestnut Street
Colorado Springs, CO 80907

Dear Mr. Koehn:

The enclosed **final audit report**, titled "Colorado Technical University's Administration of Title IV, Higher Education Act Student Financial Assistance Programs," presents the results of our audit. This report incorporates the comments that Colorado Technical University (CTU) provided in response to the draft report. If CTU has any additional comments or information that it believes might have a bearing on the resolution of this audit, CTU should send them directly to the following Education Department official, who will consider them before taking final Departmental action on this audit:

James Runcie
Chief Operating Officer
Federal Student Aid
U.S. Department of Education
Union Center Plaza, Room 112G1
830 First Street, N.E.
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 in audit reports. Therefore, receipt of any additional comments by the above official within 30 days would be appreciated.

Sincerely,

/s/

Raymond Hendren
Regional Inspector General for Audit

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Acronyms, Abbreviations, and Short Forms Used in this Report

AY	Award Year
CEC	Career Education Corporation
C.F.R.	Code of Federal Regulations
COO	Chief Operating Officer
CTU	Colorado Technical University
CVUE	Campus Vue
CY	Calendar Year
DCL	Dear Colleague Letter
Department	U.S. Department of Education
Direct Loan	William D. Ford Federal Direct Loan
FFEL	Federal Family Education Loan
FSA	Federal Student Aid
FSA Handbook	Federal Student Aid Handbook
FSEOG	Federal Supplemental Educational Opportunity Grant
HEA	Higher Education Act of 1965, as amended
OIG	Office of Inspector General
Pell	Federal Pell Grant
Title IV	Title IV of the Higher Education Act of 1965, as amended

EXECUTIVE SUMMARY

Disbursements under Title IV of the Higher Education Act of 1965, as amended (Title IV), for students attending Colorado Technical University (CTU) increased more than 188 percent over the last 5 years, from about $190 million during calendar year (CY) 2006, to nearly $548 million during CY 2010. From July 1, 2009, through June 30, 2010, more than 67 percent of the total Title IV funds that CTU disbursed went to students attending "CTU Online," which is the CTU component that delivers educational programs entirely through the Internet.

The objective of our audit was to determine whether CTU Online complied with selected provisions of Title IV and Federal regulations governing (1) student eligibility at the time of disbursement, (2) identification of withdrawn students, (3) the return of Title IV program funds, and (4) payment of incentive compensation to admissions representatives. Our audit period covered student terms beginning July 5, 2009, through May 16, 2010.

CTU Online did not comply with Federal requirements regarding student eligibility for Title IV funds, the identification of withdrawn students, and authorizations to retain credit balances. Specifically, CTU Online did not—

- Ensure students were eligible for Title IV funds at the time of disbursement, which resulted in CTU Online improperly disbursing $155,098 for 37 of the 50 students we reviewed.[1]
- Identify students who had unofficially withdrawn, which resulted in CTU Online improperly retaining unearned Title IV funds totaling $18,066 for 20 of the 50 students we reviewed.
- Obtain proper authorizations to retain students' credit balances.

Other than the exceptions noted above, we determined that CTU Online generally complied with Federal requirements applicable to the return of Title IV funds and the payment of incentive compensation to admissions representatives.

We recommend that the Chief Operating Officer (COO) for Federal Student Aid (FSA) require CTU to (1) return $173,164, which represents the amount of Title IV funds improperly disbursed or retained for the students included in our review; (2) develop and implement written policies and procedures to ensure future compliance with Title IV requirements regarding student eligibility for program funds, identification of withdrawn students, and authorizations to retain students' credit balances; and (3) review the appropriate records of all CTU Online students that were not included in our review for all terms from July 5, 2009, until such time as written policies have been implemented and return all other Title IV funds that were improperly disbursed or retained.

[1]We randomly and judgmentally selected 50 students from a total of 36,847 students enrolled during our audit period based on the risk factors discussed in the Objective, Scope, and Methodology section of this report. Because the students were both randomly and judgmentally selected, the results of our review may not be representative of the entire student population receiving Title IV disbursements. Therefore, the results presented in this report cannot be projected to the entire CTU student population.

We provided a copy of the draft report to CTU for review and comment on January 13, 2012. We received CTU's comments and additional documentation on March 2, 2012.[2] CTU disagreed with our findings and stated that the audit should be closed without further action. We summarized CTU's comments and provided our response to its comments at the end of each finding. We have also included CTU's complete written comments as Appendix A to this report. Copies of the additional documentation that CTU provided (Exhibits 1 – 10), less any personally identifiable information that is protected under the Privacy Act of 1974 (5 U.S.C. § 552a) or other information that is exempt under the Freedom of Information Act (5 U.S.C § 552b), are available upon request. We have included a list showing the titles of the exhibits provided by CTU, along with a brief description of each exhibit, as Appendix B.

In Finding No. 1, we clarified our use of criteria in effect during the audit period, added criteria related to record retention at Title 34, Code of Federal Regulations (34 C.F.R.) § 668.24(a)(3), noted that CTU did not comply with the cited regulations, and recommended that CTU adopt procedures to comply with the record retention requirements. In Finding No. 2, we made one change to enhance clarity, added criteria related to withdrawal dates at 34 C.F.R. § 668.22 (c), and noted that CTU did not comply with the Federal regulations. Other than the noted revisions to Findings No. 1 and No. 2, we did not revise our findings or recommendations based on CTU's comments or the additional documentation it provided.

[2] On March 5, 2012, CTU provided corrections to two sentences in its response to our draft report. The changes were not material to CTU's response. The response that is attached to this report includes CTU's corrections.

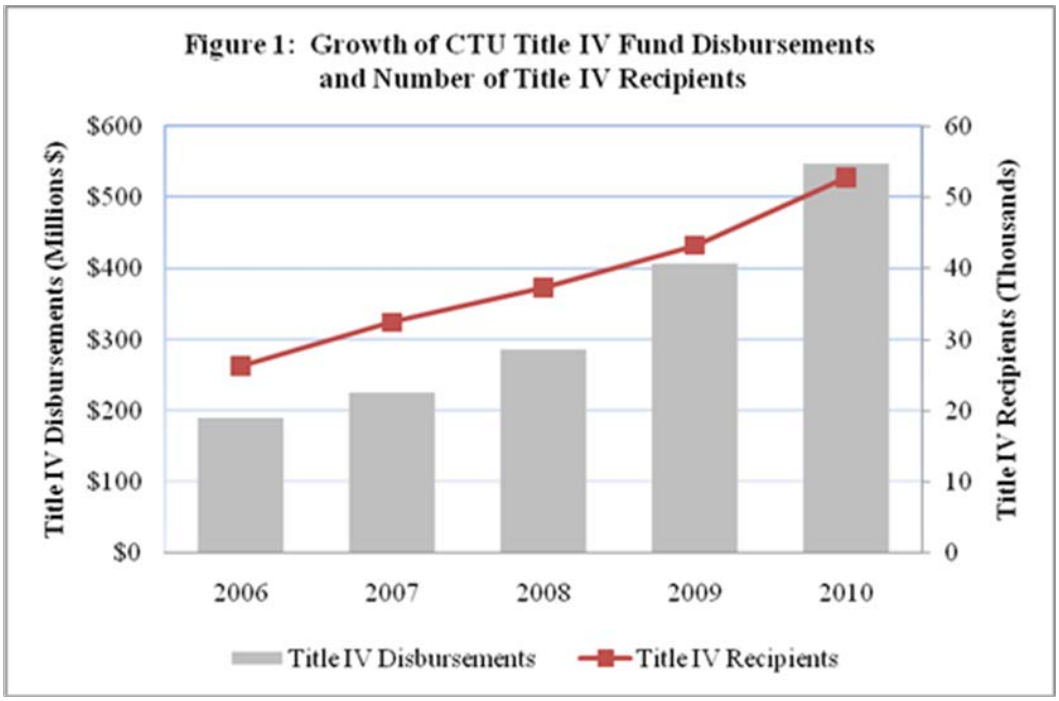
BACKGROUND

CTU is a private, for-profit institution of higher education accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. The school was founded in 1965 as a technical training school but has since expanded its curriculum to include more than 130 bachelors, masters, and doctoral degree programs. CTU was purchased by the Career Education Corporation (CEC) in 2003. According to its 2010 Annual Report, CEC is a for-profit provider of postsecondary educational services operating in 26 States and 5 countries. CEC had total revenues (including revenue from Title IV programs) of more than $2.1 billion in CY 2010. At the end of 2010, nearly 117,000 students were enrolled in CEC-owned schools. CEC's headquarters is located in Schaumburg, Illinois.

Students receive instruction either in a classroom setting at one of CTU's physical locations ("ground campuses") or through "CTU Online," the CTU component that delivers educational programs entirely through the Internet, but not both.[3] CTU's main campus is located in Colorado Springs, Colorado. CTU operates three additional campuses in Colorado (Denver, Pueblo, and Westminster) as well as campuses in Sioux Falls, South Dakota, and North Kansas City, Missouri. CTU ground campuses have financial aid advisors at each location and use CEC as their servicer for administering financial aid. CTU Online was initially approved by the U.S. Department of Education (Department) as a branch campus in April 2003. Its operations are located in Hoffman Estates, Illinois, and are separate from the ground campus operations. CTU Online administered its Title IV programs and did not use a servicer.

The total amount of Title IV funds disbursed by CTU and the number of CTU students who received a Title IV disbursement have both increased dramatically in recent years. As shown in Figure 1 below, CTU disbursements of Title IV funds have increased more than 188 percent over the last 5 years, from about $190 million during CY 2006, to nearly $548 million during CY 2010. The number of Title IV recipients at CTU more than doubled over the same period, increasing from 26,295 to 52,818 students.

[3] Students enrolled in a program at a CTU ground campus may also receive some instruction through distance education means, including through the Internet. However, CTU's ground campus distance education platform and operations are separate and distinct from the distance education platform and operations for CTU Online.



Source: Title IV disbursement and recipient data are from CTU's annual compliance attestation examination reports.

Our review of CTU's administration of Title IV programs focused on CTU Online. CTU Online is a term school offering more than 50 instructional programs leading to associates, bachelors, and masters degrees. The school operates on the quarter system with an academic year consisting of 33 weeks and 36 credits hours. Each quarter consists of two 5 ½-week modules and each course within a module is 5 ½ weeks in duration. Students may enroll at CTU Online at the beginning of any module in an academic year. Enrolled students who are carrying an academic workload totaling 12 credit hours or more per quarter are considered full-time.

CTU Online uses two proprietary information systems to operate its distance education program:

Virtual Campus. Virtual Campus is the course delivery system and students' portal for the learning environment for CTU Online. It provides students with access to course presentations, assignments, live chats, discussion boards, course information (for example, course syllabuses), grades, and financial aid information. Virtual Campus records student participation in each course, but students' official attendance records are maintained in CTU's other proprietary system, Campus Vue.

Campus Vue (CVUE). CVUE is used to document each student's activities; for example, it includes data on each student's admission, transcripts, receipt of financial aid, and graduation, withdrawal, or dismissal. Although student attendance information is initially recorded in Virtual Campus, the attendance

data are transferred to CVUE in real time and the records in CVUE are considered to be the official attendance records. CTU Online uses CVUE to monitor students' enrollment status and academic progress and to perform return of Title IV funds calculations.

During our audit period CTU Online students received financial aid from a number of Title IV programs, in the form of loans and grants to help students meet the cost of attendance. In award year (AY) 2009–2010, CTU Online participated in the (1) Federal Family Education Loan (FFEL), (2) William D. Ford Federal Direct Loan (Direct Loan), (3) Federal Pell Grant (Pell), (4) Federal Supplemental Educational Opportunity Grant (FSEOG), (5) Academic Competitiveness Grant (ACG), and (6) National Science and Mathematics Access to Retain Talent (SMART) Grant programs. CTU Online received virtually all (99.5 percent) of its Title IV funding through the following three programs in AY 2009–2010:

- **FFEL.** This program encouraged private lenders to make various types of loans available to students and their parents. The loans are guaranteed by the Federal Government against default and are subject to annual and aggregate limits. The loans are subsidized or unsubsidized, depending on financial need. For subsidized loans, the Federal Government pays the interest while a student is in school, as well as during grace and deferment periods. For unsubsidized loans, the borrower is responsible for the interest. The Health Care and Education Reconciliation Act of 2010 (Pub. Law 111-152), enacted on March 30, 2010, ended the origination of FFEL Program loans after June 30, 2010. Beginning July 1, 2010, all Federal student loans are originated through the Direct Loan program.

- **Direct Loan.** Under this program, the Secretary makes loans available to students and their parents to pay the costs of the student's attendance at a postsecondary school. These loans are also subject to annual and aggregate limits and are subsidized or unsubsidized, depending on financial need.

- **Pell.** This program provides grants to the most financially needy students. Grant amounts are subject to annual minimum and maximum levels based on the student's expected family contribution, enrollment status, and cost to attend the institution.

As shown in Table 1, during AY 2009–2010 CTU disbursed almost $507 million of Title IV program funds for its students. More than $340 million of the total, or about 67 percent, was disbursed to CTU Online students.

Table 1: CTU Disbursements by Title IV Program for AY 2009–2010

Title IV Program	Total Funds Disbursed (a)	Percentage of Total Funds Disbursed	Funds Disbursed by CTU Online (b)	Percentage of Funds Disbursed by CTU Online
FFEL	$329,032,507	64.9%	$244,537,420	71.8%
Direct Loan	80,408,859	15.9%	24,017,387	7.1%
Pell Grant (c)	92,558,226	18.3%	70,220,188	20.6%
Other (d)	4,611,699	0.9%	1,658,698	0.5%
Total	**$506,611,291**	**100%**	**$340,433,693**	**100%**

(a) We used publicly available information from the U.S. Department of Education, Federal Student Aid Data Center Web site at http://federalstudentaid.ed.gov to determine the amount of Title IV funds disbursed to students enrolled at CTU (ground campuses and CTU Online) by program.

(b) We used Title IV disbursement information provided by CTU to determine the amount of Title IV funds disbursed to CTU Online students for each program.

(c) Beginning with AY2009–2010, a portion of the funding for Pell was provided under the American Recovery and Reinvestment Act of 2009.

(d) The "Other" program category includes FSEOG, ACG, SMART, and Federal Work Study (Federal Work Study was not available to CTU Online students), which account for less than 1 percent of total and CTU Online disbursements for this award year.

To perform detailed testing of Title IV funds disbursed by CTU Online we selected 50 of 36,847 students who were enrolled in 147 of 85,524 "individual student terms" at CTU Online and who received Title IV disbursements during our audit period.[4] The 50 students reviewed received $625,758 of a total of $340,433,693 in Title IV aid that was disbursed for CTU Online students during our audit period. In this report, the term "individual student terms" means the sum of the number of terms attended by the students during the audit period. For example, if one student attended two terms during the audit period and another student attended the same two terms, the number of "individual student terms" for both students together would be four.

Subsequent Event. On February 3, 2012, FSA placed all CEC-owned schools, including CTU, on "Heightened Cash Monitoring 1" for Title IV funds because some CEC-owned schools reported inflated job placement rates for graduates. CTU was not identified as one of the schools that reported inflated job placement rates. Under Heightened Cash Monitoring 1, CTU must use its own funds to make Title IV disbursements and submit information regarding these disbursements to the Department for review. CTU may draw down Title IV funds to reimburse itself only after it has submitted a disbursement roster to the Department and has waited one business day.

[4] Refer to the Objective, Scope, and Methodology section of this audit report for a description of how we selected the 50 students included in our review.

AUDIT RESULTS

We found that CTU generally complied with the Federal requirements applicable to return of Title IV funds and the payment of incentive compensation to admissions representatives. However, we concluded that CTU did not—

- Verify that students were attending courses at the time it disbursed Title IV funds;
- Verify enrollment status to ensure students received correct Title IV disbursement amounts;
- Correctly identify students' first date of attendance;
- Identify students who had unofficially withdrawn; and
- Obtain the proper authorizations to retain students' credit balances.

