

Its purposes include "meet[ing] the unmet . . . educational . . . needs of the United States, without displacing existing workers"² and "expand[ing] and strengthen[ing] existing service programs with demonstrated experience in providing service opportunities with visible benefits to the participants and community."³

The legislative history demonstrates the extent to which Congress expected assisted programs to expand and strengthen existing programs: "The national service program will enhance, support, and build on the vast and effective network of service organizations already in place in American communities. Relying on existing structures, resources and experience is absolutely essential in the pursuit of economy and efficiency. It is equally essential to maintaining the self-starting spirit, the pluralism, and the adaptation to local conditions that have always been the basis for creative response to community needs by local government."⁴

Among the types of service programs eligible for assistance is a "professional corps program that recruits and places qualified participants in positions – (A) as teachers . . . providing service to meet educational . . . needs in communities with an inadequate number of such professionals."⁵ Such a program must be sponsored "by public or private nonprofit employers who agree to pay 100 percent of the salaries and benefits (other than any national service educational award under division D of this subchapter) of the participants."⁶

The Act also contains a provision prohibiting the duplication of services and displacement of workers.⁷ The nonduplication provision states as a general rule: "Assistance provided under this subchapter shall be used only for a program that does not duplicate, and is in addition to, an activity in the locality of such program."⁸ It further states: "Assistance made available under this subchapter shall not be provided to a private nonprofit entity to conduct activities provided by a State or local government agency that such entity resides in unless the requirements of subsection (b) of this section are met."⁹

Subsection (b) contains the nondisplacement provision. It begins by stating the following general rule: "An employer shall not displace an employee or position, including partial displacement such as reduction in hours, wages, or employment benefits, as a result of the use of such employer of a participant in a program receiving assistance under the subchapter."¹⁰ It goes on to make this prohibition more explicit, including a

² *Id.* at §12501(b)(1).

³ *Id.* at §12501(b)(6).

⁴ *Id.* at 36.

⁵ *Id.* at §12572(a)(8)(A).

⁶ *Id.* at §1257(a)(8)(C).

⁷ *Id.* at §12637.

⁸ *Id.* at §12637(a)(1).

⁹ *Id.* at §12637(a)(2).

¹⁰ *Id.* at §12637(b)(1).

prohibition on the "duplication of services" which states: "A participant in any program receiving assistance under this subchapter shall not perform any services or duties or engage in activities that would otherwise be performed by an employee as part of the assigned duties of such employee."¹¹ Thus, the nonduplication and nondisplacement provisions of the Act are not separate prohibitions; they are interconnected by the very structure of the Act. In the case of a program conducted by a nonprofit entity such as RFCUNY, the Act appears to permit duplication as long as there is compliance with the nondisplacement provision. More generally, the two provisions represent the flip sides of the same goal of preventing assisted programs from displacing workers.

This is also made clear in the legislative history of the Act, which states: "The National and Community Service Act strongly emphasizes the creation of meaningful opportunities for participants to provide services that would not otherwise be provided. Only in this way can we ensure that regular employees are not displaced."¹² Thus, the nonduplication provision must be interpreted in light of its purpose in preventing displacement of workers. Although the Act requires that a program satisfy an unmet need, it clearly contemplates the funding of an existing program designed to achieve that goal and does not require that such funding be indispensable to the existence of the program.

ARGUMENT

The Teaching Fellows Program fully complies with the statutory requirements of the Act. It meets unmet educational needs by recruiting, training and certifying highly qualified teachers for New York City's public school system, especially in those schools and classrooms where it is hardest to find and place such teachers. It does so without displacing any existing workers or duplicating an activity otherwise available in a locality. Rather, as specifically contemplated by the Act, the grants have expanded and strengthened an existing service program. That program fits perfectly within the model of a professional corps program, by recruiting and placing teachers to meet educational needs in communities with an inadequate number of such professionals, with the locality paying 100% of the salaries and benefits of the participants and the AmeriCorps grants providing for the costs of administration and for the education awards to the participants for their professional education.

The IG's letter concludes that the grants to the Teaching Fellows Program are not authorized by the Act because they were "merely 'icing on the cake' for a program that already existed." That language, while colorful, is not found anywhere in the Act and does not reflect the actual requirements contained therein. The nonduplication provision does not require, as the IG would have it, that no program is eligible for AmeriCorps funding unless there is proof that such funding is "essential" to recruiting volunteers. That interpretation would involve a wholesale rejection of the Act's approval of assistance designed to strengthen and expand existing programs, particularly using the professional corps model, which assumes

¹¹ *Id.* at §12637(b)(3)(a).

¹² S. Rep. No. 101-76 at 35 (Oct. 27, 1989) (emphasis added). The IG's Letter also cites the definition of "project" as "an activity, carried out through a program that receives assistance under this subchapter, that results in a specific service or improvement that otherwise would not be done with existing funds, and that does not duplicate the routine services or functions of the employer to whom participants are assigned." That language is nothing more than a restatement of the nonduplication and nondisplacement provisions discussed above.

correctly that the education awards provided by the Act will serve to attract more qualified professionals to underserved localities than would be the case in the absence of such benefits.

The conclusion in the IG's Letter is thus based on a fundamentally incorrect interpretation of the Act. Because of that error of law, the factual predicates for the IG's conclusion are irrelevant. As set forth below, they are also erroneous.

1. *The large number of applicants for Teaching Fellow positions does not support the conclusion that there is not an unmet need.*

The IG's Letter correctly notes that applications for Teaching Fellow positions far outnumber the positions available. This is a highly selective program. It was planned to be so. In its 2004 proposal to AmeriCorps, RFCUNY wrote that it anticipated that only about a fifth of applicants would be accepted into the program. This has been a consistent feature of the program. In its 2007 proposal, RFCUNY reiterated that the program was one of the most selective in the country. AmeriCorps has never objected to this selectivity.

RFCUNY is proud to operate a program that selects only the most talented and suitable candidates. It is a signal achievement of the program that it has drawn highly qualified candidates to teaching positions in high-poverty schools that historically have been disproportionately staffed with temporary and uncertified teachers. Indeed, ninety-two percent of 2007 Fellows work in Title I schools, which are federally-designated as serving the highest concentration of students from poor families.¹³ Researchers have found that Teaching Fellows have entered the schools with significantly higher academic qualifications than their predecessors in high-poverty schools, a change that has already benefited the City's students.¹⁴

The IG's Letter argues that the large pool of applicants is evidence that there is no longer an unmet need in New York City's schools. A large pool is not evidence, however, that most of its members would meet the stringent standards required to assume challenging teaching responsibilities. Fellows undergo a very careful selection process that includes submitting essays, a personal interview, drafting of a sample document on-site, and conducting a demonstration lesson. The rigorous selection procedure insures that only applicants with the character, academic skills, and motivation to take on high-needs classrooms actually enter the schools.

The contention in the IG's Letter that the large number of applications for the Teaching Fellows Program demonstrates that there is no unmet need is also contradicted by the legislative history of the recently enacted Edward M. Kennedy Serve America Act, which among other things directs the Corporation to develop a plan to increase AmeriCorps positions to 250,000 by 2017 and reauthorizes the funding of professional corps programs. In passing the Act, Congress recognized the efforts of the thousands of volunteers educating young people in poor and rural schools through the Teach for America Program.¹⁵

¹³ The New Teacher Project. 2009. "A Growing Force: More than 8,300 NYC Teaching Fellows." www.nttp.org/out/impact/impact_nyc.html. Retrieved April 12, 2009.

¹⁴ Boyd, Donald, Hamilton Lankford, Susanna Loeb, Joanna Rockoff, and James Wyckoff. 2008. "The Narrowing Gap in New York City Teacher Qualifications and Its Implications for Student Achievement in High-Poverty Schools." *Journal of Policy Analysis and Management*, Vol. 27, No. 4:793-818.

¹⁵ 155 CONG. REC. S3636-01 (daily ed. March 24, 2009) (statement of Sen. Akaka).

That the Teach for America Program received 35,000 applicants for 4,000 slots was viewed by Congress as a positive sign that volunteers are taking advantage of the opportunities made available by AmeriCorps funding and that there is a need to increase opportunities for more Americans to serve.¹⁶

2. *AmeriCorps Education Awards are important to the Teaching Fellows Program.*

The IG's Letter argues that the AmeriCorps Education Awards could not have spurred participation because members were unaware of them. This claim is made on the grounds that (until recently) the program web site did not announce the AmeriCorps connection and that several program members who were interviewed stated they did not know that their awards came from AmeriCorps.

It should be noted that there appears to be no legal support for the IG's view that lack of widespread publicity about the awards would undermine the Teaching Fellows program. AmeriCorps does not require that programs be identified as affiliates or that those receiving education awards be identified as AmeriCorps members.¹⁷ Nevertheless, RFCUNY regards AmeriCorps membership as a significant benefit both to the program and to the Teaching Fellows.¹⁸ It has always referenced AmeriCorps as part of the Teaching Fellows Program and has recently taken additional steps to provide more visible credit to AmeriCorps for its contribution.

The City Teaching Fellows web site has always included information on AmeriCorps and on the education awards it provides. At times this information has not been on the web site's front page, but it has consistently been placed in the section on member benefits. Candidates who are considering applying are likely to delve into the web site at least to the point of acquiring information on the benefits they might expect. Moreover, at the end of the summer pre-service training, Teaching Fellows are all advised on the application process to become AmeriCorps members and obtain the resulting benefits.

There can be no serious doubt that the AmeriCorps awards are important to Teaching Fellows. It appears that program administrators have chosen not to highlight the awards until participants successfully complete their summer pre-service training and apply for membership. The training is demanding and not all participants succeed in it. For those who do, joining AmeriCorps at the end of the summer just before they assume responsibility for their own classrooms is a final stage in becoming committed teachers in high-needs schools.

¹⁶ 155 CONG. REC. S3841-01 (daily ed. March 26, 2009) (statement of Sen. Enzi).

¹⁷ AmeriCorps. 2007 Education Award Provisions.

¹⁸ The IG's Letter appears to assume that the only legitimate purpose of education awards is to benefit the program. As noted above, they do benefit the Teaching Fellows Program by assisting in the recruitment of the most highly qualified and diverse applicants. However, as noted by the IG's draft report in this very engagement, the Corporation "also provides educational opportunities for those who have made a substantial commitment to service." "Agreed-Upon Procedures for Corporation for National and Community Service Education Award Program Grants Awarded to the Research Foundation of the City University of New York, Office of Inspector General, Corporation for National and Community Service, Prepared by Cotton & Company at 3. The Teaching Fellows have made a very large commitment to service and, like all other AmeriCorps participants who meet the eligibility requirements, are entitled to receive awards on that basis.

Although the AmeriCorps education award is a delayed benefit, it comes at a crucial stage in the Teaching Fellows' transition to becoming full-fledged teachers. The Teaching Fellows become eligible for the awards after they have completed 1700 hours of service. Coming as they do after the Teaching Fellows finish what many find to be a grueling first year, the education awards may fact serve as a welcome inducement to continue in a demanding role. Teaching Fellows are disproportionately placed in high-poverty schools, which most often experience high rates of teacher exit.¹⁹ However, Teaching Fellows have stayed in impressive numbers, helping to significantly narrow the gap between the qualifications of teachers in low- and high-poverty schools.²⁰ Moreover, the education awards can help Teaching Fellows avoid or reduce education debt, which could be a barrier to continuation in the field for teachers who are just beginning to get their professional sea legs.

Nationwide, only about half of those AmeriCorps members who receive education awards actually make use of them. In the New York City Teaching Fellows program, more than ninety-five percent do so. This suggests that these awards are, in fact, operating as intended. They recognize and encourage commitment to service, and they underwrite human capital investment by recipients. In the New York City Teaching Fellows Program, those who have received this investment in turn work to increase the human capital of those in the next generation, their students.

There can be no serious doubt that Teaching Fellows value the education awards. Nevertheless, it is entirely possible that some of them are confused about the institutional role of AmeriCorps in providing the awards. The Teaching Fellows are immersed in several complex organizational relationships: they work as NYC DOE employees; they study as students in graduate programs at a range of area universities; and they receive program materials from RFCUNY. Some of the Teaching Fellows may therefore be unclear about which agency has responsibility for which aspects of the program. This is especially so when they are questioned about the education awards months or years after they applied for them. RFCUNY will certainly endeavor to improve its communications with members so that they understand the auspices of the programmatic support they receive. Nevertheless, their occasional uncertainty on the source of their education awards hardly supports the conclusion that the education awards are not important to the Teaching Fellows Program or that the Teaching Fellows Program is not consistent with the purposes of the Act.

3. *AmeriCorps funding is neither duplicative nor wasteful.*

The IG's Letter recognizes that the Teaching Fellows Program and the Teaching Opportunity Program "appear to contribute substantially to meeting a community need for teachers." It goes on to find, however, that "the AmeriCorps aspects of the program merely support an existing activity that is already adequately funded in amounts sufficient to attract recruits to become qualified teachers." No evidence is cited to support that assertion. Instead, the IG's Letter seeks to impose on RFCUNY the obligation, found nowhere in the Act, to provide "convincing evidence that demonstrates that AmeriCorps funding is essential to recruiting volunteers into the alternative paths to becoming professional certified teachers in New York

¹⁹ Boyd, Donald, Hamilton Lankford, Susanna Loeb, Jonah Rockoff, and James Wyckoff. 2008. "The Narrowing Gap in New York City Teacher Qualifications and Its Implications for Student Achievement in High-Poverty Schools." *Journal of Policy Analysis and Management*, Vol. 27, No. 4:793-818.

²⁰ The New Teacher Project. 2009. "A Growing Force: More than 8,300 NYC Teaching Fellows." www.nttp.org/ourimpact/impact_nyc.html. Retrieved April 12, 2009.

City's public schools or that the benefits, while significant, are in any way attributable to AmeriCorps activities." (Emphasis added.) As noted above, the IG's approach is inconsistent with the Act's explicit inclusion of professional corps programs, the value of which was recognized by President Bush when he directed the Chief Executive Officer of the Corporation that "[g]uidelines for the selection of national and community service programs should recognize the importance of professional corps programs in light of the fundamental principles and policymaking criteria set forth in this order."²¹

To be sure, as a matter of policy, the Corporation should and does seek to ensure that education awards add value to an existing program before it approves an application for funding. Its instructions to grant applicants provide the following guideline: "If you currently operate a community service program and are proposing to make education awards available for those performing service, please describe how the education awards will add value to the program and increase or enhance the program's impact in the community. This 'value added' may be established by: . . . improving the caliber or diversity of members enrolled. . . ." ²² That is precisely how the Teaching Fellows Program justified the renewals of its grants, and the Corporation apparently found that justification convincing. There is no basis for the IG to second-guess the judgment of the Corporation on this matter.

The IG's Letter places emphasis on the fact that funding from NYC DOE far outstrips that from AmeriCorps. Teaching Fellows receive a salary of \$45,530 (plus benefits) from the Department of Education, while they receive an education award of \$4,725 from AmeriCorps. The disproportion is entirely in keeping with professional corps programs generally in which participants are paid salaries from government agencies that employ them. AmeriCorps contributes only education awards and limited operating funds, thereby allowing it to leverage its funding. Any professional salary would exceed an AmeriCorps education award. This is in no way unique to the New York City Teaching Fellows Program, but inheres in the design of all professional corps programs.

This does not mean, however, that AmeriCorps funding is irrelevant or meaningless. In the Teaching Fellows Program, education awards help the Teaching Fellows manage the transition from their original careers to teaching; it also helps them over the enormously difficult period in which they combine teaching with the pursuit of a graduate degree. Congress clearly provided for the funding of professional corps programs on the assumption that the education awards provided by AmeriCorps will, in fact, assist in recruiting teachers and other professionals to work in underserved localities. The Corporation has also recognized the importance of education awards despite their small cost to the Corporation. In responding to comments to the draft changes in the regulations in 2005, the Corporation stated: "The Corporation agrees that the EAP program is a clear example of a sustainable program from a financial perspective. The Corporation is aware of the significant financial contribution and investment that EAPs make in their programs and the relatively small amount of money they receive from the Corporation."²³ In other words, education awards, especially in the context of a professional corps program, are very cost effective. This hardly seems a reason for finding in the context of the Teaching Fellows Program that they fall outside the Act's purposes and should be discontinued.

²¹ Executive Order No. 13331, §3(c)(ix) (Feb. 27, 2004).

²² AmeriCorps Education Awards Program, 2004 Application Instructions at 8-9.

