

# MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202-\_\_\_\_\_

DEC 6, 1995

TO: All Regional Program Review Staff

FROM: Keith Kistler, Acting Chief, IRB/IMD

RE: Target Numbers and Reviewer Discretion

Several of you have expressed some uncertainty about the target numbers that are used in the program review process. Specifically, over the past few weeks, IRB/IMD has received questions about its policy that reviewers should look at 15 files per award year; its policy that reviewers should examine 34 separate focus items; and its policy that a 10% error rate is a prerequisite for file reconstruction findings. This memorandum will provide further guidance and clarification on these target numbers, as well as the use of reviewer discretion in interpreting them.

As all of you know, formal IRB guidance indicates that reviewers should examine 15 student files per award year reviewed. Nonetheless, while 15 files is the goal, reviewers are not strictly required to look at 15 files in every instance. There may be situations in which it will not be necessary to look at all 15 files; likewise, there may be situations in which a reviewer will need to look at more than 15 files.

For instance, after identifying a set of 15 files to review, a reviewer might peruse the first 10 files and discover no significant problems. At that point, the reviewer might determine that it would be more efficient to skip the remaining 5 files and proceed to some other task. In this way, the reviewer, exercising his or her professional judgment, has elected, based on the entirety of the circumstances, to examine only 10 of the 15 files for that award year.<sup>1</sup>

Likewise, there may be situations where the reviewer might decide that looking at 15 files per award year would be insufficient to make a determination about whether Title IV funds are being administered properly. For instance, the 15 files that the reviewer examined might not have included a sufficient number of students participating in a particular program. Concerned about that program, the reviewer might

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<sup>1</sup> As explained later in this memorandum, any deviation from formal IRB procedure must be supported by adequate documentation.

then decide to expand the number of files that he or she explores, so that the particular program can be examined.<sup>2</sup>

An analogous situation concerns how reviewers are to treat the 34 focus items. Again, while examining 34 items is the goal, it is not an absolute requirement. There can be situations where the reviewer decides, in the exercise of his or her professional judgment, that it would be neither necessary nor efficient to look at the full 34 items. Likewise, the fact that 34 focus items are specifically identified does not and should not preclude the reviewer from examining additional areas if a problem is detected.

Finally, IRB/IMD has also received several inquiries about its policy of requiring file reconstructions for findings where the error rate exceeds 10%.<sup>3</sup> Once again, 10% is a goal that reviewers should follow, but it can be over-ridden in specific situations by reviewer discretion. For example, the error rate might be 9%, but there may be other factors that lead the reviewer to decide that a file reconstruction is nonetheless warranted. Similarly, the error rate might be 11%, but the reviewer might decide that the overall situation does not warrant a file reconstruction.

Please note that, in each of the examples cited above, the details about the specific factors that would inform the reviewers' discretion have been left vague. For example, although I have indicated that there may be factors that would lead a reviewer to require a file reconstruction despite an error rate of only 9%, I have deliberately not tried to provide anything like an exhaustive list of what those factors might be. The point is that any such

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<sup>2</sup> If a reviewer does decide to look at files beyond the 15 that were randomly selected by the IPOS Statistical Sampling System, the additional files should at least be chosen from the full statistical sample. Please see the Statistical Sampling Handbook for further information.

<sup>3</sup> Observe that the principles of professional judgment described in this memorandum can also apply to situations other than the ones specifically identified here. For example, IRB Procedure Memorandum 95-6 states the general rule that if a school fails to meet the deadline for responding to a Program Review Report, the reviewer is to assess liability for all Title IV funds received by the institution for the pertinent time periods. Here again, however, reviewers' professional judgment may come into play. To illustrate: A reviewer might decide that, based on the specific situation involved, requiring the school to repay all Title IV funds would be too harsh a penalty, and might therefore grant the school an extension. The central point here is that the principles of professional judgment detailed in this memorandum are applicable to situations other than the ones specifically identified.

determination must be based on the specific facts of the case and the best professional judgment of the reviewer (and his or her supervisors). To attempt a comprehensive list of the factors that might influence the reviewers' discretion would be futile.

Although reviewers are encouraged (and, in fact, required) to use their best professional judgment in a variety of situations, I do not intend for this memorandum to serve as a license for reviewers to ignore formal guidance from IRB Headquarters.<sup>4</sup> IRB policies are carefully developed over time with an eye towards making the entire review process legally supportable in the event of an administrative hearing. Therefore, reviewers must understand that they are expected to abide by IRB procedure, even though such procedure may occasionally be over-ridden based on the unique circumstances of a particular case.

By way of illustration: It should be clear from the above discussion that a reviewer might decide, based on all the relevant circumstances and using his or her professional judgment, to examine only 10 files for a given award year at a particular school. This would be an example of an appropriate use of professional judgment. However, if that same reviewer were to decide to look at 10 files for every award year at all schools that he or she examines, this would be inappropriate and an abuse of discretion. Naturally, reviewers may feel free to call upon their supervisors, or upon IRB Headquarters, for advice and guidance on the appropriate use of professional judgment.

One final point: Whenever a reviewer does make the decision to digress from formal IRB procedure, that reviewer must thoroughly document the reason(s) for that deviation. What constitutes adequate documentation will of course depend on the particular circumstances of the case. Among the factors to be considered might be: the extent of the deviation from formal policy; the likelihood of an eventual administrative appeal; and the monetary value of contested issues. The weightier these factors become, the more detailed an explanation of the reasons for deviation from formal procedure will be expected. Bear in mind that if a reviewer fails to document the reasons for deviation from formal guidance, the Department may have difficulty supporting the reviewer's conduct in the event of an administrative hearing. In fact, the reviewer's failure to document may be grounds for finding that the employee has been derelict in the conduct of his or her duties.

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<sup>4</sup> Of course, all IRB procedures reflect input from both Headquarters and regional staff. Therefore, the procedures are truly a collaborative effort, not simply fiat from IRB Headquarters.

Thank you all for your attention to this memorandum. If you have any questions or concerns, please feel free to contact me at (202) 708-8701.

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