



February 12, 2004

Steven Y Winnick
Designated Agency Ethics Official
Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-2152

Dear Mr Winnick

The Office of Government Ethics (OGE) has completed its review of the Department of Education's (ED) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the effectiveness of the ethics program, largely measured by its compliance with applicable statutes and regulations. This review was conducted from October 2003 through January 2004.

Based on the findings of our pre-review work, we excluded examining the overall administration of ED's public and confidential financial disclosure systems.

HIGHLIGHTS

ED's ethics program is essentially sound and appears to be appropriately tailored to the needs of agency employees. However, some improvements are needed. Strong parts of your program include the ethics training program, the provision of useful ethics advice, and an enforcement process that promptly and effectively deals with employee ethical breaches. In addition, we commend the efforts expended to provide ethics-related services to several independent entities which are not organizationally part of ED.

To strengthen your program, we recommend that you ensure that (1) waivers issued pursuant to 18 U.S.C. § 208(b)(1) and (b)(3) are granted in accordance with subpart C of 5 C.F.R. part 2640 and (2) confidential financial disclosure reports are filed timely by special Government employees (SGE) at independent entities.

PROGRAM STRUCTURE

It appears that, generally, the management and staffing of your program is appropriate. We note, however, that by the close of our review, in January, two significant staffing changes had just occurred. We do not believe that these staffing changes will have any long lasting effect on the ethics program based on the experience and skill level of your current staff.

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As Deputy General Counsel for Program Service, you have long-served as ED's Designated Agency Ethics Official (DAEO) and oversee management of the Ethics Division. However, the Alternate DAEO (ADAEO) administers the day-to-day aspects of the program. One of the significant staffing changes that occurred by the close of our review was that a long-serving ADAEO stepped down from her position. She, however, remains in the Ethics Division as a part-time attorney.¹ A new ADAEO assumed the position in January and she attended our last meeting with you.

During our review, the Ethics Division was comprised of four other attorneys, three ethics program specialists, and an ethics program assistant. The other significant change that occurred by the close of our review was that a long-serving ethics program specialist retired from her position. At the time of our last meeting, you told us that you plan to fill this position.

WAIVERS

We found that ED did not issue waivers pursuant to 18 U.S.C. § 208(b)(1) and (b)(3) in accordance with subpart C of 5 C.F.R. part 2640. In the waivers we examined, ethics officials (1) did not consult with our Office prior to granting waivers nor consistently forward copies of them to us in accordance with 5 C.F.R. § 2640.303 and (2) did not adequately describe the waived disqualifying financial interest nor address the factors described in 5 C.F.R. § 2640.301(b). Also, we believe that supervisory oversight was lacking when Ethics Division attorneys were authorized to issue waivers.

We are pleased to report that you have already implemented corrective actions to address our concerns. For example, on November 18, the Secretary changed the Delegation of Authority so that authority to issue waivers primarily rests with you. However, the authority to issue waivers is reserved to the Secretary for issuing waivers to you, as well as to the Deputy Secretary, the Under Secretary, or the General Counsel with your concurrence. Also, shortly after the start of our review, Ethics Division attorneys began consulting with OGE when drafting waivers. According to the ADAEO, this practice will continue. She also explained that after waivers are issued, they will immediately be forwarded to our Office. However, thus far no new waivers have been issued. We believe consulting on waivers prior to issuance should ensure that the waived disqualifying interests and the §2640.301(b) factors are fully described and that the test for assuring a direct and predictable effect will be met.