CTU disagreed with all three findings in the draft report. We summarized CTU's comments and provided our response to its comments at the end of each finding. In Finding No. 1, we clarified our use of criteria in effect during the audit period, added the record retention regulations at 34 C.F.R. § 668.24(a)(3), noted that CTU did not comply with the cited regulations, and recommended that CTU adopt procedures to comply with the record retention requirements. In addition, we revised Finding No. 2 to clarify CTU's student withdrawal policy, added criteria related to withdrawal dates, and noted that CTU did not comply with the Federal regulations. We did not revise Finding No. 3. CTU also provided comments to the Other Matters section of the draft report. We summarized CTU's comments regarding its revised compensation plan but did not summarize CTU's other comments in the Other Matters section. CTU's written comments are included as Appendix A to this report, and a list of additional documents provided by CTU is included as Appendix B.

In the Audit Results and the Other Matters sections of this report, the term "CTU" means the management and other functions dedicated to CTU Online's administration of Title IV program funds.

FINDING NO. 1 – Student Eligibility for Disbursement of Title IV Funds

Deficiencies in CTU's Title IV disbursement policies and procedures resulted in improper disbursements to students who were not eligible for the Title IV funds. CTU improperly disbursed Title IV funds because it did not ensure that students were (1) participating in a documented academically related activity in any course in a term at the time of disbursement, (2) attending the number of credit hours for which the Title IV aid was awarded, and (3) had begun attendance on or after the start date of a course. Our review of CTU's records for 50 students receiving Title IV funds showed that $155,098 of $625,758 was improperly disbursed.

CTU Disbursed Title IV Funds to Students Who Did Not Attend During the Term

CTU did not verify that students were attending any courses within a term before it disbursed Title IV funds to them. According to 34 C.F.R. § 668.164(b)(3), schools may disburse Title IV funds to a student or parent for a payment period "only if the student is enrolled for classes for that payment period and is eligible to receive those funds."[5] In addition, if a disbursement is made after the start of the payment period, schools must verify whether a student is attending any courses in the term before making a disbursement to ensure that the student is enrolled and eligible to receive the funds.[6] Guidance in the Federal Student Aid Handbook (FSA Handbook) reflects this requirement:

> [B]efore disbursing FSA funds, you must determine and document that a student remains eligible to receive them. That is, you must confirm that . . . if the disbursement occurs on or after the first day of classes, that the student has begun attendance . . . .
> (2009-2010, FSA Handbook, volume 4, page 24)

The courses offered by CTU are telecommunication courses. According to 34 C.F.R. § 600.2, a telecommunication course is—

> A course offered principally through the use of one or a combination of technologies including television, audio, or computer transmission through open broadcast, closed circuit, cable, microwave, or satellite; audio conferencing; computer conferencing; or video cassettes or discs to deliver instruction to students who are separated from the instructor and **to support regular and substantive interaction between these students and the instructor** . . . . [emphasis added]

CTU disburses Title IV funds after the first week of the start of the term. Thus, CTU was required to verify and document that students receiving Title IV disbursements had attended one or more of the courses in which they had enrolled before making Title IV disbursements. However, for 17 of the 50 students we reviewed, CTU had no documentation to support any substantive interaction between these students and the instructor for any courses in the term, and therefore, had no record of attendance for the 17 students. Schools are required to return all Title IV funds for students who do not "begin attendance in a payment period or period of enrollment" (34 C.F.R. § 668.21(a)), so we determined that CTU improperly disbursed $102,333 of Title IV funds to these students.

CTU determined attendance based solely on students logging into Virtual Campus. However, some students logged into only an activity that did not represent substantive interaction between the student and the instructor, and therefore the activity did not qualify as attendance for students enrolled in distance education classes. The preamble to the final rule for 34 C.F.R. § 668.22 that became effective on July 1, 2011, described what constitutes attendance for students enrolled in distance education (online) classes.[7] The preamble states that its position is consistent with other guidance that the Department has provided on the applicability of the regulations to online programs. The preamble states—

[5] All regulatory citations are to the July 1, 2009, volume unless otherwise noted.
[6] For the purposes of Title IV disbursements CTU's terms are the payment periods.
[7] 75 Federal Register 66899, October 29, 2010.

> With respect to what constitutes attendance in a distance education context, the Department does not believe that documenting that a student has logged into an online class is sufficient by itself to demonstrate academic attendance by the student because a student logging in with no participation thereafter may indicate that the student is not even present at the computer past that point. Further, there is also a potential that someone other than the student may have logged into a class using the student's information to create the appearance the student was on-line. Instead, an institution must demonstrate that a student participated in class or was otherwise engaged in an academically related activity, such as by contributing to an online discussion or initiating contact with a faculty member to ask a course-related question. This position is consistent with the current guidance the Department has provided to individual institutions regarding the applicability of the regulations to online programs.

As such, documentation that a student logged on only to Virtual Campus to view a syllabus, course presentation, or archived chat did not adequately support regular and substantive interaction between the student and the instructor. As a result, we concluded that CTU did not ensure that sufficient documentation was available to support a student's attendance. According to 34 C.F.R. § 668.24(a)(3), a school is required to establish and maintain records to document its administration of the Title IV programs in accordance with all applicable requirements.

CTU monitored course participation based on rules that were programmed into Virtual Campus, which recorded the date and time that a student performed any of the six activities described below. CTU considered student participation in any of the six activities as attendance in the course.

1. Viewing the task list or the syllabus;
2. Viewing a course presentation;
3. Posting an assignment to the discussion board;
4. Writing and submitting an individual assignment, including knowledge checks (that is, tests of the students' understanding of the subject matter);
5. Participating in a live chat; and
6. Viewing an archived chat at a later date.

The date of student activity captured in Virtual Campus was transferred into CVUE (the system that CTU relies on as its students' official attendance records) in real time; however, information about the type of activity that the students performed was never transferred to CVUE. CTU used the information in CVUE to determine when a student began or ceased attendance for the purposes of administering Title IV funds. We concluded that CVUE did not provide sufficient documentation to confirm that students were engaged in any of the six activities that CTU considered to be attendance because CVUE captured only the date that a student logged (clicked) into Virtual Campus for one of the six activities. Therefore, we reviewed student activity in Virtual Campus.

We determined that CTU did have sufficient documentation to support the student's activities for regular and substantive interaction when the student posted an assignment to the discussion board or wrote and submitted an individual assignment. During our review of 50 students, we

evaluated the activities recorded in Virtual Campus for all of the courses for each term the student was enrolled during our audit period. We concluded that posting an assignment to the discussion board (activity 3) or writing and submitting an individual assignment (activity 4) demonstrated substantive interaction between the student and the instructor. The discussion board is used in either a group project that requires each student in the group to participate on a project assigned by the instructor or it consists of an individual's response to a question posed by the instructor. Writing and submitting an individual project is assigned by the instructor on a course-related subject. When appropriate documentation was available, we also considered participation in a live chat (activity 5) on a course-related subject to be attendance in the course. However, CTU was not always able to provide documentation of the live chat activity.

We determined that CTU's documentation for activities 1, 2, and 6, listed above, was not sufficient to support regular and substantive interaction between a student and an instructor as required by the definition of a telecommunication course. CTU could provide a date when a student logged (clicked) into Virtual Campus for viewing the task list or syllabus (activity 1), a course presentation (activity 2), or an archived chat (activity 6). However, viewing a task list or syllabus (activity 1) is not an academically related activity, and by itself, the date of the "click" was not adequate support to show that the student actually performed or completed activity 1, 2, or 6. For example, a student may have logged into the course to view a course presentation but then walked away from the computer. Thus, there was no evidence that the student actually viewed the course presentation and engaged in the activity.

The 50 students we reviewed were enrolled in 147 individual student terms during our audit period. For 17 students enrolled in 26 individual student terms, CTU determined attendance based solely on students logging into Virtual Campus for an activity that did not represent substantive interaction between the student and the instructor (activity 1), or for which the log-in did not indicate whether the student actually engaged in the activity (activity 2 or 6). The log-ins did not qualify as attendance for students enrolled in distance education classes.

CTU Did Not Verify Enrollment Status and Adjust Title IV Disbursement Amounts When Warranted

CTU did not have policies and procedures to ensure that Title IV funds were disbursed appropriately when a change in enrollment status occurred. A student's enrollment status could change when he/she failed to begin attendance in all courses enrolled in during a term. For example, a change in the number of credit hours that a student had attempted could result in his/her enrollment status changing from full-time to half-time or from half-time to less than half-time, which would affect the amount of the Title IV award that the student was eligible to receive. We found that CTU did not appropriately adjust the enrollment status of students who had failed to attend all of their courses because it did not verify attendance in each individual course within the module. As a result, CTU improperly disbursed $52,765 in Title IV funds for 20 of the 50 students we reviewed.

If a student's enrollment status changes before the student begins attendance in all of his or her classes for a payment period, the school is required to recalculate the student's enrollment status and Pell award based on only those classes for which the student actually began attendance (34 C.F.R. § 690.80(b)(2)(ii)).

According to Section 427(a)(1)(C) of the Higher Education Act of 1965, as amended (HEA), to be eligible for an FFEL Program loan, a student must have been "carrying at least one-half the normal full- time academic workload for the course of study the student is pursuing . . . ." Title 34 C.F.R. § 682.604(b)(2)(iv) prohibited schools from disbursing FFEL Program loans to students who were not attending on at least a half-time basis:

> If, prior to the transmittal of the proceeds of a disbursement to the student, the student temporarily ceases to be enrolled on at least a half-time basis, the school may transmit the proceeds of that disbursement and any subsequent disbursement to the student if the school subsequently determines and documents in the student's file—
>
> (A) That the student has resumed enrollment on at least a half-time basis;
>
> (B) The student's revised cost of attendance; and
>
> (C) That the student continues to qualify for the entire amount of the loan, notwithstanding any reduction in the student's cost of attendance caused by the student's temporary cessation of enrollment on at least a half-time basis.

Section 455(a)(1) of the HEA and 34 C.F.R. § 685.303(b)(2)(iv) provide similar requirements for Direct Loan Program loans.

Our review of CTU records for 50 students showed that 20 students received improper disbursements for 26 individual student terms they attended during the audit period because their enrollment status was not adjusted even though it should have been. Of the 20 students with improper disbursements, 4 students received both Pell and loans, 13 students received only Pell, and 3 students received only loans. For the 17 students who received Pell, $21,065 was disbursed for which the students were not eligible. These 17 students were eligible for only $13,911 of the $34,976 that CTU disbursed. The seven students who received loans never became eligible for the $31,700 in FFEL Program funds disbursed because they did not begin attendance on at least a half-time basis during the payment period.

CTU Incorrectly Determined the First Day of Attendance

CTU students also received improper Title IV disbursements because CTU counted the 2 days before the start date of the course as attendance for purposes of administering Title IV funds. CTU policy states, "Students who participate in a class related activity in advance of the first week of instruction will have their course participation recorded as of the first day of the [module]." When a student performed any of the six activities described above during the 2 days before the course start date, this activity was documented in CVUE as occurring on the start date of the course.

For example, the start date for a course was October 4, 2009, but CTU allowed students to access the course on October 2nd and October 3rd. One student included in our review participated in this course on October 2, 2009 and/or October 3, 2009, before the scheduled start date. However, the student's first day of attendance in CVUE was recorded as October 4, 2009. In this case, the student's only activity in the course occurred before the start date of the course.

Schools are required to return all Title IV funds for students who do not "begin attendance in a payment period or period of enrollment" (34 C.F.R. § 668.21(a)). The period of enrollment must

coincide with one or more of a school's academic terms for which institutional charges are assessed, such as a semester, trimester, or quarter; an academic year; or the length of the student's program of study (34 C.F.R. § 682.200(b)). In addition, the payment period is the academic term for a student enrolled in a program measured in credit hours that uses either standard terms or nonstandard terms that are substantially equal in length (34 C.F.R. § 668.4(a)).

Based on the above requirements, students are not considered to have begun attendance in the payment period if their only activity occurred before the academic term began. Thus, CTU is required to return all Title IV funds for students whose only participation in their course occurred before the start of the academic term. In addition, when a student's failure to begin attendance in some of their courses during the academic term causes the student's enrollment status to change, CTU must adjust the Title IV funds disbursed to reflect the student's actual enrollment status.

CTU provided an electronic data file that included a universe of 36,847 students who received Title IV funds during our audit period. This universe included 392 students for which a "0:00" time stamp was the only indication that the students had activity in at least one course that they were enrolled in.

CTU told us that this "0:00" time stamp meant that the students had "attended" during the 2 days before the course start date. In order to confirm what CTU told us about the "0:00" time stamp, we selected 5 students from the 392 students who we identified with a "0:00" time stamp and verified that they had logged on prior to the course start date. These 5 students were also part of the 50 students selected for review of Title IV funds disbursed. We also confirmed that the five students did not log into the identified course on or after the course start date.

We concluded that CTU's policy allowing students to participate in course activities prior to the course start date and subsequently recording this activity as attendance for Title IV eligibility purposes did not conform to Federal requirements. As a result, CTU failed to identify students who never began any courses in a term and failed to return Title IV funds for those students. CTU also did not ensure Title IV funds were disbursed appropriately when a change in enrollment status occurred.

The five students we reviewed with a "0:00" time stamp in at least one course were also enrolled in other courses in the given term within our audit period. For the five students in the given term:

- Four students began attendance in some but not all courses in the given term. Three of the four students received Pell grants that needed recalculation because of changes in their enrollment status. The other student received only loans and remained enrolled at least half-time. Therefore, this student was eligible for the loan disbursement.

- One student's attendance was not supported by documentation of regular and substantive interaction in any course during the term; therefore, CTU should have returned all the Title IV funds disbursed to the student.

The amount of Title IV funds improperly disbursed to the five students above is quantified in previous sections of Finding No. 1 where we identified students who had not begun attendance in

any course during a term and students whose enrollment status had changed, necessitating a recalculation.

RECOMMENDATIONS

We recommend that the COO for FSA require CTU to—

1.1 Return a total of $155,098 of Title IV funds, to the appropriate lenders and/or the Department, as applicable, for improper disbursements. Of the total amount to be returned, $51,416 is for Pell; $1,200 is for FSEOG; $98,999 is for FFEL; and $3,483 is for Direct Loan.

1.2 Return all Title IV funds to lenders and/or the Department, as appropriate, for all Title IV recipients not included in our review for which CTU made improper disbursements (1) to students who never began attendance in a term, (2) of Pell awards that were not properly adjusted based on changes to students' enrollment status, (3) of loans to students enrolled less than half-time during the payment period, and (4) to students for whom the only activity occurred before the start of the term (or module) for the period from July 5, 2009, and until such time that Recommendation 1.3 below is implemented.

1.3 Develop and implement written policies and procedures to (a) verify student eligibility determinations of attendance and enrollment status and the correct disbursement amounts in accordance with Federal requirements, and (b) ensure that the type of academic activity used to support a student's attendance is documented and maintained in accordance with Federal requirements.

CTU Comments

CTU disagreed with Finding No. 1 and stated that the Office of Inspector General (OIG) incorrectly applied regulatory requirements that were not in effect during the audit period as the primary basis for its finding. CTU also stated that it fully complied with existing requirements, used a reasonable definition of attendance for its online program in determining eligibility for Title IV funds, and that academic activity before the payment period can be used to determine student eligibility for Title IV funds.

1. Criteria cited were not in effect during the audit period.

CTU Comment

The finding applies requirements that were not in effect during the audit period. As criteria, the report cites the preamble to final regulations that were published on October 29, 2010 (75 FR 66899). The final regulations discussed in the preamble were not effective until more than a year after the end of the audit period. It is a well-settled principle that an agency may not make retroactive application of new rules or regulations.

OIG Response

We did not apply new regulations retroactively. All of the regulatory criteria we cite in the finding are from the July 1, 2009, volume of the C.F.R. and were in effect during the audit period. While the finding does cite the Department's preamble to regulations that were published after the end of the audit period, the citation is used only to provide a description of the Department's interpretation of the requirements in effect during the audit period. We clarified that the requirement for substantive interaction derives from the long-standing definition of a telecommunication course.

