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CODE OF FEDERAL REGULATIONS

Title 34
Education

Parts 1 to 299

Revised as of July 1, 2022

Containing a codification of documents
of general applicability and future effect

As of July 1, 2022

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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 34 CFR 3.1 *refers to title 34, part 3, section 1.*

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The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

The appropriate revision date is printed on the cover of each volume.

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The Paperwork Reduction Act of 1980 (Pub. L. 96–511) requires Federal agencies to display an OMB control number with their information collection request.

Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

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(a) The incorporation will substantially reduce the volume of material published in the Federal Register.

(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR part 51.

What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001, or call 202-741-6010.

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An index to the text of ''Title 3—The President'' is carried within that volume.

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A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

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OLIVER A. POTTS,
Director,
Office of the Federal Register
July 1, 2022

THIS TITLE

Title 34—EDUCATION is composed of four volumes. The parts in these volumes are arranged in the following order: Parts 1–299, parts 300–399, parts 400–679, and part 680 to end. The contents of these volumes represent all regulations codified under this title of the CFR as of July 1, 2022.

For this volume, Michele Bugenhagen was Chief Editor. The Code of Federal Regulations publication program is under the direction of John Hyrum Martinez, assisted by Stephen J. Frattini.

Title 34—Education

(This book contains parts 1 to 299)

Part

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PARTS 1–2 [RESERVED]

PART 3—OFFICIAL SEAL

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3.1 Definitions.
3.2 Description.
3.3 Authority to affix seal.
3.4 Use of the seal.

AUTHORITY: 20 U.S.C. 3472 and 3485, unless otherwise noted.

SOURCE: 45 FR 86491, Dec. 31, 1980, unless otherwise noted.

§ 3.1 Definitions.

For the purposes of this part:

(a) *ED* means all organizational units of the Department of Education.

(b) *Embossing Seal* means a display of the form and content of the Official Seal made on a die so that the Seal can be embossed on paper or other media.

(c) *Official Seal* means the original(s) of the Seal showing the exact form, content, and colors.

(d) *Replica* means a copy of the Official Seal displaying the identical form, content, and colors.

(e) *Reproduction* means a copy of the Official Seal displaying the form and content, reproduced in only one color.

(f) *Secretary* means the Secretary of Education.

§ 3.2 Description.

The Official Seal of the Department of Education is described as follows: Standing upon a mound, an oak tree with black trunk and limbs and green foliage in front of a gold rising sun, issuing gold rays on a light blue disc, enclosed by a dark blue border with gold edges bearing the inscription ''DEPARTMENT OF EDUCATION'' above a star at either side of the words ''UNITED STATES OF AMERICA'' in smaller letters in the base; letters and stars in white. The Offical Seal of the Department is modified when used in reproductions in black and white and when embossed. As so modified, it appears below.

§ 3.3 Authority to affix seal.

The Secretary and the Secretary's designees are authorized to affix the Official Seal, replicas, reproductions, and embossing seals to appropriate documents, certifications, and other material for all purposes as authorized by this section.

(Authority: 20 U.S.C. 3474)

§ 3.4 Use of the seal.

(a) Use by any person or organization outside of the Department may be made only with the Department's prior written approval.

(b) Requests by any person or organization outside of the Department for permission to use the Seal must be made in writing to Director of Public Affairs, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202, and must specify, in detail, the exact use to be made. Any permission granted applies only to the specific use for which it was granted and is not to be construed as permission for any other use.

(c) In regard to internal use, replicas may be used only:

(1) For display in or adjacent to ED facilities, in Departmental auditoriums, presentation rooms, hearing rooms, lobbies, and public document rooms;

(2) In offices of senior officials;

(3) For official awards, certificates, medals, and plaques;

(4) For electronic media, motion picture film, video tape and other audio-visual media prepared by or for ED and attributed thereto;

(5) On official publications which represent the achievements or mission of ED;

(6) In non-ED facilities in connection with events and displays sponsored by ED, and public appearances of the Secretary or other senior ED officials; and

(7) For other internal purposes as determined by the Director for Management;

(d) In regard to internal use, reproductions may be used only—

(1) On ED letterhead stationery;

(2) On official ED identification cards, security, and other approved credentials;

(3) On business cards for ED employees;

(4) On official ED signs;

(5) On official publications or graphics issued by and attributed to ED, or joint statements of ED with one or more other Federal agencies, State or local governments, or foreign governments;

(6) On official awards, certificates, and medals;

(7) On electronic media, motion picture film, video tape, and other audiovisual media prepared by or for ED and attributed thereto; and

(8) For other internal purposes as determined by the Director for Management.

(e) Embossing seals may be used only internally—

(1) On ED legal documents, including interagency or intergovernmental agreements, agreements with State or local governments, foreign patent applications, certification(s) of true copies, and similar documents;

(2) On official awards and certificates; and

(3) For other purposes as determined by the General Counsel or the Director for Management.

(f) Falsely making, forging, counterfeiting, mutilating, or altering the Official Seal, replicas, reproductions, or embossing seals, or knowingly using or possessing with fraudulent intent and altered official seal, replica, reproduction or embossing seal is punishable under 18 U.S.C. 506.

(g) Any person using the Official Seal, replicas, reproductions, or embossing seals in a manner inconsistent with the provisions of this part is subject to the provisions of 18 U.S.C. 1017, which states penalties for the wrongful use of an Official Seal, and to other provisions of law as applicable.

[45 FR 86491, Dec. 31, 1980, as amended at 53 FR 4620, Feb. 17, 1988; 56 FR 65388, Dec. 16, 1991; 65 FR 57286, Sept. 22, 2000]

PART 4—SERVICE OF PROCESS

§ 4.1 Service of process required to be served on or delivered to Secretary.

Summons, complaints, subpoenas, and other process which are required to be served on or delivered to the Secretary of Education shall be delivered to the General Counsel or a Deputy General Counsel, by mail at 400 Maryland Avenue SW., Washington, DC 20202 or by personal service at that address. The persons above designated are authorized to accept service of such process.

(Authority: 5 U.S.C. 301)

[47 FR 16780, Apr. 20, 1982]

PART 5—AVAILABILITY OF INFORMATION TO THE PUBLIC

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AUTHORITY: 5 U.S.C. 552, 20 U.S.C. 1221e-3, and 20 U.S.C. 3474.

SOURCE: 75 FR 33510, June 14, 2010, unless otherwise noted.

Subpart A—General Provisions

§5.1 Purpose.

This part contains the regulations that the United States Department of Education follows in processing requests for records under the Freedom of Information Act, as amended, 5 U.S.C. 552. These regulations must be read in conjunction with the FOIA, including its exemptions to disclosure, and, when appropriate, in conjunction with the Privacy Act of 1974, as amended, 5 U.S.C. 552a, and its implementing regulations in 34 CFR part 5b.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§5.2 Definitions.

As used in this part:

(a) *Act* or *FOIA* means the Freedom of Information Act, as amended, 5 U.S.C. 552.

(b) *Department* means the United States Department of Education.

(c) *Component* means each separate bureau, office, board, division, commission, service, administration, or other organizational entity of the Department.

(d) *FOIA request* means a written request for agency records that reasonably describes the agency records sought, made by any person, including a member of the public (U.S. or foreign citizen/entity), partnership, corporation, association, and foreign or domestic governments (excluding Federal agencies).

(e)(1) *Agency records* are documentary materials regardless of physical form or characteristics that—

(i) Are either created or obtained by the Department; and

(ii) Are under the Department's control at the time it receives a FOIA request.

(2) *Agency records* include—

(i) Records created, stored, and retrievable in electronic format;

(ii) Records maintained for the Department by a private entity under a records management contract with the Federal Government; and

(iii) Documentary materials preserved by the Department as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Department or because of the informational value of data contained therein.

(3) *Agency records* do not include tangible, evidentiary objects or equipment; library or museum materials made or acquired and preserved solely for reference or exhibition purposes; extra copies of documents preserved only for convenience of reference; stocks of publications; and personal records created for the convenience of an individual and not used to conduct Department business or incorporated into the Department's record keeping system or files.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

Subpart B—Agency Records Available to the Public

§5.10 Public reading room.

(a) *Electronic inspection*. (1) Pursuant to 5 U.S.C. 552(a)(2), the Department makes available for public inspection in an electronic format the following records created on or after November 1, 1996:

(i) Final opinions and orders in adjudications;

(ii) Statements of policy and interpretations adopted by the Department and not published in the FEDERAL REGISTER;

(iii) Administrative staff manuals and instructions affecting the public; and

(iv) Copies of all agency records regardless of form or format released to the public pursuant to a FOIA request that the Department determines are likely to be the subject of future FOIA requests or have been requested three or more times.

(2) The Department currently makes the agency records described in paragraph (a)(1) of this section available for public inspection in an electronic format through its electronic reading room located on the Department's FOIA website at *http://www2.ed.gov/policy/gen/leg/foia/readingroom.html*.

(b) *Public reading room*. The Department may maintain a public reading

room containing the agency records described in paragraph (a)(1) of this section. The Department's public reading room is currently located at the National Library of Education, 400 Maryland Avenue SW, Plaza Level (Level B), Washington, DC 20202–0008. To visit the public reading room, members of the public can contact the Department's FOIA Service Center via email at *EDFOIAManager@ed.gov*.

(c) *Hard copies*. For any agency records that are not made available for public inspection in the FEDERAL REGISTER or pursuant to paragraph (a) of this section, the Department will, upon request, provide hard copies in accordance with 5 U.S.C. 552(a)(3).

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(2), 20 U.S.C. 3474)

[75 FR 33510, June 14, 2010, as amended at 84 FR 67867, Dec. 12, 2019]

§ 5.11 Business information.

(a) *General*. The Department discloses business information it obtains from a submitter under the Act in accordance with this section.

(b) *Definitions*. For purposes of this section:

(1) *Business information* means commercial or financial information obtained by the Department from a submitter that may be protected from disclosure under 5 U.S.C. 552(b)(4) (Exemption 4 of the Act).

(2) *Submitter* means any person or entity (including corporations; State, local, and tribal governments; and foreign governments) from whom the Department obtains business information.

(c) *Designation of business information*.

(1) A submitter must use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portion of its submission that it considers to be business information protected from disclosure under Exemption 4 of the Act.

(2) A submitter's designations are not binding on the Department and will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(3) A blanket designation on each page of a submission that all information contained on the page is protected from disclosure under Exemption 4 presumptively will not be considered a good faith effort.

(d) *Notice to submitters*. Except as provided in paragraph (g) of this section, the Department promptly notifies a submitter whenever a FOIA request or administrative appeal is made under the Act seeking disclosure of the information the submitter has designated in good faith as business information protected from disclosure under paragraph (c) of this section, or the Department otherwise has reason to believe that it may be required to disclose information sought to be designated by the submitter as business information protected from disclosure under Exemption 4 of the Act. This notice includes either a description of the business information requested or copies of the requested agency records or portions of agency records containing the requested business information as well as a time period, consistent with § 5.21(c), within which the submitter can object to the disclosure pursuant to paragraph (e) of this section.

(e) *Opportunity to object to disclosure*.

(1) If a submitter objects to disclosure, it must submit to the Department a detailed written statement specifying all grounds under Exemption 4 of the Act for denying access to the information, or a portion of the information sought.

(2) A submitter's failure to object to the disclosure by the deadline established by the Department in the notice provided under paragraph (d) of this section constitutes a waiver of the submitter's right to object to disclosure under paragraph (e) of this section.

(3) A submitter's response to a notice from the Department under paragraph (d) of this section may itself be subject to disclosure under the Act.

(f) *Notice of intent to disclose*. The Department considers a submitter's objections and submissions made in support thereof in deciding whether to disclose business information sought to be protected by the submitter. Whenever the Department decides to disclose information over a submitter's objection, the Department gives the submitter written notice, which includes:

(1) A statement of the reasons why the submitter's objections to disclosure were not sustained.

(2) A description of the information to be disclosed.

(3) A specified disclosure date that is a reasonable time subsequent to the notice.

(g) *Exceptions to notice requirements.* The notice requirements of paragraph (d) of this section do not apply if—

(1) The Department does not disclose the business information of the submitter;

(2) The Department has previously lawfully published the information;

(3) The information has been made available to the public by the requester or by third parties;

(4) Disclosure of the information is required by statute (other than the Act) or regulation issued in accordance with the requirements of Executive Order 12600 (52 FR 23781, 3 CFR, 1987 Comp., p. 235); or

(5) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous, except that, in such case, the Department must provide the submitter with written notice of any final administrative disclosure determination in accordance with paragraph (f) of this section.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of a submitter's business information, the Department promptly notifies the submitter.

(i) *Corresponding notice to requester.* The Department notifies the requester whenever it notifies a submitter of its opportunity to object to disclosure, of the Department's intent to disclose requested information designated as business information by the submitter, or of the filing of a lawsuit.

(j) *Notice of reverse FOIA lawsuit.* Whenever a submitter files a lawsuit seeking to prevent the disclosure of the submitter's information, the Department promptly notifies the requester, and advises the requester that its request will be held in abeyance until the lawsuit initiated by the submitter is resolved.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.12 Creation of agency records not required.

In response to a FOIA request, the Department produces only those agency records that are not already publicly available and that are in existence at the time it receives a request. The Department does not create new agency records in response to a FOIA request by, for example, extrapolating information from existing agency records, reformatting available information, preparing new electronic programs or databases, or creating data through calculations of ratios, proportions, percentages, trends, frequency distributions, correlations, or comparisons.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.13 Preservation of agency records.

The Department does not destroy agency records that are the subject of a pending FOIA request, appeal, or lawsuit.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

Subpart C—Procedures for Requesting Access to Agency Records and Disclosure of Agency Records

§ 5.20 Requirements for making FOIA requests.

(a) *Making a FOIA request.* Any FOIA request for an agency record must be in writing, must include a valid electronic mail or physical address, and must be transmitted to the Department as indicated on the Department's website. See *www.ed.gov/policy/gen/leg/foia/request_foia.html.*

(b) *Description of agency records sought.* A FOIA request must reasonably describe the agency record sought, to enable Department personnel to locate the agency record or records with a reasonable amount of effort. Whenever possible, a FOIA request should describe the type of agency record requested, the subject matter of the agency record, the date, if known, or general time period when it was created, and the person or office that created it. Requesters who have detailed information that would assist in identifying and locating the agency records

sought are urged to provide this information to the Department to expedite the handling of a FOIA request.

(c) *FOIA request deemed insufficient.* If the Department determines that a FOIA request does not reasonably describe the agency record or records sought, the FOIA request will be deemed insufficient under the Act. In that case, the Department informs the requester of the reason the FOIA request is insufficient and, at the Department's option, either administratively closes the FOIA request as insufficient without determining whether to grant the FOIA request or provides the requester an opportunity to modify the FOIA request to meet the requirements of this section.

(d) *Verification of identity.* In compliance with the Privacy Act of 1974, as amended, 5 U.S.C. 552a, FOIA requests for agency records pertaining to the requester, a minor, or an individual who is legally incompetent must include verification of the requester's identity pursuant to 34 CFR 5b.5.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

[75 FR 33510, June 14, 2010, as amended at 84 FR 67868, Dec. 12, 2019]

§ 5.21 Procedures for processing FOIA requests.

(a) *Acknowledgements of FOIA requests.* The Department promptly notifies the requester when it receives a FOIA request.

(b) *Consultation and referrals.* When the Department receives a FOIA request for a record or records created by or otherwise received from another agency of the Federal Government, it either responds to the FOIA request after consultation with the other agency, or refers the FOIA request to the other agency for processing. When the Department refers a FOIA request to another agency for processing, the Department will so notify the requester.

(c) *Decisions on FOIA requests.* The Department determines whether to comply with a FOIA request within 20 working days after the appropriate component of the Department first receives the request. This time period commences on the date that the request is received by the appropriate component of the Department, but commences no later than 10 calendar days after the request is received by the component of the Department designated pursuant to § 5.20(a) to receive FOIA requests for agency records. The Department's failure to comply with these time limits constitutes exhaustion of the requester's administrative remedies for the purposes of judicial action to compel disclosure.

(d) *Requests for additional information.* The Department may make one request for additional information from the requester and toll the 20-day period while awaiting receipt of the additional information.

(e) *Extension of time period for processing a FOIA request.* The Department may extend the time period for processing a FOIA request only in unusual circumstances, as described in paragraphs (e)(1) through (3) of this section, in which case the Department notifies the requester of the extension in writing. For extensions of more than 10 additional working days, the Department must also notify the requester, in writing, of the right to seek dispute resolution services from the Office of Government Information Services. A notice of extension affords the requester the opportunity either to modify its FOIA request so that it may be processed within the 20-day time limit, or to arrange with the Department an alternative time period within which the FOIA request will be processed. For the purposes of this section, unusual circumstances include:

(1) The need to search for and collect the requested agency records from field facilities or other establishments that are separate from the office processing the request.

(2) The need to search for, collect, and review and process voluminous agency records responsive to the FOIA request.

(3) The need to consult with another agency or two or more agency components having a substantial interest in the determination on the FOIA request.

(f) *FOIA Public Liaison and FOIA Requester Service Center.* The Department's FOIA Public Liaison assists in the resolution of disputes between the requester and the Department. The Department provides information about

the status of a FOIA request to the requester through the Department's FOIA Requester Service Center. Contact information for the Department's FOIA Public Liaison and FOIA Requester Service Center may be found at *http://www.ed.gov/policy/gen/leg/foia/contacts.html*.

(g) *Notification of determination*. Once the Department makes a determination to grant a FOIA request in whole or in part, it notifies the requester in writing of its decision and of the right to seek assistance from the Department's FOIA Public Liaison.

(h) *Denials of FOIA requests*.

(1) Only Departmental officers or employees delegated the authority to deny a FOIA request may deny a FOIA request on behalf of the Department.

(2)(i) The Department notifies the requester in writing of any decision to deny a FOIA request in whole or in part. Denials under this paragraph can include the following: A determination to deny access in whole or in part to any agency record responsive to a request; a determination that a requested agency record does not exist or cannot be located in the Department's records; a determination that a requested agency record is not readily retrievable or reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited processing.

(ii) All determinations denying a FOIA request in whole or in part are signed by an officer or employee designated under paragraph (h)(1) of this section, and include:

(A) The name and title or position of the denying officer or employee.

(B) A brief statement of the reason or reasons for the denial, including any exemptions applicable under the Act.

(C) An estimate of the volume of agency records or information denied, by number of pages or other reasonable estimate (except where the volume of agency records or information denied is apparent from deletions made on agency records disclosed in part, or providing an estimate would harm an interest protected by an applicable exemption under the Act).

(D) Where an agency record has been disclosed only in part, an indication of the exemption under the Act justifying the redaction in the agency record (unless providing this information would harm an interest protected by an applicable exemption under the Act).

(E) A statement notifying the requester of the right to seek assistance from the Department's FOIA Public Liaison.

(F) A statement notifying the requester of the right to seek dispute resolution services from the Department's FOIA Public Liaison or the Office of Government Information Services.

(G) A statement of appeal rights and a list of requirements for filing an appeal under §5.40.

(i) *Timing of responses to FOIA requests*.

(1) *Multitrack processing*.

The Department may use two or more processing tracks to distinguish between simple and more complex FOIA requests based on one or more of the following: the time and work necessary to process the FOIA request, the volume of agency records responsive to the FOIA request, and whether the FOIA request qualifies for expedited processing as described in paragraph (i)(2) of this section.

(2) *Expedited processing*.

(i) The Department gives expedited treatment to FOIA requests and appeals whenever the Department determines that a FOIA request involves one or more of the following:

(A) A circumstance in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

(B) The urgent need of a person primarily engaged in disseminating information to inform the public about an actual or alleged Federal Government activity; or

(C) Other circumstances that the Department determines demonstrate a compelling need for expedited processing.

(ii) A requester may ask for expedited processing at the time of the initial FOIA request or at any time thereafter.

(iii) A request for expedited processing must contain a detailed explanation of the basis for the request, and must be accompanied by a statement certifying the truth of the circumstances alleged or other evidence of the requester's compelling need acceptable to the Department.

(iv) The Department makes a determination whether to grant or deny a request for expedited processing within 10 calendar days of its receipt by the component of the Department designated pursuant to § 5.20(a) to receive FOIA requests for agency records, and processes FOIA requests accepted for expedited processing as soon as practicable and on a priority basis.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

[75 FR 33510, June 14, 2010, as amended at 84 FR 67868, Dec. 12, 2019]

Subpart D—Fees

§ 5.30 Fees generally.

The Department assesses fees for processing FOIA requests in accordance with § 5.32(a), except where fees are limited under § 5.32(b) or where a waiver or reduction of fees is granted under § 5.33. Requesters must pay fees by check or money order made payable to the U.S. Department of Education, and must include the FOIA request number on the check or money order. The Department retains full discretion to limit or adjust fees.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

§ 5.31 Fee definitions.

(a) *Commercial use request* means a request from or on behalf of a FOIA requester seeking information for a use or purpose that furthers the requester's commercial, trade, or profit interests, which can include furthering those interests through litigation. For the purpose of assessing fees under the Act, the Department determines, whenever reasonably possible, the use to which a requester will put the requested agency records.

(b) *Direct costs* mean those expenses that an agency actually incurs in searching for and duplicating (and, in the case of commercial use FOIA requests, reviewing) agency records to respond to a FOIA request. Direct costs include, for example, the pro rata salary of the employee(s) performing the work (*i.e.*, basic rate of pay plus 16 percent) and the cost of operating duplication machinery. The Department's other overhead expenses are not included in direct costs.

(c) *Duplication* means making a copy of the agency record, or of the information in it, as necessary to respond to a FOIA request. Copies can be made in several forms and formats, including paper and electronic records. The Department honors a requester's specified preference as to form or format of disclosure, provided that the agency record is readily reproducible with reasonable effort in the requested form or format.

(d) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To qualify as an educational institution under this part, a requester must demonstrate that an educational institution authorized the request and that the agency records are not sought for individual or commercial use, but are instead sought to further scholarly research. A request for agency records for the purpose of affecting a requester's application for, or prospect of obtaining, new or additional grants, contracts, or similar funding is presumptively a commercial use request.

(e) *Noncommercial scientific institution* means an institution that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. A noncommercial scientific institution does not operate for a ''commercial use'', as the term is defined in paragraph (a) of this section. To qualify as a noncommercial scientific institution under this part, a requester must demonstrate that a noncommercial scientific institution authorized the request and that the agency records are sought to further scientific research

and not for a commercial use. A request for agency records for the purpose of affecting a requester's application for, or prospect of obtaining, new or additional grants, contracts, or similar funding is presumptively a commercial use request.

(f) *Representative of the news media*, or *news media requester*, means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. For the purposes of this section, the term ''news'' means information about current events or information that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals that qualify as disseminators of news and make their products available for purchase by, subscription by, or free distribution to the general public. To be regarded as a representative of the news media, a ''freelance'' journalist must demonstrate a solid basis for expecting publication, such as a publication contract or a past publication record. For inclusion in this category, a requester must not be seeking the requested agency records for a commercial use.

(g) *Review* means the examination of an agency record located in response to a FOIA request to determine whether any portion of the record is exempt from disclosure under the Act. Reviewing the record includes processing the agency record for disclosure and making redactions and other preparations for disclosure. Review costs are recoverable even if an agency record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure but does not include time spent resolving general legal or policy issues regarding the application of exemptions under the Act.

(h) *Search* means the process of looking for and retrieving agency records or information responsive to a FOIA request. Searching includes page-by-page or line-by-line identification of information within agency records and reasonable efforts to locate and retrieve information from agency records maintained in electronic form or format, provided that such efforts do not significantly interfere with the operation of the Department's automated information systems.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

§5.32 Assessment of fees.

(a) *Fees*. In responding to FOIA requests, the Department charges the following fees (in accordance with the Office of Management and Budget's ''Uniform FOIA Fee Schedule and Guidelines,'' 52 FR 10012 (March 27, 1987)), unless it has granted a waiver or reduction of fees under §5.33 and subject to the limitations set forth in paragraph (b) of this section:

(1) *Search*. The Department charges search fees, subject to the limitations of paragraph (b) of this section. Search time includes time spent searching, regardless of whether the search results in the location of responsive agency records and, if so, whether such agency records are released to the requester under the Act. The requester will be charged the direct costs, as defined in §5.31(b), of the search. In the case of computer searches for agency records, the Department charges the requester for the direct cost of conducting the search, subject to the limitations set forth in paragraph (b) of this section.

(2) *Review*. (i) The Department charges fees for initial agency record review at the same rate as for searches, subject to the limitations set forth in paragraph (b) of this section.

(ii) No fees are charged for review at the administrative appeal level except in connection with—

(A) The review of agency records other than agency records identified as responsive to the FOIA request in the initial decision; and

(B) The Department's decision regarding whether to assert that an exemption exists under the Act that was not cited in the decision on the initial FOIA request.

(iii) Review fees are not assessed for FOIA requests other than those made for a ''commercial use,'' as the term is defined in §5.31(a).

(3) *Duplication*. The Department charges duplication fees at the rate of $0.20 per page for paper photocopies of

agency records, $3.00 per CD for documents recorded on CD, and at the direct cost for duplication for electronic copies and other forms of duplication, subject to the limitations of paragraph (b) of this section.

(b) *Limitations on fees.*

(1) Fees are limited to charges for document duplication when agency records are not sought for commercial use and the request is made by—

(i) An educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or

(ii) A representative of the news media.

(2) For FOIA requests other than commercial use FOIA requests, the Department provides the first 100 pages of agency records released (or the cost equivalent) and the first two hours of search (or the cost equivalent) without charge, pursuant to 5 U.S.C. 552(a)(4)(A)(iv)(II).

(3) Whenever the Department calculates that the fees assessable for a FOIA request under paragraph (a) of this section total $25.00 or less, the Department processes the FOIA request without charge to the requester.

(4) If the Department has failed to comply with any time limit in 5 U.S.C. 552(a)(4)(A)(viii)(I), the Department may not assess search fees, except as otherwise provided in this paragraph. If the Department has determined that unusual circumstances (as described in § 5.21(e)) apply, it may assess search fees (or, for requesters with preferred fee status, it may assess duplication fees) if the Department gives the requester timely written notice under § 5.21(e) and responds to the FOIA request within 10 additional working days. If unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the Department may assess search fees (or, for requesters with preferred fee status, duplication fees) if the Department gives the requester timely written notice under § 5.21(e) and the Department discussed with the requester via written mail, electronic mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request.