According to documents forwarded to our Office, in addition to records supplied by the ADAEO, it appeared that, in 2003, ED had issued approximately 40 waivers pursuant to 18 U.S.C. § 208(b)(1) and (b)(3). We found various deficiencies in many of these. Almost none contained the analysis of the factors enumerated in 5 C.F.R. § 2640.301(b). Most significantly, the waivers generally failed to analyze how the employee's financial interest or his imputed financial interests

¹For writing ease for this report, we refer to the former ADAEO as the ADAEO.

might be affected. For example, ED issued several waivers to high level officials who were negotiating for employment. ED had essentially used pro forma language in these which contained no discussion of why the financial interest created by the negotiation for employment, which is usually considered significant, was not substantial in these cases. Instead, these waivers simply asserted the fact that negotiation for employment was occurring. Without the analyses supporting the conclusions reached, OGE is unable to determine whether we might have objected to the waivers had we been consulted.

In addition, as we discussed at our last meeting in January, a White House memorandum dated January 6, 2004 stated a new policy which prohibits agency personnel from granting waivers under 18 U S C § 208 to Senate-confirmed Presidential appointees for the purpose of negotiating for outside employment unless agency personnel have first consulted with the Office of the Counsel to the President.

We also found that several waivers were issued when there was already an applicable exemption pursuant to 18 U S C § 208(b)(2) in place. Most notably this occurred for advisory committee members who were covered by an exemption at 5 C F R § 2640.203(g). The determinations we examined incorrectly cited the exemption as the reason why the "waivers" were appropriate. We are pleased to note that the misunderstanding over the applicability of an exemption versus waiver is now being addressed through ongoing discussions among ethics officials.

We firmly believe that the above cited deficiencies would have been highlighted and addressed had consultations taken place. The consultations could have also aided in determining whether a waiver was actually needed. We also believe that many of the deficiencies would have also been prevented had there been more supervisory control over the issuance of waiver process. As noted earlier, we are satisfied that corrective measures have been put in place to address these problems. Also, ED's November change in waiver delegation authority supports that you have already complied with the additional guidance in the White House's January memorandum which directed that existing delegations of the authority to grant waivers be assessed to ensure that an appropriate level of seniority and responsibility is involved in the decision-making process. Finally, the ADAEO told us that many of the waivers issued in 2003 are being reassessed to ensure that the particular matter under scrutiny would have a direct and predictable effect on the potentially disqualifying interest. As necessary, employees may be issued additional written advice.

SPECIAL GOVERNMENT EMPLOYEES

Ethics officials do a commendable job and expend much effort in dealing with the various ethical issues surrounding ED's many SGEs. Currently, SGEs include three experts who provide consultative services to the Secretary.² In addition, there are numerous SGEs who serve on one of

²We did not include those SGEs who are nominees for Presidentially-appointed, Senate-confirmed (PAS) positions.

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ED's 12 advisory committees Moreover, many SGEs serve at the independent entities to which ED provides ethics services

We examined various records related to a sample of these SGEs to ensure that ethics requirements were being satisfied and found that they generally were But, many SGEs who serve at independent entities did not file timely confidential financial disclosure reports Also, we encourage ethics officials' ongoing initiative of determining whether SGEs who serve on some advisory committees should file an alternative confidential disclosure report in lieu of the OGE Form 450

Advisory Committees

We agree with determinations made by ethics officials on the employment status (i e , SGEs versus representatives) of advisory committees' members Also, we believe that officials made an appropriate determination when they decided to exempt the Jacob K Javits Program Fellowship Board members from filing financial disclosure reports

Of ED's 12 advisory committees, we focused our examination on 3, all of which are comprised of SGEs who file OGE Forms 450 ³ Ethics officials are in the process of examining these committees to determine whether members should continue to file OGE Forms 450 or whether an alternative confidential disclosure report would better suit their needs for identifying potential financial conflicts, considering the limited likelihood of conflicts

In 2003, the majority of confidential reports from members of NACIQI, FIPSE, and NCFMEA were filed, reviewed, and certified timely However, a few members did not file reports in 2003 and a few reports were filed late According to the ADAEO, those who did not file, did not participate in meetings in 2003 Reports appear, for the most part, to have been thoroughly reviewed, as evidenced by extensive follow-up and the drafting of ethics agreements