2. Guidance cited was not available during the audit period.

CTU Comment

Before the Department published final regulations on October 29, 2010, the Department had not articulated the requirements that are used as criteria in the finding. There were no regulations or generally available guidance to notify schools that the Department expected them to meet a specific set of standards. The preamble cited in the finding states that the Department provided its guidance to "individual institutions," but CTU was not one of those institutions.

In an August 2010 letter, the official responsible for making policy for Title IV programs, the Assistant Secretary for Postsecondary Education, stated that the Department had not published specific guidance on the documentation of attendance in online educational programs. The OIG itself complained of the lack of guidance for this requirement in two testimonies before Congress, an issued audit report, and internal e-mails released as the result of a Freedom of Information Act request.

OIG Response

CTU is correct in asserting that there was a lack of detailed guidance on the appropriate way to document attendance at online schools. However, none of the cited documents indicate that CTU's practice for documenting attendance in its courses would be acceptable. The cited letter from the Assistant Secretary for Postsecondary Education states directly that "the Department does not believe that documentation that a student has logged into an online class is sufficient by itself to demonstrate academic attendance."

The lack of detailed standards for online programs does not mean that there are no standards at all. For example, regulations at 34 C.F.R. § 668.22(c)(3) concerning the withdrawal date for a student state that schools may use a student's attendance at an academically related activity provided the school documents that the activity is academically related and the student's attendance at the activity. CTU must demonstrate and document reasonable compliance with this requirement. Furthermore, 34 C.F.R. § 668.82 provides that CTU is required to act in the nature of a fiduciary in the administration of the Title IV programs. In the capacity of a fiduciary, CTU is "subject to the highest standard of care and diligence in administrating the programs and in accounting to the Secretary for the funds received under those programs."

Record retention regulations require CTU to establish and maintain records to document that "[i]ts administration of the title IV, HEA programs [is] in accordance with all applicable

requirements" (34 C.F.R. § 668.24(a)(3)). Careful and diligent consideration of the type of evidence needed to document a student's attendance in an online course would not conclude that documentation of a student logging into the course, by itself, is sufficient; it may be true that all students who attend an online course must log into the system, but it is not true that all students who logged into the system attended the online course. For example, logging into the system does not, by itself, indicate that the student actually read an archived chat or viewed a course presentation. The student may have logged into the system in error or may have left the room as soon as he or she logged in.

Although the Department may not have established a detailed set of standards for documenting attendance at online schools, CTU should have established and documented students' academically related attendance with a standard of care and diligence required of a fiduciary acting in the interest of the Department.

We have revised the finding to include the criteria at 34 C.F.R. § 668.24(a)(3), noted CTU's non-compliance with the record retention regulations, and recommended that CTU adopt procedures to comply with the record retention requirements.

3. CTU complied with the requirements in effect during the audit period.

CTU Comment

CTU complied with the rules in effect during the audit period. During that period, "academically related activity" was defined in a non-exclusive manner: it offered examples but did not limit compliance to those examples. According to 34 C.F.R. § 668.22(c)(3)(ii)—

> An "academically-related activity" includes but is not limited to an exam, a tutorial, computer-assisted instruction, academic counseling, academic advisement, turning in a class assignment or attending a study group that is assigned by the institution.

All six of the categories of participation identified by CTU were consistent with this non-exclusive regulation. There is no lawful basis for asserting that the documentation for three of these activities ((1) viewing the task list or the syllabus, (2) viewing a course presentation, and (6) viewing an archived chat at a later date) does not support an academically related activity. As such, the documentation of students' login into any of the six academically related activities was compliant with the regulations in effect during the audit period.

OIG Response

Our report determined only that the first activity of the three (viewing the task list or the syllabus) was not academically related. That activity is restricted to reading a description of the course contents and requirements and did not reasonably constitute an academically related activity where the student engaged in study or teacher instruction. The use of a non-exclusive list of examples in the regulations does not allow an institution to designate any activity it chooses to be academically related. CTU's comments did not provide any rationale for considering the review of a syllabus, by itself, to be academic in nature or to be reasonably included as similar to the examples provided in the regulations. Where a student views a

syllabus and then discontinues attendance, that is more logically consistent with dissatisfaction with the course, rather than actual attendance.

CTU's documentation of all three activities—(1), (2), and (6)—was based entirely on its records of the students' logging onto the system to initiate one of those activities. As we explain in our response to CTU's second comment, a login by itself is insufficient to support that the student actually performed the activity and thus attended.

4. CTU's definition of online "attendance" was reasonable.

CTU Comment

In the absence of a regulatory definition of online "attendance" it was left to the reasonable discretion of institutions to define what constituted attendance. The definition of "attendance" used by CTU is reasonable.

OIG Response

As we explained in our previous responses, it is not reasonable to determine that a student has attended a class based solely on his or her logging into a system to initiate the viewing of a task list or syllabus, a course presentation, or an archived chat; and viewing a course syllabus by itself does not demonstrate the student engaged in academically related activity.

In its role as a fiduciary, CTU must act to protect the interests of the Department. However, CTU's decision to use a login as initiation, but not completion, of an activity to determine a student's attendance appears to have benefitted only CTU. This practice minimized CTU's effort to document students' attendance and maximized charges to students. The resulting records CTU maintained are inadequate to document anything but a brief and unsubstantial encounter by a student with CTU. To illustrate, we provide information for 3 of the 17 students[8] for which CTU had not documented academic attendance but nonetheless disbursed $38,972 below:

- Student A received a total of $15,701 for 3 terms, attempted one course 6 times and another course 5 times for a total of 44 attempted credits, but earned no credits. For the 11 courses, CTU's attendance records show that the student logged onto Virtual Campus to view a task list or syllabus, a course presentation, or an archived chat (herein referred to as viewings). Student A had not posted to a discussion board, submitted an individual assignment or knowledge check, or participated in a live chat (herein referred to as submissions or postings).

- Student B received a total of $13,466 for 3 terms, attempted one course 5 times and another course 3 times for a total of 32 attempted credits, but earned no credits. For the 8 courses attempted, CTU's records show that the student logged onto Virtual Campus and initiated viewings. Student B had no submissions or postings.

[8] Student A was in Sample 8-7, Student B was in Sample 8-2, and Student C was in Sample 9-1.

- Student C received a total of $9,805 for 2 terms, attempted 2 courses 4 times each for a total of 32 attempted credits, but earned no credits. For the 8 courses attempted, CTU's records show that the student logged onto Virtual Campus and initiated viewings. Student C had no submissions or postings.

In the absence of detailed guidance or regulations from the Department during the audit period, we did not expect CTU to have in place a particular method of documenting attendance or determining acceptable academic activity. Rather, our audit looked for any reasonable documentation that was adequate to support CTU's compliance with the requirements pertinent to our objectives. We found that CTU's practice for documenting attendance did not meet even this basic criterion. CTU's response did not further explain why it is reasonable for a fiduciary to disburse and retain Title IV funds for its own benefit based on records that do not in fact show that the student actually viewed or attended the activity, nor did it explain how reading a course syllabus was reasonable evidence of attendance.

5. Online courses and traditional courses should be treated the same.

CTU Comment

Under the regulations that were in effect during the audit period, there was no legal basis to treat online courses differently than traditional (on-ground) courses. However, the audit report would apply more stringent restrictions for online programs than were required for on-ground courses. The act of logging into a specific online course creates an electronic record that has long been considered the precise analogue of physical attendance in a classroom: if a student's walking into a physical classroom constitutes attendance in a traditional setting, a student's logging into an online course constitutes attendance for distance education. As the Secretary stated in the preamble to the October 29, 2010 Program Integrity Rules, "[C]ertainly, traditional academic attendance is acceptable, i.e., a student's physical attendance in a class where there is an opportunity for direct interaction between the instructor and students." (75 FR 66899)

OIG Response

Our report does not apply a more stringent standard to online courses than is applied to "on-ground" courses. Because the structure of online courses is substantially different than that of on-ground courses, the process for determining and documenting attendance in the two types of courses cannot be the same. Students cannot physically "attend" an online course—an online course has no physical location—so the same documentation that is acceptable for an on-ground course is not available for an online course.

A student logging into an online course is not the equivalent of a student attending an on-ground course. Typically, a teacher counting a student as attending an on-ground course would see the student sitting at his or her desk during the scheduled class period and having opportunities to interact with the teacher. The teacher would also be in a position to note if the student walked out once the roll had been taken. Evidence of a student logging into an online course does not reflect the same type of activities. A more accurate analogy would equate a student logging into an online course with his or her opening the door to the classroom; it does not show that the student actually entered the classroom, sat down, stayed in the classroom for any length of time, or had an opportunity to interact with the teacher.

6. Academic activity before the beginning of the payment period may be used to determine students' eligibility.

CTU Comment

CTU's documentation of academically related activities was evidence of the students beginning the term, even when the activity occurred before the official start date of the module. CTU stated, "It is a virtually universal practice in higher education for institutions to make syllabi and course assignments available to students prior to the official start date of a term. . . . To exclude students from the learning environment over a weekend preceding an official term start on that Sunday would be inconsistent with CTU's obligation to meet the needs and expectations of its largely non-traditional, career-focused student base."

According to the 2009–2010 FSA Handbook, "A student is not considered to have begun attendance if the school is unable to document the student's attendance in any class." Because the FSA Handbook did not specifically address asynchronous learning environments, CTU "interpreted the guidance to indicate that once the student had engaged in an academically- related activity, if the institution could document the activity and the course for which the activity occurred, that activity could be the basis for establishing the students' enrollment in the course," even if the activity occurred before the first day of a module.

OIG Response

The guidance quoted from the 2009–2010 FSA Handbook neither states nor implies that a school's documentation of activities that occur before the beginning of an academic term is sufficient to support attendance by the students during the term. As we state in the finding, schools are required to return all Title IV funds for students who do not begin attendance in a payment period (34 C.F.R. § 668.21(a)). CTU's payment period is the academic term. As such, students are not considered to have begun attendance in a payment period if their only activity occurred before the academic term began.

Although it may be true that it is a common practice for certain schools to make syllabi and course assignments available to students before the start date of a term, it would not be reasonable for any school to count such activities as attendance, especially when no other attendance occurred during the term. Counting pre-term activity as attendance was particularly problematic at CTU, because a student's pre-term activity could consist only of accessing a course syllabus and then deciding not to continue a course.

7. CTU's practice was consistent with practices at other, similar institutions.

CTU Comment

The activities monitored by CTU as evidence of student attendance were consistent with "what was generally accepted institutional practice among virtually all colleges and universities of all types and sizes offering online courses and programs." A May 2010 study of institutions providing online education reported that about 57 percent of responding institutions identified the last day of attendance as either the last day the student logged into (1) the school's learning management system or (2) the course for which the student had registered.

OIG Response

The May 2010 survey cited by CTU cannot be relied upon to demonstrate CTU's compliance. The survey was prepared in part by CTU's special regulatory counsel (Dow Lohnes), not an independent third party. The regulatory and factual significance of a "log-in" is dependent on the facts and circumstances at a particular institution. At CTU, for example, a student's log-in to initiate a viewing of a course presentation did suggest attendance at an academically related activity; only on detailed examination was it apparent that the "log-in" did not provide evidence that the student actually performed the activity.

Regardless, CTU cannot cite its use of generally accepted practices among institutions engaged in online learning as evidence of its compliance with regulations. CTU is responsible for ensuring that its practices comply with all applicable regulations.

8. CTU did have policies in place to ensure students were eligible for disbursements.

CTU Comment

CTU has had, and continues to have, policies in place to ensure student eligibility for Title IV disbursements. By disbursing Title IV funds after the start of the payment period, CTU ensured, before any disbursement of Pell funds, that the student was enrolled and in attendance. CTU acknowledged that its policies may have resulted in instances in which it did not adjust Pell Grant eligibility based on a change in a student's enrollment status. CTU determined that the potential financial impact for the audit period is not material and that CTU remedied this concern by revising its policies.

OIG Response

As noted in the finding, the policies in place at CTU resulted in its noncompliance with regulations governing student eligibility for Title IV funds at the time of disbursement and the recalculation of Pell grant awards when a student's enrollment status changes. CTU's comments do not provide any new information that would make us change the finding. Further, in its comments, CTU acknowledged that its policies resulted in it not performing the required recalculation of Pell grant awards when a student's enrollment status changed and that it had revised its policy. CTU did not provide its revised policy concerning Pell grant recalculations and did not disclose the amount of overawards resulting from its failure to recalculate Pell grant awards during the audit period.

9. OIG is prohibited from interfering in curriculum decisions.

CTU Comment

The OIG's insertion of its own legally unsupported opinion as to what activities are academic in nature raises concerns about the OIG asserting its authority to influence or control what activities are allowable in a classroom, when those activities should occur, and how often. Under 20 U.S.C. § 1232a, both the OIG and the Department are prohibited from interfering in an institution's curriculum decisions.

OIG Response

The finding does not interfere with CTU's curriculum decisions or attempt to control the activities that are allowable in a classroom. The finding is limited to the process that CTU used to establish that its students were eligible for Title IV funds. For example, our finding is not that the syllabi CTU provided to its students is academically inadequate; it is that a student logging into CTU's online system to access the syllabi, by itself, cannot be used as a basis for determining that the student has attended a class.

FINDING NO. 2 – Identifying Students Who Withdrew Unofficially

CTU did not identify students who withdrew without providing formal notice to the institution ("unofficial withdrawals"). As a result, CTU did not perform the required return of Title IV calculations or return Title IV funds that had not been earned. Based on our review of 50 students (enrolled in 147 individual student terms), we determined that 20 students (enrolled in 25 individual student terms) unofficially withdrew because CTU did not have procedures to identify and document whether students who failed to earn a passing grade completed the term.[9] CTU did not perform return of Title IV calculations for any of the 25 individual student terms involving those 20 students and improperly retained $18,066 of Title IV funds associated with these students.

We found that CTU did not identify any unofficial withdrawals that occurred for students included in our review. When a student receiving Title IV funds withdraws from a school, the school is required to determine the amount of Title IV funds that the student earned as of the student's withdrawal date (34 C.F.R. § 668.22(a)(1)). In addition, a school is required to determine the withdrawal date for a student who withdraws without providing notification to the school no later than 30 days after the end of the earlier of (1) the payment period or period of enrollment, (2) the academic year in which the student withdrew, or (3) the educational program from which the student withdrew (34 C.F.R. § 668.22(j)(2)).

CTU did not follow the Department's guidance for the treatment of a student who failed to receive a passing grade in any course. Dear Colleague Letter (DCL) GEN-04-03, "Return of Title IV Aid," published in February 2004 and revised in November 2004, provides—

> An institution must have a procedure for determining whether a Title IV aid recipient who began attendance during a period completed the period or should be treated as a withdrawal. We do not require an institution to use a specific procedure for making this determination . . . .
>
> . . . . . .
>
> If a student who began attendance and has not officially withdrawn fails to earn a passing grade in at least one course offered over an entire period, the institution must assume, for

[9] As discussed in Finding No. 1, CTU's attendance policies did not always support regular and substantive interactions between a student and an instructor. Our determination of the last date of attendance for the return of Title IV calculation was based on documented regular and substantive interactions between a student and an instructor.

> Title IV purposes, that the student has unofficially withdrawn, unless the institution can document that the student completed the period.