(c) *Notice of anticipated fees in excess of $25.* When the Department estimates or determines that the fees for processing a FOIA request will total more than $25 and the requester has not stated a willingness to pay such fees, the Department notifies the requester of the anticipated amount of fees before processing the FOIA request. If the Department can readily anticipate fees for processing only a portion of a request, the Department advises the requester that the anticipated fee is for processing only a portion of the request. When the Department has notified a requester of anticipated fees greater than $25, the Department does not further process the request until the requester agrees in writing to pay the anticipated total fee.

(d) *Charges for other services.* When the Department chooses as a matter of administrative discretion to provide a special service, such as certification of agency records, it charges the requester the direct cost of providing the service.

(e) *Charging interest.* The Department charges interest on any unpaid bill assessed at the rate provided in 31 U.S.C. 3717. In charging interest, the Department follows the provisions of the Debt Collection Act of 1982, as amended (Pub. L. 97–365), and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(f) *Aggregating FOIA requests.* When the Department reasonably believes that a requester, or a group of requesters acting together, is attempting to divide a FOIA request into a series of FOIA requests for the purpose of avoiding or reducing otherwise applicable fees, the Department may aggregate such FOIA requests for the purpose of assessing fees. The Department does not aggregate multiple FOIA requests involving unrelated matters.

(g) *Advance payments.*

(1) For FOIA requests other than those described in paragraphs (g)(2) and (g)(3) of this section, the Department does not require the requester to pay fees in advance.

(2) Where the Department estimates or determines that fees for processing a FOIA request will total more than $250, it may require the requester to pay the

fees in advance, except where the Department receives a satisfactory assurance of full payment from a requester with a history of prompt payment of FOIA fees.

(3) The Department may require a requester who has previously failed to pay a properly assessed FOIA fee within 30 calendar days of the billing date to pay in advance the full amount of estimated or actual fees before it further processes a new or pending FOIA request from that requester.

(4) When the Department requires advance payment of estimated or assessed fees, it does not consider the FOIA request received and does not further process the FOIA request until payment is received.

(h) *Tolling*. When necessary for the Department to clarify issues regarding fee assessment with the FOIA requester, the time limit for responding to the FOIA request is tolled until the Department resolves such issues with the requester.

(i) *Other statutory requirements*. The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for producing particular types of agency records.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

[75 FR 33510, June 14, 2010, as amended at 84 FR 67868, Dec. 12, 2019]

§5.33 Requirements for waiver or reduction of fees.

(a) The Department processes a FOIA request for agency records without charge or at a charge less than that established under §5.32(a) when the Department determines that—

(1) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(2) Disclosure of the information is not primarily in the commercial interest of the requester.

(b) To determine whether a FOIA request is eligible for waiver or reduction of fees pursuant to paragraph (a)(1) of this section, the Department considers the following factors:

(1) Whether the subject of the request specifically concerns identifiable operations or activities of the government.

(2) Whether the disclosable portions of the requested information will be meaningfully informative in relation to the subject matter of the request.

(3) The disclosure's contribution to public understanding of government operations, *i.e.*, the understanding of the public at large, as opposed to an individual or a narrow segment of interested persons (including whether the requester has expertise in the subject area of the FOIA request as well as the intention and demonstrated ability to disseminate the information to the public).

(4) The significance of the disclosure's contribution to public understanding of government operations or activities, *i.e.*, the public's understanding of the subject matter existing prior to the disclosure must be likely to be enhanced significantly by the disclosure.

(c) To determine whether a FOIA request is eligible for waiver or reduction of fees pursuant to paragraph (a)(2) of this section, the Department considers the following factors:

(1) The existence of the requester's commercial interest, *i.e.*, whether the requester has a commercial interest that would be furthered by the requested disclosure.

(2) If a commercial interest is identified, whether the commercial interest of the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(d) When the fee waiver requirements are met only with respect to a portion of a FOIA request, the Department waives or reduces fees only for that portion of the request.

(e) A requester seeking a waiver or reduction of fees must submit evidence demonstrating that the FOIA request meets all the criteria listed in paragraphs (a) through (c) of this section.

(f) A requester must seek a fee waiver for each FOIA request for which a waiver is sought. The Department does

not grant standing fee waivers but considers each fee waiver request independently on its merits.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

Subpart E—Administrative Review

§ 5.40 Appeals of adverse determinations.

(a) *In general.* A requester may seek an administrative review of an adverse determination on the FOIA request made by the requester by submitting an appeal of the determination to the Department. Adverse determinations include denials of access to agency records, in whole or in part; ''no agency records'' responses; and adverse fee decisions, including denials of requests for fee waivers, and all aspects of fee assessments.

(b) *Appeal requirements.* A requester must submit an appeal within 90 calendar days of the date on the adverse determination letter issued by the Department or, where the requester has received no determination, at any time after the due date for such determination. An appeal must be in writing and must include a detailed statement of all legal and factual bases for the appeal. The requester's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(c) *Determination on appeal.* (1) The Department makes a written determination on an administrative appeal within 20 working days after receiving the appeal. The time limit may be extended in accordance with § 5.21(c) through (e). The Department's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(2) The Department's determination on an appeal constitutes the Department's final action on the FOIA request. Any Department determination denying an appeal in whole or in part includes the reasons for the denial, including any exemptions asserted under the Act, and notice of the requester's right to seek judicial review of the determination in accordance with 5 U.S.C. 552(a)(4). Where the Department makes a determination to grant an appeal in whole or in part, it processes the FOIA request subject to the appeal in accordance with the determination on appeal.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(6), 20 U.S.C. 3474)

[75 FR 33510, June 14, 2010, as amended at 84 FR 67868, Dec. 12, 2019]

PART 5b—PRIVACY ACT REGULATIONS

Sec.

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APPENDIX B TO PART 5b—ROUTINE USES APPLICABLE TO MORE THAN ONE SYSTEM OF RECORDS MAINTAINED BY ED

AUTHORITY: 5 U.S.C. 301, 5 U.S.C. 552a.

SOURCE: 45 FR 30808, May 9, 1980, unless otherwise noted.

§ 5b.1 Definitions.

As used in this part:

(a) *Access* means availability of a record to a subject individual.

(b) *Agency* means the Department of Education.

(c) *Department* means the Department of Education.

(d) *Disclosure* means the availability or release of a record to anyone other than the subject individual.

(e) *Individual* means a living person who is a citizen of the United States or an alien lawfully admitted for permanent residence. It does not include persons such as sole proprietorships, partnerships, or corporations. A business firm which is identified by the name of one or more persons is not an individual within the meaning of this part.

(f) *Maintain* means to maintain, collect, use, or disseminate when used in connection with the term ''record''; and, to have control over or responsibility for a system of records when used in connection with the term ''system of records.''

(g) *Notification* means communication to an individual whether he is a subject individual.

(h) *Record* means any item, collection, or grouping of information about an individual that is maintained by the Department, including but not limited to the individual's education, financial transactions, medical history, and criminal or employment history and that contains his name, or an identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. When used in this part, record means only a record which is in a system of records.

(i) *Responsible Department official* means that officer who is listed in a notice of a system of records as the system manager for a given system of records or another individual listed in the notice of a system of records to whom requests may be made, or the designee of either such officer or individual.

(j) *Routine use* means the disclosure of a record outside the Department, without the consent of the subject individual, for a purpose which is compatible with the purpose for which the record was collected. It includes disclosures required to be made by statute other than the Freedom of Information Act, 5 U.S.C. 552. It does not include disclosures which are permitted to be made without the consent of the subject individual which are not compatible with the purpose for which it was collected such as disclosures to the Bureau of the Census, the General Accounting Office, or to Congress.

(k) *Secretary* means the Secretary of Education.

(l) *Statistical record* means a record maintained for statistical research or reporting purposes only and not maintained to make determinations about a particular subject individual.

(m) *Subject individual* means that individual to whom a record pertains.

(n) *System of records* means any group of records under the control of the Department from which a record is retrieved by personal identifier such as the name of the individual, number, symbol or other unique retriever assigned to the individual. Single records or groups of records which are not retrieved by a personal identifier are not part of a system of records. Papers maintained by individual employees of the Department which are prepared, maintained, or discarded at the discretion of the employee and which are not subject to the Federal Records Act, 44 U.S.C. 2901, are not part of a system of records; *Provided*, That such personal papers are not used by the employee or the Department to determine any rights, benefits, or privileges of individuals.

[45 FR 30808, May 9, 1980; 45 FR 37426, June 3, 1980]

§5b.2 Purpose and scope.

(a) This part implements section 3 of the Privacy Act of 1974, 5 U.S.C. 552a (hereinafter referred to as the Act), by establishing agency policies and procedures for the maintenance of records. This part also establishes agency policies and procedures under which a subject individual may be given notification of or access to a record pertaining to him and policies and procedures under which a subject individual may have his record corrected or amended if he believes that his record is not accurate, timely, complete, or relevant or necessary to accomplish a Department function.

(b) All components of the Department are governed by the provisions of this part. Also governed by the provisions of this part are advisory committees and councils within the meaning of the Federal Advisory Committee Act which provide advice to (1) any official or component of the Department or (2) the President and for which the Department has been delegated responsibility for providing services.

(c) Employees of the Department governed by this part include all regular and special government employees of the Department; experts and consultants whose temporary (not in excess of 1 year) or intermittent services have been procured by the Department

by contract pursuant to 3109 of title 5, United States Code; volunteers where acceptance of their services are authorized by law; those individuals performing gratuitous services as permitted under conditions prescribed by the Office of Personnel Management; and, participants in work-study or training programs.

(d) This part does not:

(1) Make available to a subject individual records which are not retrieved by that individual's name or other personal identifier.

(2) Make available to the general public records which are retrieved by a subject individual's name or other personal identifier or make available to the general public records which would otherwise not be available to the general public under the Freedom of Information Act, 5 U.S.C. 552, and part 5 of this title.

(3) Govern the maintenance or disclosure of, notification of or access to, records in the possession of the Department which are subject to regulations of another agency, such as personnel records subject to the regulations of the Office of Personnel Management.

(4) Apply to grantees, including State and local governments or subdivisions thereof, administering federally funded programs.

(5) Make available records compiled by the Department in reasonable anticipation of court litigation or formal administrative proceedings. The availability of such records to the general public or to any subject individual or party to such litigation or proceedings shall be governed by applicable constitutional principles, rules of discovery, and applicable regulations of the Department.

§ 5b.3 Policy.

It is the policy of the Department to protect the privacy of individuals to the fullest extent possible while nonetheless permitting the exchange of records required to fulfill the administrative and program responsibilities of the Department, and responsibilities of the Department for disclosing records which the general public is entitled to have under the Freedom of Information Act, 5 U.S.C. 552, and part 5 of this title.

§ 5b.4 Maintenance of records.

(a) No record will be maintained by the Department unless:

(1) It is relevant and necessary to accomplish a Department function required to be accomplished by statute or Executive Order;

(2) It is acquired to the greatest extent practicable from the subject individual when maintenance of the record may result in a determination about the subject individual's rights, benefits or privileges under Federal programs;

(3) The individual providing the record is informed of the authority for providing the record (including whether the providing of the record is mandatory or voluntary, the principal purpose for maintaining the record, the routine uses for the record, what effect his refusal to provide the record may have on him), and if the record is not required by statute or Executive Order to be provided by the individual, he agrees to provide the record.

(b) No record will be maintained by the Department which describes how an individual exercises rights guaranteed by the First Amendment unless expressly authorized (1) by statute, or (2) by the subject individual, or (3) unless pertinent to and within the scope of an authorized law enforcement activity.

§ 5b.5 Notification of or access to records.

(a) *Times, places, and manner of requesting notification of or access to a record.* (1) Any individual may request notification of a record. He may at the same time request access to any record pertaining to him. An individual may be accompanied by another individual of his choice when he requests access to a record in person; *Provided,* That he affirmatively authorizes the presence of such other individual during any discussion of a record to which access is requested.

(2) An individual making a request for notification of or access to a record shall address his request to the responsible Department official and shall verify his identity when required in accordance with paragraph (b)(2) of this section. At the time the request is made, the individual shall specify which systems of records he wishes to

have searched and the records to which he wishes to have access. He may also request that copies be made of all or any such records. An individual shall also provide the responsible Department official with sufficient particulars to enable such official to distinguish between records on subject individuals with the same name. The necessary particulars are set forth in the notices of systems of records.

(3) An individual who makes a request in person may leave with any responsible Department official a request for notification of or access to a record under the control of another responsible Department official; *Provided,* That the request is addressed in writing to the appropriate responsible Department official.

(b) *Verification of identity*—(1) *When required.* Unless an individual, who is making a request for notification of or access to a record in person, is personally known to the responsible Department official, he shall be required to verify his identity in accordance with paragraph (b)(2) of this section if:

(i) He makes a request for notification of a record and the responsible Department official determines that the mere disclosure of the existence of the record would be a clearly unwarranted invasion of privacy if disclosed to someone other than the subject individual; or,

(ii) He makes a request for access to a record which is not required to be disclosed to the general public under the Freedom of Information Act, 5 U.S.C. 552, and part 5 of this title.

(2) *Manner of verifying identity.* (i) An individual who makes a request in person shall provide to the responsible Department official at least one piece of tangible identification such as a driver's license, passport, alien or voter registration card, or union card to verify his identity. If an individual does not have identification papers to verify his identity, he shall certify in writing that he is the individual who he claims to be and that he understands that the knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense under the Act subject to a $5,000 fine.

(ii) Except as provided in paragraph (b)(2)(v) of this section, an individual who does not make a request in person shall submit a notarized request to the responsible Department official to verify his identity or shall certify in his request that he is the individual who he claims to be and that he understands that the knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense under the Act subject to a $5,000 fine.

(iii) An individual who makes a request on behalf of a minor or legal incompetent as authorized under §5b.10 of this part shall verify his relationship to the minor or legal incompetent, in addition to verifying his own identity, by providing a copy of the minor's birth certificate, a court order, or other competent evidence of guardianship to the responsible Department official; *except that,* an individual is not required to verify his relationship to the minor or legal incompetent when he is not required to verify his own identity or when evidence of his relationship to the minor or legal incompetent has been previously given to the responsible Department official.

(iv) An individual shall further verify his identity if he is requesting notification of or access to sensitive records. Any further verification shall parallel the record to which notification or access is being sought. Such further verification may include such particulars as the individual's years of attendance at a particular educational institution, rank attained in the uniformed services, date or place of birth, names of parents, or an occupation.

(v) An individual who makes a request by telephone shall verify his identity by providing to the responsible Department official identifying particulars which parallel the record to which notification or access is being sought. If the responsible Department official determines that the particulars provided by telephone are insufficient, the requester will be required to submit the request in writing or in person. Telephone requests will not be accepted where an individual is requesting notification of or access to sensitive records.

(c) *Granting notification of or access to a record.* (1) Subject to the provisions governing exempt systems in § 5b.11 of this part, a responsible Department official, who receives a request for notification of or access to a record and, if required, verification of an individual's identity, will review the request and grant notification or access to a record, if the individual requesting access to the record is the subject individual.

(2) If the responsible Department official determines that there will be a delay in responding to a request because of the number of requests being processed, a breakdown of equipment, shortage of personnel, storage of records in other locations, etc., he will so inform the individual and indicate when notification or access will be granted.

(3) Prior to granting notification of or access to a record, the responsible Department official may at his discretion require an individual making a request in person to reduce his request to writing if the individual has not already done so at the time the request is made.

§ 5b.7 Procedures for correction or amendment of records.

(a) Any subject individual may request that his record be corrected or amended if he believes that the record is not accurate, timely, complete, or relevant or necessary to accomplish a Department function. A subject individual making a request to amend or correct his record shall address his request to the responsible Department official in writing; *except that,* the request need not be in writing if the subject individual makes his request in person and the responsible Department official corrects or amends the record at that time. The subject individual shall specify in each request:

(1) The system of records from which the record is retrieved;

(2) The particular record which he is seeking to correct or amend;

(3) Whether he is seeking an addition to or a deletion or substitution of the record; and,

(4) His reasons for requesting correction or amendment of the record.

(b) A request for correction or amendment of a record will be acknowledged within 10 working days of its receipt unless the request can be processed and the subject individual informed of the responsible Department official's decision on the request within that 10 day period.

(c) If the responsible Department official agrees that the record is not accurate, timely, or complete based on a preponderance of the evidence, the record will be corrected or amended. The record will be deleted without regard to its accuracy, if the record is not relevant or necessary to accomplish the Department function for which the record was provided or is maintained. In either case, the subject individual will be informed in writing of the correction, amendment, or deletion and, if accounting was made of prior disclosures of the record, all previous recipients of the record will be informed of the corrective action taken.

(d) If the responsible Department official does not agree that the record should be corrected or amended, the subject individual will be informed in writing of the refusal to correct or amend the record. He will also be informed that he may appeal the refusal to correct or amend his record § 5b.8 of this part.

(e) Requests to correct or amend a record governed by the regulation of another government agency, *e.g.,* Office of Personnel Management, Federal Bureau of Investigation, will be forwarded to such government agency for processing and the subject individual will be informed in writing of the referral.

§ 5b.8 Appeals of refusals to correct or amend records.

(a) *Processing the appeal.* (1) A subject individual who disagrees with a refusal to correct or amend his record may appeal the refusal in writing. All appeals shall be made to the Secretary.

(2) An appeal will be completed within 30 working days from its receipt by the appeal authority; *except that,* the appeal authority may for good cause extend this period for an additional 30 days. Should the appeal period be extended, the subject individual appealing the refusal to correct or amend the

record will be informed in writing of the extension and the circumstances of the delay. The subject individual's request to amend or correct the record, the responsible Department official's refusal to correct or amend, and any other pertinent material relating to the appeal will be reviewed. No hearing will be held.

(3) If the appeal authority agrees that the record subject to the appeal should be corrected or amended, the record will be amended and the subject individual will be informed in writing of the correction or amendment. Where an accounting was made of prior disclosures of the record, all previous recipients of the record will be informed of the corrective action taken.

(4) If the appeal is denied, the subject individual will be informed in writing:

(i) Of the denial and the reasons for the denial;

(ii) That he has a right to seek judicial review of the denial; and,

(iii) That he may submit to the responsible Department official a concise statement of disagreement to be associated with the disputed record and disclosed whenever the record is disclosed.

(b) *Notation and disclosure of disputed records.* Whenever a subject individual submits a statement of disagreement to the responsible Department official in accordance with paragraph (a)(4)(iii) of this section, the record will be noted to indicate that it is disputed. In any subsequent disclosure, a copy of the subject individual's statement of disagreement, will be disclosed with the record. If the responsible Department official deems it appropriate, a concise statement of the appeal authority's reasons for denying the subject individual's appeal may also be disclosed with the record. While the subject individual will have access to this statement of reasons, such statement will not be subject to correction or amendment. Where an accounting was made of prior disclosures of the record, all previous recipients of the record will be provided a copy of the subject individual's statement of disagreement, as well as the statement, if any, of the appeal authority's reasons for denying the subject individual's appeal.

§5b.9 Disclosure of records.

(a) *Consent to disclosure by a subject individual.* (1) Except as provided in paragraph (b) of this section authorizing disclosures of records without consent, no disclosure of a record will be made without the consent of the subject individual. In each case the consent, whether obtained from the subject individual at the request of the Department or whether provided to the Department by the subject individual on his own initiative, shall be in writing. The consent shall specify the individual, organizational unit or class of individuals or organizational units to whom the record may be disclosed, which record may be disclosed and, where applicable, during which time frame the record may be disclosed (*e.g.*, during the school year, while the subject individual is out of the country, whenever the subject individual is receiving specific services). A blanket consent to disclose all of a subject individual's records to unspecified individuals or organizational units will not be honored. The subject individual's identity and, where applicable (*e.g.*, where a subject individual gives consent to disclosure of a record to a specific individual), the identity of the individual to whom the record is to be disclosed shall be verified.

(2) A parent or guardian of any minor is not authorized to give consent to a disclosure of the minor's medical record.

(b) *Disclosures without the consent of the subject individual.* The disclosures listed in this paragraph may be made without the consent of the subject individual. Such disclosures are:

(1) To those officers and employees of the Department who have a need for the record in the performance of their duties. The responsible Department official may upon request of any officer or employee, or on his own initiative, determine what constitutes legitimate need.

(2) Required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, and part 5 of this title.

(3) For a routine use as defined in paragraph (j) of §5b.1. Routine uses will be listed in any notice of a system of records. Routine uses published in appendix B are applicable to more than

one system of records. Where applicable, notices of systems of records may contain references to the routine uses listed in appendix B. appendix B will be published with any compendium of notices of systems of records.

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13 U.S.C.

(5) To a recipient who has provided the agency with advance written assurance that the record will be used solely as a statistical research or reporting record; *Provided*, That, the record is transferred in a form that does not identify the subject individual.

(6) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value.

(7) To another government agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of such government agency or instrumentality has submitted a written request to the Department specifying the record desired and the law enforcement activity for which the record is sought.

(8) To an individual pursuant to a showing of compelling circumstances affecting the health or safety of any individual if a notice of the disclosure is transmitted to the last known address of the subject individual.

(9) To either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee.

(10) To the Comptroller General, or any of the Comptroller General's authorized representatives, in the course of the performance of the duties of the General Accounting Office.

(11) Pursuant to the order of a court of competent jurisdiction.

(c) *Accounting of disclosures*. (1) An accounting of all disclosures of a record will be made and maintained by the Department for 5 years or for the life of the record, whichever is longer; *except that*, such an accounting will not be made:

(i) For disclosures under paragraphs (b) (1) and (2) of this section; and,

(ii) For disclosures made with the written consent of the subject individual.

(2) The accounting will include:

(i) The date, nature, and purpose of each disclosure; and

(ii) The name and address of the person or entity to whom the disclosure is made.

(3) Any subject individual may request access to an accounting of disclosures of a record. The subject individual shall make a request for access to an accounting in accordance with the procedures in § 5b.5 of this part. A subject individual will be granted access to an accounting of the disclosures of a record in accordance with the procedures of this part which govern access to the related record. Access to an accounting of a disclosure of a record made under paragraph (b)(7) of this section may be granted at the discretion of the responsible Department official.

§ 5b.10 Parents and guardians.

For the purpose of this part, a parent or guardian of any minor or the legal guardian or any individual who has been declared incompetent due to physical or mental incapacity or age by a court of competent jurisdiction is authorized to act on behalf of an individual or a subject individual. Except as provided in paragraph (b)(2) of § 5b.5, of this part governing procedures for verifying an individual's identity, an individual authorized to act on behalf of a minor or legal incompetent will be viewed as if he were the individual or subject individual.

§ 5b.11 Exempt systems.

(a) *General policy*. The Act permits an agency to exempt certain types of systems of records from some of the Act's requirements. It is the policy of the Department to exercise authority to exempt systems of records only in compelling cases.

(b) *Specific systems of records exempted under (j)(2).* The Department exempts the Investigative Files of the Inspector General ED/OIG (18–10–01) and the Hotline Complaint Files of the Inspector General ED/OIG (18–10–04) systems of records from the following provisions of 5 U.S.C. 552a and this part:

(1) 5 U.S.C. 552a(c)(3) and §5b.9(a)(1) and (c)(3) of this part, regarding access to an accounting of disclosures of a record.

(2) 5 U.S.C. 552a(c)(4) and §§5b.7(c) and 5b.8(b) of this part, regarding notification to outside parties and agencies of correction or notation of dispute made in accordance with 5 U.S.C. 552a(d).

(3) 5 U.S.C. 552a(d) (1) through (4) and (f) and §§5b.5(a)(1) and (c), 5b.7, and 5b.8 of this part, regarding notification or access to records and correction or amendment of records.

(4) 5 U.S.C. 552a(e)(1) and §5b.4(a)(1) of this part, regarding maintaining only relevant and necessary information.

(5) 5 U.S.C. 552a(e)(2) and §5b.4(a)(2) of this part, regarding collection of information from the subject individual.

(6) 5 U.S.C. 552a(e)(3) and §5b.4(a)(3) of this part, regarding notice to individuals asked to provide information to the Department.

(7) 5 U.S.C. 552a(e)(4) (G), (H), and (I), regarding inclusion of information in the system notice about procedures for notification, access, correction, and source of records.

(8) 5 U.S.C. 552a(e)(5), regarding maintaining records with requisite accuracy, relevance, timeliness, and completeness.

(9) 5 U.S.C. 552a(e)(8), regarding service of notice on subject individual if a record is made available under compulsory legal process if that process becomes a matter of public record.

(10) 5 U.S.C. 552a(g), regarding civil remedies for violation of the Privacy Act.

(c) *Specific systems of records exempted under (k)(2).* (1) The Department exempts the Investigative Files of the Inspector General ED/OIG (18–10–01), the Hotline Complaint Files of the Inspector General ED/OIG (18–10–04), and the Office of Inspector General Data Analytics System (ODAS) (18–10–02) from the following provisions of 5 U.S.C. 552a and this part to the extent that these systems of records consist of investigatory material and complaints that may be included in investigatory material compiled for law enforcement purposes:

(i) 5 U.S.C. 552a(c)(3) and §5b.9(c)(3) of this part, regarding access to an accounting of disclosures of records.

(ii) 5 U.S.C. 552a(d) (1) through (4) and (f) and §§5b.5(a)(1) and (c), 5b.7, and 5b.8 of this part, regarding notification of and access to records and correction or amendment of records.

(iii) 5 U.S.C. 552a(e)(1) and §5b.4(a)(1) of this part, regarding the requirement to maintain only relevant and necessary information.

(iv) 5 U.S.C. 552a(e)(4) (G), (H), and (I), regarding inclusion of information in the system notice about procedures for notification, access, correction, and source of records.

(2) The Department exempts the Complaint Files and Log, Office for Civil Rights (18–08–01) from the following provisions of 5 U.S.C. 552a and this part:

(i) 5 U.S.C. 552a(c)(3) and §5b.9(c)(3) of this part, regarding access to an accounting of disclosures of records.