²³ Federal Register, Vol. 20, No. 130 (July 8, 2005) at 39567.

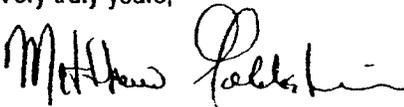
CONCLUSION

There is no dispute that the New York City Teaching Fellows Program has met an unmet social need and has done so with remarkable success. The program's results are clear, they are outstanding; and they are due to the innovative thinking, the hard work, and the contributions of many groups, including RFCUNY, NYCDOE and AmeriCorps. They have worked together, contributing in different ways and in different proportions, and together they have devised and implemented a plan that works. This is the meaning and purpose of a professional corps program.

As noted above, RFCUNY is responding separately to the Draft Report regarding its recordkeeping and administrative procedures. There are a few areas in which it needs to improve its performance. RFCUNY will do so and will ensure that participants adhere to the highest standards of compliance. I note, however, that as a professional corps program, the Teaching Fellows Program has been closely monitored by the institutions in which the Teaching Fellows have worked and studied, especially NYC DOE. Thus, the program has had built-in structural safeguards. I am confident (and there is no evidence to the contrary) that no Teaching Fellow has received an unearned education award and that no Teaching Fellow has entered the public schools without an extremely thorough criminal background check. Whatever recordkeeping errors occurred have never compromised the integrity of the program.

RFCUNY stands by the New York City Teaching Fellows program and is proud of its achievements. The Teaching Fellows program has been enormously successful in meeting a critical social need. Many Fellows have chosen to remain in the schools, demonstrating a continued ethic of service. The program has been cost-effective for AmeriCorps, and it has had the "broad reach" stipulated as a goal of programs supported by the Corporation. RFCUNY has implemented a professional corps program in accordance with the Act, and it has done so to the significant benefit of the people of New York and the United States. Far from being deemed "impermissible," the Teaching Fellows Program should be recognized for its innovation and extraordinary social impact due to the contributions of all of its partner institutions.

Very truly yours,



Matthew Goldstein

cc: Frank Trinity
General Counsel
Corporation for National and Community Service

Corporation for
**NATIONAL &
COMMUNITY
SERVICE** 

May 4, 2009

Honorable Gerald Walpin
Inspector General
Corporation for National and Community Service
1201 New York Avenue NW
Washington, D.C. 20525

RE: Your letter to the Corporation and RFCUNY dated April 2, 2009.

Dear Mr. Walpin:

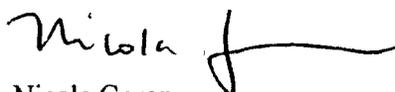
I have reviewed your letter dated April 2, 2009, to the Corporation and to the Research Foundation of the City University of New York (RFCUNY), conveying a draft of your findings and recommendations in connection with Corporation grants 04EDHNY003 and 07EDHNY002 to RFCUNY.

After careful review of your letter, we cannot concur in your draft finding that RFCUNY has never operated an AmeriCorps program. The basis of our position is set forth in the attached memorandum of the General Counsel, which does not agree with your legal analysis or with the conclusions you reach based on the factors you cited in your letter. Specifically, we do not agree with your legal analysis of unmet needs and nonduplication with respect to a professional corps program like the RFCUNY teacher corps. We believe that RFCUNY was and is eligible for AmeriCorps funding because it expands and strengthens a professional corps program addressing an unmet need as specified in section 122(a)(8) of the National and Community Service Act of 1990; in this case addressing the shortage of high-quality teachers in New York City public schools.

Accordingly, the Corporation will not act on your draft recommendations regarding the status of the RFCUNY AmeriCorps grants. General Counsel Frank Trinity and I are available to discuss this matter if you would like.

We will communicate with your office separately in connection with the draft report prepared by your outside audit firm.

Sincerely,



Nicola Goren
Acting Chief Executive Officer



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OFFICE OF INSPECTOR GENERAL

April 2, 2009

Mr. Eric Newman
Program Director,
Research Foundation of the City University of New York
CUNY, Office of Academic Affairs
535 East 80th Street
New York, NY 10021

Nicola Goren
Acting Chief Executive Officer
Corporation for National and Community Service
1201 New York Avenue, NW, Rm. 10201
Washington, DC 20525

Dear Mr. Newman and Ms. Goren:

This letter conveys the Office of Inspector General's ("OIG") draft of its finding and recommendation regarding the Corporation for National and Community Service ("Corporation") Grant Nos. 04EDHNY003 and 07EDHNY002, which it awarded to the Research Foundation for the City University of New York ("RFCUNY").

INTRODUCTION

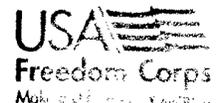
During a recent agreed-upon-procedures ("AUP") engagement regarding these grants, the OIG became aware of apparent discrepancies between the purposes and execution of the grants and the statutorily permissible use of Federal funds disbursed by the Corporation. Following our meetings with Corporation and RFCUNY officials in January and February 2009, on the subject of these Education Award Program ("EAP") grants to RFCUNY and after considering RFCUNY's responses to our inquiries, we have prepared the finding and recommendation that follows. This letter supplements the draft AUP report, which Cotton & Company prepared.

During the exit conference for the AUP engagement with RFCUNY, on January 28, 2009, we presented our initial concerns and requested a written response that we hoped would alleviate our concerns that the RFCUNY EAP grants were not congruent with the statute and purpose of the Corporation's appropriations and its mission. We received RFCUNY's written response, dated February 10, 2009, a copy of which we forwarded to the Corporation. The RFCUNY response did not alleviate but, in fact, heightened our concern that the grants are merely supplementing local programs that already would or do exist even without Corporation funding and do no more than provide education awards to members who had, prior to becoming an AmeriCorps member, volunteered for this identical community service. Thus, we have



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concluded that these grants do not meet the statutory and regulatory requirements that they must fund a service that would otherwise not be provided and that meets a presently unmet need.

BACKGROUND

The Grants. Beginning at least with Program Year 2001-2002 and Grant No. 01EDNNY003, the Corporation has provided several grants to RFCUNY, each of which covered or was expected to cover three program/budget years. These grants provided AmeriCorps-member designations to teachers in the New York City public schools who are participants in the New York City Teaching Fellows Program ("Fellows") and the City University of New York's ("CUNY") Teaching Opportunity Program ("TOP"). These teachers, as AmeriCorps members, had the opportunity to earn education and accrued interest awards, which are funded outside the grants, but through Federal funds that the Corporation obligated at grant award in the National Service Trust ("Trust"). Since that 2001-2002 grant, the Corporation has awarded two more, Grants Nos. 04EDHNY003 and 07EDHNY002, with funds totaling \$4,208,000 covering 5 budget years and which provided for 14,700 member service years ("MSY"), which include 14,300 full-time and 800 half-time members. Those 2004 and 2007 grants are the subject of the agreed-upon procedures engagement performed for the OIG by Cotton and Company. Associated with these two grants are potential and actual obligations/liabilities of the Trust, *i.e.*, as much as \$69.5 million for education awards that could be earned by the members. The Corporation has informed the OIG that it had paid accrued interest payments, totaling about \$917,000, and education awards of about \$40 million from the Trust, as of March 3, 2009.

RFCUNY, in executing the grants, recruited its AmeriCorps members from graduate students whom it had already recruited as Fellows for the same purpose as the grant. The timing for recruitment of TOP teachers into AmeriCorps may be different. In general, Fellows and TOP recruits receive a starting salary of about \$45,530 per year, plus employee benefits and tuition, while pursuing a professional teaching certification by attending graduate courses and teaching in New York City public schools.¹ Corporation funds do not pay the salary and benefits or the tuition for the education required of Fellows and TOP teachers. Those Fellows and TOP teachers who become AmeriCorps members obtain AmeriCorps service hours for the same hours for which they are compensated for teaching, for the hours attending training, the time required to take graduate classes, and for other activities. Usually, these AmeriCorps members earn full education and accrued interest awards because of the many hours involved in teaching and attending graduate courses that are required activities of Fellows and TOP.

The AmeriCorps Program is not a single homogeneous program at RFCUNY and indeed incorporates at least two different programs, Fellows and TOP, to provide alternative paths to becoming fully certified teachers in New York City's schools. However, as shown in the table of statistics that follows, the programs accept only a small number of the applicants for those programs.

¹ The Fellows Program states, "During their time in the Fellowship, Fellows are certified under a Transitional B certificate issued by the state. This certificate is valid for up to three years.... Upon completion of the Master's program ... [and after] teaching for three years (including their time in Fellowship), Fellows may apply for Professional certification." Unlike Fellows, TOP candidates may already have a New York State teaching certificate in certain instances.

Table of Statistics

Program/Description	Applicants	Started Teaching	Selection Rate	Source
Fellows (2000-2008)	134,601	13,523	10%	RFCUNY
TOP (2001-2008)	2,369	863	36%	RFCUNY
	<u>136,970</u>	<u>14,386</u>	10.5%	

Corporation Authorization and Statutory Authority. The National and Community Service Trust Act of 1993, as amended, and as specified below, provides for AmeriCorps grants for service programs that do not duplicate local programs, but, rather, address unmet needs. It permits use of Federal funds for AmeriCorps grants to expand and strengthen existing service programs that have visible benefits for the participants and the community. The Act emphasizes this requirement by providing that AmeriCorps projects must result in a specific identifiable service or improvement that otherwise would not be done with existing funds, and prohibits duplication of projects already carried on in the community.

More specifically:

42 U.S.C. § 12501. **Findings and purpose**

(a) Findings

The Congress finds the following:

(1) Throughout the United States, there are pressing **unmet** human, educational, environmental, and public safety needs.

* * *

(5) Nonprofit organizations, local governments, States, and the Federal Government are already supporting a wide variety of national service programs that deliver needed services in a cost-effective manner.

* * *

(b) Purpose

It is the purpose of this chapter to--

(1) meet the **unmet** human, educational, environmental, and public safety needs of the United States, without displacing existing works;

* * *

(5) reinvent government to eliminate duplication, support locally established initiatives, require measurable goals for performance, and offer flexibility in meeting those goals;

(6) **expand** and strengthen existing service programs with demonstrated experience in providing structured service opportunities with visible benefits to the participants and community;

(7) **build on** the existing organizational service infrastructure of Federal, State, and local programs and agencies to expand full-time and part-time service opportunities for all citizens; and

(8) provide tangible benefits to the communities in which national service is performed. **[Emphasis Added]**

42 U.S.C. § 12511. Definitions

For purposes of this subchapter:

* * *

(20) The term "project" means an activity, carried out through a program that receives assistance under this subchapter, **that results in a specific identifiable service or improvement that otherwise would not be done with existing funds**, and that does not duplicate the routine services or functions of the employer to whom participants are assigned. **[Emphasis added]**

42 U.S.C. § 12572. Types of national service programs eligible for program assistance

(a) Eligible national service programs

[T]hese national service programs may include the following types of national service programs:

* * *

(8) A professional corps program that recruits and places qualified participants in positions –

(A) as teachers ... providing service to meet educational, human, environmental, or public safety needs in communities with an inadequate number of such professionals;

(B) that may include a salary in excess of the maximum living allowance authorized in subsection (a)(3) of section 12594 of this title, as provided in subsection (c) of such section; and

(C) that are sponsored by public or private nonprofit employers who agree to pay 100 percent of the salaries and benefits (other than national service educational award under division D of this subchapter) of the participants.

42 U.S.C. 12637. Nonduplication and nondisplacement

(a) Nonduplication

(1) In general

Assistance provided under this subchapter shall be used **only for a program that does not duplicate, and is in addition to**, an activity otherwise available in the locality of such program.

(2) Private nonprofit entity

Assistance made available under this subchapter shall not be provided to a private nonprofit entity to conduct activities that are the same or substantially equivalent to activities provided by a State or local government agency that such entity resides in, unless the requirements of subsection (b) of this section are met. **[Emphasis added]**

EVALUATION AND FINDING

The finding expressed herein goes beyond the findings presented in the AUP draft report, which states, "... our compliance findings when taken as a whole indicate pervasive problems of eligibility, timekeeping, and documentation." The OIG believes that these pervasive problems are directly related to the grantee's reliance upon the existing processes in place for pre-existing non-AmeriCorps programs, *i.e.*, Fellows and TOP. The processes relied upon are contrary to RFCUNY's grant application that indicated how it would provide oversight for the AmeriCorps program and members. In its application for the 2007 grant, RFCUNY stated on page 16:

As for supervision, our program members will be supervised by both their school supervisor, usually an assistant principal, and by our program managers, the AmeriCorps site supervisors who sign the timesheets. These supervisors receive annual training on AmeriCorps guidelines and additional training as needed. They also work in the same office as our AmeriCorps staff, enabling them to confer with our staff regularly.

Our recent engagement found that the onsite supervisors were not always aware that their Fellow or TOP teacher was also an AmeriCorps member. Two of five onsite supervisors interviewed were unaware that their respective teaching Fellow was an AmeriCorps member, and none of the supervisors had access to the member contract and had knowledge of its contents, including prohibited activities.

Onsite supervisors also did not sign AmeriCorps timesheets. The process in place provided for one individual in the central AmeriCorps office, who had no knowledge of members' service, to sign all of the thousands of timesheets. The processes actually in place were not as described in RFCUNY's grant application.

In addition, RFCUNY did not comply with AmeriCorps program requirements for criminal background checks. During and because of the AUP engagement, RFCUNY requested a

waiver to rely upon the criminal background checks of the New York Department of Education. Further, RFCUNY had no plans to comply with requirements for member evaluations although Corporation waivers exempting EAP grantees from the requirement to do member evaluations had expired.

These problems in the RFCUNY program show, in our opinion, that no real AmeriCorps program was in place and that its efforts were mainly devoted to “papering the files” in an attempt to meet the documentation requirements. In some instances, for example, members did not turn in a single timesheet until after the period of service was completed.

Separate and apart from the deficiencies in program operations, we have concluded that RFCUNY is, in fact, operating an impermissible AmeriCorps program. While the Fellows and TOP programs appear to contribute substantially to meeting a community need for teachers, the AmeriCorps aspects of the program merely support an existing activity that is already adequately funded in amounts sufficient to attract recruits to become qualified teachers. RFCUNY’s response has not provided convincing evidence that demonstrates that AmeriCorps funding is essential to recruiting volunteers into the alternative paths to becoming professional certified teachers in New York City’s public schools or that the benefits, while significant, are in any way attributable to AmeriCorps activities.

The following points support our conclusion that RFCUNY’s program is, in fact, not a valid AmeriCorps program:

- RFCUNY has not demonstrated that its grants **result in a specific identifiable service or improvement that otherwise would not be done with existing funds** [See 42 U.S.C. § 12511.(20)].
- The program does not expand volunteerism. Five of the six members contacted during the AUP engagement stated that they were not aware of the AmeriCorps education Award when they signed up for the Fellows Program. The Fellows website was initially silent on AmeriCorps and its benefits as an inducement to become an AmeriCorps member to those who had not yet signed up as a Fellow. Therefore, the education award and accrued interest awards played no part in encouraging them to volunteer.
- In an October 25, 2005, letter in response to a Corporation site visit, RFCUNY stated that:
 1. It would create tools and monitoring devices to insure that all Member files are maintained with the highest levels of diligence and care.
 2. The Program Manager is in the midst of developing a manual on the nuances of processing the enrollment packets, exit forms, timesheets, and file maintenance. The manual is expected to be completed by the beginning of the new calendar year.
 3. It would develop strategies and opportunities for the AmeriCorps connection to be further emphasized.

None of these actions stated in the letter to the Corporation was completed.

- The RFCUNY grant is inconsistent with the statutory purpose of the national service laws because the activity that is performed by the Fellows in New York City would occur

regardless of the AmeriCorps grant, and therefore the program meets no unmet human need.

- The City of New York's Board of Education awarded RFCUNY/CUNY a \$61 million contract (over five years) to fund the tuition of Fellows' required education to become a teacher. In addition, the school system pays each Fellow and TOP teacher approximately \$45,530 per year plus employee benefits to teach in the City's public schools. Without evidence from RFCUNY to the contrary, we believe these incentives are adequate in themselves to attract sufficient numbers of Fellows into the alternative path to becoming a teacher. Indeed, RFCUNY provided information, as shown previously in the table of statistics, that only 10.5 percent of the nearly 137,000 applicants are accepted into Fellows and TOP, establishing both that any AmeriCorps' monetary incentives are not needed to obtain the quota of Fellows – indeed multiples of the number acceptable are waiting in the wings. Thus, the AmeriCorps grants are duplicative and unnecessary to attract teachers into alternative paths to teacher certification. The grants are, therefore, an unnecessary expense to the Corporation.