According to the records we examined, an Ethics Division attorney provided annual ethics training in 2002 to most committee members, but a few did not receive in-person training For annual training in 2003, almost all had received in-person training by December Appropriate written ethics materials were sent to those who did not receive in-person training

Outside Entities

In addition to providing ethics-related services to ED employees, ethics officials spend a significant amount of time and effort providing services to the employees of four independent

³Our sample included the National Advisory Committee on Institutional Quality and Integrity (NACIQI), the National Board of the Fund for the Improvement of Postsecondary Education (FIPSE), and the National Committee on Foreign Medical Education and Accreditation (NCFMEA)

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entities, which are comprised of both members (who are SGEs) and regular employees (who are staff) We focused our review on three of the four the National Assessment Governing Board (NAGB), the National Council on Disabilities (NCD), and the National Institute for Literacy (NIL) ⁴ Because NIL is in actuality an interagency group made up of the Secretaries of ED, the Department of Labor, and the Department of Health and Human Services, we narrowed our examination to NIL's advisory board (NILAB)

Overall, the financial disclosure systems and ethics training program are generally well managed by ED ethics officials ⁵ We examined the most recent financial disclosure reports required from SGEs and the staff of these entities Most reports were reviewed timely, but many confidential reports from NAGB and NCD SGEs were filed late ⁶ Also, the certification process was protracted for many reports due to obtaining additional information and issuances of waivers for committee members Reports were thoroughly reviewed by ethics officials as evidenced by the few technical deficiencies and no apparent conflicts of interest

Ethics officials diligently provided annual ethics training to NAGB, NILAB, and NCD members as part of their regular meetings in 2002 and 2003 But, in 2002, ethics officials were only partially successful in ensuring that staffs of these outside entities were trained In 2003, we noted improvement in staffs completing annual ethics training

To ensure the overall better management of the ethics services provided to outside entities, we encourage ethics officials to involve staff leadership at NAGB and NCD to raise awareness of ethics program requirements These officials could aid in ensuring timely report submission (including notifying ethics officials of new entrants or departing employees) and in ensuring annual ethics training completion

SUPPLEMENTAL STANDARDS OF CONDUCT REGULATION

ED's supplement to the standards of conduct regulation, at 5 C F R part 6301, requires that employees obtain prior approval before engaging in certain outside activities or employment We verified that employees are doing so by examining 15 of the approximately 70 approved requests in 2003 All appeared to be appropriate and in compliance with ED's outside activity approval process

⁴We did not examine the National Commission on Libraries and Information Science

⁵Members of NCD and NILAB file OGE Forms 450, but NAGB members file a confidential financial disclosure form pursuant to alternative instructions approved by OGE in January 2003 Most staff file OGE Forms 450, however, at NAGB and NIL some staff file SF 278s

⁶According to the ADAEO, during 2002, ED did not receive notification from White House officials on NCD nominees and new member appointments as it had in the past and as it currently does

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In addition, we noted two good management practices that contribute to ED's well-run outside activity approval system which we encourage that you continue. First, copies of approvals are maintained with employees' financial disclosure files, which we believe aids in the review of their disclosure reports. Second, as a way to organize the flow of paperwork, ethics officials keep a running list showing when the requests are received and when the assigned Ethics Division attorney completes a conflicts review.

ETHICS EDUCATION AND TRAINING

OGE's ethics education and training requirements, at 5 C F R part 2638, are not only being met but also exceeded in many ways. We confirmed that ethics officials consistently document the agency's ethics training plan. Above and beyond our requirement to provide annual training to covered employees, ED annually trains all employees paid at the rate of GS-9 and above. Concerning monitoring completion of initial ethics orientation and annual training, we are impressed by the fact that ED's training tracking system records when employees complete training, especially considering that almost 4,000 employees are trained annually. We are also impressed by ED's incorporation of a values-based training approach to supplement its compliance-based annual ethics training.