(ii) 5 U.S.C. 552a(d) (1) through (4) and (f) and §§5b.5(a)(1) and (c), 5b.7, and 5b.8 of this part, regarding notification of and access to records and correction or amendment of records.

(iii) 5 U.S.C. 552a(e)(4) (G) and (H), regarding inclusion of information in the system notice about procedures for notification, access, and correction of records.

(d) *Specific systems of records exempted under (k)(5).* The Department exempts the Investigatory Material Compiled for Personnel Security and Suitability Purposes (18–05–17) system of records from the following provisions of 5 U.S.C. 552a and this part:

(1) 5 U.S.C. 552a(c)(3) and §5b.9(c)(3) of this part, regarding access to an accounting of disclosures of records.

(2) 5 U.S.C. 552a(d) (1) through (4) and (f) and §§5b.5(a)(1) and (c), 5b.7, and 5b.8 of this part, regarding notification of and access to records and correction or amendment of records.

(3) 5 U.S.C. 552a(e)(4) (G) and (H), regarding inclusion of information in the system notice about procedures for notification, access, and correction of records.

(e) *Basis for exemptions taken under (j)(2), (k)(2), and (k)(5).* The reason the Department took each exemption described in this section is stated in the preamble for the final rulemaking document under which the exemption was promulgated. These final rulemaking documents were published in the FEDERAL REGISTER and may be obtained from the Department of Education by mailing a request to the following address: U.S. Department of Education, Privacy Act Officer, Office of the Chief Information Officer, Regulatory Information Management Group, Washington, DC 20202–4651.

(f) *Notification of or access to records in exempt systems of records.* (1) If a system of records is exempt under this section, an individual may nonetheless request notification of or access to a record in that system. An individual shall make requests for notification of or access to a record in an exempt system or records in accordance with the procedures of § 5b.5 of this part.

(2) An individual will be granted notification of or access to a record in an exempt system but only to the extent that notification or access would not reveal the identity of a source who furnished the record to the Department under an express promise, and, prior to September 27, 1975, an implied promise, that his identity would be held in confidence if—

(i) The record is in a system of records or that portion of a system of records that is exempt under subsection (k)(2), but not under subsection (j)(2), of the Act and the individual has been, as a result of the maintenance of the record, denied a right, privilege, or benefit to which he or she would otherwise be eligible; or

(ii) The record is in a system of records that is exempt under subsection (k)(5) of the Act.

(3) If an individual is not granted notification of or access to a record in a system of records exempt under subsections (k)(2) (but not under subsection (j)(2)) and (k)(5) of the Act in accordance with this paragraph, he or she will be informed that the identity of a confidential source would be revealed if notification of or access to the record were granted to the individual.

(g) *Discretionary actions by the responsible Department official.* Unless disclosure of a record to the general public is otherwise prohibited by law, the responsible Department official may, in his or her discretion, grant notification of or access to a record in a system of records that is exempt under this section. Discretionary notification of or access to a record in accordance with this paragraph will not be a precedent for discretionary notification of or access to a similar or related record and will not obligate the responsible Department official to exercise his or her discretion to grant notification of or access to any other record in a system of records that is exempt under this section.

[58 FR 44424, Aug. 20, 1993, as amended at 64 FR 31066, June 9, 1999; 69 FR 12246, Mar. 15, 2004; 73 FR 61355, Oct. 16, 2008]

§ 5b.12 Contractors.

(a) All contracts entered into on or after September 27, 1975 which require a contractor to maintain or on behalf of the Department to maintain, a system of records to accomplish a Department function must contain a provision requiring the contractor to comply with the Act and this part.

(b) All unexpired contracts entered into prior to September 27, 1975 which require the contractor to maintain or on behalf of the Department to maintain, a system of records to accomplish a Department function will be amended as soon as practicable to include a provision requiring the contractor to comply with the Act and this part. All such contracts must be so amended by July 1, 1976 unless for good cause the appeal authority identified in § 5b.8 of this part authorizes the continuation of the contract without amendment beyond that date.

(c) A contractor and any employee of such contractor shall be considered employees of the Department only for the purposes of the criminal penalties of the Act, 5 U.S.C. 552a(i), and the employee standards of conduct listed in appendix A of this part where the contract contains a provision requiring the contractor to comply with the Act and this part.

(d) This section does not apply to systems of records maintained by a

contractor as a result of his management discretion, *e.g.*, the contractor's personnel records.

§ 5b.13 Fees.

(a) *Policy*. Where applicable, fees for copying records will be charged in accordance with the schedule set forth in this section. Fees may only be charged where an individual requests that a copy be made of the record to which he is granted access. No fee may be charged for making a search of the system of records whether the search is manual, mechanical, or electronic. Where a copy of the record must be made in order to provide access to the record (*e.g.*, computer printout where no screen reading is available), the copy will be made available to the individual without cost.

(b) *Fee schedule*. The fee schedule for the Department is as follows:

(1) Copying of records susceptible to photocopying—$.10 per page.

(2) Copying records not susceptible to photocopying (*e.g.*, punch cards or magnetic tapes)—at actual cost to be determined on a case-by-case basis.

(3) No charge will be made if the total amount of copying does not exceed $25.

APPENDIX A TO PART 5b—EMPLOYEE STANDARDS OF CONDUCT

(a) *General*. All employees are required to be aware of their responsibilities under the Privacy Act of 1974, 5 U.S.C. 552a. Regulations implementing the Act are set forth in 34 CFR 5b. Instruction on the requirements of the Act and regulation shall be provided to all new employees of the Department. In addition, supervisors shall be responsible for assuring that employees who are working with systems of records or who undertake new duties which require the use of systems of records are informed of their responsibilities. Supervisors shall also be responsible for assuring that all employees who work with such systems of records are periodically reminded of the requirements of the Act and are advised of any new provisions or interpretations of the Act.

(b) *Penalties*. (1) All employees must guard against improper disclosure of records which are governed by the Act. Because of the serious consequences of improper invasions of personal privacy, employees may be subject to disciplinary action and criminal prosecution for knowing and willful violations of the Act and regulation. In addition, employees may also be subject to disciplinary action for unknowing or unwillful violations, where the employee had notice of the provisions of the Act and regulations and failed to inform himself sufficiently or to conduct himself in accordance with the requirements to avoid violations.

(2) The Department may be subjected to civil liability for the following actions undertaken by its employees:

(a) Making a determination under the Act and §§ 5b.7 and 5b.8 of the regulation not to amend an individual's record in accordance with his request, or failing to make such review in conformity with those provisions;

(b) Refusing to comply with an individual's request for notification of or access to a record pertaining to him;

(c) Failing to maintain any record pertaining to any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such a record, and consequently a determination is made which is adverse to the individual; or

(d) Failing to comply with any other provision of the Act or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual.

(3) ''An employee may be personally subject to criminal liability as set forth below and in 5 U.S.C. 552a (i):

(a) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by the Act or by rules or regulations established thereunder, and who, knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.''

(b) ''Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements [of the Act] shall be guilty of a misdemeanor and fined not more than $5,000.''

(c) *Rules Governing Employees Not Working With Systems of Records*. Employees whose duties do not involve working with systems of records will not generally disclose to any one, without specific authorization from their supervisors, records pertaining to employees or other individuals which by reason of their official duties are available to them. Notwithstanding the above, the following records concerning Federal employees are a matter of public record and no further authorization is necessary for disclosure:

(1) Name and title of individual.

(2) Grade classification or equivalent and annual rate of salary.

(3) Position description.

(4) Location of duty station, including room number and telephone number.

In addition, employees shall disclose records which are listed in the Department's Freedom of Information Regulation as being available to the public. Requests for other records will be referred to the responsible Department official. This does not preclude employees from discussing matters which are known to them personally, and without resort to a record, to official investigators of Federal agencies for official purposes such as suitability checks, Equal Employment Opportunity investigations, adverse action proceedings, grievance proceedings, etc.

(d) *Rules governing employees whose duties require use or reference to systems of records.* Employees whose official duties require that they refer to, maintain, service, or otherwise deal with systems of records (hereinafter referred to as ''Systems Employees'') are governed by the general provisions. In addition, extra precautions are required and systems employees are held to higher standards of conduct.

(1) Systems Employees shall:

(a) Be informed with respect to their responsibilities under the Act;

(b) Be alert to possible misuses of the system and report to their supervisors any potential or actual use of the system which they believe is not in compliance with the Act and regulation;

(c) Make a disclosure of records within the Department only to an employee who has a legitimate need to know the record in the course of his official duties;

(d) Maintain records as accurately as practicable.

(e) Consult with a supervisor prior to taking any action where they are in doubt whether such action is in conformance with the Act and regulation.

(2) Systems Employees shall not:

(a) Disclose in any form records from a system of records except (1) with the consent or at the request of the subject individual; or (2) where its disclosure is permitted under § 5b.9 of the regulation.

(b) Permit unauthorized individuals to be present in controlled areas. Any unauthorized individuals observed in controlled areas shall be reported to a supervisor or to the guard force.

(c) Knowingly or willfully take action which might subject the Department to civil liability.

(d) Make any arrangements for the design development, or operation of any system of records without making reasonable effort to provide that the system can be maintained in accordance with the Act and regulation.

(e) *Contracting officers.* In addition to any applicable provisions set forth above, those employees whose official duties involve entering into contracts on behalf of the Department shall also be governed by the following provisions:

(1) *Contracts for design, or development of systems and equipment.* No contract for the design or development of a system of records, or for equipment to store, service or maintain a system of records shall be entered into unless the contracting officer has made reasonable effort to ensure that the product to be purchased is capable of being used without violation of the Act or regulation. Special attention shall be given to provision of physical safeguards.

(2) *Contracts for the operation of systems and equipment.* No contract for the design or development of a system of whom he feels appropriate, of all proposed contracts providing for the operation of systems of records shall be made prior to execution of the contracts to determine whether operation of the system of records is for the purpose of accomplishing a Department function. If a determination is made that the operation of the system is to accomplish a Department function, the contracting officer shall be responsible for including in the contract appropriate provisions to apply the provisions of the Act and regulation to the system, including prohibitions against improper release by the contractor, his employees, agents, or subcontractors.

(3) *Other service contracts.* Contracting officers entering into general service contracts shall be responsible for determining the appropriateness of including provisions in the contract to prevent potential misuse (inadvertent or otherwise) by employees, agents, or subcontractors of the contractor.

(f) *Rules Governing Responsible Department Officials.* In addition to the requirements for Systems Employees, responsible Department officials shall:

(1) Respond to all requests for notification of or access, disclosure, or amendment of records in a timely fashion in accordance with the Act and regulation;

(2) Make any amendment of records accurately and in a timely fashion;

(3) Inform all persons whom the accounting records show have received copies of the record prior to the amendments of the correction; and

(4) Associate any statement of disagreement with the disputed record, and

(a) Transmit a copy of the statement to all persons whom the accounting records show have received a copy of the disputed record, and

(b) Transmit that statement with any future disclosure.

APPENDIX B TO PART 5b—ROUTINE USES APPLICABLE TO MORE THAN ONE SYSTEM OF RECORDS MAINTAINED BY ED

(1) In the event that a system of records maintained by this agency to carry out its functions indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether federal, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

(2) Referrals may be made of assignments of research investigators and project monitors to specific research projects to the Smithsonian Institution to contribute to the Smithsonian Science Information Exchange, Inc.

(3) In the event the Department deems it desirable or necessary, in determining whether particular records are required to be disclosed under the Freedom of Information Act, disclosure may be made to the Department of Justice for the purpose of obtaining its advice.

(4) A record from this system of records may be disclosed as a ''routine use'' to a federal, state or local agency maintaining civil, criminal or other relevant enforcement records or other pertinent records, such as current licenses, if necessary to obtain a record relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant or other benefit.

A record from this system of records may be disclosed to a federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the record is relevant and necessary to the requesting agency's decision on the matter.

(5) In the event that a system of records maintained by this agency to carry out its function indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether state or local charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

(6) Where federal agencies having the power to subpoena other federal agencies' records, such as the Internal Revenue Service or the Civil Rights Commission, issue a subpoena to the Department for records in this system of records, the Department will make such records available.

(7) Where a contract between a component of the Department and a labor organization recognized under E.O. 11491 provides that the agency will disclose personal records relevant to the organization's mission, records in this system of records may be disclosed to such organization.

(8) Where the appropriate official of the Department, pursuant to the Department's Freedom of Information Regulation determines that it is in the public interest to disclose a record which is otherwise exempt from mandatory disclosure, disclosure may be made from this system of records.

(9) The Department contemplates that it will contract with a private firm for the purpose of collating, analyzing, aggregating or otherwise refining records in this system. Relevant records will be disclosed to such a contractor. The contractor shall be required to maintain Privacy Act safeguards with respect to such records.

(10) To individuals and organizations, deemed qualified by the Secretary to carry out specific research solely for the purpose of carrying out such research.

(11) Disclosures in the course of employee discipline or competence determination proceedings.

[45 FR 30808, May 9, 1980; 45 FR 37426, June 3, 1980]

PART 6—INVENTIONS AND PATENTS (GENERAL)

Sec.
6.0 General policy.
6.1 Publication or patenting of inventions.
6.3 Licensing of Government-owned patents.
6.4 Central records; confidentiality.

AUTHORITY: 5 U.S.C. 301.

SOURCE: 45 FR 30814, May 9, 1980, unless otherwise noted.

§6.0 General policy.

Inventions developed through the resources and activities of the Department are a potential resource of great value to the public. It is the policy of the Department:

(a) To safeguard the public interest in inventions developed by Department

employees, contractors and grantees with the aid of public funds and facilities;

(b) To encourage and recognize individual and cooperative achievement in research and investigations; and

(c) To establish a procedure, consistent with pertinent statutes, Executive orders and general Government regulations, for the determination of rights and obligations relating to the patenting of inventions.

§ 6.1 Publication or patenting of inventions.

It is the general policy of the Department that the results of Department research should be made widely, promptly and freely available to other research workers and to the public. This availability can generally be adequately preserved by the dedication of a Government-owned invention to the public. Determinations to file a domestic patent application on inventions in which the Department has an interest will be made where the circumstances indicate that this is desirable in the public interest, and if it is practicable to do so. Department determinations not to apply for a domestic patent on employee inventions are subject to review and approval by the Commissioner of Patents. Except where deemed necessary for protecting the patent claim, the fact that a patent application has been or may be filed will not require any departure from normal policy regarding the dissemination of the results of Department research.

§ 6.3 Licensing of Government-owned patents.

(a) Licenses to practice inventions covered by patents and pending patent applications owned by the U.S. Government as represented by this Department will generally be royalty free, revocable and nonexclusive. They will normally be issued to all applicants and will generally contain no limitations or standards relating to the quality or testing of the products to be manufactured, sold, or distributed thereunder.

(b) Where it appears however that the public interest will be served under the circumstances of the particular case by licenses which impose conditions, such as those relating to quality or testing of products, requirement of payment of royalties to the Government, etc., or by the issuance of limited exclusive licenses by the Secretary after notice and opportunity for hearing thereon, such licenses may be issued.

§ 6.4 Central records; confidentiality.

Central files and records shall be maintained of all inventions, patents, and licenses in which the Department has an interest, together with a record of all licenses issued by the Department under such patents. Invention reports required from employees or others for the purpose of obtaining determinations of ownership, and documents and information obtained for the purpose of prosecuting patent applications shall be confidential and shall be disclosed only as required for official purposes or with the consent of the inventor.

PART 7—EMPLOYEE INVENTIONS

Sec.
7.0 Who are employees.
7.1 Duty of employee to report inventions.
7.3 Determination as to domestic rights.
7.4 Option to acquire foreign rights.
7.7 Notice to employee of determination.
7.8 Employee's right of appeal.

AUTHORITY: E.O. 10096, 15 FR 391; 3 CFR 1950 Supp.; E.O. 10930, 26 FR 2583; 3 CFR 1961 Supp.

SOURCE: 45 FR 30814, May 9, 1980, unless otherwise noted.

§ 7.0 Who are employees.

As used in this part, the term *Government employee* means any officer or employee, civilian or military, except such part-time employees or part-time consultants as may be excluded therefrom by a determination made in writing by the head of the employee's office or constituent organization, pursuant to an exemption approved by the Commissioner of Patents that to include him or them would be impracticable or inequitable, given the reasons therefor. A person shall not be considered to be a part-time employee or part-time consultant for this purpose unless the terms of his employment contemplate that he shall work for less than the minimum number of hours per day, or

less than a minimum number of days per week, or less than the minimum number of weeks per year, regularly required of full-time employees of his class.

§7.1 Duty of employee to report inventions.

Every Department employee is required to report to the Secretary in accordance with the procedures established therefor, every invention made by him (whether or not jointly with others) which bears any relation to his official duties or which was made in whole or in any part during working hours, or with any contribution of Government facilities, equipment, material, funds, or information, or of time or services of other Government employees on official duty.

§7.3 Determination as to domestic rights.

The determination of the ownership of the domestic right, title, and interest in and to an invention which is or may be patentable, made by a Government employee while under the administrative jurisdiction of the Department, will be made in writing by the Secretary in accordance with the provisions of Executive Order 10096 and Government-wide regulations issued thereunder by the Commissioner of Patents as follows:

(a) The Government as represented by the Secretary shall obtain the entire domestic right, title and interest in and to all inventions made by any Government employee (1) during working hours, or (2) with a contribution by the Government of facilities, equipment, materials, funds, or information, or of time or services of other Government employees on official duty, or (3) which bear a direct relation to or are made in consequence of the official duties of the inventor.

(b) In any case where the contribution of the Government, as measured by any one or more of the criteria set forth in paragraph (a) of this section, to the invention is insufficient equitably to justify a requirement of assignment to the Government of the entire domestic right, title and interest in and to such invention, or in any case where the Government has insufficient interest in an invention to obtain the entire domestic right, title, and interest therein (although the Government could obtain same under paragraph (a) of this section), the Department, subject to the approval of the Commissioner, shall leave title to such invention in the employee, subject, however, to the reservation to the Government of a nonexclusive, irrevocable, royalty-free license in the invention with power to grant licenses for all governmental purposes, such reservation to appear, where practicable, in any patent, domestic or foreign, which may issue on such invention.

(c) In applying the provisions of paragraphs (a) and (b) of this section, to the facts and circumstances relating to the making of any particular invention, it shall be presumed that an invention made by an employee who is employed or assigned (1) to invent or improve or perfect any art, machine, manufacture, or composition of matter, (2) to conduct or perform research, development work, or both, (3) to supervise, direct, coordinate, or review Government financed or conducted research, development work, or both, or (4) to act in a liaison capacity among governmental or nongovernmental agencies or individuals engaged in such work, falls within the provisions of paragraph (a) of this section, and it shall be presumed that any invention made by any other employee falls within the provisions of paragraph (b) of this section. Either presumption may be rebutted by a showing of the facts and circumstances and shall not preclude a determination that these facts and circumstances justify leaving the entire right, title and interest in and to the invention in the Government employee, subject to law.

(d) In any case wherein the Government neither (1) obtains the entire domestic right, title and interest in and to an invention pursuant to the provisions of paragraph (a) of this section, nor (2) reserves a nonexclusive, irrevocable, royalty-free license in the invention, with power to grant licenses for all governmental purposes, pursuant to the provisions of paragraph (b) of this section, the Government shall leave the entire right, title and interest in and to the invention in the Government employee, subject to law.

§ 7.4 Option to acquire foreign rights.

In any case where it is determined that all domestic rights should be assigned to the Government, it shall further be determined, pursuant to Executive Order 9865 and Government-wide regulations issued thereunder, that the Government shall reserve an option to require the assignment of such rights in all or in any specified foreign countries. In case where the inventor is not required to assign the patent rights in any foreign country or countries to the Government or the Government fails to exercise its option within such period of time as may be provided by regulations issued by the Commissioner of Patents, any application for a patent which may be filed in such country or countries by the inventor or his assignee shall nevertheless be subject to a nonexclusive, irrevocable, royalty-free license to the Government for all governmental purposes, including the power to issue sublicenses for use in behalf of the Government and/or in furtherance of the foreign policies of the Government.

§ 7.7 Notice to employee of determination.

The employee-inventor shall be notified in writing of the Department's determination of the rights to his invention and of his right of appeal, if any. Notice need not be given if the employee stated in writing that he would agree to the determination of ownership which was in fact made.

§ 7.8 Employee's right of appeal.

An employee who is aggrieved by a determination of the Department may appeal to the Commissioner of Patents, pursuant to section 4(d) of Executive Order 10096, as amended by Executive Order 10930, and regulations issued thereunder, by filing a written appeal with the Commissioner, in duplicate, and a copy of the appeal with the Secretary within 30 days (or such longer period as the Commissioner may, for good cause, fix in any case) after receiving written notice of such determination.

PART 8—DEMANDS FOR TESTIMONY OR RECORDS IN LEGAL PROCEEDINGS

Sec.

8.1 What is the scope and applicability of this part?
8.2 What definitions apply?
8.3 What are the requirements for submitting a demand for testimony or records?
8.4 What procedures are followed in response to a demand for testimony?
8.5 What procedures are followed in response to a demand for records?

AUTHORITY: 5 U.S.C. 301; 5 U.S.C. 552; 20 U.S.C. 3474, unless otherwise noted.

SOURCE: 57 FR 34646, Aug. 5, 1992, unless otherwise noted.

§ 8.1 What is the scope and applicability of this part?

(a) Except as provided in paragraph (c) of this section, this part establishes the procedures to be followed when the Department or any employee of the Department receives a demand for—

(1) Testimony by an employee concerning—

(i) Records contained in the files of the Department;

(ii) Information relating to records contained in the files of the Department; or

(iii) Information or records acquired or produced by the employee in the course of his or her official duties or because of the employee's official status; or

(2) The production or disclosure of any information or records referred to in paragraph (a)(1) of this section.

(b) This part does not create any right or benefit, substantive or procedural, enforceable by any person against the Department.

(c) This part does not apply to—

(1) Any proceeding in which the United States is a party before an adjudicative authority;

(2) A demand for testimony or records made by either House of Congress or, to the extent of matter within its jurisdiction, any committee or subcommittee of Congress; or

(3) An appearance by an employee in his or her private capacity in a legal proceeding in which the employee's

testimony does not relate to the mission or functions of the Department.

(Authority: 5 U.S.C. 301; 20 U.S.C. 3474)

[57 FR 34646, Aug. 5, 1992, as amended at 73 FR 27748, May 14, 2008]

§ 8.2 What definitions apply?

The following definitions apply to this part:

Adjudicative authority includes, but is not limited to—

(1) A court of law or other judicial forums; and

(2) Mediation, arbitration, or other forums for dispute resolution.

Demand includes a subpoena, subpoena duces tecum, request, order, or other notice for testimony or records arising in a legal proceeding.

Department means the U.S. Department of Education.

Employee means a current or former employee or official of the Department or of an advisory committee of the Department, including a special government employee, unless specifically provided otherwise in this part.

Legal proceeding means—

(1) A proceeding before an adjudicative authority;

(2) A legislative proceeding, except for a proceeding before either House of Congress or before any committee or subcommittee of Congress, to the extent of matter within the committee's or subcommittee's jurisdiction; or

(3) An administrative proceeding.

Secretary means the Secretary of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Testimony means statements made in connection with a legal proceeding, including but not limited to statements in court or other forums, depositions, declarations, affidavits, or responses to interrogatories.

United States means the Federal Government of the United States and any of its agencies or instrumentalities.

(Authority: 5 U.S.C. 301; 20 U.S.C. 3474)

[57 FR 34646, Aug. 5, 1992, as amended at 73 FR 27748, May 14, 2008]

§ 8.3 What are the requirements for submitting a demand for testimony or records?

(a) A demand for testimony of an employee or a demand for records issued pursuant to the rules governing the legal proceeding in which the demand arises—

(1) Must be in writing; and

(2) Must state the nature of the requested testimony or records, why the information sought is unavailable by any other means, and the reason why the release of the information would not be contrary to an interest of the Department or the United States''.

(b) Service of a demand for testimony of an employee must be made on the employee whose testimony is demanded, with a copy simultaneously delivered to the General Counsel, U.S. Department of Education, Office of the General Counsel, 400 Maryland Avenue, SW., room 6E300, Lyndon Baines Johnson Building, Washington, DC 20202–2100.

(c) Service of a demand for records, as described in § 8.5(a)(1), must be made on an employee who has custody of the records, with a copy simultaneously delivered to the General Counsel at the address listed in paragraph (b) of this section. For assistance in identifying the custodian of the specific records demanded, contact the Records Officer, Information Policy and Standards Team, Regulatory Information Management Services, Office of Management, U.S. Department of Education, 400 Maryland Avenue, SW., room 9161, PCP, Washington, DC 20202–4753.

(Authority: 5 U.S.C. 301; 20 U.S.C. 3474)

(Approved by the Office of Management and Budget under control number 1801–0002)

[57 FR 34646, Aug. 5, 1992, as amended at 58 FR 7860, Feb. 9, 1993; 73 FR 27748, May 14, 2008]

§ 8.4 What procedures are followed in response to a demand for testimony?

(a) After an employee receives a demand for testimony, the employee shall immediately notify the Secretary and request instructions.

(b) An employee may not give testimony without the prior written authorization of the Secretary.

(c)(1) The Secretary may allow an employee to testify if the Secretary determines that the demand satisfies the requirements of § 8.3 and that granting permission—

(i) Would be appropriate under the rules of procedure governing the matter in which the demand arises and other applicable laws, rules, and regulations; and

(ii) Would not be contrary to an interest of the United States, which includes furthering a public interest of the Department and protecting the human and financial resources of the United States.

(2) The Secretary may establish conditions under which the employee may testify.

(d) If a response to a demand for testimony is required before the Secretary determines whether to allow an employee to testify, the employee or counsel for the employee shall—

(1) Inform the court or other authority of the regulations in this part; and

(2) Request that the demand be stayed pending the employee's receipt of the Secretary's instructions.

(e) If the court or other authority declines the request for a stay, or rules that the employee must comply with the demand regardless of the Secretary's instructions, the employee or counsel for the employee shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), and the regulations in this part.

(Authority: 5 U.S.C. 301; 20 U.S.C. 3474)

§ 8.5 What procedures are followed in response to a demand for records?