Pursuant to:

45 C.F.R. § 2540.100, *What restrictions govern the use of Corporation assistance?(e) Nonduplication:* Corporation assistance may not be used to duplicate an activity that is already available in the locality of a program. And, unless the requirements of paragraph (f) of this section are met, Corporation assistance will not be provided to a private nonprofit entity to conduct activities that are the same or substantially equivalent to activities provided by a State or local government agency in which such entity resides.

This restriction applies to RFCUNY, which is a private, not-for-profit, educational corporation.

- The Inspector General presented our concerns to RFCUNY at the exit conference on January 28, 2009. RFCUNY responded in a February 10, 2009, letter to the OIG. RFCUNY stated that AmeriCorps has provided indispensable help in turning the Fellows into a significant and reliable source of fully qualified and capable teachers for New York's highest need schools, and that financial incentives would be important for defraying the associated educational costs, if the most talented candidates were to be attracted to teaching.

RFCUNY's response primarily addressed the benefit of the Fellows and TOP programs and did not provide evidence that the AmeriCorps program provided any additional value. The interviews conducted during the AUP engagement found that the AmeriCorps members were not aware of the AmeriCorps education award until after they had applied to become Fellows, which means the award offered no incentive to become a teacher. The full-time education award is \$4,725, representing far less than 10 percent of the annual salary, tuition, and employee benefits that these Fellows received. We therefore believe that the grants do not meet an unmet need and that they duplicate an activity that was already available in New York City.

CONCLUSION AND RECOMMENDATION

The Corporation promotes an ethic of service opportunities for Americans to engage in service that fosters civic responsibility, strengthens communities, and provides educational opportunities for those who make a commitment to service, fostering within them an ethic of civic responsibility.

We conclude that the AmeriCorps grant was merely 'icing on the cake' for a program that already existed and that RFCUNY was not conducting an AmeriCorps program.

Indicative of the RFCUNY recognition that the AmeriCorps facet of the program was not needed to attract teachers to the program was a sudden change in the Fellows website after the January meeting at which we first voiced our concerns. We saw that the Fellows website, after RFCUNY initially responded to our communication of our concerns about the program, in February 2009, added in its Program Overview, a new sentence, "Conditional upon funding and grant approval, Fellows may also be eligible for AmeriCorps Education Awards." That RFCUNY suddenly added that sentence after we had raised the issue of the non-use of the AmeriCorps membership to induce applicants demonstrates RFCUNY's recognition that this lack of inducement puts its program into question. Belatedly adding the sentence does not fill the void.

The costs of the two grants, including costs to the National Service Trust Fund, could exceed \$75 million for currently authorized MSYs. If a third budget year is awarded in amounts and numbers like those for years one and two for the 2007 grant, an additional 3,600 MSYs will substantially increase costs to the Corporation amounting to over \$17 million in obligations to the Trust alone (3600 members X \$4,725).

Recommendation: We recommend the Corporation terminate the grants and recover education awards and accrued interest awards paid, about \$40 million and \$.9 million, respectfully, and all grant costs, about \$4.2 million, and any other amounts paid prior to termination.²

RFCUNY's Response:

Corporation's Response:

OIG's Comments:

Very truly yours,

Gerald Walpin /s/
Inspector General

² This recommendation is made in conjunction with and as a supplement to the recommendations in the AUP report that the Education Awards be disallowed.



OFFICE OF INSPECTOR GENERAL

April 2, 2009

Mr. Eric Newman
Program Director,
Research Foundation of the City University of New York
CUNY, Office of Academic Affairs
535 East 80th Street
New York, NY 10021

Nicola Goren
Acting Chief Executive Officer
Corporation for National and Community Service
1201 New York Avenue, NW, Rm. 10201
Washington, DC 20525

Dear Mr. Newman and Ms. Goren:

Enclosed for your action are two documents: (1) the draft report on the *Agreed-Upon Procedures for Corporation for National and Community Service (Corporation) Education Award Program Grants Awarded to the Research Foundation of the City University of New York (RFCUNY)*, and (2) the *Inspector General's Letter to the Corporation and RFCUNY*. The Office of Inspector General (OIG) invites you to provide comments on the findings and recommendations in the report and in the Inspector General's letter. Your responses should not be comingled because, while the OIG will consider both responses, the independent auditor on the agreed-upon-procedures engagement will respond only to comments on that document.

Please provide us with any comments on the enclosed documents as soon as possible, but not later than May 4, 2009. We will consider your comments carefully and revise the documents, if we deem it appropriate to correct errors or clarify facts. Typically, we summarize responses after each recommendation in the body of the final report or other document and include responses verbatim as appendices.

The Rehabilitation Act of 1973, as amended (Section 508, 29 U.S.C. § 794d), requires Federal agencies that post information to their websites to meet certain accessibility standards for persons with disabilities. We will post to the OIG's website our final report along with your comments. In order to meet the accessibility requirements, your comments to our office should be sent to us as an electronic Microsoft Word file, Word Perfect file, or as an accessible Portable Document Format (PDF). Scanned documents that result in imaged documents are not accessible. If you choose to send your comments in a non-accessible format, we will convert your comments to a format that meets the Rehabilitation Act's requirements. This conversion process may result in posting your comments to our website as a degraded document or in some cases an unintelligible document.



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Senior Corps ★ AmeriCorps ★ Learn and Serve America



If you have questions or wish to discuss the enclosures, please contact Jim Elmore, Audit Manager, at (202) 606-9354 or at j.elmore@cncsoig.gov.

Very truly yours,

Stuart Axenfeld /s/
Assistant Inspector General for Audit

Enclosures

cc: Frank Trinity, General Counsel
Kristin McSwain, Chief of Program Operations
Margaret Rosenberry, Director, Office of Grants Management
Lois Nembhard, Acting Director, AmeriCorps*State and National
William Anderson, Acting Chief Financial Officer
Rocco Gaudio, Deputy Chief Financial Officer, Grants and Field Financial Management
Sherry Blue, Audit Resolution Coordinator
Sam Hadley, Partner, Cotton & Company LLP

**Office of Inspector General
Corporation for National and
Community Service**

**AGREED-UPON PROCEDURES FOR
CORPORATION FOR NATIONAL AND COMMUNITY
SERVICE EDUCATION AWARD PROGRAM GRANTS
AWARDED TO THE RESEARCH FOUNDATION OF THE
CITY UNIVERSITY OF NEW YORK**

OIG REPORT XX-XX

The attached Draft Audit Report is for review and comment only and not for distribution. Its content is confidential and should be safeguarded to prevent disclosure to parties other than those directly involved in commenting on the issues contained in this report.

Corporation for
**NATIONAL &
COMMUNITY
SERVICE** 



Prepared by:

COTTON & COMPANY LLP
635 Slaters Lane, 4th Floor
Alexandria, Virginia 22314

This report was issued to Corporation management on xxx xx, 2009. Under the laws and regulations governing audit follow-up, the Corporation is to make final management decisions on the report's findings and recommendations no later than xxxx xx, 2009 and complete its corrective actions by xxxx xx, 2010. Consequently, the reported findings do not necessarily represent the final resolution of the issues presented.

**OFFICE OF INSPECTOR GENERAL
AGREED-UPON PROCEDURES FOR
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE
EDUCATION AWARD PROGRAM GRANTS AWARDED TO
THE RESEARCH FOUNDATION OF THE CITY UNIVERSITY OF NEW YORK**

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Independent Accountants' Report on Applying Agreed-Upon Procedures	5
Exhibit A: Consolidated Schedule of Claimed and Questioned Costs	7
Exhibit B: Compliance Results.....	8

Appendices

- A: The Research Foundation of the City University of New York's Response to Agreed-Upon Procedures Report
- B: Corporation's Response to Agreed-Upon Procedures Report

EXECUTIVE SUMMARY

The Office of Inspector General (OIG), Corporation for National and Community Service (Corporation), contracted with Cotton & Company LLP to perform agreed-upon procedures to assist the OIG in grant cost and compliance testing of Corporation-funded Federal assistance provided to The Research Foundation of the City University of New York (RFCUNY). The Corporation awarded two Education Award Program grants to RFCUNY that were categorized as Professional Model grants.

SUMMARY OF RESULTS

As a result of applying our procedures, we questioned education awards of \$16,152,414 and draw downs of \$773,254. In general, we questioned the education awards for members whose eligibility was not established in accordance with grant requirements for criminal background checks. Draw downs were questioned mostly for fixed fees related to members whose eligibility we questioned and also for drawing down in excess of fees earned. In addition, our compliance findings when taken as a whole indicate pervasive problems of eligibility, timekeeping, and documentation. A questioned cost is an alleged violation of a provision of law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the expenditure of funds or a finding that, at the time of testing, includes costs not supported by adequate documentation. Detailed results of our agreed-upon procedures on claimed costs are presented in Exhibit A.

Participants who successfully complete terms of service under AmeriCorps grants are eligible for education awards and, in some cases, accrued interest awards funded by the Corporation's National Service Trust. These award amounts are not funded by Corporation grants and thus are not included in claimed costs. However, as part of our agreed-upon procedures, and using the same criteria used for the grantee's claimed costs, we determined the effect of our findings on eligibility for education awards and accrued interest awards.

The following is a summary of grant compliance testing results. These results, along with applicable recommendations, are discussed in Exhibit B.

1. RFCUNY drew down more funds than it was due.
2. RFCUNY did not follow certain AmeriCorps Provisions.
3. The supervisory signature on members' timesheets was not the members' supervisor, or that of someone with direct knowledge of hours served by the members.
4. Members did not always record actual service hours on their timesheets.
5. Some members' timesheet hours were not accurately recorded in the Corporation's Web-Based Reporting System.
6. RFCUNY did not require its members to timely submit their member contracts, forms, and timesheets.

7. RFCUNY used preprinted member documentation and did not ensure that all member documentation was completed, signed, and dated.
8. RFCUNY did not maintain documentation to demonstrate that each member's evaluation complied with AmeriCorps Regulations and the Member Agreement.
9. RFCUNY did not maintain documentation to demonstrate that members received criminal background checks and that any background checks conducted complied with AmeriCorps Provisions.
10. RFCUNY entered incorrect member start dates in Corporation systems and in member contracts.
11. Some members worked beyond their contract-end date.

AGREED-UPON PROCEDURES SCOPE

We performed the agreed-upon procedures detailed in the OIG's Agreed-Upon Procedures (AUP) Program for Corporation Education Awards Program Grants to Grantees (including Subgrantees or Sites), dated September 2008, and supplemented on December 1, 2008. Our procedures covered testing of the following grants:

Award Number	Award	Award Period	Total Award	AUP Period	Amount Awarded During AUP Period
04EDHNY003	New York City Teaching Fellows Program	09/01/04-04/01/08	\$2,408,000	09/01/06-04/01/08	\$804,000
07EDHNY002	New York City Teaching Fellows Program	08/01/07-07/31/10	\$1,800,000	08/01/07-07/31/08	\$900,000

The OIG's agreed-upon procedures program included:

- Obtaining an understanding of RFCUNY.
- Verifying that the amount of funds the grantee drew down agrees with the amount due.
- Testing grantee member files to verify that records supported eligibility to serve and education awards.
- Testing compliance of RFCUNY on selected AmeriCorps Provisions, and award terms and conditions.

We performed testing of the Education Award Program (EAP) at RFCUNY from October 2008 through January 2009.

BACKGROUND

The Corporation

The Corporation supports a range of national and community service programs that provide an opportunity for individuals (members) to serve full- or part-time. The Corporation funds opportunities for Americans to engage in service that fosters civic responsibility and strengthens communities. It also provides educational opportunities for those who have made a substantial commitment to service.

The Corporation has three major service initiatives: National Senior Service Corps, AmeriCorps, and Service-Learning (Learn and Serve America). The AmeriCorps Program, the largest of the initiatives, is funded in two ways: grants through the State Commissions, and direct funding to applicants, including funding under the National Direct Program. The Corporation distributes most of the balance of its funding directly to multi-State and national organizations such as RFCUNY through a competitive grant process. Unlike the majority of AmeriCorps grants, EAP grantees, such as RFCUNY, receive only a fixed fee for each member that they enroll. Most other types of AmeriCorps grants fund member living allowances and other benefits.

The Research Foundation of The City University of New York

RFCUNY is a non-profit educational corporation located in New York, NY, that manages private and government-sponsored programs at The City University of New York (CUNY). RFCUNY supports CUNY faculty and staff in identifying and obtaining awards for programs from government and private sponsors, and is responsible for the post-award administration of all such funded programs. While RFCUNY is the grantee, and is ultimately responsible for the management of the awards, the financial and programmatic components of the award are performed by both RFCUNY and CUNY. RFCUNY operates its AmeriCorps grant through the New York City Department of Education's (DOE) New York City Teaching Fellows Program. RFCUNY performs draw downs while CUNY operates the program and ensures compliance with award requirements. The New York City Teaching Fellows program office within DOE assists CUNY in the operation of the AmeriCorps portion of the program.

The RFCUNY AmeriCorps Program uses a Professional Corps program model. Professional Corps programs place members as teachers, health care providers, police officers, childhood development staff, engineers, or other professionals to meet unmet needs in communities with an inadequate number of such professionals. Grantees receive Corporation funding to support program costs, and use their own or other resources to pay the members' living allowance and additional member costs. Unlike other AmeriCorps models, the Professional Corps model has no cap on how much a member may earn while serving.

EXIT CONFERENCE

The contents of this report were discussed with representatives from RFCUNY, DOE, and the Corporation on January 28, 2009. We will summarize RFCUNY's and the Corporation's comments in the appropriate sections of the final report and will include their comments in Appendices A and B, respectively.

OTHER MATTERS

As part of our procedures, we were required to interview 10 members and 10 supervisors. Despite several attempts to conduct the interviews, only six members and five supervisors responded to our repeated requests for interview via telephone. Comments from members and supervisors are included, where applicable in this report. Had we been able to conduct all interviews, additional information could have been provided that might have impacted this report (see Compliance Finding No. 3 for related recommendation).



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February 3, 2009

Office of Inspector General
 Corporation for National and Community Service

**INDEPENDENT ACCOUNTANTS' REPORT ON
 APPLYING AGREED-UPON PROCEDURES**

Cotton & Company LLP performed the procedures detailed in the *OIG's Agreed-Upon Procedures (AUP) Program for Corporation Education Awards Program Grants to Grantees (including Subgrantees or Sites)*, dated September 2008, and supplemented on December 1, 2008. These procedures were agreed to by the OIG, solely to assist it in grant cost and compliance testing of Corporation-funded Federal assistance, provided to RFCUNY, for the awards detailed below.

This agreed-upon procedures engagement was performed in accordance with standards established by the American Institute of Certified Public Accountants (AICPA) and generally accepted government auditing standards. The sufficiency of these procedures is solely the responsibility of the OIG. Consequently, we make no representation regarding the sufficiency of the procedures, either for the purpose for which this report has been requested or any other purpose.

Our procedures covered testing of the following awards:

Award Number	Award	Award Period	Total Award	AUP Period	Amount Awarded During AUP Period
04EDHNY003	New York City Teaching Fellows Program	09/01/04-04/01/08	\$2,408,000	09/01/06-04/01/08	\$804,000
07EDHNY002	New York City Teaching Fellows Program	08/01/07-07/31/10	\$1,800,000	08/01/07-07/31/08	\$900,000

We also tested certain grant compliance requirements by sampling 311 members. We performed all applicable testing procedures in the AUP Program for each sampled member.

Program Year	Total Members	Sampled Members
2006-2007	2,543	127
2007-2008	3,674	184

RESULTS OF AGREED-UPON PROCEDURES

We questioned draw downs of \$773,254. A questioned cost is an alleged violation of a provision of law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the expenditure of funds or a finding that, at the time of testing, includes costs not supported by adequate documentation.

We also questioned Education Awards of \$16,152,414. Grant participants who successfully complete terms of service under AmeriCorps grants are eligible for education awards and repayment of student loan interest accrued during the term of service from the National Service Trust. These award amounts are not funded by Corporation grants and thus are not included in claimed costs. Education awards totaling \$11,340,000 in Program Year (PY) 2006-2007 and \$17,010,000 in PY 2007-2008 were available to CUNY for award to potential members. As part of our agreed-upon procedures and using the same criteria as claimed costs, we determined the effect of our findings on education and accrued interest award eligibility.