We found that CTU did not identify students who had failed to earn a passing grade and did not complete the term. Excluding students who officially withdrew during the term, CTU did not differentiate between students who had completed the term and received an "F" grade and students who had not completed the term and received an "F" grade. Instead, CTU considered those students who failed to receive a passing grade to have completed the term. We determined that 20 of the 50 students in our review failed to receive a passing grade in 25 individual student terms during our audit period and that CTU did not document that these students had completed the terms. For our review we considered students who had received "F," "R," or "W" grades as students who had failed to receive a passing grade. According to the CTU student catalog, an "F" grade indicates that a student failed a course. An "R" grade indicates repeated courses—when a course is repeated, an "R" is assigned to the previous course attended; therefore, the previous failing grade is replaced with an "R" grade.[10] The "W" grade is given to a student who withdraws from a course after the applicable add/drop period or before the fifth week of the session; therefore, the student did not receive a passing grade or complete this course.[11]

If CTU had followed its administrative withdrawal policy, it would have been able to identify some of the unofficial withdrawals in our review. CTU's policy states—

> After the first week, if a student does not participate in a class related activity at least once every 15 calendar days within a session he/she is administratively withdrawn from the University. The LDA [last date of attendance] is used as the official date of withdrawal for refund calculations.
>
> . . . . . .
>
> A student who is administratively withdrawn from the University before the fifth week will receive a W grade for all current courses. No withdrawal (W) grades may be awarded after the fourth week of the session for current courses.

As a grading policy, it is within CTU's authority to not award "W" grades, to students who stop attending after the fourth week of a module. However, for purposes of the requirements for the return of Title IV aid, schools cannot have a policy that prohibits unofficial withdrawals after a certain date. According to 34 C.F.R. § 668.22(c)(1) and (3), if a student stops attending an institution that is not required to take attendance, the school must use as the student's withdrawal date either the midpoint of the payment period or the student's last date of academically related attendance. Regardless of a school's grading policy, a student who receives only "F" and "W" grades for courses in a module cannot be considered to have completed a module based on documentation of academically related activity through the module's fourth week.

[10] CTU policy states that students must repeat any required course when they receive an "F" or "W" grade. The policy also states that "Courses repeated during a student's program due to non-satisfactory grades will be replaced with an R grade after the student has successfully completed the course with a satisfactory grade." Within the 25 individual student terms with all failing grades, 2 individual student terms had "R" grades that replaced failing grades.

[11] CTU's policy was not to award "W" grades after the fourth week of the session, but instead to award the grade earned. For students officially withdrawing after the fourth week of the session, CTU's policy stated it would perform a return of Title IV funds calculation, if warranted.

CTU's failure to identify unofficial withdrawals and return the associated Title IV loan funds may have resulted in increased costs to the Federal Government. The Federal Government is harmed when a school improperly retains Title IV loan funds because it must pay interest on subsidized student loans during in-school status, the grace period, and during authorized deferment periods. In addition, the Federal Government may pay special allowance payments to lenders on the average unpaid principal balances of all eligible FFEL loans. Borrowers are harmed when an institution improperly retains Title IV loan funds because they are responsible for the loan amounts and the interest that accrues on the loan amounts that are not returned to lenders or the Department.

RECOMMENDATIONS

We recommend that the COO for FSA require CTU to—

2.1 Return to lenders and/or the Department, as appropriate, the $18,066 in unearned Title IV funds disbursed to students who unofficially withdrew. Of the total amount to be returned, $1,459 is for Pell; $88 is for FSEOG; and $16,519 is for FFEL.

2.2 Return all Title IV funds to lenders and/or the Department, as appropriate, for all unearned amounts disbursed by CTU for students not included in our review who withdrew unofficially because they had stopped attending or failed to earn a passing grade in at least one course for the period from July 5, 2009, and until such time that Recommendation 2.3 below is implemented.

2.3 Develop and implement written policies and procedures to identify unofficial withdrawals.

CTU Comments

CTU disagreed with Finding No. 2. It stated that (1) the OIG cannot apply regulations not in effect during the audit period, (2) CTU's policies related to unofficial withdrawals complied with regulations, (3) the OIG cannot rely on sub-regulatory guidance, and (4) the finding interfered with its academic decision-making.

1. The OIG cannot apply regulations not in effect during the audit period.

CTU Comments

As noted in CTU's comments to Finding No. 1, the OIG cannot apply regulations not in effect during the audit period. Its failure to accept students' logins into academically related activities resulted in this erroneous finding.

OIG Response

As detailed in our response to CTU's comments on Finding No.1, we did not apply regulations retroactively. All of the regulatory criteria we cite in the finding are from the July 1, 2009, volume of the C.F.R. and were in effect during the audit period.

2. Policy on unofficial withdrawals complied with the regulations in effect during the audit period.

CTU Comments

CTU stated that it had a policy and procedures in place to identify when a student had unofficially withdrawn and that it had performed the required return of Title IV calculations. CTU's "Non-Return Drops" procedures were designed to identify and process students who did not provide notice of their withdrawal and did not return to CTU within the term. CTU also had a "Withdrawal from the University" policy, which states in part,

> A student who is administratively withdrawn from the University before the fifth week [of a module] will receive a W grade for all current courses. No withdrawal (W) grades may be awarded after the fourth week of the session for current courses.

The policy was designed to ensure that "students could not unofficially withdraw from courses during the last week of a term for an illegitimate reason," such as to avoid taking final exams, and thus avoid receiving a final grade. Students who showed "engagement" (that is, one of the six activities that CTU considered to be attendance) would not be withdrawn and would instead receive a grade based on their mastery of the subject.

OIG Response

We have revised our report to address the compliance with regulations of CTU's policy on student withdrawals: schools cannot have a policy that prohibits unofficial withdrawals after a certain date. However, we also state in the finding that if CTU had followed its withdrawal policies, it would have been able to identify some of the unofficial withdrawals we identified. CTU's "Withdrawal from the University" policy indicated that CTU used its grading policy to assist in identifying unofficial withdrawals before the fifth week of the session. During the fifth week and later, CTU's policy did not distinguish between students who completed the term and received an "F" grade and students who did not complete the term and received an "F" grade. In addition, CTU's policy was not to award a "W" grade for any withdrawals occurring after the fourth week of the session.

CTU's "Non-Return Drops" procedure, if implemented, may have identified some of the students who withdrew without providing notification as required by 34 C.F.R. § 668.22(j)(2). In addition, if CTU had followed its "Withdrawal from the University" policy, it may have been able to identify some of the unofficial withdrawals we identified during our review. The policy stated that if a student did not participate in a class related activity at least once every 15 calendar days within a module, that student is administratively withdrawn from CTU.

The following examples demonstrate that CTU's policy and procedures for identifying unofficial withdrawals were not sufficient to ensure that CTU routinely identified students who withdrew without providing notification, as required by the regulations.

Example 1: Student 8-1

Term/Module	Course	Credits Earned	CTU Issued Grade	Number of Academic Activities (a)	Title IV Disbursed During Term
1001A	Introduction to Criminal Justice	0	F	None	$5,313
1001A	Ethics	0	F	None	
1001B	Introduction to Criminal Justice	0	F	1	
1001B	Ethics	0	F	None	
1002A	Introduction to Criminal Justice	0	F	None	$5,313
1002A	Ethics	0	F	1	
1002B	Introduction to Criminal Justice	0	F	None	
1002B	Ethics	0	F	None	

(a) The number of academic activities based on OIG's determination of activities that documented sufficient support for regular and substantive interaction between the student and teacher, as described in Finding No. 1.

CTU disbursed to this student $10,626 ($5,313 plus $5,313) of Title IV funds that should have been returned to the Department. CTU did not identify this student as an unofficial withdrawal for either term even though the student did not earn any passing grades, recorded only two academic activities (one in each term) during the 6 months covered by the two terms (January 3, 2010 through June 23, 2010), and had periods of inactivity spanning more than 15 calendar days during both terms. In applying its policy for this student, CTU determined that because the student received "F" grades in both terms, the student therefore completed both terms and no return of Title IV funds was necessary. However, this student began the same two courses four times, received an "F" in each course and had a total of 2 days of academic activity over the eight courses.

Example 2: Student 9-3

Term/Module	Course	Credits Earned	Grade	Number of Academic Activities (a)	Title IV Disbursed During Term
903A	CTU Online University Experience	0	F	2	$4,935
903B	Medical Terminology	0	F	None	
903B	CTU Online University Experience	0	F	None	
904A	Medical Terminology	0	F	2	$4,934
904A	CTU Online University Experience	0	F	None	
904B	Medical Terminology	0	W	None	
904B	CTU Online University Experience	0	W	None	
1001A	Medical Terminology	0	F	1	$4,268
1001A	CTU Online University Experience	0	F	None	
1001B	Medical Terminology	0	F	None	
1001B	CTU Online University Experience	0	F	None	

CTU disbursed to this student $14,138 ($4,935 plus $4,934 plus $4,268) of Title IV funds that should have been returned to the Department. CTU did not identify this student as an unofficial withdrawal for any of the three terms even though the student did not earn any passing grades, recorded only five academic activities during the 8 months (July 5, 2009 through February 14, 2010) covered by the three terms, and had periods of inactivity spanning more than 15 calendar days during each term. In applying its policy to this student, CTU determined that because the student received at least 1 "F" grade in all terms the student therefore completed all terms and no return of Title IV funds was necessary. In the three terms that this student failed to earn a passing grade, the student only began two courses; repeating one course six times and the other course five times. This student only had 5 days of academic activity over the 11 courses.

CTU did not provide additional documentation to change our conclusion that 20 of the 50 students in our review, including the two examples cited above, unofficially withdrew.

3. OIG cannot rely on application of a standard articulated only in sub-regulatory guidance or apply regulations not in effect during the audit period.

CTU Comments

CTU commented that, in citing DCL GEN-04-03 as criteria, our finding inappropriately seeks to give sub-regulatory guidance the effect of law. Because the Title IV regulations do not require that a student who failed to earn a passing grade be considered unofficially withdrawn, an institution is not obligated to adopt such a standard. CTU also asserted its policy on unofficial withdrawals was consistent with DCL GEN-04-03.

OIG Response

Our report uses sub-regulatory requirements issued by the Department that are consistent with the HEA and regulations. If CTU disputes the authority of those requirements, it may raise its objection as a defense during the resolution of the audit by the Department. As described in the finding, CTU had an administrative withdrawal policy; however, the policy was not consistent with the guidance contained in DCL GEN-04-03.

4. Interference with CTU's academic decision-making.

CTU Comments

CTU commented that the draft report's insertion of its own determination about which academic activities are deemed sufficient to warrant a grade results in OIG improperly asserting its authority to influence or control the activities that are allowed in a classroom. CTU asserts that the OIG's position interferes with CTU's academic independence and is prohibited under 20 U.S.C. § 1232a.

OIG Response

The finding does not interfere with CTU's academic grading decisions or attempt to control the activities that are allowable in a classroom. The finding is limited to the process that CTU used to determine whether students had unofficially withdrawn for purposes of the return of Title IV calculations. We performed our audit procedures merely to determine whether students that had unofficially withdrawn were properly and timely identified, that the necessary return of Title IV calculations were performed, and that funds were returned as warranted. Specifically, we reviewed available documentation to confirm whether a student who received only failing grades in a term should have been treated as an unofficial withdrawal.

FINDING NO. 3 – Lack of Proper Authorizations to Retain Credit Balances

The Student Authorization to Retain Funds form used by CTU did not comply with the requirements in Federal regulations. As a result, CTU may have inappropriately used or retained Title IV funds and students may have incurred loan debts without the required authorizations.

According to CTU's Vice President of Admissions, students signed the Student Authorization to Retain Funds form as part of the admissions and enrollment process. CTU used the form as its authorization to retain and use Title IV funds, rather than disburse the funds in excess of the amount needed for tuition and fees directly to the student. If a school obtains written authorization from a student or parent, as applicable, the school may (1) use Title IV funds to pay for prior year charges of not more than $200, and (2) except if prohibited by the Secretary, hold on behalf of the student or parent any Title IV funds that would otherwise be paid directly to the student or parent (34 C.F.R. § 668.165(b)(1)).

CTU's Authorization to Retain Funds for Future Charges Was Improper

CTU's form included the following authorization to retain funds for future charges:

> Credit balances that may result from the crediting of Title IV financial aid funds to my student account **may be retained and applied to allowable future charges** (charges assessed from term to term for which federal funds other than loans was [sic] originated or loan period for which the loan was certified) incurred to my student account. In authorizing retention of any such credit balance, it is understood that I will receive no interest on the funds that are retained. [emphasis added]

This authorization does not meet Federal requirements. According to 34 C.F.R. § 668.164(d)(1), schools may use Title IV program funds "to credit a student's account at the institution to satisfy . . . [c]urrent year charges . . . ." The applicable regulation does not specify that funds can be retained for future charges, and CTU's authorization does not clearly limit its use of Title IV funds to current year charges.

CTU's Authorization for Post-Withdrawal Disbursements of Loan Funds Was Improper

CTU's form included an authorization for post-withdrawal disbursements:

> In the event that I withdraw from the program but am eligible to receive a disbursement of my Federal Stafford Subsidized, Unsubsidized Stafford and/or PLUS Loan I authorize the school to make a late disbursement to cover the costs incurred.

This authorization does not meet Federal requirements. A school may credit a student's account up to the amount of outstanding charges with all or a portion of any loan funds that make up the post-withdrawal disbursement, provided the school obtains an authorization from the student or parent, as applicable (34 C.F.R. § 668.22(a)(5)(ii)(A)). Before schools make a post-withdrawal disbursement of Title IV loan funds, they are required to provide written notification to the student or parent, as applicable, within

30 days of the date of the school's determination that the student withdrew. The school's notification shall (1) request confirmation of any post-withdrawal disbursement of loan funds that the school wishes to credit to the student's account, (2) identify the type and amount of loan funds, and (3) explain that the student or parent, as applicable, may accept or decline some or all of the loan funds (34 C.F.R. § 668.22(a)(5)(iii)(A)).

CTU must provide a written notification to the student after the student withdraws, identifying the type and amount of loan funds the student would receive, and request the student's authorization at that time. This authorization is needed to prevent the school from disbursing a loan that the student does not want.

RECOMMENDATIONS

We recommend that the COO for FSA require CTU to—

3.1 Revise the Student Authorization to Retain Funds form to ensure that all authorizations comply with Title IV regulations and/or guidance including those pertaining to retaining funds for future charges and disbursing loans after student withdrawals.

3.2 Ensure its written policies and procedures for notification to students after the student withdraws identifying the type and amount of loan funds the student would receive, and request the student's authorization at that time comply with regulations.

CTU Comments

CTU did not agree with the finding that it did not obtain proper authorizations to retain credit balances and stated that it did not use Title IV credit balances to pay for charges incurred after the applicable award year. CTU believed it complied with the applicable regulations. However, CTU acknowledged that the authorization form in use during OIG's audit period could lead to misperceptions that the form authorized the retention of funds for future charges. CTU indicated that after being advised of OIG's concerns, it modified the authorization form, a copy of which is provided at Exhibit 9. In addition, CTU planned to use a more detailed authorization form, a copy of which is provided at Exhibit 10. Based on the modifications to the authorization form, CTU considered this finding to be resolved and requested that it be removed from the final report.

CTU also stated that it considered the information in the draft report regarding the authorization for post-withdrawal disbursements of loan funds. CTU said that it modified its process for informing students who have withdrawn regarding the type and available loan amount should a student choose to receive the loan.

OIG Response

We did not perform any audit procedures to determine whether CTU used, retained, or distributed Title IV credit balances in accordance with Federal requirements. However, we did conclude that the Student Authorization to Retain Funds form that CTU used during the audit period did not comply with Federal regulations.

We did not change Finding No. 3 or the recommendation because CTU stated that it planned to revise its Student Authorization to Retain Funds form. We acknowledge that the copy of the revised Student Authorization to Retain Funds form included as CTU's Exhibit 9 specified that future charges are those assessed for the current award year and no longer included an authorization for post-withdrawal disbursements. During audit resolution, FSA should confirm that CTU's revised Student Authorization to Retain Funds form complies with Federal requirements and is written in plain language to avoid misunderstanding by students or parents.

OTHER MATTERS

As part of our audit, we identified the following two issues: (1) return of Title IV calculation errors, and (2) incentive compensation practices that are prohibited as of July 1, 2011.

Return of Title IV Funds
Calculation Errors

CTU incorrectly calculated the amounts of Title IV funds that it should have returned for students that had withdrawn from the school. However, CTU implemented corrective action before our testing disclosed the errors. Prior audits showed a pattern of issues relating to CTU's return of Title IV calculations.