Initial Ethics Orientation

Initial ethics orientation is immediately satisfied for new employees through the receipt of the required written ethics materials when they start work. Our orientation requirement is exceeded in that all new headquarters employees receive in-person training from an Ethics Division attorney when they attend a mandatory one-hour ethics session which is part of a full-day orientation for new employees. We attended one of these sessions in November and found it to be informative and well-g geared to the variety of new employees in attendance. We commend the use of a question-and-answer format as a way to engage employees.

Your program also exceeds our orientation requirement by providing new PAS employees individualized ethics briefings shortly after they enter on duty, a practice we encourage you to continue. As a good record-keeping procedure, we were pleased to observe that in-person orientation dates are recorded on your ethics training tracking system.

Values-Based Training

ED also went beyond the requirements of our training regulation by incorporating a values-based ethics training component to supplement its existing compliance-based annual ethics training. In 2002, the agency administered an agencywide ethics survey to assess ED's organizational culture with respect to ethics issues in order to provide a basis for the development and delivery of this new training approach and to identify ways ED's ethical structure could be strengthened.

Ethics officials told us that the initial effort to incorporate a values-based approach was to train approximately 500 "rating officials"⁷ These employees were required to attend one of the many three-hour sessions held for them in 2002 and ethics officials attested to the fact that almost all of those required to attend did so According to the ADAEO's description, and based on our examination of various documents, ethics officials provided a detailed presentation to attendees which reviewed ethics regulations and laws and covered the process of ethical decision-making

Annual Training In 2002

Your records reflect that most employees required to receive annual ethics training in 2002 did so We were impressed with the variety of training offered to employees Although approximately 50 public filers did not receive training during the 2002 calendar year, the ADAEO told us that most attended a make-up training session in February 2003 which was specifically geared for them Also, though it is your practice to provide individualized annual ethics training to all PAS employees, this did not occur in 2002 because these employees instead participated in the values-based training program

Annual Training In 2003

By the close of our review in December, almost all of those required to receive annual ethics training had done so During this past year, ED training primarily focused on a values-based approach agencywide and ethics officials provided in-person classroom training to most employees paid at the rate of GS-9 and above We attended one of these training sessions in November In addition to covering ethics rules, the Ethics Division attorney led participants through several case study scenarios which thoughtfully addressed the process of ethical decision-making It was clear to us that attendees were engaged in the training based on their questions and comments In addition to in-person training, ethics officials offered computer-based training modules

According to the ADAEO, individualized training was provided to all PAS employees in 2003 In addition, by December, over 90 percent of all public filers and non-public filers attended in-person training All remaining covered employees were expected to complete on-line training

ETHICS COUNSELING AND ADVICE

Ethics counseling and advice services meet the requirements of 5 C F R § 2638 203(b)(7) and (8) While ethics advice is sometimes provided orally, it is often dispensed in written form, usually by e-mail We examined approximately 40 written determinations that were provided to all PAS employees and some SGEs in 2003 In addition, we examined general advice notices provided

⁷Managers identified those employees who were rating officials, i.e., those who appraise/rate other employees The rating official designation did not necessarily comport with being a public or confidential filer

to all employees Overall we found that the advice was accurate, consistent with applicable laws and regulations, and appeared to meet employees' needs The advice covered outside activities, gift acceptance, post-employment, endorsements, fund-raising, and potential conflicting interests

A best practice that you have in place is that you provide post-employment information to all departing employees Also, your occasional issuances of ED Notices is a good method to keep all employees aware of topical ethics issues that arise from counseling and advising employees ED's Intranet (ConnectED) ethics Web site is another useful way that you reach out to employees We commend the issuance of your May 2003 Ethics Tool Kit, a compendium of references and information covering all aspects of ethics Noteworthy is the fact that the Ethics Tool Kit includes information on identifying and reporting ethical violations