Detailed results of testing grant compliance are summarized in Exhibit B. We were not engaged to, and did not perform an examination, the objective of which would be expression of an opinion on the subject matter. Accordingly, we do not express such an opinion. Had we performed other procedures, other matters might have come to our attention that would have been reported.

This report is intended solely for the information and use of the OIG, the Corporation, The Research Foundation of The City University of New York, and the U.S. Congress and is not intended to be and should not be used by anyone other than these specified parties.

COTTON & COMPANY LLP

Sam Hadley, CPA, CGFM
Partner

**THE RESEARCH FOUNDATION OF THE CITY UNIVERSITY OF NEW YORK
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE AWARDS
CONSOLIDATED SCHEDULE OF CLAIMED AND QUESTIONED COSTS**

Award No.	Fixed Awards			Education Awards
	Awarded	Claimed	Questioned	Questioned
04EDHNY003	\$2,408,000	\$2,408,000	\$104,042	\$715,839
07EDHNY002	\$1,800,000	\$669,212	\$669,212 ¹	\$15,436,575
	<u>\$4,208,000</u>	<u>\$3,077,212</u>	<u>\$773,254</u>	<u>\$16,152,414</u>

RFCUNY drew down more funds than it was due for Award No. 04EDHNY003. The resulting questioned costs of \$43,732 are further discussed in Compliance Finding No. 1. In addition, RFCUNY did not maintain documentation to demonstrate that members had undergone criminal background checks or that the background check for each member complied with AmeriCorps regulations. The resulting questioned costs of \$729,522 and questioned education awards of \$16,152,414 are further discussed in Compliance Finding No. 9.

¹ RFCUNY had drawn down this amount, as of September 2008. Had RFCUNY drawn down the entire PY 2007-2008 award of \$900,000, the entire award would have been questioned.

**THE RESEARCH FOUNDATION OF THE CITY UNIVERSITY OF NEW YORK
COMPLIANCE RESULTS**

The results of our agreed upon procedures identified the following compliance findings:

Finding 1. RFCUNY drew down more funds than it was due.

As discussed in Exhibit A, RFCUNY drew down excess fees of \$43,732 on Award No. 04EDHNY003. RFCUNY performed the draw downs based on actual expenses recorded on its books instead of the actual number of members enrolled in the AmeriCorps program.

AmeriCorps Education Award Program Grant Provisions (2005-2006), Section V.K. *Fixed Amount Award*, states:

Education Award Program Awards are for fixed amounts and are not subject to the Federal Cost Principles. The fixed amount is based on the approved number of members and is funded at the amount per full-time equivalent member specified in the awards. This award is dependent upon the grantee's performance under the terms and conditions of the award. These include properly enrolling the number of members as specified in the award to carry out the activities and to achieve the specific project objectives as approved by the Corporation. Failure to enroll the number of members approved in the grant award may result in the reduction of the amount of the grant.

As detailed below, we calculated \$43,732 of questioned draw downs.

Program Year	(A)* Members Enrolled	(B) Full Time Equivalent	(C) Fixed Amount Per Member ²	(A x B x C) Allowable Amount	Amount Drawn	Excess Amount Drawn
2004-2005	2,692 FT	1.0	\$296.30	\$797,640	\$800,000	\$2,360
2005-2006	2,186 FT 292 HT	1.0 0.5	\$335.00 \$335.00	\$732,310 <u>48,910</u> \$781,220	\$804,000	\$22,780
2006-2007	2,146 FT 397 HT	1.0 0.5	\$335.00 \$335.00	\$718,910 <u>66,498</u> \$785,408	\$804,000	\$18,592

* FT = Full Time; HT = Half Time

² Fixed amount per member was calculated by dividing the grant award amount by the number of available member slots in that year (\$800,000/2,700 in Program Year (PY) 2004-2005 and \$804,000/2,400 in PY 2005-2006 and PY 2006-2007).

Recommendations:

We recommend that the Corporation:

- 1a. Require RFCUNY to strengthen procedures to ensure that it complies with AmeriCorps Fixed Amount Award requirements;
- 1b. Verify implementation of strengthened draw down procedures; and
- 1c. Recover the excess fees drawn down.

RFCUNY's Response:

Corporation's Response:

Accountants' Comments:

Finding 2. RFCUNY did not follow certain AmeriCorps Provisions.

RFCUNY did not follow AmeriCorps Provisions related to member timesheets, orientation training, training limitations, and fundraising limitations, as follows:

Member Timesheets

None of the sampled member timesheets reviewed, for PY 2006-2007 and PY 2007-2008, were dated, as required by AmeriCorps provisions. AmeriCorps Education Awards Program Special Provisions (2005-2006), Section IV.C.2. *AmeriCorps Members*, requires that grantees keep time-and-attendance records for all AmeriCorps members to document their eligibility for in-service and post-service benefits. Timesheets must be signed and dated both by the member and by an individual with oversight responsibilities for the member. RFCUNY representatives were not aware that AmeriCorps provisions required members to date timesheets themselves but were aware of the need for a dated timesheet. As a result, member timesheets RFCUNY provided did not contain a space for the date. Without dated timesheets, the potential exists for members to complete the member timesheets before performing the required service hours. In addition, the grantee and the Corporation cannot use their automated systems to track actual service times and dates.

Orientation Training

RFCUNY did not provide documentation to demonstrate that members in either program year received AmeriCorps Program orientation before starting service. AmeriCorps Education Award Program Special Provisions (2005-2006), Section IV.E.3. *Training, Supervision, and Support*, states that grantees must conduct an orientation for members and comply with any pre-service orientation or training required by the Corporation. In addition, grantees are required to provide members with training, skills, knowledge, and supervision necessary to perform tasks required in their assigned project positions, including specific training in a particular field and background information on the community served. RFCUNY representatives stated that it conducted its orientation sessions during its eight-

week training program held prior to the start of members' service, but did not have the sign-in sheet available. However, three of six members interviewed stated they did not recall attending an AmeriCorps Program orientation. Without proper orientation, members may not be knowledgeable on how to properly fulfill program requirements.

Training Limitations

RFCUNY did not have procedures to ensure that no more than 20 percent of the aggregate of all AmeriCorps member service hours in each program year were spent on training and education activities. According to 45 Code of Federal Regulations (CFR) § 2520.50, *How much time may AmeriCorps members in my program spend in education and training activities?*, no more than 20 percent of the aggregate of all AmeriCorps member service hours may be spent in education and training activities. RFCUNY representatives were unaware of the requirement and were not sure how to demonstrate their compliance with this requirement. Without tracking member-training hours, members may exceed the maximum allowable hours permitted for training.

Fundraising Limitations

RFCUNY did not have procedures to ensure that no more than 10 percent of member service hours were spent on fundraising activities. According to 45 CFR § 2520.45, *How much time may an AmeriCorps member spend fundraising?*, an AmeriCorps member may spend no more than ten percent of their service performing fundraising activities. RFCUNY representatives stated that they did not have a procedure in place to monitor fundraising hours because members did not perform fundraising activities at school and because members spend a significant amount of time outside of the classroom creating lesson plans and attending graduate school. Two of the six members interviewed stated that they participated in fundraising activities. One member stated he sent forms home for a few of his students who participated in a candy sale. Another member stated that she participated in fundraising while she was an AmeriCorps member, but only during weekends. Without procedures for tracking member fundraising hours, members may exceed the maximum allowable hours permitted for performing fundraising activities.

Recommendations:

We recommend that the Corporation:

- 2a. Provide guidance to RFCUNY on proper timekeeping procedures to ensure that it complies with AmeriCorps requirements;
- 2b. Provide guidance to RFCUNY on procedures to ensure that its program conducts, maintains, and retains documentation to support member attendance at orientation;
- 2c. Require RFCUNY to implement procedures to track member training and fundraising to ensure members do not exceed the maximum percentage of hours allowed for those activities; and
- 2d. Verify RFCUNY's implementation of compliant timekeeping, orientation, training, and fundraising procedures.

RFCUNY's Response:

Corporation's Response:

Accountants' Comments:

Finding 3. The supervisory signature on members' timesheets was not the members' supervisor, or that of someone with direct knowledge of hours served by the members.

The Program Manager and staff for RFCUNY signed member timesheets for all sampled members in both program years. However, the Program Manager and staff do not have first-hand knowledge of member activities. Members record both direct and indirect service hours on timesheets. Direct hours include teaching hours, lesson planning, grading papers, faculty meetings, and parent conferences. Members also earn direct service hours for participating in extracurricular activities, such as coaching. Indirect hours include time to attend graduate courses and homework, professional development days/workshops, and training. Because of these varied types of activities that CUNY allows as service hours, a member may need an alternative to having a single "supervisor" verify each type of time served.

AmeriCorps Education Awards Program Special Provisions (2005-2006), Section IV.C.2. *AmeriCorps Members*, requires that grantees keep time-and-attendance records for all AmeriCorps members to document their eligibility for in-service and post-service benefits. Time and attendance records must be signed and dated both by the member and by an individual with oversight responsibilities for the member.

Without procedures to verify member activities or timesheet accuracy, the potential exists for members to perform prohibited activities, report incorrect hours, and receive education awards to which they are not entitled.

As stated on page 4 under the caption, Other Matters, we were unable to contact and interview four of ten members and five of ten supervisors we had selected for interviews. We are concerned that these members did not return our phone calls, even after RFCUNY had assisted us in attempting to contact them.

Recommendations:

We recommend that the Corporation:

- 3a. Provide guidance to RFCUNY on proper member timekeeping procedures to ensure that it complies with AmeriCorps requirements; and
- 3b. Verify RFCUNY's implementation of the revised timekeeping procedures that ensure timesheets are signed by a supervisor having direct knowledge of the members' activities.

- 3c. Verify the existence of the members who did not respond to our repeated requests to interview them.

RFCUNY's Response:

Corporation's Response:

Accountants' Comments:

Finding 4. Members did not always record actual service hours on their timesheets.

RFCUNY provided members with preprinted sample timesheets showing the total number of hours by week and by month that an average member could complete over the course of the service term (ten months for full time members and five months for part-time members). Fifty of 127 sampled members in PY 2006-2007, and 59 of the 184 sampled members in PY 2007-2008 reported hours identical to those provided on the sample timesheets. Further, the sample timesheets included mathematical errors, which were also copied by members to their timesheets.

RFCUNY representatives believed that the preprinted samples they were providing were only an example for members to use as a guide. However, members were copying the preprinted information regardless of their activity. For instance, one member used the preprinted information to report service hours; however, his onsite supervisor noted that the member had been absent several days during the school year.

Recommendations:

We recommend that the Corporation:

- 4a. Require RFCUNY to either remove the sample template timesheet or provide members with proper guidance concerning completing timesheets accurately; and
- 4b. Verify RFCUNY's implementation of revised timesheet procedures to ensure that member timesheets contain actual hours served.

RFCUNY's Response:

Corporation's Response:

Accountants' Comments:

Finding 5. Some members' timesheet hours were not accurately recorded in the Corporation's Web-Based Reporting System.

Timesheet hours for some members were not accurately recorded in the Web-Based Reporting System (WBRS). Timesheets did not support hours recorded in WBRS for 10 of 127 sampled members in PY 2006-2007 and 12 of 184 sampled members in PY 2007-2008. The hours on timesheets for two PY 2006-2007 members did not support WBRS hours used to calculate their partial education awards (the partial education awards were due to compelling personal circumstances).

RFCUNY representatives stated that the differences were due to mathematical errors. AmeriCorps has chosen to avoid requiring specific timesheet procedures that may not be applicable to every program. It is, however, good business practice to check the accuracy of hours recorded on timesheets. Without procedures to verify member activities or timesheet accuracy, the potential exists for members to perform prohibited activities or receive education awards to which they are not entitled.

Recommendations:

We recommend that the Corporation:

- 5a. Ensure RFCUNY strengthens internal controls over timesheet review and reporting hours to the Corporation; and
- 5b. Verify implementation of timekeeping procedures to strengthen internal controls to ensure that hours reported to the Corporation are accurate.

RFCUNY's Response:

Corporation's Response:

Accountants' Comments:

Finding 6. RFCUNY did not require its members to timely submit their member contracts, forms, and timesheets.

Member Contracts and Forms

We reviewed member contracts, enrollment forms, change of status forms, and exit forms for sampled members. Members did not sign member contracts and enrollment forms, and RFCUNY did not enter member enrollment, change of status, and exit forms into WBRS within 30 days after the members started or ended their service. This chart indicates that members were submitting required information, in some instances, long after the 303-day service period had been completed.

The number of late instances for each situation is noted below:

Form	PY 2006-2007	PY 2007-2008	Days Late
Enrollment Form (Approved in WBRS)	30	136	32-369
Enrollment Form (Signed by Member)	30	104	32-369
Change of Status (Approved in WBRS)	4	0	138-513
Exit From (Approved in WBRS)	72	127	31-159
Contract (Signed by Member)	<u>31</u>	<u>104</u>	32-369
Total	<u>167</u>	<u>471</u>	

AmeriCorps Education Awards Program Special Provisions (2005-2006) Section IV.C.1.a.i. *Member Enrollment Procedures*, states that an individual is enrolled as an AmeriCorps member when he or she has signed a member contract. Further, AmeriCorps Education Award Program Special Provisions (2005-2006), Section IV.F.2. *Notice to the Corporation's National Service Trust*, states that the grantee must notify the Corporation's National Service Trust within 30 days upon entering into a commitment with an individual to serve; a member's enrollment in WBRS; and completion of, lengthy or indefinite suspension from, or release from, a term of service.

RFCUNY representatives stated that they have a large program with over 3,000 members and 30 days is often an insufficient or unrealistic time frame for a program of their size. Without timely completion and submission of member contracts and enrollment, exit, and change of status forms, the Corporation cannot maintain accurate member records.

Member Status

As of November 2008, nine PY 2007-2008 sampled members were still classified as "Active" in WBRS; even though the PY 2007-2008 program year ended at the close of the school year in June 2008. RFCUNY representatives stated that these members were still "Active" because the members had not turned in all of their timesheets and exit forms. RFCUNY gives members approximately three months after the end of the program year to turn in timesheets. RFCUNY did not have any written policies and procedures concerning this practice.

AmeriCorps Education Awards Program Special Provisions (2005-2006), Section IV.O.3.c. *Exit/End-of-Term-of-Service Forms*, stipulates that Member Exit/End-of-Term-of-Service Forms must be submitted no later than 30 days after a member exits the program or finishes his/her term of service.

Eligibility

RFCUNY required members to complete, sign, and date a "Member Eligibility Verification Form." On these forms, members marked the type of documentation that they were providing to support citizenship or legal resident status. The forms for 31 of 127 sampled members in PY 2006-2007 and 115 of 184 sampled members in PY 2007-2008 were dated after the members' start dates. The range of days it took citizenship to be verified was 5-97 days in PY 2006-2007 and 2-369 days in PY 2007-2008.

According to 45 CFR § 2522.200, *What are the eligibility requirements for an AmeriCorps participant?*, every AmeriCorps participant is required to be a citizen, national, or lawful permanent resident alien of the United States. Further, AmeriCorps Education Award Program Special Provisions (2005-2006) IV.C.1.a.ii. *Member Enrollment Procedures*, states that an individual is enrolled as an AmeriCorps member when the program has verified the member's eligibility to serve.

Recommendations:

We recommend that the Corporation:

- 6a. Provide guidance to RFCUNY on proper completion of member enrollment, exit, and change of status forms. Such training must be sufficient to ensure actions with regard to such forms be taken within 30 days;
- 6b. Verify that member forms at RFCUNY are properly completed and submitted in accordance with grant requirements;
- 6c. Require RFCUNY to strengthen its member contract procedures to ensure that member contracts are signed prior to the start of service; and
- 6d. Verify that member contracts are signed prior to the start of service subsequent to RFCUNY implementing a revised program.

RFCUNY's Response:

Corporation's Response:

Accountants' Comments:

Finding 7. RFCUNY used preprinted member documentation and did not ensure that all member documentation was completed, signed, and dated.

Standard Documentation

As detailed below, RFCUNY used standard documentation with preprinted signatures.