According to 34 C.F.R. § 668.22(f)(1)(i), the percentage of Title IV funds earned by a student is calculated "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." In addition and according to 34 C.F.R. § 668.22(f)(2), the total number of calendar days in the payment period "includes all days within the period, except that scheduled breaks of at least five consecutive days are excluded."

CTU was not using the correct number of days in the payment period when performing the calculation because it inappropriately excluded a 4-day module break. CTU representatives informed us that the incorrect treatment of days between modules was a systemic error in the automated calculation performed by CVUE. This error affected two terms during our audit period.

CTU officials informed us that in October 2010 they corrected the return of Title IV calculation error in CVUE by adjusting the percentage of completion calculation. CTU also told us that it had recalculated returns for all affected students and made additional required returns of Title IV funds totaling approximately $65,000. Our review of 50 students included 6 return of Title IV calculations—2 of the calculations contained errors. Because of the frequency of calculation errors, we randomly selected an additional 25 return of Title IV calculations for review from the 7,100 return calculations performed by CTU during our audit period. Seven of the additional 25 calculations we reviewed also contained the calculation errors. To confirm that CTU corrected the errors for the 9 calculations (2 of the 6 calculations and 7 of the 25 calculations),

we reviewed the supporting documentation for the 9 revised calculations that CTU performed. We confirmed that the calculations were performed correctly and that any additional return of Title IV funds were returned to the Department or lenders as required.

Errors in return of Title IV calculations for withdrawn students were reported as a finding in the 2009 and 2010 Title IV compliance attestation examinations performed at CTU. The 2009 report stated "Return to Title IV funds calculations did not contain the correct number of days in the payment period and the accurate net amount that could have been disbursed." The 2009 finding resulted in CTU recalculating the return of Title IV calculations and determining that there were no additional returns due. The 2010 report states that "A Return to Title IV funds calculation was not completed correctly when a student withdrew . . . ." The 2010 finding also resulted in CTU recalculating and returning an additional $204 to Pell for 1 of the 50 students' files that were tested.

Incentive Compensation Practices Prohibited as of July 1, 2011

CTU admissions representatives' compensation plan included practices that qualified for the regulatory safe harbors in effect during the audit period. CTU admissions representatives received merit increases based in part on the number of student enrollments they secured and also received incentive payments based on their success in securing enrollments in which students met certain longevity requirements. For example, CTU provided admissions representatives a $400 incentive payment when an enrolled student successfully completed his or her education program, or one academic year of his or her educational program, whichever was shorter.

According to Section 487(a)(20) of the HEA, incentive payments based directly or indirectly upon success in securing enrollments are prohibited. However, a school's compensation practices were not considered to violate this provision if the practice qualified for a safe harbor found in 34 C.F.R. § 668.14(b)(22)(ii). These safe harbors were eliminated with regulations that became effective on July 1, 2011. CTU's practices qualified for these two safe harbors:

> (A) The payment of fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all full-time employees is not considered an adjustment.
>
> . . . . . .
>
> (E) Compensation that is based upon students successfully completing their educational programs, or one academic year of their educational programs, whichever is shorter. For this purpose, successful completion of an academic year means that the student has earned at least 24 semester or trimester credit hours or 36 quarter credit hours . . . . (34 C.F.R. § 668.14(b)(22)(ii))

The 2010 CTU Supplemental Compensation Plan for CTU Admissions Representatives states—

> Under this Plan, each admissions representative will be eligible to receive supplemental compensation based upon the number of students he/she is on record for enrolling who successfully complete the academic program for which they enrolled, or one academic year of their program, whichever is shorter. For a particular student to be counted towards supplemental compensation for an admissions representative, the student must successfully complete either his/her academic program, or one academic year of his/her program, whichever is shorter, within the applicable evaluation period as defined below. The admissions representative will earn supplemental compensation of $400 for each such student beyond the threshold specified . . . for number of graduates or number of students who complete one academic year of their program . . . .

As part of our audit we reviewed personnel files and other records for 13 admissions representatives and 2 admissions office managers and determined that CTU's process for determining compensation amounts was not based solely on securing enrollments and concluded that CTU's incentive practices qualified for the safe harbors. If, after June 30, 2011, CTU continued the incentive compensation practices it had in place during our audit period, it would be in violation of the new Federal requirements.

In its response to the draft report, CTU stated that since July 1, 2011, it fully complied with the Department's new regulations that prohibit incentive compensation. We did not review CTU's compliance with the regulations that became effective on July 1, 2011.

We suggest that the COO for FSA ensure that as of July 1, 2011, CTU does not provide any type of payment based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid, to any person or entity who is engaged in any student recruitment or admissions activity, or in making decisions regarding the award of Title IV funds.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of our audit was to determine whether CTU Online complied with selected provisions of Title IV and Federal regulations governing (1) student eligibility at the time of disbursement, (2) identification of withdrawn students, (3) the return of Title IV program funds, and (4) payment of incentive compensation to admissions representatives. We initially gained an understanding of the operations of both CTU's ground campuses and CTU Online but limited our testing to CTU Online.

Our audit focused on CTU's administration of Title IV programs for students who were enrolled in CTU Online instructional programs. Our review covered the terms beginning July 5, 2009, through May 16, 2010, with Title IV data current through June 10, 2010, as provided to us by CTU.

To obtain background information on CTU and its operations, we reviewed its history and other organizational information available on CTU's Web site, interviewed Department officials, and reviewed documentation provided by CTU and Department officials. We also reviewed CTU's policies and procedures, course catalogs, organizational charts, and accreditation information. We reviewed the most recent annual report available, including the audited financial statements for the year ended December 31, 2010, for CTU's parent corporation, CEC. We also reviewed reports prepared by an independent public accountant on CTU's "Compliance Attestation Examination of the Title IV Student Financial Assistance Programs" for fiscal years ending December 31, 2006, 2007, 2008, 2009, and 2010.

To achieve our audit objective, we:

- Reviewed selected provisions of the HEA, Federal regulations, and Department guidance applicable to the audit objective.
- Identified from Department records the amount of Title IV funds that CTU received on behalf of all students during award years 2007–2008, 2008–2009, and 2009–2010.
- Reviewed CTU Online's written policies and procedures and interviewed CTU and CEC officials to gain an understanding of CTU's internal control structure, policies, procedures, and practices applicable to the administration of its Title IV programs. We also performed a walk-through of selected student records to gain an understanding of the financial aid process related to our audit objective.
- Performed preliminary work at CTU's main campus in Colorado Springs, Colorado, to obtain a general understanding of policies and procedures, including a walk-through of selected student records and interviews with CTU personnel responsible for administering Title IV programs for students attending ground campuses.
- Obtained an understanding of the CVUE and Virtual Campus information systems and the information maintained in each system.
- Reviewed academic, financial aid, accounting, and attendance records for 50 of 36,847 students who were enrolled at CTU Online during our audit period.

- Reviewed all 6 return of Title IV calculations that CTU performed for the 50 students we reviewed to determine whether calculations were performed accurately and funds were returned timely to the lender(s) and/or Department as discussed in the Other Matters section of the report. Two of six calculations contained errors in the percentage of completion. CTU provided revised calculations for the two containing errors and documentation showing that subsequent return of Title IV calculations were performed correctly before being identified by our testing. Because of the 2 errors we identified, we obtained the universe of 7,100 return of Title IV calculations performed by CTU during our audit period. We randomly selected an additional 25 calculations to determine whether CTU self-corrected the systemic percentage of completion errors for certain terms in the award year.

- Determined whether CTU paid incentive compensation and whether the compensation qualified for the safe harbors as discussed in the Other Matters section of the report. We judgmentally selected 6 personnel files for 4 admissions representatives and 2 admissions office managers who were among the highest earners (base and incentive compensation) from 2 payroll periods within the 27 pay periods between October 15, 2009, and October 31, 2010. We reviewed their initial offer letter, subsequent pay increases, and performance evaluations.

  We also judgmentally selected nine additional admissions representatives from among the highest incentive compensation earners for one of the pay periods above. For the 13 admissions representatives, we reviewed detail worksheets containing information on each representative's student start dates and academic credits to confirm the students completed their educational program or one academic year. We also verified that the representatives received the payment for the enrollment, and after tracing 4 of the 13 detail worksheets to the admissions representatives' payroll earnings without identifying any problems we concluded that further tracing was unnecessary.

We relied on computer-processed data provided by CTU to identify the universe of CTU Online students who had received Title IV funds during our audit period. To assess the accuracy and completeness of the universe, we reviewed the CVUE data dictionary and the queries CTU used to extract the data from CVUE. To corroborate data received from CTU, we also compared the CVUE and Virtual Campus data with information in the Department's National Student Loan Data System. Based on our analysis and testing, we determined that the data were sufficiently reliable for the purposes of our audit.

We obtained Title IV disbursement data from CTU's CVUE system for all CTU Online students with terms beginning July 5, 2009, through May 16, 2010. The disbursement data for the term which began on April 4, 2010, and ended on June 23, 2010, were essentially complete even though the data we obtained included disbursements only through June 10, 2010. However, for the term that began on May 16, 2010, and ended on August 10, 2010, the data we obtained were only partially complete because the term was ongoing during our audit period. Subsequent disbursements would likely have occurred after our cutoff date of June 10, 2010. In all, our audit universe contained 36,847 students who had received a total of $340,433,693 in Title IV disbursements.

We reviewed a total of 50 of 36,847 students in our audit universe who had received $625,758 of a total of $340,433,693 in Title IV disbursements made by CTU during our audit period. Separate groups were created to characterize significant categories of risks of noncompliance that may have existed based on our understanding of CTU's internal controls. The reviewed students were both randomly and judgmentally selected from the groups. Thus, our selection of students was not statistical, and the results presented in this report cannot be projected to the universe of students enrolled at CTU and receiving Title IV disbursements during our audit period. Once a student was selected for review, we reviewed all terms for which Title IV funds were disbursed during our audit period.

For our review of students who had received Title IV funds during our audit period, we initially selected 30 students based on their academic situation for any term they were enrolled in, as shown in Table 2. For example, we included a student in Group 1 (that is, a student who had not begun attendance for one or more courses in a term) if the student's situation in a particular term met this group's definition. If a student's academic situation in one or more individual student terms, as applicable, did not meet the definition for Group 1, then the student's situation was considered for the remaining groups. This process was repeated for all students in the universe for each individual student term in which they received Title IV funds during our audit period. Because all terms for each student were assigned to one or more groups, students who were enrolled in more than one term were potentially listed multiple times in Table 2. Although selection within each group was random, students with multiple terms had a greater chance of selection. As noted above, once a student was selected for review, we reviewed all terms for which Title IV funds were disbursed during our audit period. The number of individual student terms reviewed for the selected students are identified in the column titled, Number of Terms Students Reviewed Were Enrolled.

The 30 students who we selected for review that are identified in Table 2 received a total of $349,864 in Title IV disbursements. Note that attendance as used in Table 2 refers to CTU's definition of attendance as described in Finding No. 1.

Table 2: Group Descriptions for Initial Selection of 30 Students

Group		Number of Students in Group	Number of Students Reviewed	Number of Terms Students Reviewed Were Enrolled	Title IV Funds Disbursed to Students Reviewed ($)
1	Did not begin attendance for one or more courses in a term (a)	1,728	5	13	56,462
2	For one or more courses in a term the only attendance for the course shows a time stamp of "0:00" on the first official day of the course (b)	392	5	12	50,237
3	Credit hours earned were equal to zero (c)	10,329	5	15	58,677
4	Student earned less than 12 credits and greater than zero credits (d)	19,138	3	9	48,577
5	Withdrawal from school (e)	8,866	4	14	68,390
6	Student earned 12 or more credits (f)	16,584	3	7	27,958
7	Miscellaneous students (g)	1,160	5	10	39,563
Total		**n/a**	**30**	**80**	**$349,864**

(a) We determined that a student had at least one course in the term where there was no attendance.

(b) We determined that a student had at least one course in the term where there was only 1 day of attendance and the date/timestamp for this 1 day of attendance showed a "00:00:00" for the time, indicating that the student actually attended the course in the 2-day window before the module started.

(c) We determined that the student earned zero credits for the term.

(d) We determined that the student earned greater than zero credits but less than 12 credits for the term.

(e) CTU determined that the student withdrew from school.

(f) We determined that the student earned greater than or equal to 12 credits for the term.

(g) We were unable to determine whether the students met the definitions of Groups 1 through 6. For example, a student's grade or attendance data was not available.

Note: The groups of students in Table 2 are not mutually exclusive from each other, nor are they mutually exclusive from any of the groups in Table 3.

The remaining 20 students included in our review were selected based on the criteria described in Table 3. Using the same audit universe of 36,847 students, we performed an analysis to identify students who were at the highest risk of receiving improper disbursements and/or not being properly identified as withdrawn based on our understanding of CTU's internal controls.

Based on this analysis, we created three additional groups focusing on additional risk categories as shown in Table 3 below. We selected students from each group who had the highest number

of courses during our audit period that exhibited the group description. None of the additional 20 students selected were part of the 30 students selected in Table 2. The 20 students that we selected for review that are identified in Table 3 received a total of $275,894 in Title IV disbursements during our audit period.

Table 3: Group Descriptions for Selection of Additional 20 Students

Group		Number of Students in Group	Number of Students Reviewed	Number of Terms Students Reviewed Were Enrolled	Title IV Funds Disbursed for Students Reviewed ($)
8	Students at risk of unofficially withdrawing (a)	1,509	10	35	$145,927
9	Did not begin attendance for one or more courses in a term but received a grade	1,068	5	16	68,974
10	Student began attendance in a course after first week of module	4,298	5	16	60,993
Total		**n/a**	**20**	**67**	**$275,894**

(a) For our review we considered students who had received "F" or "R" grades as students who failed to receive a passing grade. The students in this group received the most failing grades of "F" or "R" in our audit universe. A failing grade of "F" is assigned when students do not successfully complete a course. An "R" is assigned when students repeat a course they previously attended. Students must repeat any required courses when they receive an "F" grade. When a student successfully completes a repeated course, the previous non-satisfactory grade is replaced with an "R."

Note: The groups of students in Table 3 are not mutually exclusive from each other, nor are they mutually exclusive from any of the groups in Table 2.

We performed our fieldwork at CTU Online's offices located in Hoffman Estates, Illinois, and CTU's ground campus in Colorado Springs, Colorado, between June 7, 2010, and November 5, 2010. We held an exit briefing with CTU officials on June 29, 2011.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

APPENDIX A – CTU Comments to the Draft Report

In addition to its formal audit response letter, CTU provided 10 separate exhibits. Because of the voluminous nature of the exhibits that CTU provided, the personally identifiable information they contained, and other information potentially exempt from disclosure, we have not included them in Appendix A. A copy of CTU's exhibits, less any personally identifiable information that is protected under the Privacy Act of 1974 (5 U.S.C. § 552a) or other information that is exempt under the Freedom of Information Act (5 U.S.C § 552), is available upon request. We will refer any requests for documents constituting internal communications between non-OIG Department personnel (that is, emails in CTU's Exhibit 5) to the Department for a Freedom of Information Act determination. We have included a list of the 10 exhibits, along with a brief description of each, as Appendix B.

Colorado Technical University

March 2, 2012

Via Email

Raymond Hendren
Regional Inspector General for Audit
U.S. Department of Education
Office of Inspector General
501 I Street, Suite 9-200
Sacramento, CA 95814

Re: Draft Audit Report Regarding Colorado Technical University's Administration of Title IV, Higher Education Act Student Financial Assistance Programs
Control Number ED-OIG/A09K0008, Dated January 13, 2012

Mr. Hendren,

On behalf of Colorado Technical University (the "University") (OPE ID: 01014800), attached is the University's response to the asserted findings set forth in the above-referenced Draft Audit Report dated January 13, 2012 (the "Draft Report"), issued by the Office of the Inspector General ("OIG") of the U.S. Department of Education (the "Department") . As we have not been afforded access to the entirety of the work-papers underlying the Draft Report, this response is based on the University's current understanding of the Draft Report's asserted findings as informed by the limited work-papers in our possession. The University reserves the right to assert additional arguments, including any arguments based on any new information and/or documents the University should receive in the future.