ETHICS AGREEMENTS

All of the actions required to be taken pursuant to PAS employees' ethics agreements were completed timely, in accordance with 5 C F R § 2634 802(b) In all but a few cases, requisite evidence of action taken was submitted timely to OGE, in accordance with 5 C F R § 2634 804(a) From 2001 up to the present, 14 PAS employees took required actions following their Senate confirmation to fulfill their ethics agreements

ENFORCEMENT

In accordance with 5 C F R § 2638 203(b)(9), ED appears to promptly and effectively deal with those employees who engage in unethical conduct Also, ED is complying with 5 C F R § 2638 603 by notifying OGE of referrals for prosecution to the Department of Justice (Justice) of alleged violations of the criminal conflict-of-interest laws, as well as any related declinations Finally, the requirements of 5 C F R § 2638 203(b)(11) and (12) are being satisfied pertaining to reviewing ethics-related information developed by Office of Inspector General (OIG) audits and making appropriate use of OIG services Ethics and OIG officials stated that they have a very good working relationship with one another and that they, as necessary, coordinate employee misconduct cases and other ethics matters We commend the ADAEO for recently providing specialized training to OIG staff focusing on the conflict of interest laws

From 2002 up to the present, the agency investigated and took administrative action against several employees who had violated various ethical standards Eight employees from headquarters were disciplined in 2002⁸ based in part on their violations of standards of conduct provisions, mostly for failing to meet their financial obligations (5 C F R § 2635 809) Discipline for these eight cases ranged from issuing an official reprimand to a 60-day suspension and reassignment

⁸Information about discipline meted out in 2003 was not readily available, therefore, we did not review those case files

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According to information provided by ethics officials, ED also took action against five other employees who were accused of committing various ethical violations in 2002 and 2003. In addition, the ADAEO told us that ethics officials had just recently referred to the OIG a matter involving a former PAS employee for violating 18 U S C § 207. Of those five cases where the agency has already taken action, the ethical wrongdoings included time and attendance violations and an ethics agreement violation. Of the five involved employees, four resigned or were fired. By the time of our last meeting, you told us that the one remaining employee was recently reprimanded.

In 2003, the OIG referred three employees for alleged violations of the criminal conflict-of-interest laws (involving either 18 U S C § 208 or 209) to Justice. One was declined for prosecution and two are pending disposition. Pursuant to 5 C F R § 2638.603, OGE was concurrently notified of all three referrals and the declination. For the one matter declined, ED counseled the employee about her unintentional violation and determined that further discipline was not warranted. For the remaining two referrals, though employees have left ED, ethics officials are aware of the requirement to report to OGE on Justice's disposition of these matters.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

ED accepted 60 payments greater than \$250 from non-Federal sources for travel, subsistence, and related expenses incurred by employees on official travel from April 1, 2002 to March 30, 2003. We found that these payments were accepted in accordance with 31 U S C § 1353. The required semiannual reports were generally forwarded to OGE timely.

RECOMMENDATIONS

We recommend that you

1. Ensure that waivers issued pursuant to 18 U S C § 208(b)(1) and (b)(3) are granted in accordance with subpart C of 5 C F R part 2640.
2. Ensure that confidential financial disclosure reports are filed timely by SGEs of NAGB and NCD.

In closing, I wish to thank you for all of your efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions planned or taken concerning the recommendations in our report. A follow-up review will be scheduled within six months from the date of this report. In view of the corrective action authority vested with the Director of the Office of Government Ethics under subsection 402(b)(9) of the Ethics Act, as implemented in subpart D of 5 C F R part 2638, it is important that ethics officials take actions to correct these deficiencies in a timely

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manner We are sending a copy of this report to the Inspector General Please contact Ilene Cranisky at 202-482-9227, if we can be of further assistance

Sincerely,

A handwritten signature in black ink that reads "Jack Covaleski". The signature is written in a cursive style with a large, looping initial "J".

Jack Covaleski
Deputy Director
Office of Agency Programs

Report Number 04 - 002