- The RFCUNY Program Manager did not sign or complete Part 2 of the AmeriCorps Exit Form for members. Part 2 of the Exit Form documents the member's completion of the program, number of hours served, and the member's eligibility for an education award. Instead of completing each Exit Form, RFCUNY Program Manager or Program Assistant attached a photocopy of Part 2 of the member Exit Form, which reported total service hours of 1700 regardless of actual service hours for the member. The form also included the Program Manager's signature and date, which certifies that the member successfully completed service.
- The RFCUNY Program Manager did not sign the Member Agreements for all

members sampled in both program years. Instead, RFCUNY attached a photocopy of the Program Manager's signature and date to each Member Agreement.

The RFCUNY representatives stated that the size of their program and the tight deadlines preclude them from completing forms for each member. Without member specific data on original forms, RFCUNY cannot maintain accurate member records, increasing the possibility that inaccurate information may be entered into WBRS, or that members may receive awards to which they are not entitled.

Member Eligibility Documentation

- Twelve of 127 sampled members in PY 2006-2007 did not complete the self-certification at the bottom of the enrollment form. While these members did not self-certify that they had met the high school education requirement, the members indicated elsewhere on the enrollment form that they had completed at least a high school education.

AmeriCorps Education Award Program Special Provisions (2005-2006) Section IV.M.2. *Verification*, states that to verify that a member meets the requirement relating to high-school education, the grantee must obtain from the member, and maintain in the member's file, a written declaration under penalty of law that the member meets the provision requirement relating to high-school education.

- Three of 184 sampled members in PY 2007-2008 did not complete and sign "Member Eligibility Verification Forms" and four of 184 sampled members in PY 2007-2008 did not date their Member Eligibility Verification forms. The education awards for these members were not questioned because documentation to support citizenship or legal resident status was provided for these members.

According to 45 CFR § 2522.200, *What are the eligibility requirements for an AmeriCorps participant?*, every AmeriCorps participant is required to be a citizen, national, or lawful permanent resident alien of the United States. Further, AmeriCorps Education Award Program Special Provisions (2005-2006) IV.C.1.a.ii. *Member Enrollment Procedures*, states that an individual is enrolled as an AmeriCorps member when the program has verified the individual's eligibility to serve.

RFCUNY did not require members to date all documentation submitted to RFCUNY or resubmit incomplete documents or documents with missing signatures. AmeriCorps requirements do not specifically address procedures for preparing member forms. It is, however, good business practice to sign, date, and complete forms.

Recommendations:

We recommend that the Corporation:

- 7a. Require RFCUNY to discontinue the use of preprinted signatures and service hours on AmeriCorps documentation, including Exit Forms;
- 7b. Require RFCUNY to strengthen eligibility procedures; and
- 7c. Verify that the use of preprinted signatures and service hours has been discontinued on Exit Forms and that eligibility procedures are strengthened.

RFCUNY's Response:

Corporation's Comments:

Accountants' Comments:

Finding 8. RFCUNY did not maintain documentation to demonstrate that each member's evaluation complied with AmeriCorps Regulations and the Member Agreement.

RFCUNY did not have member evaluations for any of its members that complied with its PY 2006-2007 and PY 2007-2008 Member Agreements and Corporation regulations. RFCUNY stated it currently evaluates its members in two areas:

- Members receive ratings from their school administrators. This information is fed to DOE. If a member receives an unsatisfactory rating, DOE notifies RFCUNY, which then terminates the member.
- Members must maintain a grade point average of 3.0 to remain in the program. If the member's grade point average falls below 3.0, the CUNY campuses notify RFCUNY and the member is terminated.

RFCUNY did not participate in the evaluation process and did not have procedures in place to ensure that the process was operating properly. Instead, RFCUNY received evaluation feedback from the DOE only when a member was not performing satisfactorily.

Section III. of the RFCUNY Member Agreement states the following:

The Member understands in order to be eligible for serving a second term of service, the Member must receive satisfactory performance reviews for any previous term of service. The Member's eligibility for a second term of service with this program will be based at least on the end-of-term evaluation of the Member's performance focusing on factors such as whether the Member has:

- Completed the required number of hours;

- Completed assignments, tasks or projects in a satisfactory manner; and
- Completed any other assignments that were clearly communicated both orally and in writing at the beginning of the term of service.

Grantees must comply with their Member Agreement requirements for member performance reviews. While the AmeriCorps requirement for member performance reviews had been waived for Education Award Programs by the Corporation, the requirement in the CFR is applicable for PY 2008-2009. As of November 2008, RFCUNY still had not revised its evaluation procedures, even though PY 2008-2009 started in August 2008.

According to 45 CFR § 2522.220(d), *Participant performance review*, a participant is not eligible for a second or additional term of service and/or for an AmeriCorps education award without mid-term and final evaluations.

The end-of-term performance evaluation will assess the following:

- Whether the participant has completed the required number of hours in order to be eligible for the education award;
- Whether the participant has satisfactorily completed assignments, tasks, or projects; and
- Whether the participant has met any other performance criteria, which has been clearly communicated both orally and in writing at the beginning of the term of service.

Recommendations:

We recommend that the Corporation:

- 8a. Require RFCUNY to revise its member evaluation procedures in order to comply with the Regulations and member agreement; and
- 8b. Verify the revision of RFCUNY's procedures for member evaluations.

RFCUNY's Response:

Corporation's Response:

Accountants' Comments:

Finding 9. RFCUNY did not maintain documentation to demonstrate that members received criminal background checks, and that any background checks conducted complied with AmeriCorps Provisions.

RFCUNY did not maintain documentation to demonstrate that members had background checks or that the background check for each member complied with AmeriCorps regulations.

According to 45 CFR § 2540.205 *What documentation must I maintain regarding a National Service Criminal History Check for a covered position?*, grantees must document the following in writing:

- The identify of the individual in a covered position was verified by examining the individual's government-issued photo identification card;
- Required checks for the covered position were conducted;
- The results of the National Service Criminal History Check were maintained, unless precluded by State law; and
- The results were considered in selecting the individual

RFCUNY had no documentation in its program files to support that background checks were conducted on all members prior to entering school grounds. RFCUNY relied on DOE to ensure background checks were completed on each member. DOE conducts a background check on each member at the State and Federal levels and reviews results prior to the start of the members' enrollment in the AmeriCorps program. Subsequent to our identification of this issue, RFCUNY submitted a request to the Corporation for an 'alternate screening protocol' to rely on efforts of DOE; the request was pending as of January 2009.

A stated in 45 CFR § 2540.40 202 *What two search components of the National Service Criminal History Check must I satisfy to determine an individual's ability to serve in a covered position?*:

Unless the Corporation approves an alternative screening protocol, in determining an individual's suitability to serve in a covered position, you are responsible for conducting and documenting a National Service Criminal History Check, which consists of two search components:

- (a) *State criminal registry search.* A search by the name or fingerprint) of the State criminal registry search for the State in which your program operates and the State in which the individual resides at the time of the application; and
- (b) *National Sex Offender Public Regsity.* A name-based search of the Department of Justice (DOJ) National Sex Offender Public Registry (NSOPR).

Further, 45 CFR § 2540.203 *When must I conduct a State criminal registry check and NSORP check on an individual in a covered position?*, required the State criminal registry check to be conducted on an individual who enrolled or was hired by the program after November 23, 2007. The NSOPR check was required to be performed on an individual who was serving or applied to serve in a covered position on or after November 23, 2007.

Because RFCUNY did not have any written documentation to support that the background checks were conducted and complied with AmeriCorps regulations, we questioned the education awards and related fixed fees for those members who were serving on or applied to serve in a covered position after November 23, 2007.

Award No.	PY	Members	Fixed Fees Questioned	Education Awards Questioned ³
04EDHNY003	2006-2007	190	\$60,310	\$715,839
07EDHNY002	2007-2008	<u>3,674</u>	<u>\$669,212⁴</u>	<u>\$15,436,575</u>
		<u>3,864</u>	<u>\$729,522</u>	<u>\$16,152,414</u>

Recommendations:

We recommend that the Corporation:

- 9a. Determine if RFCUNY's current background check process is acceptable, and if not, provide guidance on procedures that ensure RFCUNY's programs conduct, maintain, and retain documentation to support member background checks are in compliance with AmeriCorps Provisions; and
- 9b. Verify implementation of the background check procedures.
- 9c. Disallow and, if already used, recover education awards and accrued interest awards made to members with questioned education awards. In addition, recover fixed grant fees for any member whose education award was disallowed for reasons of eligibility.

RFCUNY's Response:

Corporation's Response:

Accountants' Comments:

³ Members may also earn accrued interest awards. Information on accrued interest awards was not available at the conclusion of our fieldwork. If the members' education award is questioned, accrued interest awards for those members should also be questioned.

⁴ RFCUNY had drawn down this amount, as of September 2008. Had RFCUNY drawn down the entire PY 2007-2008 award of \$900,000, the entire award would have been questioned.

Finding 10. RFCUNY entered incorrect member start dates in Corporation systems and in member contracts.

For each program year, all members began on the same date. However, the start date shown on the member contract, as well as the start date in WBRS, was not the actual date members started performing service. RFCUNY changed the start date on the member contract to define groups of members (cohorts) for its internal management purposes.

AmeriCorps Education Awards Program Special Provisions (2005-2006), Section IV.C.1.b. *Member Enrollment Procedures*, stipulates that prior to enrolling a member, AmeriCorps programs are required to sign a member contract with an individual or otherwise enter a legally enforceable commitment as defined by state law.

Recommendations:

We recommend that the Corporation:

- 10a. Provide guidance to RFCUNY on proper member contract procedures to ensure that they comply with AmeriCorps requirements;
- 10b. Require RFCUNY to enter proper dates into WBRS; and
- 10c. Verify implementation of proper member contract procedures and input of proper dates into WBRS.

RFCUNY's Response:

Corporation's Response:

Accountants' Comments:

Finding 11. Some members worked beyond their contract-end date.

Twelve part-time members of the 127 sampled members during PY 2006-2007 completed service hours beyond the end date specified by the Member Agreement. The member agreement, as well as the member handbook, listed a completion date of December 31, 2006. However, the member agreement was titled "2006 Fall 5 Month Service Learning" and members continued service until January 31, 2007.

The hours members worked beyond their end date are, as follows:

Member	Total Hours From Timesheets	Total Hours Beyond End Date	Net Hours Earned
1 ⁵	1042	200	842
2	1182	250	932
3	1188	256	932
4	1170	250	920
5	1170	250	920
6	1170	250	920
7	1170	250	920
8	1171	250	921
9	1170	250	920
10	1170	250	920
11	1170	250	920
12	1182	255	927

If hours worked beyond the service completion date in their contract were disallowed, one member would not have enough service hours to earn their education award.

Recommendations:

We recommend that the Corporation:

- 11a. Require RFCUNY to amend member contracts to ensure that members do not work beyond the specified end date;
- 11b. Determine if excess service hours are eligible, if not, disallow excess hours and, if already used, recover education awards to members who did not serve the minimum required service hours; and
- 11c. Verify the amendment of the member contract.

RFCUNY's Response:

Corporation's Response:

Accountants' Comments:

⁵ Member would not have obtained the required number of service hours if excess hours are disallowed.

APPENDIX A

**THE RESEARCH FOUNDATION OF THE CITY UNIVERSITY OF NEW YORK'S
RESPONSE TO AGREED-UPON PROCEDURES REPORT**

Draft - For Discussion Purposes Only

APPENDIX B
CORPORATION'S
RESPONSE TO AGREED-UPON PROCEDURES REPORT

Draft - For Discussion Purposes Only

Corporation for
**NATIONAL &
COMMUNITY
SERVICE**

OFFICE OF INSPECTOR GENERAL

To: David Eisner, Chief Executive Officer

From: Gerald Walpin, Inspector General

Cc: Frank Trinity, General Counsel
Nicola Goren, Chief of Staff

Re: Memorandum from Frank Trinity to David Eisner dated April 23, 2008¹

Date: May 6, 2008

As Frank Trinity notes in his Memorandum to you, which, we believe, represents the work of the Corporation's Office of General Counsel ("General Counsel"), there have been extensive discussions on how the Corporation should handle improper end of term service hour certifications for AmeriCorps members. Congress, in its wisdom, has mandated that AmeriCorps members serve a specified number of hours in order to earn an educational award, and the certification that those hours have been earned operates as a gateway to the disbursement of previously encumbered funds from the Trust. General Counsel and OIG have stated and refined their views in a number of memoranda, and it is time for that process to come to an end with a management decision.

In this Memorandum, I will, first, set forth the structure of the Trust, and, then, briefly reiterate OIG's position and respond to the points that General Counsel has raised. I hope to do this by identifying the issues as to which there is still disagreement with sufficient clarity that there will be no need for a responsive memorandum.

The Trust Structure

At the outset, it is important to understand how Congress has structured the Trust, how it determines the amount it appropriates each year for the Trust, and how the protective provisions covering the Trust work.

Congress annually appropriates an amount for the Trust which provides the Trust with sufficient funds to cover the present value of education awards for each member envisaged in the total amount of AmeriCorps grants contemporaneously appropriated. Congress is essentially

¹ I have previously responded to Frank Trinity's memorandum to me of the same date. That earlier reply memorandum from me likewise responds to the last paragraph of Mr. Trinity's memorandum to you. I merely add that, of course, you are free to reject my views in favor of those you received from Mr. Trinity; I, however, would never suggest that you should disregard any views that you receive from any source, but rather analyze any different view that you receive and then make your own conclusions based on your judgment of the merits of the competing views.



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saying to the Corporation that it wants the Corporation to have sufficient funds to finance education awards for the total number of members which the Corporation is thereby authorized to recruit and who validly serve the minimum number of hours required for an education award. Congress also has created a reserve amount in the Trust to cover the possibility that the historical percentages of education awards draw-downs and presumed discount rate are inapplicable in any one year -- again as insurance that the Corporation would always have funds available in the Trust to cover the total number of member slots awarded in grants for each year.

As soon as a grant is made, the Trust amount, applicable to the total number of members for which the grant is made, is automatically encumbered, *i.e.*, that amount can no longer be used by the Corporation for any additional number of members. At the end of the year, the amounts applicable to these members who either never signed up or, if they signed up, didn't fulfill the required service hours, is unencumbered, *i.e.*, the applicable funds again become available for other valid members. Whatever Trust funds remained encumbered at the end of the first year then continue that encumbered status for seven years, during which time these funds would be disbursed to pay the amount of education awards for which the member applies, with any remaining funds in the Trust, not requested by the awardee, unencumbered only at the end of seven years (the statutory time limitation before an award expires).

This procedure ensures that the Corporation would have available the total amount needed to cover recruiting members for the total hours of service to be validly served by the total number of members for which Congress appropriated grant funds.

Issues

A. The Responsible Entity

With respect to which entity is to be held liable for an improper service hour certification, General Counsel and OIG agree that two entities may potentially be liable: (1) the grantee State Commission or national direct, and (2) the subgrantee. The Corporation focuses on the certifying entity, which is usually the subgrantee, while OIG follows a line of privity that runs first to the grantee and then, through the grantee, to the subgrantee. OIG agrees that the certifying party, most often the subgrantee, may well be looked to for primary responsibility for any improper certifications, but believes that the grantee should not be absolved from responsibility.

A construction law analogy is instructive. On large construction projects, the owner contracts with the general contractor, which then subcontracts portions of the work to specialty subcontractors. Even when a portion of the work has been subcontracted, the general contractor remains responsible for its performance and for making sure that any necessary coordination is done. One common issue is the wiring up of mechanical equipment: Who is responsible, the electrical subcontractor that does the wiring for other parts of the project, or the mechanical subcontractor that puts the equipment in place? The owner does not care because it is the general contractor's obligation to coordinate the work of its subcontractors so that the installed equipment works. When the owner complains, it complains to the general contractor, which is

free to try to pass the complaint on to one or both of the subcontractors, but the general contractor's efforts to pass the responsibility on do not absolve it.

In the same way, the Corporation deals directly with the grantee. The Corporation selects the grantee, and the grantee selects its subgrantees. The grantee should be encouraged to stand behind its selection and take steps to make sure that the subgrantee is spending the grant funds consistent with the obligations set out in the grant documents. If the Corporation looks to the grantee, the grantee is free to pass the claim through to the certifying subgrantee, but it is not absolved from potential responsibility by doing so; it is absolved only when the certifying program makes the Trust whole, and not before. It is important to note that one non-pecuniary benefit to holding the grantee responsible is that it induces proper attention by the grantee to its supervisory responsibility over the subgrantee: if the Corporation does not look to the grantee for satisfaction, the grantee will have no incentive to monitor the activities of its subgrantees.