Also, we wish to confirm the OIG practice that the text of the University's response will accompany any public issuance of the Final Audit Report.

If you have any questions regarding this response, please contact me at (719) 590-6723 or *JWheaton@coloradotech.edu*. Matters of legal interpretation should be directed to the University's special regulatory counsel, Michael B. Goldstein of Dow Lohnes PLLC, at (202) 776-2569 or *mgoldstein@dowlohnes.com*. Your attention is appreciated.

Sincerely,

Jeremy J. Wheaton
Chief Executive Officer
Colorado Technical University

cc: Eric M. Israel, Associate General Counsel, Career Education Corporation
Michael B. Goldstein, Dow Lohnes PLLC

COLORADO TECHNICAL UNIVERSITY

RESPONSE TO THE U.S. DEPARTMENT OF EDUCATION OFFICE OF INSPECTOR GENERAL'S DRAFT AUDIT REPORT CONCERNING COLORADO TECHNICAL UNIVERSITY'S ADMINISTRATION OF TITLE IV, HIGHER EDUCATION ACT STUDENT FINANCIAL ASSISTANCE PROGRAMS ED-OIG/A09K0008

MARCH 2, 2012

Colorado Technical University ("University" or "CTU") does not concur with the findings in the Draft Audit Report, issued January 13, 2012, concerning Colorado Technical University's Administration of Title IV, Higher Education Act Student Financial Assistance Programs ("Draft Report"), and for the reasons set forth below asserts that the Audit should be closed without further action or response by the University.

FINDING NO. 1: COLORADO TECHNICAL UNIVERSITY DID NOT ENSURE THAT STUDENTS WERE ELIGIBLE WHEN DISBURSING TITLE IV FUNDS

The Draft Report erroneously asserts that the University's student federal financial aid ("Title IV") disbursement policies and procedures resulted in improper disbursements to students who were not eligible for Title IV funds on the grounds that the University did not ensure that the students: (1) were participating in a documented academically-related activity in any course in a term at the time of disbursement; (2) were attending the number of credit hours for which Title IV funds were awarded; and (3) had begun attendance on or after the start date of the course. The University does not agree with the Draft Report's assertions. First, Finding No. 1 is based on the erroneous, retroactive application of regulations which were neither in effect nor indeed promulgated during the Audit Period, which ended more than a year prior to the current law's effective date. The Draft Report erroneously applies regulatory standards not in effect during the Audit Period in its assessment of the University's attendance activities, and as a result excludes academically-related activities that, under then-applicable law, properly served as the basis for the award of Title IV assistance. Therefore, this finding should be closed without further action or response by the University.

The Draft Report asserts that the University did not properly determine and document that students were attending their online courses prior to disbursing Title IV funds. In reaching this erroneous conclusion, the Draft Report cites as support for its interpretation of what activity should constitute attendance for students enrolled in distance education (online) courses, language in the preamble to the final Program Integrity Rules, as published at 75 Fed. Reg. 66899 (October 29, 2010). However, the Program Integrity Rules did not take effect until July 1, 2011, more than a full year after the end of the Audit Period. Indeed, the cited preamble language interpreting the ***prospectively*** effective Program Integrity Rule, was itself published five months ***after*** the end of the Audit Period. By erroneously applying a standard not publicly articulated until long after the close of the Audit Period, the Draft Report rejected the University's documentation of student participation, notwithstanding the fact that the documentation relied upon by the University was at the time standard practice among institutions of higher education and entirely consistent with applicable law and regulation.

The University's documentation of student engagement and online attendance was based on evidence of engagement in academically-related activities that fall within the parameters of one of six categories: (1) viewing the task list or the syllabus; (2) viewing a course presentation; (3) posting an assignment to the course discussion board; (4) writing and submitting an assignment; (5) participating in a live chat; and (6) viewing an archived chat at a later date (See Draft Report, at p. 8). The Draft Report erroneously, and without any lawful basis, rejects activities (1), (2) and (6) as not supporting a determination of attendance. The activities monitored by the University as evidence of student attendance were entirely consistent with generally accepted practices among institutions of higher education engaged in online learning during the Audit Period and with the requirements of then-applicable law.

The OIG Itself Repeatedly Complained to the Department and to the Congress that Prior To, During and After the Audit Period, there was a Lack of Standards Addressing Documentation of Attendance Specific to an Online Learning Environment.

Prior to the current enactment of 34 C.F.R. § 668.22, respecting the treatment of Title IV funds when a student withdraws, there were no regulations, or generally available guidance, that put institutions on notice that the U.S. Department of Education ("Department") expected them to meet a specific set of standards for the purpose of establishing a student's attendance and documenting last date of attendance ("LDA") in an online environment. Indeed, it is striking to note that on two separate occasions in 2010, during and immediately after the Audit Period, *two* U.S. Department of Education Inspectors General testified before Congressional committees about the *lack* of guidance then afforded to institutions by the Department, regarding the documentation of attendance in an online learning environment.

Specifically, in a hearing before the Senate Committee on Health, Education, Labor, and Pensions ("HELP"), on June 24, 2010, U.S. Department of Education Inspector General Kathleen Tighe tellingly stated, "[t]he point at which a student progresses from online registration to actual online academic engagement or class attendance is often not defined by institutions and *is not defined by Federal statute or regulations*."[12] And, in an October 14, 2009 hearing before the House Subcommittee on Higher Education, Lifelong Learning, and Competitiveness, then-Acting Inspector General Mary Mitchelson stated that:

> The point at which a student progresses from online registration to actual online academic engagement or class attendance is often not defined by institutions and is not defined by Federal regulations. * * * *Neither the HEA nor the Department's regulations define what constitutes instruction or attendance in an online environment*.[13]

Nor has the testimony of the two Inspectors General stood alone. In the Final Audit Report for Baker College, published on August 24, 2010, the OIG unambiguously stated that ". . . the Department has not published specific guidance for documentation of online delivery," and "[t]he College's assertion that the Department has not established separate guidance for distance education courses is true."[14]

Even prior to the issuance of the Baker College Final Audit Report and the testimony of the Inspectors General before Congress, OIG officials contacted their counterparts in the Department to express their concern about the lack of guidance to institutions regarding any special requirements related to the documentation of online attendance. A series of inter-Departmental emails obtained through a FOIA request is starkly revealing. An email dated

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[12] *Emerging Risk? An Overview of the Federal Investment in For-Profit Education: Hearing Before the Sen. Comm. On the Health, Education, Labor and Pensions*, 111th Cong. 9 (2010).(Emphasis supplied).

[13] *Ensuring Student Eligibility Requirements for Federal Aid: Hearing Before the Subcomm. on Higher Ed., Lifelong Learning, and Competitiveness*, 110th Cong.10 (2010)(footnote in original states "Neither the HEA nor the Department's regulations define what constitutes instruction or attendance – for the on-line environment, *or the traditional classroom instruction*."(Emphases added)).

[14] *Baker College's Compliance with Selected Provisions of the Higher Education Act of 1965 and Corresponding Regulations*, U.S. Department of Education Office of Inspector General, ED-OIG/A0510012, August 24, 2010, at 11.

March 10, 2008, between an OIG auditor and the then Assistant Secretary for Postsecondary Education, highlighted an OIG audit report involving Capella University which clearly articulated the lack of any published standard. The email, provided as **Exhibit 1,** states:

> We are providing this final report to you because it may contain information of interest in regards to policy. *Because there is no separate standard in the regulations or published guidance for institutions that offer classes on-line compared to traditional instruction, it is unclear what it means for a student to begin attendance in that context.* For traditional instruction, there is no requirement that a student do anything except attend a class in order to begin attendance. *However, for institutions that offer on-line instruction, the department is silent on what demonstrates that students begun attendance*. (Emphases added).

Despite the lack of applicable requirement consistently articulated and affirmed by the OIG, the Department did not act to modify the applicable regulations until after the close of the Audit Period.

In fact, the issuance of final audit reports challenging documentation of online attendance without, as the OIG noted, supporting regulation or guidance, led several national higher education associations, including the Association of Jesuit Colleges and Universities ("AJCU") and the Jesuit Distance Education Network ("JesuitNET"); the Western Interstate Commission for Higher Education Cooperative for Educational Technologies ("WCET"); the Instructional Technology Council ("ITC"); and the Association for Information Communications Technology Professionals in Higher Education ("ACUTA"), to challenge the propriety and legal basis for such findings, and request that the Department provide clear and unambiguous guidance for the *future* reference of institutions.[15] Their letters seeking the Department's guidance are provided as **Exhibit 2.**[16]

In responding to this call for clarification, Assistant Secretary Ochoa admitted that as of August 23, 2010 (almost two months after the close of the Audit Period), the Department had not published general guidance on the documentation of attendance in an online educational program, stating that ". . . the regulations do not specifically address the determination of a last date of attendance for withdrawals from online programs." In that same communication, while Dr. Ochoa noted that the Department's assertion that a student login was insufficient to demonstrate academic attendance, he stated that this position was "consistent with the guidance the Department has provided *to individual institutions* regarding the applicability of the regulations to online programs."[17] His letter is provided as **Exhibit 4**.

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[15] *See also* Libby Nelson, A Secret Rule, Inside Higher Education, November 4, 2011, at *http://www.insidehighered.com/news/2011/11/04/education-department-enforced-distance-education-rule-it-was-published*. (Explaining the industry's frustration with the retroactive application of the Program Integrity definition for "academically-related activity" and "last date of attendance" to community colleges and other institutions.) Attached as **Exhibit 3.**

[16] The regulatory requirements for documenting attendance are the same for both establishing a student's attendance for purposes of Title IV eligibility, and determining a student's last date of attendance in order to calculate a return of any unearned Title IV funds.

[17] Letter from E. Ochoa, Asst. Sec. of Postsecondary Ed. to Jeri Semer, Association for Information Communications Technology Professionals in Higher Education, August 23, 2010, at 9. (Emphasis supplied)

It is abundantly clear that despite the clear fact that the rules relied upon were not in effect during the audit period, the Draft Report attempts to apply *current* regulations to the University's activities during the Audit Period, which is simply unsupportable as a matter of law and in error as a matter of fact.

Retroactive Application of Current Regulations is Not Permissible.

It is a well settled principle that an agency may not make retroactive application of new rules or regulations. The agency cannot publish new standards that alter the face of an existing substantive rule, and then seek to enforce the new regulations pursuant to such standards with retroactive effect. The law is clear that such enforcement must be prospective.[18] The definitions section of the Administrative Procedures Act, 5 U.S.C. § 551(d), states that a "rule" in whole or in part is an agency statement "of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy."[19] Even without such unambiguous statutory standards, basic principles of due process and fundamental fairness prevent an agency from imposing sanctions for conduct that occurred prior to the enactment of the regulation prohibiting the conduct.[20] Simply put, the University cannot be held to newly promulgated standards for activities it completed prior to their enactment.

Because of the disfavor of retroactive rulemaking, "Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[21] In *Bowen*, the Supreme Court stated that courts "should be reluctant to find such authority absent an *express* statutory grant."[22] The Higher Education Act of 1965, as amended, and the relevant regulations have neither any expressed, nor even an implied, authorization for the retroactive application of these new regulations to an institution's operations in prior years. The courts have been clear in holding that "a decision branding as 'unfair' conduct stamped 'fair' at the time a party acted…raises judicial hackles…[and] the hackles bristle still more when

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[18] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also Univ. of Iowa Hosps. & Clinics v. Shalala*, 180 F.3d 943, 951-52 (8th Cir. 1999) (holding that hospitals did not have to undertake studies of office space usage because the rule was being applied retroactively); *Rock of Ages Corp. v. Sec. of Labor*, 170 F.3d 148, 158 (2d Cir. 1999) (holding that the Petitioner did not violate a regulation requiring mine owners not to resume work prior to post-blast examination because it was retroactive in effect); *Rosenau v. Farm Serv.'s Agency*, 395 F.Supp.2d 868, 873 (D.N.D. 2005) (holding that the retroactive application of a Farm Service Agency Guide Book adopted after the review was improper to reject Plaintiff's claims that he deserved a "minimum effect" exemption from penalties on wetlands conversions); *Sweet v. Sheahan*, 243 F.3d 80, 88-89 (2d. Cir. 2000) (holding that regulations implemented by EPA and HUD in response to the Residential Lead-Based Paint Hazard Reduction Act could not be applied retroactively to require warning to a tenant by a landlord even though the claim arose after the "effective" date of the legislation because EPA/HUD regulations were not promulgated until later).

[19] Emphasis added. *See Bowen*, 488 U.S. at 217 (J. Scalia concurring) ("The only plausible reading of the italicized phrase is that rules have legal consequences only for the future.").

[20] *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122-23 (D.C. Cir. 2008) ("[T]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.") (citation omitted); *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996) ("[D]ue process requires fair notice of what conduct is prohibited before a sanction can be imposed."); *United States v. Gavrilovic*, 551 F.2d 1099, 1105 (8th Cir. 1977) ("When the consequence of agency rulemaking is to make previously lawful conduct unlawful and to impose criminal sanctions, the balance of these competing policies imposes a heavy burden upon the agency to show public necessity.") (holding that defendants were not guilty of acts which occurred prior to the effective date of the regulation).

[21] 488 U.S. 204, at 209.

[22] *Id.* at 209-201.

a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known."[23] This judicial disapproval of retroactivity speaks clearly to the case here. The Draft Report is rejecting the institution's definition of what constitutes attendance and subjecting the University to a potential financial liability for the 2009-10 award year, which ended on June 30, 2010, based on an application of standards never even published until October 29, 2010 and not effective until July 1, 2011, exactly a year and a day after the completion of the 2009-10 award year.

The retroactive application of a regulation is also disfavored where an entity is precluded from bringing itself into compliance before it is deemed in violation of the regulation.[24] The regulatory definition relied upon by the OIG would create legal consequences for the University based on conduct that took place well prior to its enactment.[25] The Draft Report cannot now simply assert without benefit of either contemporaneous statutory or regulatory authority that the University has violated legal standards that were not in effect during the Audit Period. Stated another way, the Draft Report cannot cite the existing regulatory standards to decide that three of the University's categories of engagement in academically-related activities do not count for Title IV purposes, when during the Audit Period such existing regulatory standards were not in place.

As such, there is no way that the new regulation, published on October 29, 2010 and effective as a matter of law on July 1, 2011, could be applied to the University's documentation of academically-related activity during the Audit Period. Indeed, in supporting the reasonableness of the ***recent*** rulemaking, the Secretary states that the revised regulation would be "consistent with the current guidance the Department has provided to ***individual institutions*** regarding the applicability of the regulations to online programs."[26] The record is clear that the University was not one of the individual institutions with whom the Department had articulated this guidance. [27] As the law is clear that where the agency chooses to interpret that law in a "subtle and refined way…the public may not be held accountable under this construction without some appropriate notice."[28] It would therefore be clear error for the Draft Report to seek to apply the newly articulated regulations to the Audit Period.