(a)(1) After an employee receives a demand for records issued pursuant to the rules governing the legal proceeding in which the demand arises, the employee shall immediately notify the Secretary and request instructions.

(2) If an employee receives any other demand for records, the Department—

(i) Considers the demand to be a request for records under the Freedom of Information Act; and

(ii) Handles the demand under rules governing public disclosure, as established in 34 CFR part 5.

(b) An employee may not produce records in response to a demand as described in paragraph (a)(1) of this section without the prior written authorization of the Secretary.

(c) The Secretary may make these records available if the Secretary determines that the demand satisfies the requirements of § 8.3 and that disclosure—

(1) Would be appropriate under the rules of procedure governing the matter in which the demand arises and other applicable laws, rules, and regulations; and

(2) Would not be contrary to an interest of the United States, which includes furthering a public interest of the Department and protecting the human and financial resources of the United States.

(d) If a response to a demand for records as described in paragraph (a)(1) of this section is required before the Secretary determines whether to allow an employee to produce those records, the employee or counsel for the employee shall—

(1) Inform the court or other authority of the regulations in this part; and

(2) Request that the demand be stayed pending the employee's receipt of the Secretary's instructions.

(e) If the court or other authority declines the request for a stay, or rules that the employee must comply with the demand regardless of the Secretary's instructions, the employee or counsel for the employee shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), and the regulations in this part.

(Authority: 5 U.S.C. 301; 5 U.S.C. 552; 20 U.S.C. 3474)

PART 12—DISPOSAL AND UTILIZATION OF SURPLUS FEDERAL REAL PROPERTY FOR EDUCATIONAL PURPOSES

Subpart A—General

Sec.

12.1 What is the scope of this part?
12.2 What definitions apply?
12.3 What other regulations apply to this program?

Subpart B—Distribution of Surplus Federal Real Property

12.4 How does the Secretary provide notice of availability of surplus Federal real property?
12.5 Who may apply for surplus Federal real property?
12.6 What must an application for surplus Federal real property contain?
12.7 How is surplus Federal real property disposed of when there is more than one applicant?
12.8 What transfer or lease instruments does the Secretary use?
12.9 What warranties does the Secretary give?
12.10 How is a Public Benefit Allowance (PBA) calculated?

Subpart C—Conditions Applicable to Transfers or Leases

12.11 What statutory provisions and Executive Orders apply to transfers of surplus Federal real property?
12.12 What are the terms and conditions of transfers or leases of surplus Federal real property?
12.13 When is use of the transferred surplus Federal real property by entities other than the transferee or lessee permissible?

Subpart D—Enforcement

12.14 What are the sanctions for noncompliance with a term or condition of a transfer or lease of surplus Federal real property?

Subpart E—Abrogation

12.15 What are the procedures for securing an abrogation of the conditions and restrictions contained in the conveyance instrument?
APPENDIX A TO PART 12—PUBLIC BENEFIT ALLOWANCE FOR TRANSFER OF SURPLUS FEDERAL REAL PROPERTY FOR EDUCATIONAL PURPOSES

AUTHORITY: 40 U.S.C. 471–488; 20 U.S.C. 3401 *et seq.;* 42 U.S.C. 2000d (1) *et seq.;* 20 U.S.C. 1681 *et seq.;* 29 U.S.C. 794 *et seq.;* 42 U.S.C. 4332.

SOURCE: 57 FR 60394, Dec. 18, 1992, unless otherwise noted.

Subpart A—General

§ 12.1 What is the scope of this part?

This part is applicable to surplus Federal real property located within any State that is appropriate for assignment to, or that has been assigned to, the Secretary by the Administrator for transfer for educational purposes, as provided for in section 203(k) of the Federal Property and Administrative Services Act of 1949, as amended, 63 Stat. 377 (40 U.S.C. 471 *et seq.)*.

(Authority: 40 U.S.C. 484(k))

§ 12.2 What definitions apply?

(a) *Definitions in the Act.* The following terms used in this part are defined in section 472 of the Act:

Administrator
Surplus property

(b) *Definitions in the Education Department General Administrative Regulations (EDGAR).* The following terms used in this part are defined in 34 CFR 77.1:

Department
Secretary
State

(c) *Other definitions:* The following definitions also apply to this part:

Abrogation means the procedure the Secretary may use to release the transferee of surplus Federal real property from the covenants, conditions, reservations, and restrictions contained in the conveyance instrument before the term of the instrument expires.

Act means the Federal Property and Administrative Services Act of 1949, as amended, 63 Stat. 377 (40 U.S.C. 471 *et seq.*).

Applicant means an eligible entity as described in § 12.5 that formally applies to be a transferee or lessee of surplus Federal real property, using a public benefit allowance (PBA) under the Act.

Lessee, except as used in § 12.14(a)(5), means an entity that is given temporary possession, but not title, to surplus Federal real property by the Secretary for educational purposes.

Nonprofit institution means any institution, organization, or association, whether incorporated or unincorporated—

(1) The net earnings of which do not inure or may not lawfully inure to the benefit of any private shareholder or individual; and

(2) That has been determined by the Internal Revenue Service to be tax-exempt under section 501(c)(3) of title 26.

Off-site property means surplus buildings and improvements—including any

related personal property—that are capable of being removed from the underlying land and that are transferred by the Secretary without transferring the underlying real property.

On-site property means surplus Federal real property, including any related personal property—other than off-site property.

Period of restriction means that period during which the surplus Federal real property transferred for educational purposes must be used by the transferee or lessee in accordance with covenants, conditions, and any other restrictions contained in the conveyance instrument.

Program and plan of use means the educational activities to be conducted by the transferee or lessee using the surplus Federal real property, as described in the application for that property.

Public benefit allowance (''PBA'') means the credit, calculated in accordance with appendix A to this part, given to a transferee or lessee which is applied against the fair market value of the surplus Federal real property at the time of the transfer or lease of such property in exchange for the proposed educational use of the property by the transferee or lessee.

Related personal property means any personal property—

(1) That is located on and is an integral part of, or incidental to the operation of, the surplus Federal real property; or

(2) That is determined by the Administrator to be otherwise related to the surplus Federal real property.

Surplus Federal real property means the property assigned or suitable for assignment to the Secretary by the Administrator for disposal under the Act.

Transfer means to sell and convey title to surplus Federal real property for educational purposes as described in this part.

Transferee means that entity which has purchased and acquired title to the surplus Federal real property for educational purposes pursuant to section 203(k) of the Act.

(Authority: 40 U.S.C. 472 and 20 U.S.C. 3401 *et seq.*)

§ 12.3 What other regulations apply to this program?

The following regulations apply to this program:

(a) 34 CFR parts 100, 104, and 106.

(b) 41 CFR part 101–47.

(c) 34 CFR part 85.

(Authority: 40 U.S.C. 484(k); 42 U.S.C. 2000d–1 *et seq.*; 29 U.S.C. 794 *et seq.*; 20 U.S.C. 1681 *et seq.*; Executive Order 12549; and 20 U.S.C. 3474)

Subpart B—Distribution of Surplus Federal Real Property

§ 12.4 How does the Secretary provide notice of availability of surplus Federal real property?

The Secretary notifies potential applicants of the availability of surplus Federal real property for transfer for educational uses in accordance with 41 CFR 101–47.308–4.

(Authority: 40 U.S.C. 484(k)(1))

§ 12.5 Who may apply for surplus Federal real property?

The following entities may apply for surplus Federal real property:

(a) A State.

(b) A political subdivision or instrumentality of a State.

(c) A tax-supported institution.

(d) A nonprofit institution.

(e) Any combination of these entities.

(Authority: 40 U.S.C. 484(k)(1)(A))

§ 12.6 What must an application for surplus Federal real property contain?

An application for surplus Federal real property must—

(a) Contain a program and plan of use;

(b) Contain a certification from the applicant that the proposed program is not in conflict with State or local zoning restrictions, building codes, or similar limitations;

(c) Demonstrate that the proposed program and plan of use of the surplus Federal real property is for a purpose that the applicant is authorized to carry out;

(d) Demonstrate that the applicant is able, willing, and authorized to assume immediate custody, use, care, and

maintenance of the surplus Federal real property;

(e) Demonstrate that the applicant is able, willing, and authorized to pay the administrative expenses incident to the transfer or lease;

(f) Demonstrate that the applicant has the necessary funds, or the ability to obtain those funds immediately upon transfer or lease, to carry out the proposed program and plan of use for the surplus Federal real property;

(g) Demonstrate that the applicant has an immediate need and ability to use all of the surplus Federal real property for which it is applying;

(h) Demonstrate that the surplus Federal real property is needed for educational purposes at the time of application and that it is so needed for the duration of the period of restriction;

(i) Demonstrate that the surplus Federal real property is suitable or adaptable to the proposed program and plan of use; and

(j) Provide information requested by the Secretary in the notice of availability, including information of the effect of the proposed program and plan of use on the environment.

(Approved by the Office of Management and Budget under control number 1880–0524)

(Authority: 40 U.S.C. 484(k))

§ 12.7 How is surplus Federal real property disposed of when there is more than one applicant?

(a) If there is more than one applicant for the same surplus Federal real property, the Secretary transfers or leases the property to the applicant whose proposed program and plan of use the Secretary determines provides the greatest public benefit, using the criteria contained in appendix A to this part that broadly address the weight given to each type of entity applying and its proposed program and plan of use. (See example in § 12.10(d)).

(b) If, after applying the criteria described in paragraph (a) of this section, two or more applicants are rated equally, the Secretary transfers or leases the property to one of the applicants after—

(1) Determining the need for each applicant's proposed educational use at the site of the surplus Federal real property;

(2) Considering the quality of each applicant's proposed program and plan of use; and

(3) Considering each applicant's ability to carry out its proposed program and plan of use.

(c) If the Secretary determines that the surplus Federal real property is capable of serving more than one applicant, the Secretary may apportion it to fit the needs of as many applicants as is practicable.

(d)(1) The Secretary generally transfers surplus Federal real property to a selected applicant that meets the requirements of this part.

(2) Alternatively, the Secretary may lease surplus Federal real property to a selected applicant that meets the requirements of this part if the Secretary determines that a lease will promote the most effective use of the property consistent with the purposes of this part or if having a lease is otherwise in the best interest of the United States, as determined by the Secretary.

(Authority: 40 U.S.C. 484(k))

§ 12.8 What transfer or lease instruments does the Secretary use?

(a) The Secretary transfers or leases surplus Federal real property using transfer or lease instruments that the Secretary prescribes.

(b) The transfer or lease instrument contains the applicable terms and conditions described in this part and any other terms and conditions the Secretary or Administrator determines are appropriate or necessary.

(Authority: 40 U.S.C. 484(c))

§ 12.9 What warranties does the Secretary give?

The Secretary transfers or leases surplus Federal real property on an ''as is, where is,'' basis without warranty of any kind.

(Authority: 40 U.S.C. 484(k)(1))

§ 12.10 How is a Public Benefit Allowance (PBA) calculated?

(a) The Secretary calculates a PBA in accordance with the provisions of appendix A to this part taking into account the nature of the applicant, and the need for, impact of, and type of

program and plan of use for the property, as described in that appendix.

(b) The following are illustrative examples of how a PBA would be calculated and applied under appendix A:

(1) Entity A is a specialized school that has had a building destroyed by fire, and that has existing facilities determined by the Secretary to be between 26 and 50% inadequate. It is proposing to use the surplus Federal real property to add a new physical education program. Entity A would receive a basic PBA of 70%, a 10% hardship organization allowance, a 20% allowance for inadequacy of existing school plant facilities, and a 10% utilization allowance for introduction of new instructional programs. Entity A would have a total PBA of 110%. If Entity A is awarded the surplus Federal real property, it would not be required to pay any cash for the surplus Federal real property, since the total PBA exceeds 100%.

(2) Entity B proposes to use the surplus Federal real property for nature walks. Because this qualifies as an outdoor educational program, Entity B would receive a basic PBA of 40%. If Entity B is awarded the surplus Federal real property, it would be required to pay 60% of the fair market value of the surplus Federal real property in cash at the time of the transfer.

(3) Entity C is an accredited university, has an ROTC unit, and proposes to use the surplus Federal real property for a school health clinic and for special education of the physically handicapped. Entity C would receive a basic PBA of 50% (as a college or university), a 20% accreditation organization allowance (accredited college or university), a 10% public service training organization allowance (ROTC), a 10% student health and welfare utilization allowance (school health clinic), and a 10% service to the handicapped utilization allowance (education of the physically handicapped). Entity C would have a total PBA of 100%. If Entity C is awarded the surplus Federal real property, it would not be required to pay any cash for the surplus Federal real property, since the total PBA is 100%.

(4) Entities A, B, and C all submit applications for the same surplus Federal real property. Unless the Secretary decides to apportion it, the Secretary transfers or leases the surplus Federal real property to Entity A, since its proposed program and plan of use has the highest total PBA.

(Authority: 40 U.S.C. 484(k)(1)(c))

Subpart C—Conditions Applicable to Transfers or Leases

§ 12.11 What statutory provisions and Executive Orders apply to transfers of surplus Federal real property?

The Secretary directs the transferee or lessee to comply with applicable provisions of the following statutes and Executive Orders prior to, or immediately upon, transfer or lease, as applicable:

(a) National Environmental Policy Act of 1969, 42 U.S.C. 4332.

(b) National Historic Preservation Act of 1966, 16 U.S.C. 470.

(c) National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*

(d) Floodplain Management, Exec. Order No. 11988, 42 FR 26951 (May 25, 1977).

(e) Protection of Wetlands, Exec. Order No. 11990, 42 FR 26961 (May 25, 1977).

(f) Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(d)(1) *et seq.*

(g) Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

(h) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 *et seq.*

(i) Age Discrimination Act of 1975, 42 U.S.C. 1601 *et seq.*

(j) Any other applicable Federal or State laws and Executive Orders.

(Authority: 40 U.S.C. 484(k))

(Approved by the Office of Management and Budget under control number 1880–0524)

§ 12.12 What are the terms and conditions of transfers or leases of surplus Federal real property?

(a) *General terms and conditions for transfers and leases.* The following general terms and conditions apply to transfers and leases of surplus Federal real property under this part:

(1) For the period provided in the transfer or lease instrument, the transferee or lessee shall use all of the surplus Federal real property it receives

solely and continuously for its approved program and plan of use, in accordance with the Act and these regulations, except that—

(i) The transferee or lessee has twelve (12) months from the date of transfer to place this surplus Federal real property into use, if the Secretary did not, at the time of transfer, approve in writing construction of major new facilities or major renovation of the property;

(ii) The transferee or lessee has thirty-six (36) months from the date of transfer to place the surplus Federal real property into use, if the transferee or lessee proposes construction of major new facilities or major renovation of the property and the Secretary approves it in writing at the time of transfer; and

(iii) The Secretary may permit use of the surplus Federal real property at any time during the period of restriction by an entity other than the transferee or lessee in accordance with § 12.13.

(2) The transferee or lessee may not modify its approved program and plan of use without the prior written consent of the Secretary.

(3) The transferee or lessee may not sell, lease or sublease, rent, mortgage, encumber, or otherwise dispose of all or a portion of the surplus Federal real property or any interest therein without the prior written consent of the Secretary.

(4) A transferee or lessee shall pay all administrative costs incidental to the transfer or lease including, but not limited to—

(i) Transfer taxes;

(ii) Surveys;

(iii) Appraisals;

(iv) Inventory costs;

(v) Legal fees;

(vi) Title search;

(vii) Certificate or abstract expenses;

(viii) Decontamination costs;

(ix) Moving costs;

(x) Recordation expenses;

(xi) Other closing costs; and

(xii) Service charges, if any, provided for by an agreement between the Secretary and the applicable State agency for Federal Property Assistance.

(5) The transferee or lessee shall protect the residual financial interest of the United States in the surplus Federal real property by insurance or such other means as the Secretary directs.

(6) The transferee or lessee shall file with the Secretary reports on its maintenance and use of the surplus Federal real property and any other reports required by the Secretary in accordance with the transfer or lease instrument.

(7) Any other term or condition that the Secretary determines appropriate or necessary.

(b) *Additional terms and conditions for on-site transfers.* The terms and conditions in the transfer, including those in paragraph (a) of this section, apply for a period not to exceed thirty (30) years.

(c) *Additional terms and conditions for off-site transfers.* (1) The terms and conditions in the transfer, including those in paragraph (a) of this section, apply for a period equivalent to the estimated economic life of the property conveyed for a transfer of off-site surplus Federal real property.

(2) In addition to the terms and conditions contained in paragraph (c) of this section, the Secretary may also require the transferee of off-site surplus Federal real property—

(i) To post performance bonds;

(ii) To post performance guarantee deposits; or

(iii) To give such other assurances as may be required by the Secretary or the holding agency to ensure adequate site clearance.

(d) *Additional terms and conditions for leases.* In addition to the terms and conditions contained in paragraph (a) of this section, the Secretary requires, for leases of surplus Federal real property, that all terms and conditions apply to the initial lease agreement, and any renewal periods, unless specifically excluded in writing by the Secretary.

(Authority: 40 U.S.C. 484(k)(1))

(Approved by the Office of Management and Budget under control number 1880–0524)

§ 12.13 When is use of the transferred surplus Federal real property by entities other than the transferee or lessee permissible?

(a) *By eligible entities.* A transferee or lessee may permit the use of all or a portion of the surplus Federal real property by another eligible entity as described in § 12.5, only upon those

terms and conditions the Secretary determines appropriate if—

(1) The Secretary determines that the proposed use would not substantially limit the program and plan of use by the transferee or lessee and that the use will not unduly burden the Department;

(2) The Secretary's written consent is obtained by the transferee or lessee in advance; and

(3) The Secretary approves the use instrument in advance and in writing.

(b) *By ineligible entities.* A transferee or lessee may permit the use of a portion of the surplus Federal real property by an ineligible entity, one not described in § 12.5, only upon those terms and conditions the Secretary determines appropriate if—

(1) In accordance with paragraph (a) of this section, the Secretary makes the required determination and approves both the use and the use instrument;

(2) The use is confined to a portion of the surplus Federal real property;

(3) The use does not interfere with the approved program and plan of use for which the surplus Federal real property was conveyed; and

(4) Any rental fees or other compensation for use are either remitted directly to the Secretary or are applied to purposes expressly approved in writing in advance by the Secretary.

(Authority: 40 U.S.C. 484(k)(4))

Subpart D—Enforcement

§ 12.14 What are the sanctions for noncompliance with a term or condition of a transfer or lease of surplus Federal real property?

(a) *General sanctions for noncompliance.* The Secretary imposes any or all of the following sanctions, as applicable, to all transfers or leases of surplus Federal real property:

(1) If all or a portion of, or any interest in, the transferred or leased surplus Federal real property is not used or is sold, leased or subleased, encumbered, disposed of, or used for purposes other than those in the approved program and plan of use, without the prior written consent of the Secretary, the Secretary may require that—

(i) All revenues and the reasonable value of other benefits received by the transferee or lessee directly or indirectly from that use, as determined by the Secretary, be held in trust by the transferee or lessee for the United States subject to the direction and control of the Secretary;

(ii) Title or possession to the transferred or leased surplus Federal real property and the right to immediate possession revert to the United States;

(iii) The surplus Federal real property be transferred or leased to another eligible entity as the Secretary directs;

(iv) The transferee or lessee abrogate the conditions and restrictions in the transfer or lease instrument in accordance with the provisions of § 12.15;

(v) The transferee or lessee place the surplus Federal real property into immediate use for an approved purpose and extend the period of restriction in the transfer or lease instrument for a term equivalent to the period during which the property was not fully and solely used for an approved use; or

(vi) The transferee or lessee comply with any combination of the sanctions described in paragraph (a)(1) or (a)(3) of this section.

(2) If title or possession reverts to the United States for noncompliance or is voluntarily reconveyed, the Secretary may require the transferee or lessee—

(i) To reimburse the United States for the decrease in value of the transferred or leased surplus Federal real property not due to—

(A) Reasonable wear and tear;

(B) Acts of God; or

(C) Reasonable alterations made by the transferee or lessee to adapt the surplus Federal real property to the approved program and plan of use for which it was transferred or leased;

(ii) To reimburse the United States for any costs incurred in reverting title or possession;

(iii) To forfeit any cash payments made by the transferee or lessee against the purchase or lease price of surplus Federal real property transferred;

(iv) To take any other action directed by the Secretary; or

(v) To comply with any combination of the provisions of paragraph (a)(3) of this section.

(3) If the transferee or lessee does not put the surplus Federal real property into use within the applicable time limitation in § 12.12(a), the Secretary may require the transferee or lessee to make cash payments to the Secretary equivalent to the current fair market rental value of the surplus Federal real property for each month during which the program and plan of use has not been implemented.

(Authority: 40 U.S.C. 484(k)(4))

(4) If the Secretary determines that a lessee of a transferee or a sublessee of a lessee is not complying with a term or condition of the lease, or if the lessee voluntarily surrenders the premises, the Secretary may require termination of the lease.

(Authority: 40 U.S.C. 484(k)(4)(A))

(b) *Additional sanction for noncompliance with off-site transfer*. In addition to the sanctions in paragraph (a) of this section, if the Secretary determines that a transferee is not complying with a term or condition of a transfer of off-site surplus Federal real property, the Secretary may require that the unearned PBA become immediately due and payable in cash to the United States.

(Authority: 40 U.S.C. 484(k)(4)(A))

Subpart E—Abrogation

§ 12.15 What are the procedures for securing an abrogation of the conditions and restrictions contained in the conveyance instrument?

(a) The Secretary may, in the Secretary's sole discretion, abrogate the conditions and restrictions in the transfer or lease instrument if—

(1) The transferee or lessee submits to the Secretary a written request that the Secretary abrogate the conditions and restrictions in the conveyance instrument as to all or any portion of the surplus Federal real property;

(2) The Secretary determines that the proposed abrogation is in the best interests of the United States;

(3) The Secretary determines the terms and conditions under which the Secretary will consent to the proposed abrogation; and

(4) The Secretary transmits the abrogation to the Administrator and there is no disapproval by the Administrator within thirty (30) days after notice to the Administrator.

(b) The Secretary abrogates the conditions and restrictions in the transfer or lease instrument upon a cash payment to the Secretary based on the formula contained in the transfer or lease instrument and any other terms and conditions the Secretary deems appropriate to protect the interest of the United States.

(Authority: 40 U.S.C. 484(k)(4)(A)(iii))

APPENDIX A TO PART 12—PUBLIC BENEFIT ALLOWANCE FOR TRANSFER OF SURPLUS FEDERAL REAL PROPERTY FOR EDUCATIONAL PURPOSES [1]

Classification	Percent allowed												
	Basic public benefit allowance	Organization allowances							Utilization allowances				Maximum public benefit allowance [4]
		Accreditation	Federal impact	Public service training	Hardship	Inadequacy of existing school plant facilities			Introduction of new instructional programs	Student health and welfare	Research	Service to handicapped	
						10–25%	26–50%	51–100%					
Elementary or high schools	70	.....	10	10	10	10	20	30	10	10	10	10	100
Colleges or Universities	50	20	.....	10	10	10	20	30	10	10	10	10	100
Specialized schools	70	.....	.....	10	10	10	20	30	10	10	10	10	100
Public libraries or educational museums	[2] 100	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	[2] 100
School outdoor education	40	.....	.....	.....	.....	.....	.....	.....	10	[3] 10	10	.....	70
Central administrative and/or service centers	80	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	80
Non-profit educational research organizations	50	20	.....	10	.....	.....	.....	.....	10	10	.....	10	100

[2] Applicable when this is the primary use to be made of the property. The public benefit allowance for the overall program is applicable when such facilities are conveyed as a minor component of other facilities.

[3] This 10% may include an approvable recreation program which will be accessible to the public and entirely compatible with, but subordinate to, the educational program.

[4] This column establishes the maximum discount from the fair market value for payment due from the transferee at the time of the transfer. This column does not apply for purposes of ranking applicants to determine to which applicant the property will be transferred. Competitive rankings are based on the absolute total of public benefit allowance points and are not limited to the 100% ceiling.

DESCRIPTION OF TERMS USED IN THIS APPENDIX

Elementary or High School means an elementary school (including a kindergarten), high school, junior high school, junior-senior high school or elementary or secondary school system, that provides elementary or secondary education as determined under State law. However, it does not include a nursery school even though it may operate as part of a school system.

College or University means a non-profit or public university or college, including a junior college, that provides postsecondary education.

Specialized School means a vocational school, area trade school, school for the blind, or similar school.

Public Library means a public library or public library service system, not a school library or library operated by non-profit, private organizations or institutions that may be open to the general public. School libraries receive the public benefit allowance in the appropriate school classification.

Educational Museum means a museum that conducts courses on a continuing, not *ad hoc*, basis for students who receive credits from accredited postsecondary education institutions or school systems.

School Outdoor Education means a separate facility for outdoor education as distinguished from components of a basic school. Components of a school such as playgrounds and athletic fields receive the basic allowance applicable for that type of school. The

[1] This Appendix applies to transfers of both on-site and off-site surplus property.

outdoor education must be located reasonably near the school system and may be open to and used by the general public, but only if the educational program for which the property is conveyed is given priority of use. This category does not include components of the school such as playgrounds and athletic fields, that are utilized during the normal school year, and are available to all students.

Central Administrative and/or Service Center means administrative office space, equipment storage areas, and similar facilities.

DESCRIPTION OF ALLOWANCES

Basic Public Benefit Allowance means an allowance that is earned by an applicant that satisfies the requirements of § 12.10 of this part.

ORGANIZATION ALLOWANCE

Accreditation means an allowance that is earned by any postsecondary educational institution, including a vocational or trade school, that is accredited by an accrediting agency recognized by the Secretary under 34 CFR part 602.

Federal Impact means an allowance that is earned by any local educational agency (LEA) qualifying for Federal financial assistance as the result of the impact of certain Federal activities upon a community, such as the following under Public Law 81–874 and Public Law 81–815: to any LEA charged by law with responsibility for education of children who reside on, or whose parents are employed on, Federal property, or both; to any LEA to which the Federal Government has caused a substantial and continuing financial burden as the result of the acquisition of a certain amount of Federal property since 1938; or to any LEA that urgently needs minimum school facilities due to a substantial increase in school membership as the result of new or increased Federal activities.