The Corporation's responsibility is to recover funds that have been improperly disbursed, so as to have funds freely available for use for the purpose for which Congress appropriated it: to finance the number of validly serving members envisaged by the appropriations. It should not abandon that responsibility by declaring in advance that it will not pursue grantees unless facts establish that the grantee was involved in the improper certification -- a sure-fire deterrent against the grantee even bothering to get involved in monitoring sub-grantees. Instead, OIG suggests that, if the Corporation is inclined to look at the certifying subgrantee program first, it should treat the grantee as a guarantor. If the subgrantee fails, for one reason or another, to satisfy its responsibility to make the Trust whole, the Corporation should hold the grantee responsible.

B. When the Trust Should Be Made Whole

With respect to the issue that General Counsel has characterized as "Collectible debt vs. contingent claim," the fundamental questions are when a debt arises and the amount of the debt, *i.e.*, when the Trust fund needs to be made whole. In General Counsel's presentation, there is no occasion to make the Trust whole until a debt arises which does not occur until there has been a disbursement, and the amount of the debt is the amount of the disbursement.² OIG does not view the triggering event as the disbursement to the member, but rather to what is in reality creation of the debt to the Trust fund to allow it to use the appropriated funds for the purpose for which Congress appropriated the funds: to use for valid education awards. As discussed above in describing the Congressionally-created Trust structure, funds are put into the Trust to allow use for the intended awards to the intended number of members who are entitled to an award -- who provide the service required. This Trust structure ensures that objective, by encumbering sufficient funds as soon as the grant is issued for a specified number of members. At the end of the year, funds applicable to the number of members who never signed up or who did not perform the required number of service hours are unencumbered, *i.e.*, allowed to be used for other members. Indeed, the purpose of allowing funds in the Trust to be used for valid members

² If General Counsel is correct in this characterization, there would appear to be no barrier to putting all funds recovered back into the Trust under the nonstatutory but well established "refund" exception to the Miscellaneous Receipts Act because those funds are, ipso facto, refunds of funds that have been improperly disbursed.

is emphasized by the ability of the Corporation (through the grantee) to use encumbered dollars in the first year for a "substitute" member, if the first chosen member drops out early.

If a member is awarded an education award to which not entitled, through a grantee's fault, either due to affirmative wrongdoing or passive negligent administration, the effect is that encumbered Trust funds cannot be used for Congress' purpose. The only way to make the Trust fund whole is for the responsible grantee or liable sub-grantee, or both, to make the Trust whole immediately.

The contrary view does not recognize the effect of the grant on the Trust. The grant starts a process of encumbrance that continues with the certification. With certification, the encumbrance can remain in place for up to seven years until the member's ability to draw down the award expires. Again, that encumbered amount will not be available for another AmeriCorps member until up to seven years have run.

Immediate imposition of liability on grantee/subgrantee for improperly encumbered amounts due to education awards furnished to members who did not complete the required service is not only correct, but is the only practical solution. When the member draws the award down in increments, the Corporation's efforts to recover the amounts disbursed from the responsible party will be inefficient, if anything is done at all. Given that reality, it is likely that the Trust will never be refunded the amounts improperly paid, thus precluding use of those funds for their purpose.

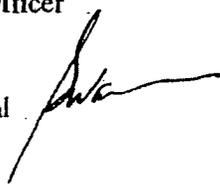
C. Recipient of Recovered Funds

With respect to where the recovered funds should be placed, OIG must make clear that it understands and agrees that, if more than the amount of the actual loss is recovered, the excess goes into the Treasury. But, the first step should be to make the Trust whole.

OFFICE OF INSPECTOR GENERAL

Memorandum

TO: David Eisner, Chief Executive Officer
Frank Trinity, General Counsel

FROM: Gerald Walpin, Inspector General 

DATE: April 25, 2008

RE: One portion of Frank Trinity's memoranda dated April 15, 2008

I received late Wednesday two memoranda from Frank Trinity in response to my memorandum dated April 15, 2008. While I will respond to the merits of his memorandum to David (but, unfortunately, because I will be out of town next week, not until I return), I feel sufficiently troubled by the last page of his memorandum to David, which is essentially repeated in his memorandum to me, that I believe that it requires an immediate response on my part.

At the outset, I never understood that the legal opinion of someone who is the "agency general counsel" is sacrosanct and could not be erroneous, merely because of his position. As much as I respect Frank as a person and as a lawyer, and I believe he reciprocates, just as he has not been shy about disagreeing with my views on certain subjects, it is ludicrous to suggest that I cannot do likewise. Indeed, my duties as IG require that I do so.

As you both know, my practice is to be open with both of you as to my views, and thereby attempt, if at all possible, to reach agreement through communications between us, rather than immediately jumping to air my objections with Congress or other entities. I would not be continuing our candid communication relationship, which I believe is the correct relationship, if I did not candidly express to both of you my disagreement with Frank's legal interpretation on the issue under discussion.

As to the major implication (perhaps even more) in Frank's memos: Under no circumstances would I suggest an avenue which I believed was illegal, and there is no basis for suggesting that to be my view. As I expressly stated at the beginning of the last paragraph of my memorandum, "[w]e believe that 'refund' is the appropriate label, for the reasons discussed above" -- indeed for the reasons discussed at length therein. There is no dispute between Frank and me that, if it is a "refund," it then goes back into the Trust.

What followed in that paragraph reflects my view of what a lawyer should do when advising his client. A lawyer should first determine what is in his client's best interests and then determine if an honest analysis of controlling rules, decisions and statutes would support an opinion which allows the client to do what is in the client's best interests. If an honest analysis would not allow it, then the lawyer must tell the client that it cannot be done.



Seldom -- including on the issue here -- is the issue 100% clear cut. A lawyer, in my mind, should not be a cautious naysayer who takes the safer way out by saying it cannot be done when any question exists. In that spirit, my colleagues and I did a careful analysis. We concluded that it certainly would be in the Corporation's best interest -- and, indeed, consistent with the purpose of the statute and Congressional appropriation -- to return, to the Trust, money erroneously disbursed from the Trust. In that way, the money could be put to its intended use, the provision of education awards to eligible recipients, rather than depriving the Trust of such funds.

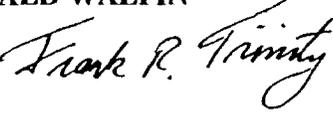
Then we analyzed the controlling rules and concluded that they authorized the return to the Trust of refunds made, equal to amounts which had been erroneously disbursed from the Trust.

Then, as a proper supplementary procedure, we analyzed what the danger was to the client, *i.e.*, the Corporation, if our legal opinion was incorrect (recognizing that we too are not infallible). For the reasons set forth, we concluded that there was no material risk.

But our doing this thorough analysis provides no basis for the suggestion that it involved our overlooking Congress, the GAO or the Justice Department and their respective views on the Miscellaneous Receipts Act.

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MEMORANDUM FOR GERALD WALPIN

FROM: Frank R. Trinity 
General Counsel

SUBJECT: Your memorandum dated April 15, 2008

DATE: April 23, 2008

Your memorandum of April 15, 2008, to the Chief Executive Officer raised several concerns about how to handle improper end of term service hour certifications for AmeriCorps members. I have provided a memorandum to the Chief Executive Officer explaining our position in the areas you identified as in dispute. I am providing a copy of that memorandum to you.

I am writing separately concerning the following concluding paragraphs in your April 15 memorandum:

In conclusion, the issue comes down to whether the funds recovered are labeled a “refund” or a “miscellaneous receipt.” This labeling decision is outcome-determinative in that refunds go back to the Trust while miscellaneous receipts go to the Treasury.

We believe that “refund” is the appropriate label, for the reasons discussed above. But to the extent the answer is not clear, the Corporation should consider its interests, the equities, and likely downside consequences or risks. The Corporation’s interests are served when the funds recovered are called “refunds” and go back into the Trust. The equities favor the Corporation doing precisely that: The Corporation will be making the Trust whole with funds recovered from a certifying program or member, not entitled to keep them. The downside risk is that someone will disagree – but who? And why? Someone would have to pick that fight, and the Corporation’s position defending the Trust is eminently defensible, particularly as it would be relying on OIG’s advice. The Corporation should do so.

I have several concerns about your concluding paragraphs, but first let me acknowledge your directness, transparency, and candor in our discussion on this and other matters since you began your tenure as Inspector General. You have personally invested many



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hours in discussions with me and many other management officials in determining the best way to resolve the issue of improper service hour certifications. Please take my response in the same spirit of direct and candid dialogue. I feel compelled to put this response in writing for the purposes of the record, as you made the above-referenced recommendation in writing to the agency head.

In my view, the quoted language is reasonably interpreted as (1) advising the agency head to disregard the legal advice of the agency general counsel; (2) providing assurances that no one is likely to disagree if the agency head disregards the legal advice of agency general counsel; and (3) providing assurances that reliance on your contrary advice will serve as a defense in the event of a future controversy. If I have misunderstood your words, please let me know so we can properly understand your position.

First, as explained in more detail in my memorandum of this date to the Chief Executive Officer, it is my view that your legal position on the disposition of recovered funds in excess of an actual loss to the Government is not supported under the Constitutional and statutory framework governing public expenditures. Second, I think in expressing doubt about the likelihood of anyone disagreeing with your position, you overlook the importance placed upon the Miscellaneous Receipts Act by Congress, the Government Accountability Office, and the U.S. Department of Justice. Third, suggesting that an agency head specifically rely on OIG legal advice – contrary to the agency general counsel’s advice – is a problematic precedent, and I would like to discuss this issue with you as part of our ongoing dialogue.

OFFICE OF INSPECTOR GENERAL

April 15, 2008

Memorandum

To: David Eisner

CC: Jerry Bridges
Frank Trinity

From: Gerald Walpin 

Subject: Proposed Guidance on Term Certifications

I thought that it would be appropriate to express to you in writing my disagreement with what I understand to be certain aspects of the yet to be published proposed Guidance on improper end of term certifications, which make members eligible for an Education Award.

Last Tuesday, April 8, 2008, my staff and I met with General Counsel Frank Trinity and members of his staff, and CFO Jerry Bridges, COO Elizabeth Seale, AmeriCorps Director Kristin McSwain, OGM Director Peg Rosenberry, as well as other members of the Corporation staff.

I understand from what was expressed at this meeting (although I still have not seen the latest draft) that, under the proposed Guidance, the Corporation:

- will not hold accountable a direct grantee of Corporation funds for the improperly certified term service, but only hold accountable the so-called “certifying program” that issued the incorrect certification;
- will not declare a debt against the certifying program grantee when the Corporation discovers an improperly certified award, but only upon disbursement of an Education Award amount from the National Service Trust;
- will submit any funds recouped from the certifying program to the general fund in Treasury—and not replenish the National Service Trust from which the Education Award payment was made.

I disagree with these positions, and will address each in turn.



Holding Only the “Certifying Program” Accountable

As you know, two thirds of all of the Corporation’s AmeriCorps grant funds go to State Commissions, whether by formula or competitive grant, which in turn subgrants these funds to AmeriCorps programs in the grantee’s state. It is the Commissions that compete and select the AmeriCorps subgrant programs in their state, draw down the funds from the federal government, and, in turn, use these funds to reimburse the costs of their AmeriCorps subgrantees. Other AmeriCorps funds go to so-called National Direct grantees, which also frequently have subgrants, and, in such instances, perform the same functions toward the subgrantees as the State Commissions.

It is the State Commissions and the National Directs with which the Corporation has a legal relationship, and which the Corporation holds accountable for use of the AmeriCorps grant funds. Yet, within what I understand to be the proposed guidance, the Corporation intends to hold accountable only the subgrantee of a State Commission, or what the Guidance refers to as the “certifying program,” for an improper certification of the term of service, and hence eligibility for an education award, and hold a State Commission, and any other direct grant recipient, harmless, unless finding them “complicit” (an unlikely finding).

I find this is inconsistent with the legal relationship established under federal law and manifested by the AmeriCorps grant agreement, which makes plain that the direct recipient of funds is ultimately responsible for their use. With regard to State Commission responsibilities, the AmeriCorps regulations state that, after the grants are awarded, “State entities will be responsible for administering the grants and overseeing and monitoring the performance and progress of funded programs.” 45 C.F.R. § 2550.80(d). The 2007 AmeriCorps Grant Provisions, as did all prior editions, state:

Grantee, for the purposes of this agreement, means *the direct recipient* of this grant. The term sub-grantee shall be substituted for the term grantee where appropriate. The grantee is also responsible for ensuring that sub-grantees or other organizations carrying out activities under this award comply with these provisions, including regulations and OMB circulars incorporated by reference. **The grantee is legally accountable to the Corporation for use of grant funds and is bound by the provisions of the grant.**

AmeriCorps Grant Provisions, Section IV.A.4. (emphasis added)

Under this definition of “grantee,” the provisions state that “[t]he grantee has full fiscal and programmatic responsibility for managing all aspects of the grant and grant-supported activities, subject to the oversight of the Corporation” (Section V.A.1); “the grantee must keep time and attendance records on all AmeriCorps members in order to documents their eligibility for in service and post-service” (Section IV.C.2); and “in order for a member to receive a post-service Education Award from the National Service Trust, the grantee must certify to the National Service Trust that the member is eligible to

receive the education benefit" (Section IV.J). Section N.I. states that "[t]he grantee is required to submit to the National Service Trust . . . Exit/End of Term of Service Forms." Ultimate responsibility thus lies with the direct grantee, and ultimate accountability ought to as well.

The limitation that only the "certifying program" is accountable creates a regime wherein it will be unlikely that Federal funds can be recouped. Both the grantee and the subgrantee ought to be held accountable for an improper certification, and the Corporation is well within its rights to proceed against a State Commission or a National Direct grantee, as well as the "certifying program." In law, the Grantee is the contractor with the Corporation, and the subgrantee is the subcontractor chosen by the contractor. The Government regularly holds the contractor liable for its subcontractors' violations of the terms of the contract. No reason exists for a different rule for the Corporation. To the extent that the grantee is held liable, it can, of course, seek reimbursement from the subgrantee, if the latter is still viable.

If the Corporation feels it has no ability to hold the grantee accountable for the improper certification by its subgrantees, it ought to require that the grantee also certify the accuracy of the certification of a term of service for its subgrantees.

When a Debt Should be Establish and Enforced

The guidance, as I understand it, will declare a debt against the "certifying program," not upon the Corporation's discovery of an improperly certified award, but only upon disbursement of the Education Award from the Trust. This, of course, can happen in a piecemeal fashion as the member may not draw down the whole amount, and it may happen years after the Corporation's discovery of the incorrect certification. The logic appears to be that the Corporation has not yet disbursed the funds; therefore, none of the Corporation's assets has been adversely affected.)

I think that this is the wrong view of the situation, both actually and practically. The Corporation has taken the position, rightly I believe, that, where the member acted in good faith, it intends to honor the improper certification, and disburse the Education Award upon presentation of a voucher. Because the Corporation has committed to honor the education award, a liability has immediately been created against the Trust, and no other use can be made for that amount within the Trust, *i.e.*, the Corporation's assets available for use have been adversely affected. (Recall that in 2003, in response to Corporation practices that caused a shortfall in the Trust, Congress amended the National Community Service Trust Act ("NCSTA") to require that the Trust "record as an obligation" an Education Award for each AmeriCorps position when "the Corporation . . . awards a grant." 42 U.S.C. 12605(b)).

Thus, the Trust has a real liability that will become due and owing ~~once~~ a certification has occurred. Because of this, the Corporation should, at that point, attempt to ~~recoup~~ the full amount from the negligent grantee as soon as possible, rather than wait for the member to cash the award, and then declare a debt against the grantee.

Your staff also believes it is best to wait until the member uses the award, and then go to the grantee for the debt, because there is a chance that the award will not be used, and the grantee would have paid unnecessarily. That is imposing an impractical and often impossible burden on the Corporation. First, the certifying program may not exist at that point, and the Government would then not be able to be made whole. The issue is on whom should the risk of ultimate loss be imposed: the innocent Corporation which had no responsibility for ensuring that only entitled members be given an Education Award or the Grantee which assumed that responsibility? Clearly, the Corporation should not shoulder the loss.

Moreover, there is a second practical reason for using the certification of the Education Award as the triggering event, rather than each disbursement of any part of the award. The amount of the Education Award is small enough to make litigation or otherwise pressing the Corporation's claim practically unwise. But when it is divided up into fractional disbursements, the impracticality is even greater.