It is clear that the Draft Report calls for more stringent restrictions on online programs than provided for by the regulations in effect during the Audit Period. However, it was not until

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[23] *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966).
[24] *See, e.g., Rosenau v. Farm Service Agency*, 395 F. Supp. 2d 868, 874 (D.N.D. 2005) (agency's retroactive application of recently approved assessment model to determine whether farmers' prior wetland conversions qualified for minimum effect exemptions was abuse of discretion); *City of Rochester v. EPA*, 496 F. Supp. 751, 769 (D. Minn. 1980) (agency barred from "giv[ing] retroactive effect to a significant change in the substantive law" regarding participation in federal program).
[25] *Univ. of Iowa Hosps. & Clinics v. Shalala,* 180 F.3d 943, 953 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").
[26] 75 Fed. Reg. 66899 (October 29, 2010). *See also* PRCN: #200040917744, Masters Institute Final Program Review Determination Letter, 2000.
[27] Even if the University had received individualized guidance, a policy statement would not supersede the regulations then in effect.
[28] *Stoller v. Commodity Futures Trading Comm.*, 834 F.2d 262 (2d Cir. 1987)(stating that an agency may not charge a knowing violation of a revised standard without announcing the new standard of conduct without unduly prejudicing the party who relied on the agency's prior policy or interpretation).

certain internal communications were obtained pursuant to the Freedom of Information Act that it was conclusively demonstrated that (b) (5)

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Based on the clearly erroneous, yet knowing, retroactive application of the Program Integrity Rules to the Audit Period, the assertions in the Draft Report that the University improperly disbursed funds to students without establishing their attendance should be closed without further action and the University's documentation of students undertaking academically-related activity as the basis for establishing attendance should be recognized as being compliant with the regulations as they stood during the Audit Period.

The University Complied with the Law in Effect during the Audit Period

The Draft Report inappropriately applies standards and criteria that were first published on October 29, 2010 and became effective July 1, 2011, as part of the Program Integrity Rules.[29] A comparison between the revised regulations and the regulations in effect during the Audit Period establishes that the University was in compliance with the requirements in effect during the Audit Period.

[29] 20 U.S.C. § 1089 (ED operates using a master calendar as required by the Higher Education Act of 1965 to assure adequate notification about regulatory changes so that institutions can have time to adapt to any new standards or other regulatory change promulgated by a rulemaking by ED).

During the Audit Period, the University administered its attendance policies in full compliance with the then current, effective regulations which were unchanged during the entirety of the review period.[30] Under the regulations effective during the Audit Period, the "academically-related activity" that institutions were to utilize for documenting attendance was expressly defined at 34 C.F.R. § 668.22(3)(ii) in a non-exclusive manner, with several activities offered as exemplary but not by way of limitation:

> (ii) An ''academically-related activity'' includes, *but is not limited to*, an exam, a tutorial, computer-assisted instruction, academic counseling, academic advisement, turning in a class assignment or attending a study group that is assigned by the institution. (Emphasis supplied)

With the regulation then in effect written as exemplary but not by way of limitation, the Draft Report should have accepted the sufficiency of all of the University's documented academically-related activities for attendance purposes.

The regulations in effect during the Audit Period required institutions to calculate the percentage of the originally scheduled Title IV funds that a student actually earned by documenting the recipient's commencement of attendance, as well as the student's withdrawal date should the student fail to complete the payment period (term) or period of enrollment.[31] If a student did not begin attendance in the payment period (term) or period of enrollment, then the institution was required to return all Title IV funds that had been credited to the student's account.[32] For purposes of addressing the issues raised in this finding, the issue of determining a student's LDA and whether the student established attendance for enrollment level purposes, turns on the same analysis. In the case of the University, the institution identified six categories of participation which mattered for these purposes. These categories were consistent with the applicable regulation. *In addition to attendance*, as noted above, during the Audit Period, the Department provided a non-exclusive list of activities intended to serve as examples of academically-related activity, including *but not limited to* examinations, academic counseling, academic advisement, or attending a required study group.[33] While the then current regulations did not alter the documentation requirements, the Program Integrity Rules, effective July 1, 2011, did change the list of "academically-related activities."[34]

Under the *new* regulations the Department redefined what constitutes "attendance at an academically-related activity," creating a *new*, heightened – *and previously not generally articulated* – standard for establishing online attendance. Specifically, the new regulation includes the following changes (new text in *underscored italics*):

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[30] *See* 20 U.S.C. 1091b (2009).
[31] Letter from E. Ochoa, Asst. Sec. of Postsecondary Ed. to Jeri Semer, Association for Information Communications Technology Professionals in Higher Education, August 23, 2010, at fn. 2. ("We note that these same issues arise in the determination of whether a student has begun attendance – if a student has not, all Federal student financial aid must be returned in accordance with 34 CFR 668.21 – and the same guidance applies.") Attached in **Exhibit 4**.
[32] 34 C.F.R. § 668.21(a)(2010).
[33] 34 C.F.R. § 668.22(c)(3)(ii)(2009).
[34] *See* http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity.html (providing information on the fourteen federal financial aid related topics included within the Program Integrity Negotiated Rulemaking).

(7)(i) ''Academic attendance'' and ''attendance at an academically-related activity''—
(A) Include, but are not limited to—
(1) Physically attending a class where there is an opportunity for direct interaction between the instructor and students;
(2) Submitting an academic assignment;
(3) Taking an exam, an interactive tutorial, or computer-assisted instruction;
(4) Attending a study group that is assigned by the institution;
(5) Participating in an online discussion about academic matters; and
(6) Initiating contact with a faculty member to ask a question about the academic subject studied in the course; and
(B) Do not include activities where a student may be present, but not academically engaged, such as —
(1) Living in institutional housing;
(2) Participating in the institution's meal plan;
(3) Logging into an online class without active participation; or
(4) Participating in academic counseling or advisement.[35]

A comparison of the regulation in effect during the Audit Period and the new regulations which took effect on July 1, 2011, shows that the Department has only recently established unique requirements for online education that are significant, affecting a pattern of conduct that has been the norm in distance learning that has been relied upon since the inception of the Internet as an instructional medium. Through its May 2010 study, ITC and WCET, which together represent a substantial portion of institutions providing online education, requested institutions to share the standard they used to document attendance for the purpose of determining a student's last date of attendance. Almost *sixty percent* of the responding institutions identified the "last day the student logged into the college's learning management system" or the "last day the student logged into the course for which he or she was registered." One commenter put it this way: "We cannot be expected to retroactively collect or return funds if guidelines were not provided at the front end," and another said, "The last day a student logged into the course is just like a student walking into a face to face course in a live classroom."[36] On the basis of these studies, it is patently clear that the use of a login to the classroom or learning platform was clearly understood to represent the standard for documenting online attendance among a diverse grouping of institutions, and the revised regulations above, clearly constitutes a new regulatory standard for the administration of financial aid programs for students engaged in online learning – a standard that was not in effect and therefore may not be applied to the University's activities during the Audit Period. A summary of these studies is provided as **Exhibit 6**.

Specifically, in the commentary to the October 29, 2010 Program Integrity Rules, the Secretary *for the first time* distinguished between what would constitute an academically-related activity in on-ground versus online instruction. Whereas the Secretary stated that "[C]ertainly, traditional academic attendance is acceptable, *i.e.,* a student's physical attendance in a class

[35] 75 Fed. Reg. 66899 (October 29, 2010).
[36] Russ Poulin, *Last Day of Attendance WCET Survey Results,* May 9, 2010. Christine Mullins, *ITC Last Day of Attendance – R2T4 Calculation for Online Programs,* May 7, 2010.

where there is an opportunity for direct interaction between the instructor and students,"[37] the Secretary articulated a different standard of activity, distilled to the term "attendance ***with engagement***," that would only be applied to distance education. In the commentary accompanying the October 29, 2010 rulemaking, the Secretary ***for the first time*** publically stated that:

> With respect to what constitutes attendance in a distance education context, the Department does not believe that documenting that a student has logged into an online class is sufficient by itself to demonstrate academic attendance by the student because a student logging in with no participation thereafter may indicate that the student is not even present at the computer past that point. . . . Instead, an institution must demonstrate that a student participated in class or was otherwise ***engaged*** in an academically-related activity, such as by contributing to an online discussion or initiating contact with a faculty member to ask a course-related question.[38]

The imposition of the requirement that a student's attendance at an academically-related activity must consist of "attendance with engagement" as defined under the current regulations simply finds no support under the law in effect during the Audit Period. The act of logging into a specific online course in fact creates an electronic record that has long been considered the precise analogue of physical attendance in a classroom.

Prior to the October 29, 2010 publication of the Program Integrity Rules, and during the entirety of the Audit Period, the University followed what was generally accepted institutional practice among virtually all colleges and universities of all types and sizes offering online courses and programs.[39] During that period, and in the absence of a regulatory definition of online "attendance," it was left to the reasonable discretion of the institutions to define what constituted attendance. During the Audit Period, it is manifestly clear that the generally accepted institutional practice for determining a student's "attendance" was to apply the plain meaning, or standard dictionary definition of, "to attend" which is "to be present."[40] Recognizing that a class is obviously an "academically-related activity," the plain language meaning of the then current regulation (34 C.F.R. § 668.22(c)(3)) would indicate that it is sufficient for an institution to document that the student was present at class, to either establish his or her attendance or determine his or her LDA. In fact, there is obviously no requirement that an institution confirm that there is adequate – or any -- attention being paid by each student sitting in a conventional classroom. As a clear matter of law, as well as fundamental fairness, there is no basis for the Draft Report to read that requirement into the online environment prior to the Program Integrity Rules taking effect on July 1, 2011. More succinctly put, had the regulatory standard cited by the Draft Report as in effect during the Audit Period ***actually*** been in effect, there would have been no reason for the Department to go through the lengthy and burdensome process of a rulemaking to create, or articulate, the self-same standard. Under the regulations that were actually in effect during the Audit Period, rather than those that the OIG might have wished to

[37] *Id.* at 66898.
[38] 75 Fed. Reg. 66899 (October 29, 2010)(emphasis added).
[39] *See* Russ Poulin, *Last Day of Attendance WCET Survey Results*, May 9, 2010; Christine Mullins, *ITC Last Day of Attendance – R2T4 Calculation for Online Programs*, May 7, 2010.
[40] *Id.*; *See also* http://dictionary.cambridge.org/dictionary/british/attend_1.

have been in effect at that time, there was no legal basis to treat online courses differently than on-ground courses.[41]

The University's determination that attendance could be properly demonstrated through a student's accessing online course materials via a secure login reflected the common understanding among institutions of higher education of the Department's regulations in effect during the Audit Period relating to documenting attendance at an academically-related activity, and was well within the institutional discretion articulated in the then-applicable regulations. It was commonly understood that "attending class" constituted an academically-related activity; and similarly it was commonly understood that the act of logging *into* the student's online environment constituted evidence of such attendance in much the same way that a student's walking into a physical classroom constitutes attendance in a traditional setting. Further, during the Audit Period, activities such as reviewing the task list and syllabus would clearly be academically-related activities, as would viewing an archived chat or course presentation, which in an asynchronous learning environment, would be the equivalent of attending a class lecture.

As such, the documentation of students' login into any of the six academically-related activity categories identified in the Draft Report was compliant with the regulations in effect during the Audit Period, and all such documentation must be accepted as sufficient by the OIG. The exclusion of certain forms of documentation and certain forms of academically-related activity is a clear error.

The OIG's insertion of its own legally unsupported opinion as to what activities should be treated as academic in nature, also raises specific concerns about the OIG asserting its authority to influence, if not control, what activities are allowable in a classroom, when those activities should occur and how often. This OIG cannot seek to advise the Department that in resolving the Audit it must add additional requirements to the attendance policies and procedures implemented by the University based on the OIG's determination that the nature of an activity was not adequate as an academically-related activity.

20 U.S.C. § 1232a (2009) provides:

> No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

[41] CTU notes that it has modified its policies and procedures to comply with the Program Integrity rules, once they became effective on July 1, 2011. The University now tracks student engagement through discussion board postings, submission of assignments, and completion of online Knowledge Checks.

Both the OIG and the Department are prohibited from interfering in an institution's curriculum decisions. The exclusion of certain forms of documentation and certain forms of academically-related activity is, again, a clear error.

It is beyond cavil that the Draft Report applies the current Program Integrity Rules' standard of "attendance with engagement" rather than the requirement that was in effect during the Audit Period to insert itself into the operations of the University's online classrooms, and arrive at the material findings in the Draft Report which give rise to the asserted liability. Indeed, the Draft Report directly cites to the Program Integrity commentary as the basis for its standard of review for academically-related activity, with no acknowledgement that this standard reflects a later enacted, and significantly altered, standard from that which was in effect during the Audit Period.[42]

Because the Draft Report Applies an Incorrect Legal Standard to the University's Documentation of Online Attendance, the Draft Report Erroneously Identified Students as Failing to Establish Attendance for Purposes of Disbursement of Title IV.

Throughout the Audit Period, the University documented student logins into six categories of academically-related activities in compliance with the regulatory standards in order to comply with the applicable attendance regulations. In our review of the limited OIG auditors' work-papers provided to us, we were able to identify students whose files the OIG auditors deemed to not contain documentation of attendance, yet, when viewed under the proper legal standards, clearly contained documentation of multiple academically-related activities, adequate to establish eligibility for the Title IV funds disbursed.

For example, University Student ID (b) (6) was cited in the OIG work-papers as failing to have any documented academically-related activities for the 0904A and 0904B terms. However, the conclusion was based on applying the documentation requirements under the post-July 1, 2011 standard of "attendance with engagement" rather than the applicable "attendance" standard and, on that basis, rejecting three of the University's appropriate categories of activity. Upon application of the correct requirements, Student ID (b) (6) established academically-related activities during the 0904A and 0904B terms by engaging in her courses on multiple occasions. In fact, the University's documentation of the student's activities show the student established attendance by viewing the task list, syllabus, course presentation, or discussion board for both ENG 111 and INTD 112 for both terms, and had multiple academically-related activities logged by the University over a two month period (October, 2009 through December, 2009). On that basis, this student did establish attendance in the 0904A and 0904B terms and, as one example, cannot provide a basis for the finding in the Draft Report.

The University Has Had and Continues to Have Policies in Place to Ensure Student Eligibility for Title IV Disbursements.

Procedurally, it was the University's practice to generate a Master Student Listing ("MSL") report from CampusVue after completion of the add/drop period. The MSL report identified the students who did not participate during the add/drop period so that students could be administratively withdrawn consistent with University policies. The University had also

[42] Draft Report, at p. 5.

implemented a Pell screening process at the mid-point of the term, where the University would evaluate course-specific attendance during that secondary check. The University reviewed scheduled courses within the academic year at the time of the initial award, and subsequently once each term prior to requesting funds.[43]

Through its regular course of reviewing its policies and procedures the University, in October, 2010, began verifying student enrollment and Pell Grant eligibility prior to the request for funds; prior to the posting of funds; and finally, after the end of the term to verify the student had attendance posted for each class for which that student was registered in the first module of the term, and that the student had begun attendance in the second module of the term. The University's policy expressly states that, "[if] a student fails to attend one of more of the courses within a term for which a Pell Grant award exists; the award is to be adjusted appropriately." Notwithstanding the assertions in the Draft Report, in disbursing Title IV funds after the start of the payment period, the University appropriately ensured that prior to any such disbursement a student was enrolled and in attendance.

The University ensured its staff complied with the FA Award Calculations policy and other policies and procedures by creating a wiki-resource page; a centralized database of financial aid trainings, information pieces and topic based resources that would be accessible to all of CTU's financial aid staff at any time and continuing to implement a quality assurance practice where internal reviewers operate as a final review for financial aid packaging. CTU also implements directed quality assurance reviews, focusing on specific topics such as Pell Grant reimbursements or return of Title IV calculations when needed.

The University had compliant policy and procedures to verify the enrollment status of its students. It therefore strenuously contests this aspect of Finding No. 1 which should be closed without further action by the University.

The University's Determination of the First Day of Attendance was Reasonable for an Asynchronous Learning Environment.

The Draft Report asserts that University students received improper Title IV disbursements on the basis that attendance could be established slightly in advance of the formal class start. The University's documentation of students' logins and engagement in academically-related activities was evidence of the students' beginning the term, even when the activity occurred prior to the official start date of the module.

It is a virtually universal practice in higher education for institutions to make syllabi and course assignments available to students prior to the official start date of a term. In fact, it is common practice at universities throughout the nation for professors to require students to pick up their required materials and often to complete an assignment prior to the first day of class. The University's students commonly access their courses on weekends and evenings, when they are most likely to have blocks of time available. To exclude students from the learning

[43] The "Non-Return Drops" Standard Operating Procedure, as operated during the Audit Period, may have resulted in instances in which the University did not adjust Pell Grant eligibility based on enrollment status changes. The University has determined that the potential financial impact for the Audit Period is not material. CTU remedied this concern through its implementation of the "FA Award Calculations" SOP.

environment over a weekend preceding an official term start on that Sunday would be inconsistent with the University's obligation to meet the needs and expectations of its largely non-traditional, career-focused student base. The University's policy is not only logical but essential in an asynchronous learning environment.