Public Services Training means an allowance that is earned if the applicant has cadet or ROTC units or other personnel training contracts for the Federal or State governments. This is given to a school system only if the particular school receiving the property furnishes that training.

Hardship means an allowance earned by an applicant that has suffered a significant facility loss because of fire, storm, flood, other disaster, or condemnation. This allowance is also earned if unusual conditions exist such as isolation or economic factors that require special consideration.

Inadequacies of Existing Facilities means an allowance that is earned on a percentage basis depending on the degree of inadequacy considering both public and nonpublic facilities. Overall plant requirements are determined based on the relationship between the maximum enrollment accommodated in the present facilities, excluding double and night sessions and the anticipated enrollment if the facilities are transferred. Inadequacies may be computed for a component school unit such as a school farm, athletic field, facility for home economics, round-out school site, cafeteria, auditorium, teacherages, faculty housing, etc., only if the component is required to meet State standards. In that event, the State Department of Education will be required to provide a certification of the need. Component school unit inadequacies may only be related to a particular school and not to the entire school system.

UTILIZATION ALLOWANCES

Introduction of New Instructional Programs means an allowance that is earned if the proposed use of the property indicates that new programs will be added at a particular school. Examples of these new programs include those for vocational education, physical education, libraries, and similar programs.

Student Health and Welfare means an allowance that is earned if the proposed program and plan of use of the property provides for cafeteria, clinic, infirmary, bus loading shelters, or other uses providing for the well-being and health of students and eliminating safety and health hazards.

Research means an allowance that is earned if the proposed use of the property will be predominantly for research by faculty or graduate students under school auspices, or other primary educational research.

Service to Handicapped means an allowance that is earned if the proposed program and plan of use for the property will be for special education for the physically or mentally handicapped.

PART 15—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

AUTHORITY: Section 213, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91–646, 84 Stat. 1894 (42 U.S.C. 4601) as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Title IV of Pub. L. 100–17, 101 Stat. 246–256 (42 U.S.C. 4601 note).

§ 15.1 Uniform relocation assistance and real property acquisition.

Regulations and procedures for complying with the Uniform Relocation Assistance Act of 1970 (Pub. L. 91–646, 84 Stat. 1894, 42 U.S.C. 4601) as amended

by the SUrface Transportation and Uniform Relocation Assistance Act of 1987 (Title IV of Pub. L. 100–17, 101 Stat. 264-255, 42 U.S.C. 4601 note) are set forth in 49 CFR part 24.

[52 FR 48021, Dec. 17, 1987]

PART 21—EQUAL ACCESS TO JUSTICE

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AUTHORITY: 5 U.S.C. 504, unless otherwise noted.

SOURCE: 58 FR 47192, Sept. 7, 1993, unless otherwise noted.

Subpart A—General

§ 21.1 Equal Access to Justice Act.

(a) The Equal Access to Justice Act (the Act) provides for the award of fees and other expenses to applicants that—

(1) Are prevailing parties in adversary adjudications before the Department of Education; and

(2) Meet all other conditions of eligibility contained in this part.

(b) An eligible applicant, as described in paragraph (a) of this section, is entitled to receive an award unless—

(1) The adjudicative officer, the Civil Rights Reviewing Authority (CRRA), or the Secretary on review, determines that—

(i) The Department's position was substantially justified; or

(ii) Special circumstances make an award unjust; or

(2) The adversary adjudication is under judicial review, in which case the applicant may receive an award only as described in § 21.11.

(c) The determination under paragraph (b)(1)(i) of this section is based on the administrative record, as a whole, made during the adversary adjudication for which fees and other expenses are sought.

(Authority: 5 U.S.C. 504(a)(1) and (c)(1))

§ 21.2 Time period when the Act applies.

The Act applies to any adversary adjudication covered under this part pending or commenced before the Department on or after August 5, 1985.

(Authority: 5 U.S.C. 504(note))

§ 21.3 Definitions.

The following definitions apply to this part:

Act means the Equal Access to Justice Act.

Adjudicative officer means the Administrative Law Judge, hearing examiner,

or other deciding official who presided at the underlying adversary adjudication.

(Authority: 5 U.S.C. 504(b)(1)(D))

Adversary adjudication means a proceeding—

(1) Conducted by the Department for the formulation of an order or decision arising from a hearing on the record under the Administrative Procedure Act (5 U.S.C. 554);

(2) Listed in §21.10; and

(3) In which the position of the Department was represented by counsel or other representative who entered an appearance and participated in the proceeding.

(Authority: 5 U.S.C. 504(b)(1)(C))

Application subject to the jurisdiction of the CRRA means an application for fees and expenses based on an underlying proceeding conducted under 34 CFR parts 100, 101, 104, 106, or 110.

(Authority: 5 U.S.C. 504(b)(1)(C); 20 U.S.C. 1681; 29 U.S.C. 794; 42 U.S.C. 2000d–1 *et seq.* and 6101 *et seq.*)

CRRA means the Civil Rights Reviewing Authority, the reviewing authority established by the Secretary to consider applications under 34 CFR parts 100, 101, 104, 106, and 110.

(Authority: 5 U.S.C. 504(b)(1)(C); 20 U.S.C. 1681; 29 U.S.C. 794; 42 U.S.C. 2000d–1 *et seq.* and 6101 *et seq.*)

Department means the U.S. Department of Education.

Department's counsel means counsel for the Department of Education or another Federal agency.

Employee means:

(1) A person who regularly performs services for an applicant—

(i) For remuneration; and

(ii) Under the applicant's direction and control.

(2) A part-time or seasonal employee who performs services for an applicant—

(i) For renumeration; and

(ii) Under the applicant's direction and control.

(Authority: 5 U.S.C. 504(c)(1))

Fees and other expenses means an eligible applicant's reasonable fees and expenses—

(1) Related to the issues on which it was the prevailing party in the adversary adjudication; and

(2) Further described in §§21.33 and 21.50.

(Authority: 5 U.S.C. 504 (a)(1), (b)(1)(A), and (c)(1))

Party means a ''person'' or a ''party'' as those terms are defined in the Administrative Procedure Act (5 U.S.C. 551(3)), including an individual, partnership, corporation, association, unit of local government, or public or private organization that meets the requirements in §21.20. The term does not include an agency of the Federal Government.

(Authority: 5 U.S.C. 504(b)(1)(B))

Position of the Department means, in addition to the position taken by the Department in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication is based.

(Authority: 5 U.S.C. 504 (a)(1) and (b)(1)(E))

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

(Authority: 5 U.S.C. 504 (b)(2) and (c)(1))

Subpart B—Which Adversary Adjudications Are Covered?

§21.10 Adversary adjudications covered by the Act.

The Act covers adversary adjudications under section 554 of title 5 of the United States Code. These include the following:

(a) Compliance proceedings under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*).

(b) Compliance and enforcement proceedings under the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*).

(c) Compliance proceedings under title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*).

(d) Compliance proceedings under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).

(e) Withholding proceedings under section 1001 of Pub. L. 100–297 (Hawkins-Stafford) (20 U.S.C. 2833).

(f) Proceedings under any of the following:

(1) Section 5(g) of Pub. L. 81–874 (Financial Assistance for Local Educational Agencies in Areas Affected by Federal Activity) (20 U.S.C. 240(g)).

(2) Sections 6(c) or 11(a) of Pub. L. 81–815 (an act relating to the construction of school facilities in areas affected by Federal activities and for other purposes) (20 U.S.C. 636(c) or 641(a)).

(3) Section 6 of Pub. L. 95–563 (Contract Disputes Act of 1978) (41 U.S.C. 605).

(4) Part E of the General Education Provisions Act (20 U.S.C. 1234 *et seq.*).

(g) Other adversary adjudications that fall within the coverage of the Act.

(Authority: 5 U.S.C. 504(c) and 554; 20 U.S.C. 1234(f)(2))

§ 21.11 Effect of judicial review of adversary adjudication.

If a court reviews the underlying decision of an adversary adjudication covered under this part, an award of fees and other expenses may be made only under 28 U.S.C. 2412 (awards in certain judicial proceedings).

(Authority: 5 U.S.C. 504(c)(1); 28 U.S.C. 2412(d)(3))

Subpart C—How Is Eligibility Determined?

§ 21.20 Types of eligible applicants.

The following types of parties that prevail in adversary adjudications are eligible to apply under the Act for an award of fees and other expenses:

(a) An individual who has a net worth of not more than $2 million.

(b) Any owner of an unincorporated business who has—

(1) A net worth of not more than $7 million, including both personal and business interests; and

(2) Not more than 500 employees.

(c) A charitable or other tax-exempt organization—

(1) As described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)); and

(2) Having not more than 500 employees.

(d) A cooperative association—

(1) As defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141(a)); and

(2) Having not more than 500 employees.

(e) Any other partnership, corporation, association, unit of local government, or organization that has—

(1) A net worth of not more than $7 million; and

(2) Not more than 500 employees.

(Authority: 5 U.S.C. 504(b)(1)(B))

§ 21.21 Determination of net worth and number of employees.

(a) The adjudicative officer shall determine an applicant's net worth and number of employees as of the date the adversary adjudication was initiated.

(b) In determining eligibility, the adjudicative officer shall include the net worth and number of employees of the applicant and all of the affiliates of the applicant.

(c) For the purposes of paragraph (b) of this section, the adjudicative officer shall consider the following as an affiliate:

(1) Any individual, corporation, or other entity that directly or indirectly owns or controls a majority of the voting shares or other interest of the applicant;

(2) Any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest; and

(3) Any entity with a financial relationship to the applicant that, in the determination of the adjudicative officer, constitutes an affiliation for the purposes of paragraph (b) of this section.

(d) In determining the number of employees of an applicant and its affiliates, the adjudicative officer shall count part-time employees on a proportional basis.

(Authority: 5 U.S.C. 504(c)(1))

§ 21.22 Applicants representing others.

If an applicant is a party in an adversary adjudication primarily on behalf of one or more persons or entities that are ineligible under this part, then the applicant is not eligible for an award.

(Authority: 5 U.S.C. 504 (b)(1)(B) and (c)(1))

Subpart D—How Does One Apply for an Award?

§21.30 Time for filing application.

(a) In order to be considered for an award under this part, an applicant may file its application when it prevails in an adversary adjudication—or in a significant and discrete substantive portion of an adversary adjudication—but no later than 30 days after the Department's final disposition of the adversary adjudication.

(b) In the case of a review or reconsideration of a decision in which an applicant has prevailed or believes it has prevailed, the adjudicative officer shall stay the proceedings on the application pending final disposition of the underlying issue.

(c) For purposes of this part, final disposition of the adversary adjudication means the latest of—

(1) The date on which an initial decision or other recommended disposition of the merits of the proceeding by an adjudicative officer becomes administratively final;

(2) The date of an order disposing of any petitions for reconsideration of the final order in the adversary adjudication;

(3) If no petition for reconsideration is filed, the last date on which that type of petition could have been filed; or

(4) The date of a final order or any other final resolution of a proceeding—such as a settlement or voluntary dismissal—that is not subject to a petition for reconsideration.

(Authority: 5 U.S.C. 504 (a)(2) and (c)(1))

§21.31 Contents of application.

(a) In its application for an award of fees and other expenses, an applicant shall include the following:

(1) Information adequate to show that the applicant is a prevailing party in an adversary adjudication or in a significant and discrete substantive portion of an adversary adjudication.

(2) A statement that the adversary adjudication is covered by the Act according to §21.10.

(3) An allegation that the position of the Department was not substantially justified, including a description of the specific position.

(4) Unless the applicant is a qualified tax-exempt organization or a qualified agricultural cooperative association, information adequate to show that the applicant qualifies under the requirements of §§21.20 and 21.21 regarding net worth. The information, if applicable, shall include a detailed exhibit of the net worth of the applicant—and its affiliates as described in §21.21—as of the date the proceeding was initiated.

(5)(i) The total amount of fees and expenses sought in the award; and

(ii) An itemized statement of—

(A) Each expense; and

(B) Each fee, including the actual time expended for this fee and the rate at which the fee was computed.

(6) A written verification under oath or affirmation or under penalty of perjury from each attorney representing the applicant stating—

(i) The rate at which the fee submitted by the attorney was computed; and

(ii) The actual time expended for the fee.

(7) A written verification under oath, affirmation, or under penalty of perjury that the information contained in the application and any accompanying material is true and complete to the best of the applicant's information and belief.

(b) The adjudicative officer may require the applicant to submit additional information.

(Authority: 5 U.S.C. 504 (a)(2) and (c)(1))

§21.32 Confidentiality of information about net worth.

(a) In a proceeding on an application, the public record ordinarily includes the information showing the net worth of the applicant.

(b) However, if an applicant objects to public disclosure of any portion of the information and believes there are legal grounds for withholding it from disclosure, the applicant may submit directly to the adjudicative officer—

(1) The information the applicant wishes withheld in a sealed envelope labeled ''Confidential Financial Information;'' and

(2) A motion to withhold the information from public disclosure.

(c) The motion must—

(1) Describe the information the applicant is requesting be withheld; and

(2) Explain in detail—

(i) Why that information falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act;

(ii) Why public disclosure of the information would adversely affect the applicant; and

(iii) Why disclosure is not required in the public interest.

(d)(1) The applicant shall serve on Department's counsel a copy of the material referred to in paragraph (c) of this section.

(2) The applicant is not required to give a copy of that material to any other party to the proceeding.

(e)(1) If the adjudicative officer finds that the information should not be withheld from public disclosure, the information is placed in the public record of the proceeding.

(2) If the adjudicative officer finds that the information should be withheld from public disclosure, any request to inspect or copy the information is treated in accordance with the Department's established procedures under the Freedom of Information Act (34 CFR part 5).

(Authority: 5 U.S.C. 504(c)(1))

§ 21.33 Allowable fees and expenses.

(a) A prevailing party may apply for an award of fees and other expenses incurred by the party in connection with—

(1) An adversary adjudication; or

(2) A significant and discrete substantive portion of an adversary adjudication.

(b) If a proceeding includes issues covered by the Act and issues excluded from coverage, the applicant may apply only for an award of fees and other expenses related to covered issues.

(c) Allowable fees and expenses include the following, as applicable:

(1) An award of fees based on rates customarily charged by attorneys, agents, and expert witnesses.

(2) An award for the reasonable expenses of the attorney, agent, or expert witness as a separate item if the attorney, agent, or expert witness ordinarily charges clients separately for those expenses.

(3) The cost of any study, analysis, engineering report, test, or project related to the preparation of the applicant's case in the adversary adjudication.

(d) The calculation of fees and expenses as provided for under paragraph (c) of this section shall be in accordance with the standards for awards as described in § 21.50(a) through (c).

(Authority: 5 U.S.C. 504(a)(1), (b)(1)(A) and (c)(1))

Subpart E—What Procedures Are Used in Considering Applications?

§ 21.40 Filing and service of documents.

(a) Except as provided in § 21.32 and in applications subject to the jurisdiction of the CRRA, an applicant shall—

(1) File with the adjudicative officer its application and any related documents; and

(2) Serve on all parties to the adversary adjudication copies of its application and any related documents.

(b)(1) In an application subject to the jurisdiction of the CRRA, the applicant shall—

(i) File with the CRRA its application and any other related documents; and

(ii) Serve on all parties to the adversary adjudication copies of its application and any related documents.

(2) In applications subject to § 21.40(b)(1), the CRRA shall direct the adjudicative officer to issue an initial decision within 30 days of the completion of the proceedings on the application. The adjudicative officer shall conduct proceedings under the procedures of §§ 21.41–21.44.

(Authority: 5 U.S.C. 504(a)(2) and (c)(1); 20 U.S.C. 1681; 29 U.S.C. 794; 42 U.S.C. 2000d–1 *et seq.* and 6101 *et seq.*)

§ 21.41 Answer to application.

(a)(1) Within 30 days after receiving an application for an award under this part, the Department's counsel may file an answer to the application.

(2) The Department's counsel may request an extension of time for filing the Department's answer.

(3) The adjudicative officer shall grant the request for an extension if the Department's counsel shows good cause for the request.

(b)(1) The Department's answer must—

(i) Explain any objections to the award requested; and

(ii) Identify the facts relied on in support of the position of the Department.

(2) If the answer is based on any alleged facts not in the record of the adversary adjudication, the Department's counsel shall include with the answer either—

(i) Supporting affidavits; or

(ii) A request for further proceedings under §21.44.

(c)(1) If the Department's counsel and the applicant believe that the issues in the application can be settled, they may jointly file a statement of their intent to negotiate a settlement.

(2)(i) The filing of a statement of an intent to negotiate extends the time for filing an answer for 30 days.

(ii) The adjudicative officer shall grant further extensions if the Department's counsel and the applicant jointly request those extensions.

(Authority: 5 U.S.C. 504(c)(1))

§21.42 Reply.

(a) Within 15 days after receiving an answer, an applicant may file a reply.

(b) If the applicant's reply is based on any alleged facts not in the record of the adversary adjudication, the applicant shall include with the reply either—

(1) Supporting affidavits; or

(2) A request for further proceedings under §21.44.

(Authority: 5 U.S.C. 504(c)(1))

§21.43 Comments by other parties.

(a) Any party to a proceeding, other than an applicant or the Department's counsel, may file comments on—

(1) The application within 30 days after the applicant files the application;

(2) The answer within 30 days after the counsel files the answer; or

(3) Both, if the comments are filed within the time period specified in paragraphs (a)(1) and (a)(2) of this section.

(b) The commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that further participation is necessary to permit full exploration of matters raised in the comments.

(Authority: 5 U.S.C. 504(c)(1))

§21.44 Further proceedings.

(a) The adjudicative officer shall make the determination of an award on the basis of the written record.

(b)(1) However, the adjudicative officer may order further proceedings on his or her own initiative or at the request of the applicant or the Department's counsel.

(2) The adjudicative officer may order further proceedings only if he or she determines that those proceedings are necessary for full and fair resolution of issues arising from the application.

(3) If further proceedings are ordered, the adjudicative officer shall determine the scope of those proceedings, which may include such proceedings as informal conferences, oral arguments, additional written submissions, discovery, or an evidentiary hearing.

(4) An adjudicative officer may not order discovery or an evidentiary hearing for the issue of whether or not the Department's position was substantially justified.

(c) If the applicant or the Department's counsel requests the adjudicative officer to order further proceedings, the request must—

(1) Specify the information sought or the disputed issues; and

(2) Explain why the additional proceedings are necessary to obtain that information or resolve those issues.

(Authority: 5 U.S.C. 504(a)(3) and (c)(1))

Subpart F—How Are Awards Determined?

§21.50 Standards for awards.

(a) In determining the reasonableness of the amount sought as an award of fees and expenses for an attorney, agent, or expert witness, the adjudicative officer shall consider one or more of the following:

(1)(i) If the attorney, agent, or expert witness is in private practice, his or her customary fee for similar services; or

(ii) If the attorney, agent, or expert witness is an employee of the applicant, the fully allocated cost of the services.

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services.

(3) The time the attorney, agent, or expert witness actually spent on the applicant's behalf with respect to the adversary adjudication.

(4) The time the attorney, agent, or expert witness reasonably spent in light of the difficulty or complexity of the covered issues in the adversary adjudication.

(5) Any other factors that may bear on the value of the services provided by the attorney, agent, or expert witness.

(b) The adjudicative officer may not grant—

(1) An award for the fee of an attorney or agent in excess of $75.00 per hour; or

(2) An award to compensate an expert witness in excess of the highest rate at which the Department pays expert witnesses.

(c) The adjudicative officer may also determine whether—

(1) Any study, analysis, engineering report, text, or project for which the applicant seeks an award was necessary for the preparation of the applicant's case in the adversary adjudication; and

(2) The costs claimed by the applicant for this item or items are reasonable.

(d) The adjudicative officer may not make an award to an eligible party if the adjudicative officer, the CRRA, or the Secretary on review finds that, based on a review of the administrative record as a whole—

(1) The position of the Department, as defined in § 21.3, was substantially justified; or

(2) Special circumstances make an award unjust.

(e) The adjudicative officer may reduce or deny an award to the extent that the applicant engaged in conduct that unduly or unreasonably protracted the adversary adjudication.

(f) If an applicant is entitled to an award because the applicant prevailed over another agency of the United States that participated in a proceeding before the Department and that agency's position was not substantially justified, the adjudicative officer shall determine whether to make the award, or an appropriate portion of the award, against that agency. For the purpose of this determination, the requirements of this subpart apply.

(Authority: 5 U.S.C. 504(a), (b)(1)(A), and (b)(1)(E))

§ 21.51 Initial decision in applications not subject to the CRRA.

(a) In applications not subject to the jurisdiction of the CRRA, the adjudicative officer shall issue an initial decision on an application within 30 days after completion of proceedings on the application.

(b) The initial decision must include the following:

(1) Written findings, including sufficient supporting explanation, on—

(i) The applicant's status as a prevailing party;

(ii) The applicant's eligibility;

(iii) Whether the position of the Department was substantially justified;

(iv) Whether special circumstances make an award unjust;

(v) If applicable, whether the applicant engaged in conduct that unduly or unreasonably protracted the adversary adjudication; and

(vi) Other factual issues raised in the adversary adjudication.

(2) A statement of the amount awarded, including an explanation—with supporting information—for any difference between the amount requested by the applicant and the amount awarded.

(3) A statement of the applicant's right to request review by the Secretary under § 21.54.

(4) A statement of the applicant's right under § 21.56 to seek judicial review of the final award determination.

(c) The explanation referred to in paragraph (b)(2) of this section may include—

(1) Whether the amount requested was reasonable; and

(2) The extent to which the applicant unduly or unreasonably protracted the adversary adjudication.

(Authority: 5 U.S.C. 504 (a)(3) and (c))

§21.52 Initial decision by an adjudicative officer in applications subject to CRRA jurisdiction.

(a) If the application is subject to the jurisdiction of the CRRA, the adjudicative officer shall issue the initial decision within 30 days after completion of the proceedings.

(b) The initial decision must include the information required under §21.51(b). However, instead of the information required under §21.51(b)(3), the initial decision must inform the applicant of—

(1) Its right to request review by the CRRA; and

(2) Its right to request review by the Secretary of the CRRA's final decision.

(c) If the applicant or the Department's counsel appeals the adjudicative officer's initial decision, the appeal must be submitted to the CRRA, in writing, within 30 days after the initial decision is issued.

(d) If the applicant or the Department's counsel does not appeal the adjudicative officer's initial decision to the CRRA and the Secretary does not decide to review the initial decision under §21.54(a), the initial decision becomes the Department's final decision 60 days after it is issued by the officer.

(Authority: 5 U.S.C. 504(b)(1)(C); 20 U.S.C. 1681; 29 U.S.C. 794; 42 U.S.C. 2000d–1 *et seq.* and 6101 *et seq.*)

§21.53 Final decision of the CRRA.

(a) In an application subject to the jurisdiction of the CRRA, the CRRA shall, within 30 days after receipt of the written appeal—

(1) Issue a final decision on the appeal of the adjudicative officer's initial decision; or

(2) Remand the application to the adjudicative officer for further proceedings.

(b) The CRRA shall review the initial decision on the basis of the written record of the proceedings on the application. This includes but is not limited to—

(1) The written request; and

(2) The adjudicative officer's findings as described in §21.51(b).

(c) The CRRA shall act on the review by either—

(1) Issuing a final decision on the application; or

(2) Remanding the application to the adjudicative officer for further proceedings.

(d) If the CRRA issues a final decision, the CRRA's decision must include—

(1) Written findings, including supporting explanation, on—

(i) The applicant's status as a prevailing party;

(ii) The applicant's eligibility;

(iii) Whether the position of the Department was substantially justified;

(iv) Whether special circumstances make an award unjust;

(v) Whether the applicant engaged in conduct that unduly or unreasonably protracted the adversary adjudication; and

(vi) Other factual issues raised in the adversary adjudication.

(2) A statement of the amount awarded, including an explanation—with supporting information—for any difference between the amount requested by the applicant and the amount awarded.

(3) A statement of the applicant's right to request review by the Secretary under §21.54.

(4) A statement of the applicant's right under §21.56 to seek judicial review of the final award determination.

(e) The explanation referred to in paragraph (d)(2) of this section may include—

(1) Whether the amount requested was reasonable; and

(2) The extent to which the applicant unduly or unreasonably protracted the adversary adjudication.

(Authority: 5 U.S.C. 301, 557 (b) and (c); 20 U.S.C. 1681 and 3401 *et seq.;* 29 U.S.C. 794; 42 U.S.C. 2000d–1 *et seq.* and 6101 *et seq.*)

§21.54 Review by the Secretary.

(a) The Secretary may decide to review—

(1) An initial decision made by an adjudicative officer in a proceeding not subject to CRRA review;

(2) An initial decision made by an adjudicative officer in a proceeding subject to CRRA review that was not appealed to the CRRA; or

(3) A final decision made by the CRRA under § 21.53.

(b)(1) The Secretary does not review a final decision made by an adjudicative officer of the General Services Administration Board of Contract Appeals.

(2) The Secretary or a party to the proceedings may seek reconsideration of the final decision by an adjudicative officer of the General Services Administration Board of Contract Appeals on the fee application in accordance with 48 CFR 6101.32.

(c) The Secretary decides to review a decision under § 21.54(a) either—

(1) Upon receipt of a written request for review by an applicant or Department's counsel; or

(2) Upon the Secretary's own motion.

(d) If the applicant or the Department's counsel seeks a review, the request must be submitted to the Secretary, in writing, within 30 days of—

(1) An initial decision in a proceeding not subject to CRRA review; or

(2) A final decision of the CRRA.

(e) The Secretary decides whether to accept or reject a request for review of an initial decision made by the adjudicative officer in a proceeding not subject to CRRA review or a final decision of the CRRA within 30 days after receipt of a request for review.

(f) The Secretary may decide on his own motion to review a decision made under § 21.54(a) within 60 days of the initial decision by the adjudicative officer or a final decision of the CRRA.

(g) If the Secretary decides to review the adjudicative officer's initial decision or the CRRA's final decision—

(1) The Secretary reviews the adjudicative officer's initial decision or the CRRA's final decision on the basis of the written record of the proceedings on the application. This includes, but is not restricted to—

(i) The written request for review;

(ii) The adjudicative officer's findings as described in § 21.51(b); and

(iii) If applicable, the final decision of the CRRA, if any; and

(2) The Secretary either—

(i) Issues a final decision; or

(ii) Remands the application to the adjudicative officer or the CRRA for further proceedings.