Again, I would impose the impracticalities of waiting until the seventh year (to determine if any balance of the award was not used) on the grantee, not the uninvolved Corporation, which has the responsibility imposed by Congress of protecting the Trust Fund to ensure it is used only for properly granted Education Awards. As OIG proposes, the grantee would reimburse the Trust Fund for the full amount of the Education Award which, at its award, reduces the funds available in the Trust Fund for valid Education Awards, with the right of the grantee to receive back after seven years any portion of that Education Award not in fact used.

Your staff objected that the Corporation has no authority to do such a thing under the NCSTA. Clearly, what we proposed was consistent with the purpose of the Trust Fund: to ensure the funds be available for use for valid Education Awards, not for invalid expenditures.

Contrary to his position on this subject, your General Counsel has convinced OIG that a literal insistence on following the words of the statute, without analyzing the purpose of and policy supporting the statute, would be incorrect. For example, the Corporation, on the advocacy of your General Counsel, has taken the position under the Act, that an AmeriCorps member who did not complete the term of service (the statutory condition for receiving an Education Award) would be allowed to retain a disbursed Education Award (and also to obtain disbursements thereafter); yet, the General Counsel relies on a very technical reading of the statute to reject our proposed procedure of making the Trust Fund whole by having the responsible grantee pay to the Trust Fund the full amount of the Education Award on its award, thus neutralizing the reduction of available Trust Funds from the award, subject to remitting back amounts determined after seven years not to have been necessary due to the subsequent non-takedown by the eligible member.

The circumstances involving the Trust are unique, and, as all parties will agree, there is no exact standard or binding opinion from a legal authority that addresses what ought to occur when improper payments are made from it. That being the case, and in the face of reasonable interpretations to the contrary, I question the rigidity for viewing our proposal – one difficult to address as other than in the interest of the Government and fairness – as “can’t do.”

Reimbursement to Treasury or a Refund to the National Service Trust?

I acknowledge that there are circumstances under which money the government receives must be regarded as credited to the general fund at Treasury, rather than an agency’s appropriation accounts, pursuant to the so-called Miscellaneous Receipts Act (“MRA”), which states that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b). The funds that go to miscellaneous receipts typically involve fines, penalties, damages to government property, and the theory that they cannot go back to an agency’s appropriation, but to Treasury, is that they are in excess or “an augmentation” of the amounts and purposes for which Congress has already appropriated funds to the agency.

Both the Office of Legal Counsel at the Department of Justice and the Comptroller General have interpreted the MRA to provide an exception for “refunds to appropriations.” This permits repayment to the appropriation for “amounts collected from outside sources for payments made in error, overpayments, or adjustments to previous amounts disbursed.” 69 Comp. Gen. 260, 262 (1990); Op. Off. Legal Counsel 2004 WL 5277346 OLC * 2 (emphasis added). In an early opinion, the Comptroller General stated that “if the collection involves a refund or repayment of moneys paid from an appropriation in excess of what was actually due, such refund has been held to be properly for credit to the appropriation originally charged.” 5 Comp. Gen. 734, 736 (1926)

We have brought this exception to the attention of the General Counsel’s Office. Nonetheless, that office seems to be of the view that permitting the member to keep the award, makes the award a valid expense under the appropriation, and that any amounts refunded from the grantee for a payment made in error, creates an excess or augmentation to the National Service Trust, and therefore any such funds received ought to go to the Treasury accounts. I submit that the proper view is that the grantee is refunding to the Trust amounts for “a payment made in error,” for the improper certification, or, for those hours the member never served, “in excess of what is actually due.” In a sense, both the grantee and the member are jointly and severally liable for the amount disbursed, and the government is making an election to liquidate the debt against the grantee, rather than the member. Note that the Federal Claims Collection Standards states that “[a]gencies should not attempt to allocate the burden of payment between debtors but should proceed to liquidate the indebtedness as quickly as possible.” 45 C.F.R. § 902.4.

Therefore, I question the rigidity for viewing any refunds from grantees to be receipts intended for the Treasury account, and to the detriment of the National Service Trust. What OIG proposes is clearly both fair and consistent with the purpose of Congress which appropriates a specified amount for Education Awards. When an amount is paid from the Trust Fund for an improperly-awarded Education Award, it reduces the funds available for validly-awarded Education Awards below the amount Congress had directed be used for validly-awarded Education Awards. When the grantee repays the cost of an improperly-awarded Education Award, and it goes into the Trust, it returns the Trust Fund amount to the amount Congress intended; if, instead, it goes to Treasury, the amount in the Trust Fund remains below what Congress intended.

In conclusion, the issue comes down to whether the funds recovered are labeled a "refund" or a "miscellaneous receipt." This labeling decision is outcome-determinative in that refunds go back to the Trust while miscellaneous receipts go to the Treasury.

We believe that "refund" is the appropriate label, for the reasons discussed above. But, to the extent the answer is not clear, the Corporation should consider its interests, the equities, and likely downside consequences or risks. The Corporation's interests are served when the funds recovered are called "refunds" and go back into the Trust. The equities favor the Corporation doing precisely that: The Corporation will be making the Trust whole with funds recovered from a certifying program or member, not entitled to keep them. The downside risk is that someone will disagree – but who? And why? Someone would have to pick that fight, and the Corporation's position defending the Trust is eminently defensible, particularly as it would be relying on OIG's advice. The Corporation should do so.

* * *

I suggest that we discuss this subject at your earliest convenience.

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MEMORANDUM FOR DAVID EISNER

FROM: Frank R. Trinity
 General Counsel

Frank R. Trinity

SUBJECT: Inspector General Memorandum dated April 15, 2008

DATE: April 23, 2008

Over the past year we have engaged in extensive discussions with the Inspector General on how the Corporation should handle improper end of term service hour certifications for AmeriCorps members. We seem to have agreement with the Inspector General that, in the absence of a member's affirmative culpability and in the interest of equity, we should leave undisturbed a member's good faith reliance on the end of term certification. We also seem to have agreement on reducing the responsible entity's liability to a pro-rated amount for relatively small errors (with Education Award Programs' liability capped at the per member grant amount).

Please disregard the views ascribed to me in the Inspector General memorandum dated April 15, 2008, as the memorandum contains several material misstatements. My views on this subject are set out herein and in a previous General Counsel memorandum to Chief Financial Officer Jerry Bridges dated June 14, 2007.

The Inspector General expresses concern about three issues:

- (1) Under what circumstances are State Commissions liable for debts associated with improper service hour certifications executed by subgrantee programs?
- (2) What action may we take to protect the Government's financial position if the member has not yet used the education award at the time we identify the error?
- (3) May recovered funds in excess of payments from the Trust be returned to the National Service Trust instead of being paid into Treasury's General Fund as miscellaneous receipts?

State Commission liability

In a State Commission-funded program, there are two entities potentially liable in connection with an improper service hour certification: (1) the state commission; and (2)



the subgrantee organization. The principal legal authority for pursuing recovery of funds in connection with improper service hour certifications provides as follows:

Any individual who makes a materially false statement or representation in connection with the approval or disbursement of an education award or other payment from the National Service Trust may be liable for the recovery of funds and subject to civil and criminal sanctions.

45 C.F.R. 2526.10(e).

In most cases, a program director or other representative of the subgrantee organization signs the end of term certification, documenting the number of service hours completed by the member. Under this regulation, our strongest case for liability is against the subgrantee organization, the entity that actually executes and transmits the certification to the Government. The draft guidance document therefore focuses on the subgrantee organization. Having said that, the draft guidance document explicitly puts State Commissions on notice that they may also be held accountable for an improper certification. In establishing a debt against a State Commission we would rely on, among other authorities, the sub-statutory provisions cited in the Inspector General's memo. Our decision in a given situation whether to pursue recovery from a State Commission rather than a subgrantee certifying program will be informed by the specific facts surrounding the improper certification, and the Inspector General will have an opportunity to make a recommendation at that time.

Collectible debt vs. contingent claim

The Corporation may establish a debt in connection with any improper payment by the Government. See United States v. Wurts, 303 U.S. 414, 415 (1938) ("The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid"). The amount of the improper payment determines the amount of the debt. As explained by the Government Accountability Office,

... a 'debt,' for purposes of the Federal Claims Collection Act and Standards, requires two elements: there must be an amount of money or property which is owed to the United States, and the government must be entitled to receive it immediately. If it is not immediately payable (as, for example, in the case of loan payments which have not yet become due), then there is no 'debt' upon which collection action can be taken

Government Accountability Office, Principles of Appropriations Law, volume III, page 13-15 (1994). To the extent the National Service Trust has disbursed funds based on an improper certification, we may establish and collect that amount under our debt collection procedures.

By law, a member has seven years to use the education award. 42 U.S.C. 12602(d). Trust records show that members draw down relatively substantial amounts during the first three years with a precipitous drop-off in usage in the last four years of eligibility. Roughly 20% of the amount reserved for education awards goes unrequested at the end of the seven-year period.

If a member has not yet drawn down all or part of an education award, and if we leave undisturbed the member's good faith reliance on the certification of hours, we may assert a contingent claim against the party responsible for the improper certification. The claim would ripen into a collectible debt if and when the member uses the education award. We share the Inspector General's concern about the administrative burdens associated with the contingent nature of the claim. However, we have no legal authority to collect an amount as a debt before there has been an actual loss to the Government. To the extent we wish to collect a debt before the disbursement of funds, we would need to request such authority from Congress in law.

Recovered funds payable to the National Service Trust or to Treasury's General Fund.

Under the Miscellaneous Receipts Act, 31 U.S.C. 3302(b), if any agency collects a debt, the agency must deposit the funds in the Treasury as miscellaneous receipts unless the agency has statutory authority to credit the receipt to an account such as the National Service Trust.

A long-recognized exception to the Miscellaneous Receipts Act is a "refund" representing "amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed." Government Accountability Office, Principles of Appropriations Law, volume II, pages 6-170-171 (2006). Refunds are defined by the Government Accountability Office as "repayments for excess payments . . . directly related to previously recorded expenditures . . ." *Id.*, at 6-170. While we may retain "refunds" of improper payments in the National Service Trust, we do not have legal authority to adopt a blanket policy of returning all recovered funds to the Trust. To the extent that the recovered funds reflect disbursements from the National Service Trust, we may return them to the Trust. To the extent that the recovered funds reflect the settlement of a contingent liability or civil liability greater than the actual loss to the Government, however, they must be deposited in the Treasury as miscellaneous receipts.

Failure to comply with the Miscellaneous Receipts Act can have serious consequences, including the removal of the responsible federal employee, and can result in the improper augmentation of the credited appropriation.

IG's proposal to hold contingent repayments in the National Service Trust

When an improper certification is discovered before a member has drawn down the education award, the Inspector General proposes to make the National Service Trust whole

... by having the responsible grantee pay to the Trust Fund the full amount of the Education Award on its award, thus neutralizing the reduction of available Trust Funds from the award, subject to remitting back amounts determined after seven years not to have been necessary due to the subsequent non-takedown by the eligible member.

April 15, 2008, memorandum, at 4.

The Inspector General further says there is “no exact standard or binding opinion from a legal authority that addresses what ought to occur when improper payments are made from it.” That is incorrect. When improper payments are made, we have clear authority to retain recovered funds equal to the amount of the improper payments in the National Service Trust. The Inspector General’s proposal does not involve the recovery of “improper payments.” His proposal addresses the situation in which no payment has been made or may ever be made. Where there has been no improper payment, there is both an “exact standard” for disposing of recovered funds -- the Miscellaneous Receipts Act -- and “binding opinion” -- the long line of Comptroller General decisions and Office of Legal Counsel Opinions. (“The requirement [in the Miscellaneous Receipts Act] safeguards the separation-of-powers principle embedded in the Appropriations Clause that is fundamental to our constitutional structure.” *Matter of Maritime Administration*, B-287738, 2002 U.S. Comp. Gen. LEXIS 277, *6 (May 16, 2002); “The Constitution commits to the legislative branch of government control over public expenditures. U.S. Const. Art. I. Sec. 8, cl. 1; *id.*, Art. I, Sec. 9, cl. 7. Congress has passed various statutes designed to ensure that congressional prerogatives under this constitutional scheme are not diminished by executive action.” 4 Op. Off. Legal Counsel (vol. B) 684, *4 (June 13, 1980)).

Under current law, we may establish a contingent claim against the responsible entity for the amount potentially available for the member’s use. If we receive an amount greater than the actual payment in error, we must remit the difference to the general fund of the Treasury.

The Inspector General’s proposal would also run afoul of the specific statutory provisions governing the National Service Trust. By law, the Trust may consist only of (1) appropriated funds; (2) donations; and (3) interest on Trust investments. 42 U.S.C. 12601(a). Amounts in the Trust may only be used to pay for specific educational expenses, to repay qualified student loans, and related student loan interest payments. 42 U.S.C. 12601(c), 42 U.S.C. 12604(a). We have no authority to hold in the National Service Trust a payment from a responsible entity in excess of an actual loss to the Government, or to pay to the responsible entity an unclaimed amount from the National Service Trust at the expiration of the seven-year period of education award availability.

The Inspector General’s proposal offers practical ideas on resolving improper service hour certifications when they are discovered. We would be well-advised to consider his

ideas in pursuing statutory authority for a process that meets our shared goals of equity, practicality, and appropriate stewardship of the Federal fisc. For now, however, we may administer the National Service Trust only as authorized in statute.

IG's concluding recommendation

Finally, I draw your attention to several concluding paragraphs in the Inspector's General's memorandum:

In conclusion, the issue comes down to whether the funds recovered are labeled a "refund" or a "miscellaneous receipt." This labeling decision is outcome-determinative in that refunds go back to the Trust while miscellaneous receipts go to the Treasury.

We believe that "refund" is the appropriate label, for the reasons discussed above. But to the extent the answer is not clear, the Corporation should consider its interests, the equities, and likely downside consequences or risks. The Corporation's interests are served when the funds recovered are called "refunds" and go back into the Trust. The equities favor the Corporation doing precisely that: The Corporation will be making the Trust whole with funds recovered from a certifying program or member, not entitled to keep them. The downside risk is that someone will disagree – but who? And why? Someone would have to pick that fight, and the Corporation's position defending the Trust is eminently defensible, particularly as it would be relying on OIG's advice. The Corporation should do so.

April 15, 2008, memorandum, at 6.

The Inspector General's recommendation is unfortunate in at least two respects. First, the recommendation fails to show due regard for the prerogatives held by Congress in the area of appropriations and public expenditures, as well as our responsibilities to abide by the statutory provisions that embody those prerogatives. Second, the recommendation appears to offer the Inspector General himself as a substitute for the agency General Counsel on a matter of law. In my view, that type of substitution is inappropriate under these circumstances and will ultimately impair the Inspector General's effectiveness. I am communicating directly with the Inspector General on my concerns. But for purposes of this memorandum, I advise you to disregard the concluding recommendation.

CC: Gerald Walpin
Jerry Bridges

**Office of Inspector General
Corporation for National and
Community Service**

**Semiannual Report
to Congress**

October 1, 2007 - March 31, 2008

Fiscal Year 2008 Semiannual Report No. 1



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About The Office Of Inspector General

In 1993, Congress created the Corporation for National and Community Service ("Corporation"), along with this Office of Inspector General ("OIG"), in the National and Community Service Trust Act (42 U.S.C. §§ 12501-681). Independent of the agency we oversee and led by a presidential appointee, the OIG conducts audits and investigations of Corporation programs, including AmeriCorps, Volunteers In Service to America ("VISTA"), the National Civilian Community Corps, Learn and Serve America, and Senior Corps. The OIG also examines Corporation operations, and State community service programs that receive and distribute the majority of Corporation grant funds. Based on the results of our work, and in addition to our audit reports and criminal and civil referrals based on our investigations, the OIG recommends to the Corporation policies to promote economy and efficiency.

This semiannual report, as required by the Inspector General Act of 1978, details our work for the first six months of Fiscal Year 2008. It is being transmitted to the Corporation's Chief Executive Officer, Board of Directors, and Members of Congress.

A Message From Inspector General Gerald Walpin

April 30, 2008

I'm pleased to present the Office of Inspector General's ("OIG") Semiannual Report to Congress and share with you the achievements and challenges my staff and I have experienced during the period October 1, 2007, through March 31, 2008.