When drafting its policy to allow students to access their class materials prior to a new module start, the University looked to the FSA Handbook to determine what was required for a student to begin attendance. According to the *2009-10 FSA Handbook*, beginning attendance is defined in the negative as, "A student is not considered to have begun attendance if the school is unable to document the student's attendance in any class."[44] While there was nothing in the FSA 2009 Handbook addressing asynchronous learning environments specifically, the University interpreted the guidance to indicate that once the student had engaged in an academically-related activity, if the institution could document the activity and the course for which the activity occurred, that activity could be the basis for establishing the students' enrollment in the course. As such, the documentation of an attendance activity, without a requirement of logging in prior to or even on the first day of a new module was understood to be an allowable form of documenting a students' attendance in the online environment. This aspect of the finding should also be closed without liability or further action on the part of the University.

FINDING NO. 2: COLORADO TECHNICAL UNIVERSITY DID NOT IDENTIFY STUDENTS WHO WITHDREW UNOFFICIALLY

The University does not agree with this finding and asserts that its policies were compliant with the regulations in effect during the Audit Period. In short, Finding No. 2 is erroneous, as it is unsupported by the regulations in effect during the Audit Period, relies on application of a standard articulated only in sub-regulatory guidance, which does not have the force and effect of law and impermissibly interferes with the academic decision making of the institution in contravention of 20 U.S.C. § 1232a. The University had a policy and procedures in place to identify when a student had unofficially withdrawn, and based on this policy, performed the required R2T4 calculations. As an initial matter, and as explained in detail in response to Finding No. 1, the Draft Report cannot apply regulations not in effect during the Audit Period and, as such, its failure to accept documentation of students' logins into academically-related activities, consistent with the University's categories as in effect during the Audit Period, contributed to this erroneous finding.

During the Audit Period, the University, as an institution not required to take attendance, was obligated under the R2T4 regulations to determine the amount of Title IV funds earned by a student as of the students' withdrawal date.[45] When a student withdrew without providing formal or official notice to the institution, the University was required to determine the withdrawal date no later than 30 days after the end of the earlier of: (1) the payment period or period of enrollment, (2) the academic year in which the student withdrew, or (3) the educational program from which the student withdrew.[46]

[44] U.S. Department of Education, *Federal Student Aid Handbook 2009-10*, vol. 5, 5-10, (2009).
[45] 34 C.F.R. § 668.22(a)(1)(2009).
[46] 34 C.F.R. § 668.22(j)(2)(2009).

To comply with the regulatory requirements outlined above, the University drafted and implemented the "Non-Return Drops" Standard Operating Procedure ("SOP") which outlined for staff in the Registrar Services and the Financial Aid Services teams within the University the procedures for how to identify and process unofficial withdrawals for students who did not provide notice of their withdrawal and did not return to the University within the term. Please see the "Non-Return Drops" SOP in **Exhibit 7**. Supplementing this policy was the "Withdrawal from the University" policy (enclosed from the 2009 Catalog as **Exhibit 8**).

The University designed its withdrawal policy to encourage student engagement and integrity. The "Withdrawal from the University" policy stated, in part:

> A student who is administratively withdrawn from the University before the fifth week [of a module] will receive a W grade for all current courses. No withdrawal (W) grades may be awarded after the fourth week of the session for current courses. Students desiring to return to the University following a withdrawal should refer to the Re-Entry to the University section elsewhere in this catalog.

This policy was designed to ensure that the University students could not unofficially withdraw from courses during the last week of a term for an illegitimate reason, such as avoiding final exams or failure to complete a final project, and thus avoiding receipt of a final grade. This is consistent with how many on-ground institutions handle unofficial withdrawals. The Withdrawal from the University Policy" stated that the University would withdraw a student who did not have any academically-related activity recorded during a 15-day period. Students who showed engagement consistent with the University's policy would not trigger an unofficial withdrawal and would receive a grade based on mastery of their subject, as shown through their participation in the course. The University's policies in this regard complied with the regulations in effect during the Audit Period.

Notwithstanding the clear fact that the University's policies complied with applicable regulatory requirements, the Draft Report seeks to give sub-regulatory guidance in the form of a Dear Colleague Letter ("DCL") the effect of law by asserting standards discussed only in a guidance document as a minimum that must be reached for a school to comply with a regulation. A Dear Colleague Letter cannot be used in such a manner. The Office of Hearings and Appeals of the Department has determined quite consistently that "in certifying institutions to participate in the Title IV student financial assistance programs, the Secretary expressly limits the obligation of institutions to compliance with all applicable 'statutes and implementing regulations.'"[47] Therefore, in this instance, where the regulations do not require students who failed to earn a passing grade to be treated as unofficially withdrawn, there is no obligation that an institution adopt such a standard.

Assuming for the sake of argument that a Dear Colleague Letter could provide a basis for a negative finding against an institution, the University's policies did comply with the published

[47] *In re Associated Technical Coll.*, Dkt. No. 91-112-SP (Feb. 3, 1993), at 32, *certified as Final Decision by the Secretary*, July 23, 1993. *Accord, In re Baytown Technical Sch., Inc.*, Dkt. No. 91-40-SP (Jan. 13, 1993), at 26, *aff'd by the Secretary*, Apr. 14, 1994 ("[T]his tribunal is obliged to finding violations of law, not violations of statements of policy.").

Dear Colleague Letter GEN 04-03 (2004), as relied on in the Draft Report. Per guidance published in that DCL, the University's policies did outline the procedure for "determining whether a Title IV aid recipient who had begun attendance during a period completed the period or should be treated as a withdrawal."[48] The University's policy complied with the DCL's guidance that where a student earned a passing grade, the University could assume the student earned all of the Title IV for the payment period, but where a student failed to earn a passing grade the University had to assume the student had withdrawn unless the University could document that the student completed the period consistent with the University's policy. The University notes that the DCL specifically and clearly stated that "*we [the Department] do not require an institution to use a specific procedure for making this determination.*"[49] As such, even assuming that the DCL can establish a basis for liability, which it cannot, the University had and applied a policy consistent with the DCL.

In addition, the University believes that the Draft Report over-reaches in asserting that the University's policy for determining whether a student failed or withdrew, an academic policy at its core, can be challenged as deficient. The Draft Report's insertion of its own determination as to what activities should be treated as sufficient to warrant an academic grade involves the OIG asserting its authority to influence, if not control, what activities are allowable in a classroom, when those activities should occur and how often. As noted in response to Finding No. 1, 20 U.S.C. § 1232a (2009) prohibits the OIG, as an office of the United States government, from directing the administration of a school such that the University's ability to determine its own curriculum and academic grading is compromised or otherwise inhibited. The Draft Report's position that the University's chosen policies were not adequate impermissibly interferes with its academic autonomy.

The University did indeed have a policy and process for determining whether a student failed to earn a passing grade or was deemed to have unofficially withdrawn: where the student had activity in the course for a duration that would not warrant an administrative withdrawal, the student was deemed to have attended and attempted the course under the University Non-Return Drops SOP and the Withdrawal from the University Policies. The University drafted its policies and procedures in consideration of the guidance and regulations published at the time and complied with those regulations.

In sum, the University's policies complied with the regulations as published during the Audit Period. The Draft Report cannot seek to enforce as law its interpretation of the meaning of a Dear Colleague Letter – which does not have the effect of law. Stated another way, the Draft Report cannot on its own initiative replace the University's policy with a policy that the OIG has decided better meets the meaning of the Dear Colleague Letter, where the University's policy remains compliant with the requirements of law.

FINDING NO. 3: COLORADO TECHNICAL UNIVERSITY DID NOT OBTAIN PROPER AUTHORIZATIONS TO RETAIN CREDIT BALANCES.

While the University agrees that the wording in our prior "Student Authorization to Retain Funds" form allowed for the misperception that the form sought to authorize the retention

[48] DCL GEN 04-03, Attachment p.2 (November 2004).
[49] *Id.*

of funds for charges incurred after the award year, or "future charges," the University does not agree with the Draft Report's finding that the University did not obtain proper authorizations to retain credit balances. In practice, the University did not use credit balances of Title IV funds to pay for charges incurred after the applicable Title IV award year and, thus, acted in compliance with the regulations.

The University's prior "Student Authorization to Retain Funds" form was utilized by the University to comply with 34 C.F.R. §§ 668.164 and 668.165, which require institutions to obtain written authorization from a student or parent, as applicable, prior to retaining any credit balances created from Title IV funds for more than fourteen days. The University did seek the proper authorization to retain funds, but expressly limited how these funds could be utilized. Specifically, the policy states, ". . . the [authorization to retain funds] does not override the following: For students in an active in-school status: [sic] the school may NOT retain funds to cover future or expected charges (e.g. grad fees not yet charged to the student)." The policy further states that the "school must pay any remaining credit balance on Title IV loan funds to the student (or parent for PLUS), by the end of each loan period," and the "school must pay any other remaining Title IV program funds balance by the end of the last payment period in the award year, for which the funds were awarded." The University complied with this policy, which was, and is, in compliance with the applicable regulations.

Yet, even though the University did not apply any credit balances to future charges, the University has no desire or intent to use forms that are unclear or have statements which could lead to possible confusion for our students. As such, upon being advised of the OIG's concerns related to the form, the University modified its "Student Authorization to Retain Funds' form. This version of the form was immediately implemented and is provided as **Exhibit 9.** The University took the recommendations of the OIG regarding the authorization for post-withdrawal disbursements into advisement, and modified its written notification process for informing students who have withdrawn, as to the type and amount of loan funds the student would receive should s/he choose to receive the loan.

Through our regular procedural review process the University is preparing to adopt a more detailed draft of the "Student Authorization to Retain Funds" form, which is provided as **Exhibit 10**. This version of the document is projected to be approved for use within the award year so that the language of the document will make clear our practices related to the credit balances retained by the University; including, application of a credit only to charges incurred during the applicable award year.[50]

Based on the modifications to the "Student Authorization to Retain Funds" form made at the OIG's recommendation, the University considers this finding to be resolved and asks that it be removed from the final report without further action. While the wording of the previous form could have allowed for misinterpretations, the practice and policies of the University were fully compliant with the Title IV regulations, and the retention of credit balances only occurred upon receipt of student or parental authorization and consistent with the applicable regulations.

[50] As stated on the Student Authorization Form, up to $200 can be applied to charges from a previous year in limited circumstances.

OTHER MATTERS

In addition to the Findings in the Draft Report, the OIG notes two additional issues under a section of the Draft Report captioned "Other Matters." While these other matters are not findings and do not require any response by the University, it would like to provide a brief response to each of the issues. The first issue involves errors identified by the University related to the calculation of Return to Title IV ("R2T4") funds, and the second issue concerns the University's previous compensation plans for admissions personnel.

Regarding the University's calculation of R2T4, the University realized that it was improperly excluding a four-day break between modules when calculating the total number of calendar days in a payment period, having confused the exception for breaks of at least "five consecutive days" in 34 C.F.R. § 668.22(f)(1)(i). The University realized its error in October, 2010 and immediately took action to remedy the error. As noted in the Draft Report, the University recalculated returns for all the students affected by the error, completed additional R2T4 returns, and notified the OIG of the corrective measures.

The University recognizes that R2T4 errors are among the most frequently cited errors in program reviews and audits and it is committed to vigilant monitoring of its Title IV program administration. To ensure this error cannot be repeated the University has reprogrammed CampusVue by adjusting the percentage of completion calculation. The financial aid staff continues to monitor this process, and since the initial identification and correction of the error, no additional actions have been needed.

In addition, the "Other Matters" section of the Draft Report references two aspects of compensating the University admissions personnel: (1) merit increases based in part on the number of student enrollments the employee secured, and (2) additional incentive payments based on the number of students enrolled who completed their educational program or one academic year of their program, whichever was shorter. The Draft Report found that both of these practices qualified for the "safe harbors" that were then in the regulations, and therefore were in compliance with the incentive compensation provision of the HEA. The Draft Report also noted that, since the applicable regulations changed effective July 1, 2011, the continuation of either of those compensation practices would be in violation of the new regulations. The OIG did not review the University's compensation practices for the period after June 30, 2011.

The University was well aware that ED was significantly changing its regulations and closely monitored the revised rulemaking process. The University revised and implemented new compensation practices well before the July 1, 2011 effective date respecting the repeal of the "safe harbors." With respect to merit increases for admissions personnel, the revised compensation plan eliminates any measure of student enrollments so that adjustments to the employees' salaries are now not "based, in any part, directly or indirectly, upon success in securing enrollments," as required by the new regulations. The revised compensation plan was implemented in March, 2011 for all salary adjustments occurring after March 1, 2011. In addition, the University ended its Supplemental Compensation Plan for admissions representatives, under which employees had received an additional payment for each student they recruited who completed his/her educational program or one year of his/her program. The University ceased making payments under that Supplemental Compensation Plan in April, 2011, and since that time has not made any payments to admissions representatives based on successful

student completion. The University is confident that its compensation of admissions personnel, since July 1, 2011, fully complies with ED's new regulations.

CONCLUSION

It is the University's position that Findings No. 1 and 2 of the Draft Audit Report are fatally flawed as a result of the reliance on a regulatory construct that was not in effect during the Audit Period. While it is obvious from the record – particularly the Congressional testimony of two Inspectors General -- that the OIG has disfavored the previous regulatory environment, and while it has on several occasions pointed to those regulatory deficiencies, it has also clearly spoken, in public and in internal communications with the Department, that the legal basis for its findings in the Draft Audit Report *simply were not in effect* during the Audit Period. The OIG cannot then call upon the Department to require the repayment of substantial sums where there did not exist – at the time of the conduct in question – any legal requirement for the University to act in any manner other than the course of action it pursued.

Further, the matters addressed in Finding No. 3 and under "Other Matters" have been resolved in full. Any ambiguity regarding the University's retention of credit balances has been removed from the Student Authorization Form, and the University has affirmed that its practices throughout the Audit Period complied with the relevant regulations. The University has an active compliance program that regularly reviews the University's policies and procedures to ensure compliance with regulatory changes, such as the Program Integrity Rules, and as shown in "Other Matters," the University has reviewed and revised its R2T4 and incentive compensation plans to comply with the regulatory changes that were promulgated through the Program Integrity Rulemaking. The University was able to successfully adopt and implement these revisions because it was provided with sufficient notice of the required changes and was able to prepare its community to adapt to the new requirements. The need for notice prior to the enforcement of a new regulatory standard is fundamental to the operation of the University and to retaining the integrity of the Title IV programs.

In conclusion, Findings Nos. 1 and 2 cannot be supported by the applicable regulations and should be removed in their entirety. Finding No. 3 been fully resolved, and should also be removed in its entirety.

APPENDIX B – List of Exhibits

Exhibit #	Title/Description
1	Email, dated March 10, 2008, regarding Capella University Final Audit Report A05G0017.
2	Letters, dated June 4, 2010, and August 2, 2010, addressed to the Secretary of the U.S. Department of Education from representatives of the higher education associations Re: Documentation of Last Day of Attendance for Online Programs
3	Article from the *Inside Higher ED* publication titled "Education Department enforced distance education rule before it was published." Article submitted on November 4, 2011.
4	Letter, dated August 23, 2010, responding to the letters in Exhibit 2.
5	Communications via email in 2007/2008 on guidance regarding attendance related to Capella University.
6	WCET Survey Results on Last Day of Attendance, dated May 9, 2010
7	CTU "Non-Return Drops" standard operating process
8	CTU's 2009 University Policies including Withdrawal from the University (effective July 2, 2009)
9	CTU's revised "Authorization for Title IV Financial Aid Funds"
10	CTU's draft "Authorization for Title Financial Aid Funds"