(h) If the Secretary issues a final decision, the Secretary's decision—

(1) Is in writing;

(2) States the reasons for the decision; and

(3) If the decision is adverse to the applicant, advises the applicant of its right to petition for judicial review under § 21.56.

(Authority: 5 U.S.C. 557 (b) and (c))

§ 21.55 Final decision if the Secretary does not review.

If the Secretary takes no action under § 21.54—

(a) The adjudicative officer's initial decision on the application becomes the Department's final decision 60 days after it is issued by the adjudicative officer; or

(b) The CRRA's decision on the application becomes the Department's final decision 60 days after it is issued by the CRRA.

(Authority: 5 U.S.C. 301)

§ 21.56 Judicial review.

If the applicant is dissatisfied with the award determination in the final decision under §§ 21.52–21.55, the applicant may seek judicial review of that determination under 5 U.S.C. 504(c)(2) within 30 days after that determination was made.

(Authority: 5 U.S.C. 504(c)(2))

Subpart G—How Are Awards Paid?

§ 21.60 Payment of awards.

To receive payment, an applicant granted an award under the Act must submit to the Financial Management Service of the Department—

(a) A request for payment signed by the applicant or its duly authorized agent;

(b) A copy of the final decision granting the award; and

(c) A statement that—

(1) The applicant will not seek review of the decision in the United States courts; or

(2) The process for seeking review of the award has been completed.

(Authority: 5 U.S.C. 504(c)(1) and (d))

§21.61 Release.

If an applicant, its agent, or its attorney accepts payment of any award or settlement in conjunction with an application under this part, that acceptance—

(a) Is final and conclusive with respect to that application; and

(b) Constitutes a complete release of any further claim against the United States with respect to that application.

(Authority: 5 U.S.C. 504(c)(1))

PART 30—DEBT COLLECTION

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30.35 What procedures does the Secretary follow to report debts to consumer reporting agencies?

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Subpart F—What Requirements Apply to the Compromise of a Debt or the Suspension or Termination of Collection Action?

30.70 How does the Secretary exercise discretion to compromise a debt or to suspend or terminate collection of a debt?

Subpart G [Reserved]

AUTHORITY: 20 U.S.C. 1221e–3(a)(1), and 1226a–1, 31 U.S.C. 3711(e), 31 U.S.C. 3716(b) and 3720A, unless otherwise noted.

SOURCE: 51 FR 24099, July 1, 1986, unless otherwise noted.

Subpart A—General

§30.1 What administrative actions may the Secretary take to collect a debt?

(a) The Secretary may take one or more of the following actions to collect a debt owed to the United States:

(1) Collect the debt under the procedures authorized in the regulations in this part.

(2) Refer the debt to the General Accounting Office for collection.

(3) Refer the debt to the Department of Justice for compromise, collection, or litigation.

(4) Take any other action authorized by law.

(b) In taking any of the actions listed in paragraph (a) of this section, the Secretary complies with the requirements of the Federal Claims Collection

Standards (FCCS) at 4 CFR parts 101–105 that are not inconsistent with the requirements of this part.

(c) The Secretary may—

(1) Collect the debt under the offset procedures in subpart C of this part;

(2) Report a debt to a consumer reporting agency under the procedures in subpart C of this part;

(3) Charge interest on the debt as provided in the FCCS;

(4) Impose upon a debtor a charge based on the costs of collection as determined under subpart E of this part;

(5) Impose upon a debtor a penalty for failure to pay a debt when due under subpart E of this part;

(6) Compromise a debt, or suspend or terminate collection of a debt, under subpart F of this part;

(7) Take any other actions under the procedures of the FCCS in order to protect the United States Government's interests; or

(8) Use any combination of the procedures listed in this paragraph (c) as may be appropriate in a particular case.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3711(e))

[53 FR 33425, Aug. 30, 1988]

§ 30.2 On what authority does the Secretary rely to collect a debt under this part?

(a)(1) The Secretary takes an action referred to under § 30.1(a) in accordance with—

(i) 31 U.S.C. chapter 37, subchapters I and II;

(ii) Other applicable statutory authority; or

(iii) The common law.

(2) If collection of a debt in a particular case is not authorized under one of the authorities described in paragraph (a)(1) of this section, the Secretary may collect the debt under any other available authority under which collection is authorized.

(b) The Secretary does not use a procedure listed in § 30.1(c) to collect a debt, or a certain type of debt, if—

(1) The procedure is specifically prohibited under a Federal statute; or

(2) A separate procedure other than the procedure described under § 30.1(c) is specifically required under—

(i) A contract, grant, or other agreement;

(ii) A statute other than 31 U.S.C. 3716; or

(iii) Other regulations.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3711(e))

[53 FR 33425, Aug. 30, 1988]

Subpart B [Reserved]

Subpart C—What Provisions Apply to Administrative Offset?

GENERAL OFFSET PROCEDURES

§ 30.20 To what do §§ 30.20–30.31 apply?

(a)(1)(i) Sections 30.20–30.31 establish the general procedures used by the Secretary to collect debts by administrative offset.

(ii) The Secretary uses the procedures established under other regulations, including § 30.33, What procedures does the Secretary follow for IRS tax refund offsets?, 34 CFR part 31, Salary Offset for Federal Employees Who Are Indebted to the United States Under Programs Administrated by the Secretary of Education, and 34 CFR part 32, Salary Offset to Recover Overpayments of Pay or Allowances from Department of Education Employees, if the conditions requiring application of those special procedures exists.

(2) The word ''offset'' is used in this subpart to refer to the collection of a debt by administrative offset.

(b) The Secretary does not rely on 31 U.S.C. 3716 as authority for offset if:

(1) The debt is owed by a State or local government;

(2) The debt, or the payment against which offset would be taken, arises under the Social Security Act;

(3) The debt is owed under:

(i) The Internal Revenue Code of 1954; or

(ii) The tariff laws of the United States; or

(4) The right to collect the debt first accrued more than ten years before initiation of the offset.

(c)(1) The Secretary may rely on 31 U.S.C. 3716 as authority for offset of a debt to which paragraph (b)(4) of this section would otherwise apply if facts material to the Government's right to

collect the debt were not known and could not reasonably have been known by the official or officials of the Government who are charged with the responsibility to discover and collect the debt.

(2) If paragraph (c)(1) of this section applies, the Secretary may rely on 31 U.S.C. 3716 as authority for offset up to 10 years after the date that the official or officials described in that paragraph first knew or reasonably should have known of the right of the United States to collect the debt.

(d) The Secretary determines when the right to collect a debt first accrued under the existing law regarding accrual of debts such as 28 U.S.C. 2415.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

[51 FR 24099, July 1, 1986, as amended at 51 FR 35646, Oct. 7, 1986; 53 FR 33425, Aug. 30, 1988; 54 FR 43583, Oct. 26, 1989]

§ 30.21 When may the Secretary offset a debt?

(a) The Secretary may offset a debt if:

(1) The debt is liquidated or certain in amount; and

(2) Offset is feasible and not otherwise prohibited.

(b)(1) Whether offset is feasible is determined by the Secretary in the exercise of sound discretion on a case-by-case basis, either:

(i) For each individual debt or offset; or

(ii) For each class of similar debts or offsets.

(2) The Secretary considers the following factors in making this determination:

(i) Whether offset can be practically and legally accomplished.

(ii) Whether offset will further and protect the interests of the United States.

(c) The Secretary may switch advance funded grantees to a reimbursement payment system before initiating an offset.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

§ 30.22 What notice does the debtor receive before the commencement of offset?

(a)(1) Except as provided in §§ 30.28 and 30.29, the Secretary provides a debtor with written notice of the Secretary's intent to offset before initiating the offset.

(2) The Secretary mails the notice to the debtor at the current address of the debtor, as determined by the Secretary from information regarding the debt maintained by the Department.

(b) The written notice informs the debtor regarding:

(1) The nature and amount of the debt;

(2) The Secretary's intent to collect the debt by offset;

(3) The debtor's opportunity to:

(i) Inspect and copy Department records pertaining to the debt;

(ii) Obtain a review within the Department of the existence or amount of the debt; and

(iii) Enter into a written agreement with the Secretary to repay the debt;

(4) The date by which the debtor must request an opportunity set forth under paragraph (b)(3) of this section; and

(5) The Secretary's decision, in appropriate cases, to switch the debtor from advance funding to a reimbursement payment system.

(c)(1) In determining whether a debtor has requested an opportunity set forth under paragraph (b)(3) of this section in a timely manner, the Secretary relies on:

(i) A legibly dated U.S. Postal Service postmark for the debtor's request; or

(ii) A legibly stamped U.S. Postal service mail receipt for debtor's request.

(2) The Secretary does not rely on either of the following as proof of mailing;

(i) A private metered postmark.

(ii) A mail receipt that is not dated by the U.S. Postal Service.

NOTE: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method for proof of mailing, a debtor should check with its local post office.

(d) If a debtor previously has been notified of the Secretary's intent to offset

or offered an opportunity to take any of the actions set forth in paragraph (b)(3) of this section in connection with the same debt, the Secretary may offset without providing the debtor with an additional notice of intent or opportunity to take any of those actions under these offset procedures.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

§ 30.23 How must a debtor request an opportunity to inspect and copy records relating to a debt?

(a) If a debtor wants to inspect and copy Department documents relating to the debt, the debtor must:

(1) File a written request to inspect and copy the documents within 20 days after the date of the notice provided under § 30.22; and

(2) File the request at the address specified in that notice.

(b) A request filed under paragraph (a) of this section must contain:

(1) All information provided to the debtor in the notice under § 30.22 or § 30.33(b) that identifies the debtor and the debt, including the debtor's Social Security number and the program under which the debt arose, together with any corrections of that identifying information; and

(2) A reasonably specific identification of the records the debtor wishes to have available for inspection and copying.

(c) The Secretary may decline to provide an opportunity to inspect and copy records if the debtor fails to request inspection and copying in accordance with this section.

(Approved by the Office of Management and Budget under control number 1880–0515)

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3716(b))

[51 FR 24099, July 1, 1986, as amended at 51 FR 35646, Oct. 7, 1986]

§ 30.24 What opportunity does the debtor receive to obtain a review of the existence or amount of a debt?

(a) If a debtor wants a review within the Department of the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii), the debtor must:

(1) File a request for review within 20 days after the date of the notice provided under § 30.22; and

(2) File a request at the address specified in that notice.

(b) A request filed under paragraph (a) of this section must contain:

(1) All information provided to the debtor in the notice under § 30.22 or § 30.33(b) that identifies the debtor and the particular debt, including the debtor's Social Security number and the program under which the debt arose, together with any corrections of that identifying information; and

(2) An explanation of the reasons the debtor believes that the notice the debtor received under § 30.22 or § 30.33(b) inaccurately states any facts or conclusions relating to the debt.

(c) The Secretary may decline to provide an opportunity for review of a debt if the debtor fails to request the review in accordance with this section.

(d)(1) The debtor shall:

(i) File copies of any documents relating to the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) that the debtor wishes the Secretary to consider in the review;

(ii) File the documents at the address specified in that notice, and

(iii) File the documents no later than:

(A) 20 days after the date of the notice provided under § 30.22; or

(B) If the debtor has requested an opportunity to inspect and copy records under § 30.23 within the time period specified in that section, 15 days after the date on which the Secretary makes available to the debtor the relevant, requested records.

(2) The Secretary may decline to consider any reasons or documents that the debtor fails to provide in accordance with paragraphs (b) and (d) of this section.

(e) If the Secretary bases the review on only the documentary evidence, the Secretary:

(1) Reviews the documents submitted by the debtor and other relevant evidence; and

(2) Notifies the debtor in writing of the Secretary's decision regarding the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) and, if

appropriate, the question of waiver of the debt.

(Approved by the Office of Management and Budget under control number 1880–0515)

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3716(b))

[51 FR 24099, July 1, 1986, as amended at 51 FR 35647, Oct. 7, 1986]

§ 30.25 How may a debtor obtain an oral hearing?

(a) If a debtor wants the Secretary to conduct the review requested under § 30.24 as an oral hearing, the debtor must file a written request for an oral hearing together with the request for review filed under § 30.24(a).

(b) A request filed under paragraph (a) of this section must contain the following in addition to the information filed under § 30.24(b):

(1) An explanation of reason(s) why the debtor believes the Secretary cannot resolve the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) through a review of the documentary evidence.

(2) An identification of:

(i) The individuals that the debtor wishes to have testify at the oral hearing;

(ii) The specific issues identified in the notice regarding which each individual is prepared to testify; and

(iii) The reasons why each individual's testimony is necessary to resolve the issue.

(c) The Secretary grants a debtor's request for an oral hearing regarding the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) only if:

(1)(i) A statute authorizes or requires the Secretary to consider waiver of the indebtedness involved;

(ii) The debtor files a request for waiver of the indebtedness with the request for review filed under paragraph (a)(1) of this section; and

(iii) The question of waiver of the indebtedness turns on an issue of credibility or veracity; or

(2) The Secretary determines that the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) cannot be resolved by review of only the documentary evidence.

(d) Notwithstanding paragraph (b) of this section, the Secretary may deny oral hearings for a class of similar debts if:

(1) The issues identified in the notice under § 30.22(b)(3)(ii) or 30.33(b)(3)(ii) for which an oral hearing was requested, or the issue of waiver, rarely involve issues of credibility or veracity; and

(2) The Secretary determines that review of the documentary evidence is ordinarily an adequate means to correct mistakes.

(e) The Secretary may decline to consider any reasons that the debtor fails to provide in accordance with paragraph (b)(1) of this section.

(Approved by the Office of Management and Budget under control number 1880–0515)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

[51 FR 24099, July 1, 1986, as amended at 51 FR 35647, Oct. 7, 1986]

§ 30.26 What special rules apply to an oral hearing?

(a) The oral hearing under § 30.25 is not a formal evidentiary hearing subject to 5 U.S.C. 554, unless required by law.

(b) If the Secretary grants an oral hearing, the Secretary notifies the debtor in writing of:

(1) The time and place for the hearing;

(2) The debtor's right to representation; and

(3) The debtor's right to present and cross examine witnesses.

(c) If the Secretary grants an oral hearing, the Secretary designates an official to:

(1) Govern the conduct of the hearing;

(2) Take all necessary action to avoid unreasonable delay in the proceedings;

(3) Review the evidence presented at the hearing, the documents submitted by the debtor, and other relevant evidence; and

(4) After considering the evidence, notify the debtor in writing of the official's decision regarding the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) and, if appropriate, the question of waiver of the debt.

(d) The official designated under paragraph (c) of this section may decline to hear any witnesses or testimony not identified by the debtor in accordance with § 30.25(b)(2).

(e) The decision of the designated official under paragraph (c) of this section constitutes the final decision of the Secretary.

(Authority: 20 U.S.C. 1221-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

§ 30.27 When does the Secretary enter into a repayment agreement rather than offset?

(a) If a debtor wants an opportunity to enter into a written agreement to repay a debt on terms acceptable to the Secretary, the debtor must:

(1) File a request to enter into such agreement within 20 days after the date of the notice provided under § 30.22; and

(2) File the request at the address specified in the notice.

(b) A request filed under paragraph (a) of this section must contain all information provided to the debtor in the notice under § 30.22 or § 30.33(b) that identifies the debtor and the debt, including the debtor's Social Security number and the program under which the debt arose, together with any corrections of that identifying information.

(c) If the Secretary receives a request filed in accordance with this section, the Secretary may enter into a written agreement requiring repayment in accordance with 4 CFR 102.11, instead of offsetting the debt.

(d) In deciding whether to enter into the agreement, the Secretary may consider:

(1) The Government's interest in collecting the debt; and

(2) Fairness to the debtor.

(e)(1) A debtor that enters into a repayment agreement with the Secretary under this section waives any right to further review by the Secretary of the issues relating to the original debt identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii).

(2) If a debtor breaches a repayment agreement, the Secretary may offset, or, under § 30.30, refer to another agency for offset:

(i) The amount owing under the agreement; or

(ii) The entire original debt, to the extent not repaid.

(Authority: 20 U.S.C. 1221-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

[51 FR 24099, July 1, 1986, as amended at 51 FR 35647, Oct. 7, 1986]

§ 30.28 When may the Secretary offset before completing the procedures under §§ 30.22–30.27?

(a) The Secretary may offset before completing the procedures otherwise required by §§ 30.22–30.27 if:

(1) Failure to offset would substantially prejudice the Government's ability to collect the debt; and

(2) The amount of time remaining before the payment by the United States which is subject to offset does not reasonably permit completion of the procedures under §§ 30.22–30.27.

(b) If the Secretary offsets under paragraph (a) of this section, the Secretary:

(1) Promptly completes the procedures under §§ 30.22–30.27 after initiating the offset; and

(2) Refunds any amounts recovered under the offset that are later found not to be owed to the United States.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3716(b))

§ 30.29 What procedures apply when the Secretary offsets to collect a debt owed another agency?

The Secretary may initiate offset to collect a debt owed another Federal agency if:

(a) An official of that agency certifies in writing:

(1) That the debtor owes a debt to the United States;

(2) The amount of the debt; and

(3) That the agency has complied with 4 CFR 102.3; and

(b) For offsets under 31 U.S.C. 3716, the Secretary makes an independent determination that the offset meets the standards under § 30.21(a)(2).

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3716(b))

§ 30.30 What procedures apply when the Secretary requests another agency to offset a debt owed under a program or activity of the Department?

(a) The Secretary may request another Federal agency to offset a debt owed under a program or activity of the Department if the Secretary certifies in writing to the other Federal agency:

(1) That the debtor owes a debt to the United States;

(2) The amount of the debt; and

(3) That the Secretary has complied with 4 CFR 102.3.

(b) Before providing the certification required under paragraph (a) of this section, the Secretary complies with the procedures in §§ 30.20–30.27.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3716(b))

§ 30.31 How does the Secretary apply funds recovered by offset if multiple debts are involved?

If the Secretary collects more than one debt of a debtor by administrative offset, the Secretary applies the recovered funds to satisfy those debts based on the Secretary's determination of the best interests of the United States, determined by the facts and circumstances of the particular case.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3716(b))

IRS Tax Refund Offset Procedures

§ 30.33 What procedures does the Secretary follow for IRS tax refund offsets?

(a) If a named person owes a debt under a program or activity of the Department, the Secretary may refer the debt for offset to the Secretary of the Treasury after complying with the procedures in §§ 30.20–30.28, as modified by this section.

(b) Notwithstanding § 30.22(b), the notice sent to a debtor under § 30.22 informs the debtor that:

(1) The debt is past due;

(2) The Secretary intends to refer the debt for offset to the Secretary of Treasury;

(3) The debtor has an opportunity to:

(i) Inspect and copy Department records regarding the existence, amount, enforceability, or past-due status of the debt;

(ii) Obtain a review within the Department of the existence, amount, enforceability, or past-due status of the debt;

(iii) Enter into a written agreement with the Secretary to repay the debt; and

(4) The debtor must take an action set forth under paragraph (b)(3) by a date specified in the notice.

(c) Notwithstanding § 30.23(a), if a debtor wants to inspect and copy Department records regarding the existence, amount, enforceability, or past-due status of the debt, the debtor must:

(1) File a written request to inspect and copy the records within 20 days after the date of the notice provided under § 30.22; and

(2) File the request at the address specified in that notice.

(d) Notwithstanding the time frame under § 30.24(a), if a debtor wants a review under that paragraph, the debtor must file a request for review at the address specified in the notice by the later of:

(1) Sixty-five days after the date of the notice provided under § 30.22;

(2) If the debtor has requested an opportunity to inspect and copy records within the time period specified in paragraph (c) of this section, 15 days after the date on which the Secretary makes available to the debtor the relevant, requested records; or

(3) If the debtor has requested a review within the appropriate time frame under paragraph (d) (1) or (2) of this section and the Secretary has provided an initial review by a guarantee agency, seven days after the date of the initial determination by the guarantee agency.

(e) Notwithstanding the time frames under § 30.24(d), a debtor shall file the documents specified under that paragraph with the request for review.

(f) Notwithstanding the time frame under § 30.27(a), a debtor must agree to repay the debt under terms acceptable to the Secretary and make the first payment due under the agreement by the latest of:

(1) The seventh day after the date of decision of the Secretary if the debtor requested a review under § 30.24;

(2) The sixty-fifth day after the date of the notice under § 30.22(b), if the debtor did not request a review under § 30.24, or an opportunity to inspect and copy records of the Department under § 30.23; or

(3) The fifteenth day after the date on which the Secretary made available relevant records regarding the debt, if the debtor filed a timely request under § 30.23(a).

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3720A)

PROCEDURES FOR REPORTING DEBTS TO CONSUMER REPORTING AGENCIES

§ 30.35 What procedures does the Secretary follow to report debts to consumer reporting agencies?

(a)(1) The Secretary reports information regarding debts arising under a program or activity of the Department and held by the Department to consumer reporting agencies, in accordance with the procedures described in this section.

(2) The term *consumer reporting agency*, as used in this section, has the same meaning as provided in 31 U.S.C. 3701(a)(3).

(b) Before reporting information on a debt to a consumer reporting agency, the Secretary follows the procedures set forth in § 30.33.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3711, § 16023, 16029, Pub. L. 99–272)

Subpart D [Reserved]

Subpart E—What Costs and Penalties Does the Secretary Impose on Delinquent Debtors?

SOURCE: 53 FR 33425, Aug. 30, 1988, unless otherwise noted.

§ 30.60 What costs does the Secretary impose on delinquent debtors?

(a) The Secretary may charge a debtor for the costs associated with the collection of a particular debt. These costs include, but are not limited to—

(1) Salaries of employees performing Federal loan servicing and debt collection activities;

(2) Telephone and mailing costs;

(3) Costs for reporting debts to credit bureaus;

(4) Costs for purchase of credit bureau reports;

(5) Costs associated with computer operations and other costs associated with the maintenance of records;

(6) Bank charges;

(7) Collection agency costs;

(8) Court costs and attorney fees; and

(9) Costs charged by other Governmental agencies.

(b) Notwithstanding any provision of State law, if the Secretary uses a collection agency to collect a debt on a contingent fee basis, the Secretary charges the debtor, and collects through the agency, an amount sufficient to recover—

(1) The entire amount of the debt; and

(2) The amount that the Secretary is required to pay the agency for its collection services.

(c)(1) The amount recovered under paragraph (b) of this section is the entire amount of the debt, multiplied by the following fraction:

$$\frac{1}{1-\mathrm{cr.}}$$

(2) In paragraph (c)(1) of this section, cr equals the commission rate the Department pays to the collection agency.

(d) If the Secretary uses more than one collection agency to collect similar debts, the commission rate (cr) described in paragraph (c)(2) of this section is calculated as a weighted average of the commission rates charged by all collection agencies collecting similar debts, computed for each fiscal year based on the formula

$$\sum_{i=1}^{N}\left(\frac{Xi \cdot Yi}{Z}\right)$$

where—

(1) Xi equals the dollar amount of similar debts placed by the Department with an individual collection agency as of the end of the preceding fiscal year;

(2) Yi equals the commission rate the Department pays to that collection agency for the collection of the similar debts;

(3) Z equals the dollar amount of similar debts placed by the Department with all collection agencies as of the end of the preceding fiscal year; and

(4) N equals the number of collection agencies with which the Secretary has placed similar debts as of the end of the preceding fiscal year.

(e) If a debtor has agreed under a repayment or settlement agreement with the Secretary to pay costs associated with the collection of a debt at a specified amount or rate, the Secretary collects those costs in accordance with the agreement.

(f) The Secretary does not impose collection costs against State or local governments under paragraphs (a) through (d) of this section.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3711(e), 3717(e)(1), 3718))

§ 30.61 What penalties does the Secretary impose on delinquent debtors?

(a) If a debtor does not make a payment on a debt, or portion of a debt, within 90 days after the date specified in the first demand for payment sent to the debtor, the Secretary imposes a penalty on the debtor.

(b)(1) The amount of the penalty imposed under paragraph (a) of this section is 6 percent per year of the amount of the delinquent debt.

(2) The penalty imposed under this section runs from the date specified in the first demand for payment to the date the debt (including the penalty) is paid.

(c) If a debtor has agreed under a repayment or settlement agreement with the Secretary to pay a penalty for failure to pay a debt when due, or has such an agreement under a grant or contract under which the debt arose, the Secretary collects the penalty in accordance with the agreement, grant, or contract.

(d) The Secretary does not impose a penalty against State or local governments under paragraphs (a) and (b) of this section.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3711(e))

§ 30.62 When does the Secretary forego interest, administrative costs, or penalties?

(a) For a debt of any amount based on a loan, the Secretary may refrain from collecting interest or charging administrative costs or penalties to the extent that compromise of these amounts is appropriate under the standards for compromise of a debt contained in 4 CFR part 103.

(b) For a debt not based on a loan the Secretary may waive, or partially waive, the charging of interest, or the collection of administrative costs or penalties, if—

(1) Compromise of these amounts is appropriate under the standards for compromise of a debt contained in 4 CFR part 103; or

(2) The Secretary determines that the charging of interest or the collection of administrative costs or penalties is—

(i) Against equity and good conscience; or

(ii) Not in the best interests of the United States.

(c) The Secretary may exercise waiver under paragraph (b)(1) of this section without regard to the amount of the debt.

(d) The Secretary may exercise waiver under paragraph (b)(2) of this section if—

(1) The Secretary has accepted an installment plan under 4 CFR 102.11;

(2) There is no indication of fault or lack of good faith on the part of the debtor; and

(3) The amount of interest, administrative costs, and penalties is such a large portion of the installments that the debt may never be repaid if that amount is collected.

(e)(1) The Secretary does not charge interest on any portion of a debt, other than a loan, owed by a person subject to 31 U.S.C. 3717 if the debt is paid within 30 days after the date of the first demand for payment.

(2) The Secretary may extend the period under paragraph (e)(1) of this section if the Secretary determines that the extension is appropriate.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3711(e))

Subpart F—What Requirements Apply to the Compromise of a Debt or the Suspension or Termination of Collection Action?

§ 30.70 How does the Secretary exercise discretion to compromise a debt or to suspend or terminate collection of a debt?