There was good news on two major oversight fronts during this reporting period. Our audit of the Corporation for National and Community Service's ("Corporation") 2007 Financial Statements resulted in a clean opinion and, for the first time, found no significant deficiencies or material weaknesses. This result can be attributed to efforts by Corporation management to improve its financial reporting, combined with the diligent work of the OIG Audit Section in ensuring prompt and full disclosure by the Corporation. Also, our Federal Information Security Management Act ("FISMA") Independent Evaluation found significant improvements in the Corporation's information technology security compared to prior OIG evaluations. The enhancements included increased information technology staffing and security awareness training for all system users, as well as improved monitoring and testing of Corporation systems. Our report did recommend, however, that the Corporation improve its oversight of contractors and grantees that store and process information on its behalf.

Overall, our Audit Section issued 13 reports during this period and identified questioned costs totaling \$332,000, as well as \$499,000 in taxpayer funds that could be put to better use. We expect those numbers to increase as a result of our proactive stance in the audit resolution process. Working with Corporation officials, we are seeking to maximize monetary recoveries resulting from audit findings and to identify the parties directly responsible for errors and therefore liable for the reimbursement of misspent funds.

We are also working with the Corporation to expedite the process of audit report resolution and conclusions, which depend on Corporation decisions based on our audit findings. This process has too often dragged on beyond the schedule set forth in Corporation policy. The quicker that the Final Management Decision is made on an OIG audit, the sooner improperly charged funds can be returned to the Corporation for proper use.

Our Investigations Section opened 17 cases and closed 25 actions, resulting in the recovery of more than \$523,000 in Corporation funds, with work continuing towards the potential recovery of an additional \$2.314 million.

In our ongoing effort to put wrongdoers on notice that there is no such thing as a small fraud or offense committed against the public's trust and purse, our investigations led to five successful criminal prosecutions, three indictments in pending cases, and the debarment of four convicted persons from participation in Federal grant programs. Three additional OIG referrals for debarment are awaiting Corporation action.

Our outreach to the prosecutorial community, including the presentation of detailed and compelling referrals, also continued to bear fruit. Overcoming longstanding arguments that our cases tend to involve "low-dollar amounts," we had five cases accepted for prosecution by United States Attorneys and local jurisdictions, and experienced only one declination.

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Both our audits and investigations noted troubling problems with member eligibility and the recording and reporting of member service hours. The causes for these problems range from human error and ignorance of regulations to outright fraud. We have expressed our concerns to Corporation management and its grantees, stressing that service hour compilation and reporting is the basis for determining member eligibility for education awards and accrued interest awards. We are working with the Corporation to strengthen oversight, controls, and grantee accountability regarding service hours and member eligibility.

The OIG also has been working with Corporation officials to strengthen the requirement that criminal background checks be conducted prior to deployment for all volunteers who will be serving with children, the disabled, elderly and other vulnerable persons. During this reporting period, the Corporation expanded its background check requirement to cover all Foster Grandparent and Senior Companion volunteers, as well as AmeriCorps members, under a new regulation which effectively supports our audit work. All members or volunteers who were enrolled after November 23, 2007, and who work with vulnerable persons, must undergo pre-service criminal background checks in order to be eligible for service and member benefits. The regulation also covers grant-funded program staff. Grantees which fail to adhere to the rules face sanctions, including refunding to the Corporation the costs of living allowances and education awards given to ineligible members, and stipends and other benefits given to volunteers and grant-supported program staff. In egregious cases of noncompliance, grantees can have their grants suspended or withdrawn.

Our technical staff continues to find ways to help the OIG work smarter and faster. During this reporting period, we began work on a Computer Management System that will assist our investigators in their efforts to bring wrongdoers to justice. Our information technology staff has also assisted its Corporation counterparts in addressing problems with system implementation, shared its expertise on detecting employee travel card fraud, and participated in joint efforts to improve database and system security and user awareness.

All of this fine work has been achieved despite increasing budget restraints which I fear could eventually jeopardize continuation of the OIG's excellent record as a steward of taxpayer funds invested in National Service. After years of expanding our oversight activity, including the careful budgeting of two-year money (which is no longer available) to fulfill and enhance our audit and investigative missions, the OIG in Fiscal Year 2008 has had to absorb a 15 percent funding reduction, from \$6.9 million to \$5.828 million.

This cut has greatly impacted our ability to conduct the contracted random audits of grantees that are so essential to our oversight duties and are mandated by Congress. We were able to award contracts for 14 grant audits in FY 2007. Several of these audits, along with reports issued under contracts initiated during the previous fiscal year, resulted during FY 2007 in the questioning of more than \$5 million in claimed grant costs and in more than 180 recommendations to improve program and Corporation operations.

For FY 2008, our reduced financial circumstances allow for only three grant audit contracts.

Our Audit Section is working hard to offset the impact of the shortfall, conducting more staff-produced audits and focusing on key issues and on grantees shown to have the highest risk of financial irregularities. But there is no way totally to offset the loss of large-scale, contract grant audits which play a crucial role in monitoring and improving grantee performance, both through uncovering improprieties at the entity being audited, and through the deterrent effect on all grantees from the knowledge that the OIG engages in random audits and that any grantee might be next.

The outlook for effective and proactive OIG oversight is no brighter for FY 2009. Our carefully considered request to the Office of Management and Budget ("OMB") for \$7.245 million would have allowed for seven contract audits during the coming fiscal year. OMB's initial passback number for OIG was \$6.935 million. While we thought that our performance and plans warranted our request in full, we decided not to appeal. Unfortunately, in negotiating the Corporation's independent appeal from its passback number, OMB reallocated \$423,000 of the amount OMB had initially agreed to

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provide to OIG, and used it to increase the Corporation's FY 2009 budget allocation, resulting in OIG's number being whittled down to \$6.512 million by OMB. This amount, if allowed to stand, would again allow for only three contracted grant audits.

When I questioned this action, OMB officials suggested that the OIG ask Corporation officials for the disputed \$423,000. I rejected this suggested course of action of going hat-in-hand to the Corporation as totally inconsistent with the OIG's independence. My staff and I will continue, through this report and discussions with Congressional staff, to inform Congress of – as we are statutorily required to do – the adverse impact of the reduced appropriations on the OIG's ability to perform the duties which Congress has assigned it.

Finally, while guarding our independence, I have actively pursued efforts during this period to interact with Corporation officials and employees in an effort to inform them about our role and work, obtain knowledge of the Corporation's operations and problems, and engender a cooperative atmosphere.

It is imperative that the OIG demonstrate that, while it acts independently of the Corporation, it is motivated to assist the Corporation in its service endeavor. For that purpose, I meet every two weeks separately with the Corporation's Chief Executive Officer and Chief Financial Officer, permitting with each a very candid discussion of my views and recommendations on how the Corporation can more effectively operate and ensure against waste, fraud and abuse, while providing the best service to needy persons and communities. The relationship is excellent: The Corporation has welcomed our input, accepted our recommendations with few exceptions and, as to those, we have frankly discussed our differences without being disagreeable. I applaud the Corporation management in its overall attitude towards the OIG and its recognition that a candid relationship with the OIG is in the Corporation's best interests.

My staff and I also continue to give fraud awareness and audit briefing presentations at Corporation gatherings across the country. The OIG was also an active participant in the Corporation's holiday celebration and charity fund drive, as well as its annual employee recognition event at which, to inform Corporation staff of the individual talents and qualities that exist in the OIG staff, I presented our first annual "Inspector General Award" to Senior Budget Analyst Karen Howard.

I am proud of the very able, conscientious, and dedicated OIG staff with whom I am privileged to serve. I find that morale is magnificent, primarily because they all feel that our office is accomplishing its purpose: to root out the small number of bad apples in the Corporation's operations while helping the vast preponderance of Corporation employees, grantee personnel and volunteers in reaching the goal of best utilizing every penny Congress has appropriated for National Service.

SECTION 22—COMMUNICATIONS WITH THE CONGRESS AND THE PUBLIC AND
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22.1 Confidentiality of budget deliberations.

The nature and amounts of the President's decisions and the underlying materials are confidential. Do not release the President's decisions outside of your agency until the Budget is transmitted to the Congress. The materials underlying those decisions should not be released at any time, except in accordance with this section. In addition, outyear discretionary data is considered pre-decisional and should not be released without prior OMB approval. (For additional information on the confidentiality of pre-decisional budget information, please consult OMB Memorandum M-01-17 of April 25, 2001.)

Presidential decisions on current and budget year estimates (other than forecasts of items that will be transmitted formally later), both in total and in detail, become the "proposed appropriations" as that term is used in the Budget and Accounting Act of 1921, as amended, and must be justified by your agency. Do not release agency justifications provided to OMB and any agency future year plans or long-range estimates to anyone outside the Executive Branch, except in accordance with this section.

22.2 Congressional testimony and communications.

The Executive Branch communications that led to the President's budgetary decisions will not be disclosed either by the agencies or by those who have prepared the budget. In addition, agency justifications provided to OMB and any agency future year plans or long-range estimates will not be furnished to anyone outside the Executive Branch, except in accordance with this section.

When furnishing information on appropriations and budgetary matters, you (and your agency representatives) should be aware of the following limitation on communications:

"...An officer or employee of an agency may submit to Congress or a committee of Congress an appropriations estimate or request, a request for an increase in that estimate or request, or a recommendation on meeting the financial needs of the Government only when requested by either House of Congress" (31 U.S.C. 1108(e)).

You should also be aware of restrictions on communications to influence legislation that are not conducted through proper official channels (18 U.S.C. 1913).

After formal transmittal of the budget, an amendment, or a supplemental appropriations request, the following policies apply when testifying before any congressional committee or communicating with Members of the Congress:

- Witnesses will give frank and complete answers to all questions.

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- Witnesses will avoid volunteering personal opinions that reflect positions inconsistent with the President's program or appropriation request.
- If statutory provisions exist for the direct submission of the agency budget request to the Congress, OMB may provide you additional materials supporting the President's Budget request that you will forward to the Congress with the agency testimony. Witnesses will be prepared to explain the agency submission, the request in the President's Budget, and any justification material.
- When responding to specific questions on program and appropriations requests, witnesses will not provide the agency request to OMB or plans for the use of appropriations that exceed the President's request. Typically, witnesses are responsible for one or a few programs, whereas the President is responsible for all the needs of the Federal Government given the revenues available. Where appropriate, witnesses should explain this difference in perspective and that it is therefore not appropriate for them to support appropriations above the President's request.
- When asked to provide a written response that involves a statement of opinion on program and appropriations requests, witnesses will provide a reply through the agency head.
- Do not let your communications be perceived as an "appropriations estimate or request ... or an increase in that estimate or request" (31 U.S.C. 1108). You are expected to support the President's budgetary decisions and seek adjustments to those decisions only through established procedures if your agency head determines such action is necessary.

22.3 Clearance of materials for the Congress and the media.

Policy consistency between the President's Budget and the budget-related materials prepared for the Congress and the media is essential. To ensure this consistency, you are required to submit budget-related materials to OMB for clearance prior to transmittal to congressional committees, individual Members of the Congress or their staff, or the media. Unless a specific exemption is approved by OMB, materials subject to OMB clearance include:

- All budget justifications and budget-related oversight materials;
- Testimony before and letters to congressional committees;
- Written responses to congressional inquiries or other materials for the record;
- Materials responding to committee and subcommittee reporting requirements;
- Capability statements;
- Appeals letters;
- Reprogramming requests;
- Related cost information;

- Financial management documents addressing budget and policy issues (e.g., some accountability reports or transmittal documents for audited financial statements); and
- Proposed press releases relating to the President's Budget.

Provide this information to OMB five working days in advance to allow adequate review time. Performance and Accountability Reports should be provided 10 days in advance unless a shorter period is approved by OMB. OMB review of reprogramming requests may take longer in some circumstances (e.g., if the request has not been coordinated or if supporting materials have not been provided concurrently). In exceptional circumstances, where the response time is very short, agencies may request oral clearance or make other arrangements for expedited review. Immediately after the budget transmittal and after subsequent transmittals, provide OMB with a schedule of anticipated congressional reviews that require agency oral and written participation. Revise this schedule as appropriate.

Address any questions you have about this subsection to the OMB representatives whom you normally consult on budget-related matters.

22.4 Clearance of changes to the President's Budget.

If you want to propose changes to the President's Budget (e.g., appropriations language, limitations, balance sheets required by the Government Corporation Control Act, and dollar amounts), you must follow the confidentiality and clearance guidance provided in this section and submit a written request as described in section 110.3. OMB will notify you whether a formal transmittal of the change will be made.

When it is possible to reduce the amount of an appropriations request before action has been taken by the Appropriations Committee of either House, the head of your agency should inform OMB promptly. Before your agency head decides to request restoration of a reduction, the reasons for the reduction, the circumstances under which it was made, and its significance to the President's program should be carefully considered.

22.5 Information available to the public.

Many agency budget documents that are subject to the Freedom of Information Act (FOIA) are exempt from mandatory release pursuant to 5 U.S.C. 552(b)(5). Depending on the nature of the record requested, other FOIA exemptions may apply. When deciding whether to withhold a budget document that is exempt from mandatory release, follow the FOIA memorandum issued by the Attorney General on October 12, 2001. Any discretionary decision by an agency to disclose protected information should be made only after full and deliberate consideration of the institutional interests that could be implicated by disclosure, as well as after consultation with OMB. Agency heads are responsible for determining the propriety of record releases under FOIA.

Certain agencies headed by a collegial body may be required to hold their meetings open to public observation unless the agency properly determines that the matter to be discussed warrants the closing of those meetings for reasons enumerated in the Government in the Sunshine Act (Public Law 94-409). Some meetings covered by that Act may pertain to budgetary information discussed in this Circular. Although, as with the FOIA, it is not possible to determine merely by the generic category of such information whether such an agency would be authorized to close a particular meeting covered by the Act, the premature disclosure of budgetary information may "be likely to significantly frustrate implementation of a proposed agency action" (5 U.S.C. 552b(c)(9)(B)). Furthermore, other exemptions from the open meeting requirements of the Act may apply. Such agencies are responsible for the propriety of determinations that would lead to the disclosure of this budgetary information.

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22.6 Congressional budget justifications.

Congressional budget justification materials include the performance budget submission and additional information described below as well as detailed descriptions of agencies' activities and proposals at the program, project, and activity level.

(a) Materials for performance budget submission to the Congress.

For FY 2010, you will have submitted your budget to OMB as a performance budget, presenting what you propose to accomplish in the upcoming year and what resources your proposal will require. Descriptions of the performance budget are presented in sections 51 and 200. If you are participating in the Performance and Accountability Report (PAR) pilot, you should follow the instructions in Section 230 to transmit the Annual Performance Report (APR) with your congressional budget justification.

You should revise the performance budget submission to reflect decisions made in the Administration's budget process, and use the performance budget format as the basis for your justification of the budget request to the Congress. You should consult with your congressional representatives to agree on the performance budget format, including the use of the results of PART assessments, prior to submitting your congressional justification. Your OMB representative should be included in those consultations as appropriate.

Your congressional justification should be in the form of a "performance budget" to the greatest extent possible. A performance budget should include:

- A description of what you plan to accomplish, organized by strategic goal;
- Background on what you have accomplished;
- Performance targets for current and budget years and how you expect to achieve those targets; and
- What resources you are requesting to achieve the targets.

Where possible, you should include the full cost of a program, and you should align budget accounts with programs.

You should provide your proposed justification to the Congress to your OMB representative with sufficient time for review. Because agencies participating in the PAR pilot will be including additional information in their congressional justification, they should plan to provide OMB with additional time to review the document.

(b) Material to be included in congressional budget justifications.

Consistent with 41 U.S.C. 433(h), you should identify funding levels requested for education and training of the acquisition workforce in your budget justifications to the Congress.

Consistent with 42 U.S.C. 8255, you should identify funds requested for energy conservation measures in your budget justifications to the Congress.

You should provide the Congress with information to assess current and proposed capital projects that is consistent with the Administration's budget proposals, including: appropriate information on planning; budgeting, including the current or proposed use of incremental or full funding; acquisition; and management of the projects.

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You should also provide the Congress with information on the expected benefits you will receive from the President's E-Government initiatives and the funding levels for FY 2010 by account code. Include a link to the website containing your updated exhibit 300s (see section 300.7).

You must submit all budget justification materials to OMB for clearance before transmitting them to the Congress.

(c) Availability of congressional budget justifications.

You should make your full congressional budget justification materials available to the public and post the materials on the Internet within two weeks after transmittal of those materials to the Congress. Release of these materials must be done in accordance with the requirements of this section and any relevant provisions of law. Materials will not be released if disclosure is prohibited by statute, the materials are classified or must be kept secret in the interest of national security or foreign policy, or the materials are otherwise exempt from release pursuant to 5 U.S.C. 552(b).