(a)(1) The Secretary uses the standards in the FCCS, 31 CFR part 902, to determine whether compromise of a debt is appropriate if the debt arises under a program administered by the Department, unless compromise of the debt is subject to paragraph (b) of this section.

(2) If the amount of the debt is more than $100,000, or such higher amount as the Department of Justice may prescribe, the Secretary refers a proposed compromise of the debt to the Department of Justice for approval, unless the compromise is subject to paragraph (b) of this section or the debt is one described in paragraph (e) of this section.

(b) Under the provisions in 34 CFR 81.36, the Secretary may enter into certain compromises of debts arising because a recipient of a grant or cooperative agreement under an applicable Department program has spent some of these funds in a manner that is not allowable. For purposes of this section, neither a program authorized under the Higher Education Act of 1965, as amended (HEA), nor the Impact Aid Program is an applicable Department program.

(c)(1) The Secretary uses the standards in the FCCS, 31 CFR part 903, to determine whether suspension or termination of collection action on a debt is appropriate.

(2) Except as provided in paragraph (e), the Secretary—

(i) Refers the debt to the Department of Justice to decide whether to suspend or terminate collection action if the amount of the debt outstanding at the time of the referral is more than $100,000 or such higher amount as the Department of Justice may prescribe; or

(ii) May suspend or terminate collection action if the amount of the debt outstanding at the time of the Secretary's determination that suspension or termination is warranted is less than or equal to $100,000 or such higher amount as the Department of Justice may prescribe.

(d) In determining the amount of a debt under paragraph (a), (b), or (c) of this section, the Secretary deducts any partial payments or recoveries already received, and excludes interest, penalties, and administrative costs.

(e)(1) Subject to paragraph (e)(2) of this section, under the provisions of 31 CFR part 902 or 903, the Secretary may compromise a debt in any amount, or suspend or terminate collection of a debt in any amount, if the debt arises under the Federal Family Education Loan Program authorized under title IV, part B, of the HEA, the William D. Ford Federal Direct Loan Program authorized under title IV, part D of the HEA, or the Perkins Loan Program authorized under title IV, part E, of the HEA.

(2) The Secretary refers a proposed compromise, or suspension or termination of collection, of a debt that exceeds $1,000,000 and that arises under a loan program described in paragraph (e)(1) of this section to the Department of Justice for review. The Secretary does not compromise, or suspend or terminate collection of, a debt referred to the Department of Justice for review until the Department of Justice has provided a response to that request.

(f) The Secretary refers a proposed resolution of a debt to the Government Accountability Office (GAO) for review and approval before referring the debt to the Department of Justice if—

(1) The debt arose from an audit exception taken by GAO to a payment made by the Department; and

(2) The GAO has not granted an exception from the GAO referral requirement.

(g) Nothing in this section precludes—

(1) A contracting officer from exercising his authority under applicable statutes, regulations, or common law to settle disputed claims relating to a contract; or

(2) The Secretary from redetermining a claim.

(h) Nothing in this section authorizes the Secretary to compromise, or suspend or terminate collection of, a debt—

(1) Based in whole or in part on conduct in violation of the antitrust laws; or

(2) Involving fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any party having an interest in the claim.

(Authority: 20 U.S.C. 1082(a) (5) and (6), 1087a, 1087hh, 1221e–3(a)(1), 1226a–1, and 1234a, 31 U.S.C. 3711)

[81 FR 76070, Nov. 1, 2016]

Subpart G [Reserved]

PART 31—SALARY OFFSET FOR FEDERAL EMPLOYEES WHO ARE INDEBTED TO THE UNITED STATES UNDER PROGRAMS ADMINISTERED BY THE SECRETARY OF EDUCATION

Sec.

31.1 Scope.
31.2 Definitions.
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AUTHORITY: 5 U.S.C. 5514; 31 U.S.C. 3716.

SOURCE: 54 FR 31821, Aug. 19, 1989, unless otherwise noted.

§31.1 Scope.

(a) *General*. The Secretary establishes the standards and procedures in this part that apply to the offset from disposable pay of a current or former Federal employee or from amounts payable from the Federal retirement account of a former Federal employee to recover a debt owed the United States under a program adminstered by the Secretary of Education.

(b) *Exclusions*. This part does not apply to—

(1) Offsets under 34 CFR part 32 to recover for overpayments of pay or allowances to an employee of the Department;

(2) Offsets under 34 CFR part 30; or

(3) Offsets under section 124 of Pub. L. 97–276 to collect debts owed to the United States on judgments.

(c) *Reports to consumer reporting agency*. The Secretary may report a debt to a consumer reporting agency after notifying the employee, in accordance with 34 CFR 30.35, of the intention to report the debt, and after providing the employee an opportunity to inspect documents, receive a hearing, and enter into a repayment agreement under this part.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3711; 31 U.S.C. 3716)

§31.2 Definitions.

As used in this part:

Agency means—

(1) An Executive agency as defined in 5 U.S.C. 105, including the U.S. Postal Service and the U.S. Postal Rate Commission;

(2) A military department as defined in 5 U.S.C. 102;

(3) An agency or court in the judicial branch, including a court as defined in 28 U.S.C. 610, the District Court for the Northern Mariana Islands, and the Judicial Panel on Multidistrict Litigation;

(4) An agency of the legislative branch, including the U.S. Senate and the U.S. House of Representatives; and

(5) Any other independent establishment that is an entity of the Federal Government.

Days refer to calendar days.

Department means the Education Department.

Disposable pay means the amount that remains from an employee's pay after required deductions for Federal, State, and local income taxes; Social Security taxes, including Medicare taxes; Federal retirement programs; premiums for basic life insurance and health insurance benefits; and such other deductions that are required by law to be withheld.

Employee means a current or former employee of an agency. In the case of an offset proposed to collect a debt owed by a deceased employee, the references in this part to the employee shall be read to refer to the payee of

benefits from the Federal retirement account or other pay of the employee.

Federal retirement account means an account of an employee under the Civil Service Retirement System or the Federal Employee Retirement System.

Offset means a deduction from the pay of an employee, or a payment due from the Federal retirement account of an employee, to satisfy a debt.

Pay means basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an individual not entitled to basic pay, other authorized pay, including severance pay or lump sum payments for accrued annual leave, and amounts payable from the Federal retirement account of an employee.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 31.3 Pre-offset notice.

(a) At least 65 days before initiating an offset against the pay of an employee, the Secretary sends a written notice to the employee stating—

(1) The nature and amount of the debt;

(2) A demand for payment of the debt;

(3) The manner in which the Secretary charges interest, administrative costs, and penalties on the debt;

(4) The Secretary's intention to collect the debt by offset against—

(i) 15 percent of the employee's current disposable pay; and

(ii) If the debt cannot be satisfied by offset against current disposable pay, a specified amount of severance pay, a lump sum annual leave payment, a final salary check, or payments from the Federal retirement account of the employee;

(5) The amount, frequency, approximate beginning date and duration of the proposed offset;

(6) The employee's opportunity to—

(i) Inspect and copy Department records pertaining to the debt;

(ii) Obtain a pre-offset hearing before a hearing official who is not under the control or supervision of the Secretary regarding the existence or amount of the debt, or the proposed offset schedule; and

(iii) Enter into a written agreement with the Secretary to repay the debt;

(7) The date by which the employee must request an opportunity set forth under paragraph (a)(6) of this section;

(8) The grounds for objecting to collection of the debt by offset;

(9) The applicable hearing procedures and requirements;

(10) That the Secretary grants any request for access to records, for a hearing, or for a satisfactory repayment agreement made by an employee;

(11) That the Secretary does not delay the start of the proposed offset, or suspend an offset already commenced, unless—

(i) An employee makes the request for access to records or for a hearing, or enters into a repayment agreement that is acceptable to the Secretary, before the deadlines described in this part; or

(ii) An employee requests a hearing after the deadlines established in § 31.5(a), but submits evidence satisfactory to the Secretary that the request was not made in a timely manner because the employee did not have notice of the proposed offset, or was prevented from making the request by factors beyond his or her control, until after the deadlines had passed;

(12) That a final decision on the hearing will be issued not later than 60 days after the date on which the employee files a request for a hearing under § 31.5, unless a delay in the proceedings is granted at the request of the employee;

(13) That submission by the employee of knowingly false statements, representations or evidence may subject the employee to applicable disciplinary procedures, or civil or criminal penalties; and

(14) That any amounts paid or collected by offset on a debt later determined to be unenforceable or canceled will be refunded to the employee.

(b)(1) In determining whether an employee has requested an opportunity set forth under paragraph (a)(6) of this section in a timely manner, the Secretary relies on—

(i) A legibly dated U.S. Postal Service postmark for the employee's request; or

(ii) A legibly stamped U.S. Postal Service mail receipt for the employee's request.

(2) The Secretary does not rely on either of the following as proof of mailing:

(i) A private metered postmark.

(ii) A mail receipt that is not dated by the U.S. Postal Service.

(c) Payment by offset under this part of all or part of a debt does not constitute an acknowledgment of the debt or a waiver of rights available to the employee under this part or other applicable law if the employee has not agreed in writing to the offset.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§31.4 Request to inspect and copy documents relating to a debt.

(a) The Secretary makes available for inspection and copying before offset under this part those Department documents that relate to the debt, if the employee—

(1) Files a written request to inspect and copy the documents within 20 days of the date of the pre-offset notice under §31.3, and

(2) Files the request at the address specified in that notice.

(b) A request filed under paragraph (a)(1) of this section must contain—

(1) All information provided to the employee in the pre-offset notice under §31.3 that identifies the employee and the debt, including the employee's Social Security number and the program under which the debt arose, together with any corrections of that identifying information; and

(2) A reasonably specific identification of the documents that the employee wishes to have available for inspection and copying.

(c) The Secretary makes available documents for inspection and copying upon request by the employee. However, the Secretary may initiate an offset before making the requested documents available if the employee fails to request inspection and copying in accordance with this section.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§31.5 Request for hearing on the debt or the proposed offset.

(a) *Deadlines.* (1) The Secretary provides a hearing before offset on the existence, amount, or enforceability of the debt described in the pre-offset notice provided under §31.3, or on the amount or frequency of the offsets as proposed in that notice, if the employee—

(i) Files a request for the hearing within the later of—

(A) 65 days after the date of the pre-offset notice provided under §31.3; or

(B) 15 days after the date on which the Secretary makes available to the employee the relevant, requested documents if the employee had requested an opportunity to inspect and copy documents within 20 days of the date of the pre-offset notice provided under §31.3; and

(ii) Files a request at the address specified in that notice.

(2) The Secretary provides a hearing upon request by the employee. However, if the employee does not submit, within the deadlines in paragraph (a)(1) of this section, a request that meets the requirements of paragraphs (b) and (c) of this section, the Secretary does not delay the start of an offset, or suspend an offset already commenced, unless the employee submits evidence satisfactory to the Secretary that the request was not made in a timely manner because the employee did not have notice of the proposed offset, or was otherwise prevented from making the request by factors beyond his or her control, until after the deadlines had passed.

(b) *Contents of request for a hearing.* A request for a hearing must contain—

(1) All information provided to the employee in the pre-offset notice under §31.3 that identifies the employee and the particular debt, including the employee's Social Security number and the program under which the debt arose, together with any corrections needed with regard to that identifying information;

(2) An explanation of the reasons why the employee believes that—

(i) The debt as stated in the pre-offset notice is not owing or is not enforceable by offset; or

(ii) The amount of the proposed offset described in the pre-offset notice will cause extreme financial hardship to the employee;

(3) If the employee contends that the amount of the proposed offset will cause extreme financial hardship under the standards set forth in § 31.8(b)—

(i) An alternative offset proposal;

(ii) An explanation, in writing, showing why the offset proposed in the notice would cause an extreme financial hardship for the employee; and

(iii) Documents that show for the employee and for the spouse and dependents of the employee, for the one-year period preceding the Secretary's notice and for the repayment period proposed by the employee in his or her offset schedule—

(A) Income from all sources,

(B) Assets,

(C) Liabilities,

(D) Number of dependents,

(E) Expenses for food, housing, clothing, and transportation,

(F) Medical expenses, and

(G) Exceptional expenses, if any; and

(4) Copies of all documents that the employee wishes to have considered to support the objections raised by the employee regarding the enforceability of the debt or the claim of extreme financial hardship.

(c) *Request for oral hearing.* (1) If the employee wants the hearing to be conducted as an oral hearing, the employee must submit a request that contains the information listed in paragraph (b) and must include with the request—

(i) An explanation of reasons why the employee believes that the issues raised regarding the enforceability of the debt or a claim of extreme financial hardship cannot be resolved adequately by a review of the written statements and documents provided with the request for a hearing;

(ii) An identification of—

(A) The individuals that the employee wishes to have testify at the oral hearing;

(B) The specific issues about which each individual is prepared to testify; and

(C) The reasons why each individual's testimony is necessary to resolve the issue.

(2) The Secretary grants a request for an oral hearing if—

(i) The employee files a request for an oral hearing that meets the requirements of paragraphs (b) and (c) of this section; and

(ii) The Secretary determines that the issues raised by the employee require a determination of the credibility of testimony and cannot be adequately resolved by a review of the written statements and documents submitted by the employee and documents contained in the Department's records relating to the debt.

(3) The Secretary may decline a request for an oral hearing if the Secretary accepts the employee's proffer of testimony made in the request for an oral hearing under paragraph (c)(1) of this section, and considers the facts at issue to be established as stated by the employee in the request.

(4) If the Secretary grants a request for an oral hearing, the Secretary—

(i) Notifies the employee in writing of—

(A) The date, time, and place of the hearing;

(B) The name and address of the hearing official;

(C) The employee's right to be represented at the hearing by counsel or other representatives;

(D) The employee's right to present and cross-examine witnesses; and

(E) The employee's right to waive the requested oral hearing and receive a hearing in the written record; and

(ii) Provides the hearing official with a copy of all written statements submitted by the employee with the request for a hearing, and all documents pertaining to the debt or the amount of the offset contained in the Department's files on the debt or submitted with the request for a hearing.

(d) *Employee choice of oral hearing or hearing on written submissions.* An employee who has been sent notice under paragraph (c)(4) that an oral hearing will be provided must, within 15 days of the date of that notice, state in writing to the hearing official and the Secretary—

(1) Whether the employee intends to proceed with the oral hearing, or wishes a decision based on the written record; and

(2) Any changes in the list of the witnesses the employee proposes to produce for the hearing, or the facts about which a witness will testify.

(e) *Dismissal of request for hearing.* The Secretary considers the employee to have waived the request for a hearing of any kind—

(1) If an employee does not provide the hearing official in a timely manner the written statement required under paragraph (d) of this section; or

(2) If the employee does not appear for a scheduled oral hearing.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§31.6 Location and timing of oral hearing.

(a) If the Secretary grants a request for an oral hearing, the Secretary selects the time, date, and location of the hearing. The Secretary selects, to the extent feasible, the location that is most convenient for the employee.

(b) For a current military employee, the Secretary selects the time, date, and location of the hearing after consultation with the Secretary of Defense.

(c) For a current Coast Guard employee, the Secretary selects the time, date, and location of the hearing after consultation with the Secretary of Transportation.

(d) For an employee not described in paragraph (a) or (b) of this section, the hearing will be held in Washington, DC, or in one of the following cities: Boston, Philadelphia, New York, Atlanta, Chicago, Dallas, Kansas City, Denver, San Francisco, or Seattle.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§31.7 Hearing procedures.

(a) *Independence of hearing official.* A hearing provided under this part is conducted by a hearing official who is not under the supervision or control of the Secretary, except that this prohibition does not apply to the Department's administrative law judges.

(b) *Lack of subpoena authority or formal discovery.* (1) Neither the hearing official nor the Secretary has authority to issue subpoenas to compel the production of documents or to compel the attendance of witnesses at an oral hearing under this part. The Secretary will attempt to make available during an oral hearing the testimony of a current official of the Department if—

(i) The employee had identified the official in the request for a hearing under §31.5(b) and demonstrated that the testimony of the official is necessary to resolve adequately an issue of fact raised by the employee in the request for a hearing; and

(ii) The Secretary determines that the responsibilities of the official permit his or her attendance at the hearing.

(2) If the Secretary determines that the testimony of a Department official is necessary, but that the official cannot attend an oral hearing to testify, the Secretary attempts to make the official available for testimony at the hearing by means of a telephone conference call.

(3) No discovery is available in a proceeding under this part except as provided in §31.4.

(c) *Hearing on written submissions.* If a hearing is conducted on the written submissions, the hearing official reviews documents and responses submitted by the Secretary and the employee under §31.5.

(d) *Conduct of oral hearing.* (1) The hearing official conducts an oral hearing as an informal proceeding. The official—

(i) Administers oaths to witnesses;

(ii) Regulates the course of the hearing;

(iii) Considers the introduction of evidence without regard to the rules of evidence applicable to judicial proceedings; and

(iv) May exclude evidence that is redundant, or that is not relevant to those issues raised by the employee in the request for hearing under §31.5 that remain in dispute.

(2) An oral hearing is generally open to the public. However, the hearing official may close all or any portion of the hearing if doing so is in the best interest of the employee or the public.

(3) The hearing official may conduct an oral hearing by telephone conference call—

(i) If the employee is located in a city outside the Washington, DC Metropolitan area.

(ii) At the request of the employee.

(iii) At the discretion of the hearing official.

(4) No written record is created or maintained of an oral hearing provided under this part.

(e) *Burden of proof.* In any hearing under this part—

(1) The Secretary bears the burden of proving, by a preponderance of the evidence, the existence and amount of the debt, and the failure of the employee to repay the debt, as the debt is described in the pre-offset notice provided under § 31.3; and

(2) The employee bears the burden of proving, by a preponderance of the evidence—

(i) The existence of any fact that would establish that the debt described in the pre-offset notice is not enforceable by offset; and

(ii) The existence of any fact that would establish that the amount of the proposed offset would cause an extreme financial hardship for the employee.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

[54 FR 31821, Aug. 19, 1989, as amended at 86 FR 40334, July 28, 2021]

§ 31.8 Rules of decision.

(a) *Enforceability of debt by offset.* In deciding whether the Secretary has established that the debt described in the pre-offset under § 31.3 is owed by the employee, or whether the employee has established that the debt is not enforceable by offset, the hearing official shall apply the principles in this paragraph.

(1) The statutes and Department regulations authorizing and implementing the program under which the debt arose must be applied in accordance with official written interpretations by the Department.

(2) The principles of res judicata and collateral estoppel apply to resolution of disputed facts in those instances in which the debt or material facts in dispute have been the subject of prior judicial decision.

(3) The act or omission of an institution of higher education at which the employee was enrolled does not constitute a defense to repayment of an obligation with regard to a grant or loan under a program authorized under Title IV of the Higher Education Act or similar authority, except to the extent that—

(i) The act or omission constitutes a defense to the debt under applicable Federal or State law;

(ii) The institution owed the employee a refund under its refund policy and failed to pay that refund to the employee or to a lender holding a loan made to the employee; or

(iii) The institution ceased teaching activity while the employee was in attendance and during the academic period for which the grant or loan was made, and failed to refund to the employee or holder of a loan to the employee a proportionate amount of the grant or loan funds used to pay tuition and other institutional charges for that academic period.

(4)(i) A debt otherwise established as owed by the employee is enforceable by offset under this part if the Secretary sends the pre-offset notice for the debt within the ten year period following the later of—

(A) The date on which the Secretary acquired the debt by assignment or referral, or

(B) The date of a subsequent partial payment reaffirming the debt.

(ii) Periods during which the statute of limitations applicable to a lawsuit to collect the debt has been tolled under 11 U.S.C. 108, 28 U.S.C. 2416, 50 U.S.C. App. 525, or other authority are excluded from the calculation of the ten year period described in paragraph (a)(4)(i) of this section.

(b) *Extreme financial hardship.* (1) In deciding whether an employee has established that the amount of the proposed offset would cause extreme financial hardship to the employee, the hearing official shall determine whether the credible, relevant evidence submitted demonstrates that the proposed offset would prevent the employee from meeting the costs necessarily incurred for essential subsistence expenses of the employee and his or her spouse and dependents.

(2) For purposes of this determination, essential subsistence expenses include costs incurred only for food, housing, clothing, essential transportation and medical care.

(3) In making this determination, the hearing official shall consider—

(i) The income from all sources of the employee, and his or her spouse and dependents;

(ii) The extent to which the assets of the employee and his or her spouse and dependents are available to meet the offset and the essential subsistence expenses;

(iii) Whether these essential subsistence expenses have been minimized to the greatest extent possible;

(iv) The extent to which the employee and his or her spouse and dependents can borrow to satisfy the debt to be collected by offset or to meet essential expenses; and

(v) The extent to which the employee and his or her spouse and dependents have other exceptional expenses that should be taken into account, and whether these expenses have been minimized.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§31.9 Decision of the hearing official.

(a) The hearing official issues a written opinion within sixty days of the date on which the employee filed a request for a hearing under §31.5, unless a delay in the proceedings has been granted at the request of the employee. In the opinion, the hearing official states his or her decision and the findings of fact and conclusions of law on which the decision is based.

(b) If the hearing official finds that a portion of the debt described in the pre-offset notice under §31.3 is not enforceable by offset, the official shall state in the opinion that portion which is enforceable by offset.

(c) If the hearing official finds that the amount of the offset proposed in the pre-offset notice will cause an extreme financial hardship for the employee, the hearing official shall establish an offset schedule that will result in the repayment of the debt in the shortest period of time without producing an extreme financial hardship for the employee.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§31.10 Request for repayment agreement.

(a) The Secretary does not initiate an offset under this part if the employee agrees in writing to repay the debt under terms acceptable to the Secretary and makes the first payment due under the agreement on or before the latest of—

(1) The seventh day after the date of the decision of the hearing official, if the employee timely requested a hearing under §31.5 (a) and (d);

(2) The sixty-fifth day after the date of the pre-offset notice under §31.3 if the employee did not timely request either a hearing in accordance with §31.5 (a) and (d) or an opportunity to inspect and copy documents related to the debt under §31.4; or

(3) The fifteenth day after the date on which the Secretary made available documents related to the debt, if the employee filed a timely request for documents under §31.4.

(b) In the agreement, the Secretary and the employee may agree to satisfaction of the debt from sources other than an offset under this part, or may modify the amount proposed to be offset in the pre-offset notice or estimated in the decision of the hearing official.

(c) If the employee does not enter into a repayment agreement acceptable to the Secretary within the deadlines in this section, the Secretary may initiate an offset under this part. The Secretary continues to collect by offset until an employee enters in a satisfactory repayment agreement for the debt. The Secretary suspends an offset already commenced under circumstances described in §31.5(a)(2).

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§31.11 Offset process.

(a) The Secretary attempts to collect debts under this part within the shortest time authorized under—

(1) The offset schedule proposed in the pre-offset notice, unless modified by agreement or by the decision of a hearing official;

(2) A written repayment agreement with the employee; or

(3) The offset schedule established in the decision of the hearing official.

(b) In proposing an offset schedule under §31.3 or establishing a repayment agreement under §31.10, the Secretary also considers the expected period of Federal employment of the employee.

(c) Unless the Secretary determines, in his discretion, to delay or suspend collection, the Secretary effects an offset under this part—

(1) According to the terms agreed to by the employee pursuant to a timely request under § 31.10 to enter into a repayment agreement; or,

(2) After the deadlines in § 31.10(b) for requesting a repayment agreement with the Secretary.

(d) If the employee retires, resigns, or leaves Federal employment before the debt is satisfied, the Secretary collects the amount necessary to satisfy the debt by offset from subsequent payments of any kind, including a final salary payment or a lump sum annual leave payment, due the employee on the date of separation. If the debt cannot be satisfied by offset from any such final payment due the employee on the date of separation, the Secretary collects the debt from later payments of any kind due the employee in accordance with the provisions of 4 CFR 102.4.

(e) The Secretary effects an offset under this part against payments owing to an employee of another Federal agency after completion of the requirements of this part, in accordance with the provisions of 5 CFR 550.1108.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

PART 32—SALARY OFFSET TO RECOVER OVERPAYMENTS OF PAY OR ALLOWANCES FROM DEPARTMENT OF EDUCATION EMPLOYEES

Sec.

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AUTHORITY: 5 U.S.C. 5514; 31 U.S.C. 3716.

SOURCE: 52 FR 24957, July 1, 1987, unless otherwise noted.

§ 32.1 Scope.

(a) The Secretary establishes the standards and procedures in this part that apply to the deductions through offset from disposable pay of a current or former employee of the Department of Education to recover overpayments of pay or allowances.

(b) This part does not apply to—

(1) Recovery through offset of an indebtedness to the United States by an employee of the Department under a program administered by the Secretary of Education covered under 34 CFR part 31;

(2) The offset of an indebtedness to the United States by a Federal employee to satisfy a judgment obtained by the United States against that employee in a court of the United States;

(3) The offset of any payment to an employee of the Department of Education which is expressly allowed under statutes other than 5 U.S.C. 5514, except as to offsets of severance pay and/or lump sum annual leave payments as authorized under 31 U.S.C. 3716;

(4) Offsets under 34 CFR part 30; or

(5) An employee election of coverage or of a change of coverage under a Federal benefits program which requires periodic deductions from pay if the amount to be recovered was accumulated over four pay periods or less.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.2 Definitions.

The following definitions apply to this part:

Department means the Department of Education.

Disposable pay means the amount that remains from an employee's pay after required deductions for Federal, State, and local income taxes; Social Security taxes, including Medicare taxes; Federal retirement programs; premiums for health and basic life insurance benefits; and such other deductions that are required by law to be withheld.

Employee means a current or former employee of the Department.

Former employee means a former employee of the Department who is entitled to pay from the Department or another agency.

Pay means basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an individual not entitled to basic pay, other authorized pay, including severance pay and/or

lump sum payments for accrued annual leave.

Paying agency means a Federal agency currently employing an individual and authorizing the payment of his or her current pay.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.3 Pre-offset notice.

At least 30 days before initiating a deduction from the disposable pay of an employee to recover an overpayment of pay or allowances, the Secretary sends a written notice to the employee stating—

(a) The origin, nature and amount of the overpayment;

(b) How interest is charged and administrative costs and penalties will be assessed, unless excused under 31 U.S.C. 3716;

(c) A demand for repayment, providing for an opportunity for the employee to enter into a written repayment agreement with the Department;

(d) Where a waiver of repayment is authorized by law, the employee's right to request a waiver;

(e) The Department's intention to deduct 15 percent of the employee's disposable pay, or a specified amount if the disposable pay is severance pay and/or a lump sum annual leave payment, to recover the overpayment if a waiver is not granted by the Secretary and the employee fails to repay the overpayment or enter into a written repayment agreement;

(f) The amount, frequency, approximate beginning date and duration of the intended deduction;

(g) If Government records on which the determination of overpayment are not attached, how those records will be made available to the employee for inspection and copying;

(h) The employee's right to request a pre-offset hearing concerning the existence or amount of the overpayment or an involuntary repayment schedule;

(i) The applicable hearing procedures and requirements, including a statement that a timely petition for hearing will stay commencement of collection proceedings and that a final decision on the hearing will be issued not later than 60 days after the hearing petition is filed, unless a delay is requested and granted;

(j) That any knowingly false or frivolous statements, representations or evidence may subject the employee to applicable disciplinary procedures, civil or criminal penalties; and

(k) That where amounts paid or deducted are later waived or found not owed, unless otherwise provided by law, they will be promptly refunded to the employee.

(Authority: 5 U.S.C. 5514, 31 U.S.C. 3716)

§ 32.4 Employee response.

(a) *Voluntary repayment agreement.* Within 7 days of receipt of the written notice under § 32.3, the employee may submit a request to the Secretary to arrange for a voluntary repayment schedule. To arrange for a voluntary repayment schedule, the employee shall submit a financial statement and sign a written repayment agreement approved by the Secretary. An employee who arranges for a voluntary repayment schedule may nonetheless request a waiver of the overpayment under paragraph (b) of this section.

(b) *Waiver.* An employee seeking a waiver of collection of the debt that is authorized by law must request the waiver in writing to the Secretary within 10 days of receipt of the written notice under § 32.3. The employee must state why he or she believes a waiver should be granted.

(c) *Involuntary repayment schedule.* If the employee claims that the amount of the involuntary deduction will cause extreme financial hardship and should be reduced, he or she must submit a written explanation and a financial statement signed under oath or affirmation to the Secretary within 10 days of receipt of the written notice under § 32.3. An employee who fails to submit this financial information in a timely manner waives the right to object to the involuntary repayment schedule at a hearing under § 32.5. The Secretary notifies the employee, in writing, whether the Secretary will reduce the rate of the involuntary deduction.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.5 Pre-offset hearing—general.

(a) An employee who wishes a review of the existence or amount of the overpayment or an involuntary repayment schedule may request a pre-offset hearing. The pre-offset hearing does not review:

(1) The denial of a waiver of repayment under 5 U.S.C. 5584;

(2) The involuntary repayment schedule or financial hardship caused by the amount of the involuntary deduction from the employee's disposable pay, unless the employee has submitted the financial statement and written explanation required under § 32.4(c); and

(3) The determination under paragraph (b) of this section that the pre-offset hearing is on the written submissions.

(b) Unless the Secretary determines that a matter reviewable under paragraph (a) of this section turns on an issue of credibility or veracity or cannot be resolved by a review of the documentary evidence, the pre-offset hearing is on the written submissions.

(c) A pre-offset hearing is based on the written submissions for overpayments arising from:

(1) A termination of a temporary promotion;

(2) A cash award;

(3) An erroneous salary rate;

(4) Premature granting of a within-grade increase;

(5) A lump sum payment for annual leave;

(6) Unauthorized appointment to a position;

(7) An error on time and attendance records; or

(8) Other circumstances where the Secretary determines that an oral hearing is not required.

(d) The hearing is conducted by a hearing official who is not under the supervision or control of the Secretary, except that this prohibition does not apply to the Department's administrative law judges.

(e) Formal discovery between the parties is not provided.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

[52 FR 24957, July 1, 1987, as amended at 86 FR 40335, July 28, 2021]

§ 32.6 Request for a pre-offset hearing.

(a) Except for an employee who has requested a waiver of collection of the debt under § 32.4(b), an employee who wishes a pre-offset hearing must request the hearing within 15 days of receipt of the written notice given under § 32.3. The Secretary waives the 15-day requirement if the employee shows that the delay was because of circumstances beyond his or her control or because of failure to receive notice and lack of knowledge of the time limit.

(b) An employee who has requested a waiver under § 32.4(b) may request a hearing within 10 days of receipt of a determination by the Secretary denying a waiver.

(c) The request for a hearing must:

(1) Be in writing;

(2) State why the employee:

(i) Contests the existence or amount of the overpayment; or

(ii) Claims that the involuntary repayment schedule will cause extreme financial hardship;

(3) Include all documents on which the employee is relying, other than those provided by the Secretary under § 32.3; any document which is a statement of an individual must be in the form of an affidavit; and

(4) Be submitted to the designated hearing official with a copy to the Secretary.

(d) If the employee timely requests a pre-offset hearing or the timelines are waived under paragraph (a) of this section, the Secretary:

(1) Notifies the employee whether the employee may elect an oral hearing; and

(2) Provides the hearing official with a copy of all records on which the determination of the overpayment and any involuntary repayment schedule are based.

(e) An employee who has been given the opportunity to elect an oral hearing and who does elect an oral hearing must notify the hearing official and the Secretary of his or her election in writing within 7 days of receipt of the notice under paragraph (d)(1) of this section and must identify all proposed witnesses and all facts and evidence about which they will testify.

(f) Where an employee requests an oral hearing, the hearing official notifies the Secretary and the employee of the date, time, and location of the hearing. However:

(1) The employee subsequently may elect to have the hearing based only on the written submissions by notifying the hearing official and the Secretary at least 3 calendar days before the date of the oral hearing. The hearing official may waive the 3-day requirement for good cause when the employee notifies the hearing official before the date of the hearing; and

(2) The request for a hearing of an employee who fails to appear at the oral hearing must be dismissed and the Secretary's decision affirmed.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.7 Pre-offset oral hearing.

(a) Oral hearings are informal in nature. The Secretary and the employee, through their representatives, and by reference to the documentation submitted, explain their case. The employee may testify on his or her own behalf, subject to cross examination. Other witnesses may be called to testify only where the hearing official determines that their testimony is relevant and not redundant.

(b) The hearing official shall:

(1) Conduct a fair and impartial hearing; and

(2) Preside over the course of the hearing, maintain decorum, and avoid delay in the disposition of the hearing.

(c) The employee may represent himself or herself or may be represented by another person at the hearing. The employee may not be represented by a person whose representation creates an actual or apparent conflict of interest.

(d) Oral hearings are open to the public. However, the hearing official may close all or any portion of the hearing where to do so is in the best interests of the employee or the public.

(e) Oral hearings may be conducted by conference call—

(1) If the employee is located in a city outside the Washington, DC Metropolitan area;

(2) At the request of the employee; or

(3) At the discretion of the hearing official.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.8 Pre-offset hearing on the written submissions.

If a hearing is to be held on the written submissions, the hearing official reviews the records and responses submitted by the Secretary and the employee under § 32.6.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.9 Written decision.

(a) The hearing official issues a written decision stating the facts supporting the nature and origin of the debt and the hearing official's analysis, findings and conclusions as to the amount of the debt and the repayment schedule within 60 days of filing of the employee's request for a pre-offset hearing, unless the employee requests, and the hearing official grants, a delay in the proceedings.

(b) The hearing official decides whether the Secretary's determination of the existence and the amount of the overpayment or the extreme financial hardship caused by the involuntary repayment schedule is clearly erroneous. A determination is clearly erroneous if although there is evidence to support the determination, the hearing official, considering the record as a whole, is left with a definite and firm conviction that a mistake was made.

(c) In making the decision, the hearing official is governed by applicable Federal statutes, rules and regulations.

(d) The hearing official decides the issue of extreme financial hardship caused by the involuntary repayment schedule only where the employee has submitted the financial statement and written explanation required under § 32.4(c). Where the hearing official determines that the involuntary repayment schedule creates extreme financial hardship, he or she must establish a schedule that alleviates the financial hardship but may not reduce the involuntary repayment schedule to a deduction of zero percent.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.10 Deductions process.

(a) Debts must be collected in one lump sum where possible. If the employee does not agree to a lump sum that exceeds 15 percent of disposable pay, the debt must be collected in installment deductions at officially established pay intervals in the amount established under:

(1) A voluntary repayment agreement;

(2) An involuntary repayment schedule where no hearing is requested; or

(3) The schedule established under the written hearing decision.

(b) Installment deductions must be made over a period not greater than the anticipated period of employment, except as provided under paragraph (d) of this section. If possible, the installment payment must be sufficient in size and frequency to liquidate the debt in, at most, three years. Installment payments of less than $25 may be accepted only in the most unusual circumstances.

(c) Deductions must begin:

(1) After the employee has entered a voluntary repayment schedule;

(2) If a waiver is requested under § 32.4(b), after the employee has been denied a waiver by the Secretary; or

(3) If a hearing is requested under § 32.5, after a written decision.

(d) If the employee retires or resigns or his or her employment ends before collection of the debt is completed, the amount necessary to liquidate the debt must be offset from subsequent payments of any nature (for example, final salary payment and/or lump sum annual leave payment) due the employee on the date of separation. If the debt cannot be liquidated by offset from any such final payment due the employee on the date of separation, the debt must be liquidated by administrative offset pursuant to 31 U.S.C. 3716 from later payments of any kind due the employee, where appropriate. After the Secretary has complied with the procedures in this part, the Secretary may refer the debt to a paying agency for collection by offset under 5 CFR 550.1108.

(e) Interest, penalties and administrative costs on debts collected under this part must be assessed, in accordance with the provisions of 4 CFR 102.13.

(f) An employee's payment, whether voluntary or involuntary, of all or any portion of an alleged debt collected pursuant to this part may not be construed as a waiver of any rights which the employee may have under this part or any other provision of law, except as otherwise provided by law.

(g) Amounts paid or deducted pursuant to this part by an employee for a debt that is waived or otherwise found not owing to the United States or which the Secretary is ordered to refund must be promptly refunded to the employee.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

PART 33—PROGRAM FRAUD CIVIL REMEDIES ACT

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AUTHORITY: 31 U.S.C. 3801–3812.

SOURCE: 53 FR 15675, May 3, 1988, unless otherwise noted.

§ 33.1 Basis and purpose.

(a) *Basis*. This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. No. 99–509, 6101 through 6104, 100 Stat. 16674 (October 21, 1986), to be codified at 31 U.S.C. 3801 through 3812. This law (31 U.S.C. 3809) requires each Federal department head to promulgate regulations necessary to implement the provisions of the statute.

(Authority: 31 U.S.C. 3809)

(b) *Purpose*. This part:

(1) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to the Department or to its agents; and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for those penalties and assessments.

(Authority: 31 U.S.C. 3809)

§ 33.2 Definitions.

As used in this part:

ALJ means an Administrative Law Judge in the Department appointed pursuant to 5 U.S.C. 3105 or detailed to the Department pursuant to 5 U.S.C. 3344.

(Authority: 31 U.S.C. 3801(a)(7)(A))

Benefits, as used in the definition of ''statement,'' means anything of value, including but no limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

(Authority: 31 U.S.C. 3809)

Claim means any request, demand, or submission:

(a) Made to the Department for property, services, or money (including money representing grants, cooperative agreements, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the Department or to a party to a contract or agreement with the Department:

(1) For property or services if the United States:

(i) Provided the property or services;

(ii) Provided any portion of the funds for the purchase of the property or services; or

(iii) Will reimburse the recipient or party for the purchase of the property or services; or

(2) For the payment of money (including money representing grants, cooperative agreements, loans, insurance, or benefits) if the United States:

(i) Provided any portion of the money requested or demanded;

(ii) Will reimburse the recipient or party for any portion of the money paid on that request or demand; or

(iii) Will guarantee or reinsure any portion of a loan made by the party; or

(c) Made to the Department which has the effect of decreasing an obligation to pay or account for property, services, or money.

(Authority: 31 U.S.C. 3801(a)(3))

Complaint means the administrative complaint served by the reviewing official on the defendant under § 33.7.

(Authority: 31 U.S.C. 3809)

Defendant means any person alleged in a complaint under § 33.7 to be liable for a civil penalty or assessment under § 33.3.

(Authority: 31 U.S.C. 3809)

Department means the United States Department of Education.

(Authority: 31 U.S.C. 3809)

Department head means the Secretary or Under Secretary of the United States Department of Education.

(Authority: 31 U.S.C. 3801(a)(2))

Government means the United States Government.

(Authority: 31 U.S.C. 3809)

Individual means a natural person.

(Authority: 31 U.S.C. 3809)

Initial decision means the written decision of the ALJ required by § 33.10 or § 33.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

(Authority: 31 U.S.C. 3803(h))

Investigating official means the Inspector General of the Department or an officer or employee of the Office of the Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

(Authority: 31 U.S.C. 3801(4)(A)(i))

Knows or has reason to know, means that a person, with respect to a claim or statement:

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

(Authority: 31 U.S.C. 3801(5))

Makes includes the terms presents, submits, and causes to be made, presented, or submitted.

(Authority: 31 U.S.C. 3802(a))

Person means any individual, partnership, corporation, association, or private organization.

(Authority: 31 U.S.C. 3801(a)(6))

Representative means:

(a) An attorney who is a member in good standing of the bar of any State, territory, possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico; or

(b) Any other person designated by a party in writing, provided that the designation includes a certification that the party understands the nature and consequences of an administrative enforcement action under this part, and that he or she has the right to representation by counsel or to self-representation.

(Authority: 31 U.S.C. 3803(g)(2)(F))

Reviewing official means the General Counsel of the Department or his or her designee who is:

(a) Not subject to supervision by, or required to report to, the investigating official; and

(b) Not employed in the organizational unit of the Department in which the investigating official is employed; and

(c) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

(Authority: 31 U.S.C. 3801(8))

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made:

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for):

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, cooperative agreement, loan, or benefit from;

The Department, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under the contract or for the grant, loan, cooperative agreement, or benefit, or if the Government will reimburse or reinsure the State, political subdivision, or party for any portion of the money or property under the contract or for the grant, cooperative agreement, loan, or benefit.

(Authority: 31 U.S.C. 3801(9))

§ 33.3 Basis for civil penalties and assessments.

(a) *Claims*. (1) Any person who makes a claim that the person knows or has reason to know:

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that:

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed;

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim is considered made to the Department, a recipient, or party when that claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Department, a recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether the property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section is also subject to an assessment of not more than twice the amount of that claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. The assessment is in lieu of damages sustained by the Government because of that claim.

(Authority: 31 U.S.C. 3802(a)(1))

(b) *Statements*. (1) Any person who makes a written statement that:

(i) The person knows or has reason to know:

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in the statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement;

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement is considered made to the Department when the statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Department.

(Authority: 31 U.S.C. 3802(a)(2))

(c) No proof of specific intent to defraud is required to establish liability under this section.

(Authority: 31 U.S.C. 3801(5))

(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each of those persons may be held liable for a civil penalty under this section.

(Authority: 31 U.S.C. 3802(a))

(e) In any case in which it is determined that more than one person is liable for making a claim under this section of which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any of those persons or jointly and severally against any combination of those persons.

(Authority: 31 U.S.C. 3802(a)(1); 3809)

§ 33.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3604(a) is warranted:

(1) The subpoena so issued must notify the person to whom it is addressed of the authority under which the subpoena is issued and must identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving the subpoena is required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that the documents are not available and the reasons therefore, or that the documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(Authority: 31 U.S.C. 3804(a))

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of the investigation to the reviewing official.

(Authority: 31 U.S.C. 3803(a)(1))

(c) Nothing in this section precludes or limits an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(Authority: 31 U.S.C. 3809)

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

(Authority: 31 U.S.C. 3803(a)(1))

§ 33.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 33.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 33.3 of this part, the reviewing official transmits to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 33.7.

(b) The notice must include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 33.3;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments. Such a statement may be based upon information then known or an absence of any information indicating that the person may be unable to pay such an amount.

(Authority: 31 U.S.C. 3803(a)(2); 3809(2))

§ 33.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 33.7 only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1); and

(2) In the case of allegations of liability under § 33.3(a) with respect to a claim, the reviewing official determines that, with respect to that claim or a group of related claims submitted at the same time the claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 33.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time includes only those claims arising from the same transaction (*e.g.*, grant, cooperative agreement, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section may be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are

unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

(Authority: 31 U.S.C. 3803(b), (c))

§ 33.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 33.8.

(b) The complaint must state:

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from those claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 33.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of the regulations in this part.

(Authority: 31 U.S.C. 3803(a))

§ 33.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by:

(1) Affidavit of the individual serving the complaint by delivery;

(2) An acknowledged United States Postal Service return receipt card; or

(3) Written acknowledgment of receipt by the defendant or his representative.

(Authority: 31 U.S.C. 3802(d))

§ 33.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer is deemed to be a request for hearing.

(b) In the answer, the defendant:

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in § 33.11 for good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

(Authority: 31 U.S.C. 3803(d)(2), 3809)

§ 33.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 33.9(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed

in § 33.8, a notice that an initial decision will be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true and, if those facts establish liability under § 33.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision becomes final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision must be stayed pending the ALJ's decision on the motion.

(f) If, on such a motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision under paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 33.38.

(h) The defendant may appeal to the Department head the decision denying a motion to reopen by filing a notice of appeal with the Department head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal stays the initial decision until the Department head decides the issue.

(i) If the defendant files a timely notice of appeal with the Department head, the ALJ shall forward the record of the proceeding to the Department head.

(j) The Department head decides expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the Department head decides that extraordinary circumstances excuse the defendant's failure to file a timely answer, the Department head remands the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the Department head decides that the defendant's failure to file a timely answer is not excused, the Department head reinstates the initial decision of the ALJ, which becomes final and binding upon the parties 30 days after the Department head issues that decision.

(Authority: 31 U.S.C. 3809)

§ 33.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

(Authority: 31 U.S.C. 3803(d)(2); 3809)

§ 33.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 33.8. At the same time, the ALJ shall send a copy of the notice to the representative for the Government.

(b) The notice must include:

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

(Authority: 31 U.S.C. 3803(g)(2)(A))

§ 33.13 Parties to the hearing.

(a) The parties to the hearing are the defendant and the Department.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

(Authority: 31 U.S.C. 3803(g)(2))

§ 33.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the Department who takes part in investigating, preparing, or presenting a particular case may not, in that case or a factually related case:

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the Department head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ may not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the Department, including in the offices of either the investigating official or the reviewing official.

(Authority: 31 U.S.C. 3809(1)(2))

§ 33.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) may communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

(Authority: 31 U.S.C. 3803(g)(1)(A))

§ 33.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. That motion must be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) The motion and affidavit must be filed promptly upon the party's discovery of reasons requiring disqualification, or the objections are deemed waived.

(d) The affidavit must state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of those facts. It must be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of the motion and affidavit, the ALJ shall not proceed further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case must be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the Department head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

(Authority: 31 U.S.C. 3803(g)(2)(G))

§ 33.17 Rights of parties.

Except as otherwise limited by this part, all parties may:

(a) Be accompanied, represented, and advised by a representative (as defined in § 33.2);

(b) Participate in any conference held by the ALJ:

(c) Conduct discovery under § 33.21;

(d) Agree to stipulations of fact or law, which must be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

(Authority: 31 U.S.C. 3803(g) (2) (E), (F), (3)(B)(ii))

§ 33.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Disqualify a non-attorney representative (designated as described in the § 33.2 definitions of ''representative'') if the ALJ determines that the representative is incapable of rendering reasonably effective assistance;

(3) Continue or recess the hearing in whole or in part for a reasonable period of time;

(4) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(5) Administer oaths and affirmations;

(6) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(7) Rule on motions and other procedural matters;

(8) Regulate the scope and timing of discovery;

(9) Regulate the course of the hearing and the conduct of representatives and parties;

(10) Examine witnesses;

(11) Receive, rule on, exclude, or limit evidence;

(12) Upon motion of a party, take official notice of facts;

(13) Upon motion of a party, decide cases, in whole or in part, by summary judgment if there is no disputed issue of material fact;

(14) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(15) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

(Authority: 31 U.S.C. 3803(g))

§ 33.19 Prehearing conferences.

(a) The ALJ may schedule perhearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one perhearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues.

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement.

(3) Stipulations, admissions of fact or as to the contents and authenticity of documents.

(4) Whether the parties can agree to submission of the case on a stipulated record.

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument.

(6) Limitation of the number of witnesses.

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits.

(8) Discovery.

(9) The time and place for the hearing.

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

(Authority: 31 U.S.C. 3803(g))

§ 33.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 33.4(b) are based, unless those documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of the documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 33.5 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 33.9.

(Authority: 31 U.S.C. 3803(g)(3)(B)(ii), 3803(e))

§ 33.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying.

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact.

(3) Written interrogatories.

(4) Depositions.

(b) For the purpose of this section and §§ 33.22 and 33.23, the term ''documents'' includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained in this part may be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery*. (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion or a motion for protective order, or both, as provided in § 33.24.

(3) The ALJ may grant a motion for discovery only if he finds that the discovery sought:

(i) Is necessary for the expeditious, fair, and reasonable determination of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 33.24.

(Authority: 31 U.S.C. 3803(a)(3)(B)(ii))

(e) *Depositions*. (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena must specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 33.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking a verbatim transcript of the deposition, which the party shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

(Authority: 31 U.S.C. 3803(g)(3)(B)(ii))

§ 33.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 33.33(b). At the time these documents are exchanged, any party that is permitted by the ALJ to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, shall provide each other party with a copy of the specific pages of the transcript it intends to introduce.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided in paragraph (a) of this Section unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section are deemed to be authentic for the purpose of admissibility at the hearing.

(Authority: 31 U.S.C. 3803(g)(2))

§ 33.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. The request must specify any documents to be produced and must designate the witnesses and describe their address and location with sufficient particularity to permit the witnesses to be found.

(d) The subpoena must specify the time and place at which a witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 33.8. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if is is less then ten days after service.

(Authority: 31 U.S.C. 3804(b))

§ 33.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may take any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had.

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place.

(3) That the discovery may be had only through a method of discovery other than that requested.

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters.

(5) That the discovery be conducted with no one present except persons designated by the ALJ.

(6) That the contents of discovery or evidence be sealed.

(7) That a deposition after being sealed be opened only by order of the ALJ.

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way.

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

(Authority: 31 U.S.C. 3803(g)(3)(B)(ii))

§ 33.25 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage must accompany the subpoena when served, except that if a subpoena is issued on behalf of the authority, a check for witness fees and mileage need not accompany the subpoena.

(Authority: 31 U.S.C. 3804(b))

§ 33.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ must include an original and two copies.

(2) Every pleading and paper filed in the proceeding must contain a caption setting for the title of the action, the

case number assigned by the ALJ, and a designation of the paper (*e.g.*, motion to quash subpoena).

(3) Every pleading and paper must be signed by, and must contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of the document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 33.8 shall be made by delivering a copy, or by placing a copy of the document in the United States mail, postage prepaid and addressed, to the party's last known address. If a party is represented by a representative, service must be made upon the representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, is proof of service.

(Authority: 31 U.S.C. 3803(b)(3)(A))

§ 33.27 Computation of time.

(a) In computing any period of time under this part or in an order issued under this part, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) If the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government are excluded from the computation.

(c) If a document has been served or issued by placing it in the mail, an additional five days is added to the time permitted for any response.

(Authority: 31 U.S.C. 3809)

§ 33.28 Motions.

(a) Any application to the ALJ for an order or ruling must be by motion. Motions must state the relief sought, the authority relied upon, and the facts alleged, and must be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions must be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to the motion.

(d) The ALJ may not grant a written motion before the time for filing responses to the motion has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny the motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

(Authority: 31 U.S.C. 3803(g)(3)(A))

§ 33.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section must reasonably relate to the severity and nature of the failure or misconduct.

(c) If a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with the order from introducing evidence concerning, or otherwise relying upon testimony relating to, the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with the request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief, or other document that is not filed in a timely fashion.

(Authority: 31 U.S.C. 3803(g)(2))

§ 33.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 33.3 and, if so, the appropriate amount of the civil penalty or assessment considering any aggravating or mitigating factors.

(b) The Department shall prove a defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing must be open to the public unless otherwise ordered by the ALJ for good cause shown.

(Authority: 31 U.S.C. 3803 (f), (g)(2))

§ 33.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the Department head, upon appeal, evaluate any circumstances that mitigate or aggravate the violation and articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty is imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the Department head in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements.

(2) The time period over which such claims or statements were made.

(3) The degree of the defendent's culpability with respect to the misconduct.

(4) The amount of money or the value of the property, services, or benefit falsely claimed.

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation.

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss.

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs.

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct.

(9) Whether the defendant attempted to conceal the misconduct.

(10) The degree to which the defendant has involved others in the misconduct or in concealing it.

(11) If the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude the misconduct.

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct.

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers.

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect

to it, including the extent of the defendant's prior participation in the program or in similar transactions.

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly.

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section may be construed to limit the ALJ or the Department head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

(Authority: 31 U.S.C. 3803(a)(2) (e), (f))

§ 33.32 Location of hearing.

(a) The hearing may be held:

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party must have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing must be held at the place and at the time ordered by the ALJ.

(Authority: 31 U.S.C. 3803(g)(4))

§ 33.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing must be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of the witness, in a manner that allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts must be exchanged as provided in § 33.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination must be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the party *pro se* or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

(Authority: 31 U.S.C. 3803(g)(2)(E); 3809))

§ 33.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ is not bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence if appropriate, *e.g.*, to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighted by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement are inadmissible to the extend provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All Documents and other evidence offered or taken for the record must be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 33.24.

(Authority: 31 U.S.C. 3803(f)(g)(2)(E))

§ 33.35 The record.

(a) The hearing must be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(Authority: 31 U.S.C. 3803 (f))

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Department head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 33.24.

(Authority: 5 U.S.C. App. 2, section 11)

§ 33.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing these briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. The briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

(Authority: 31 U.S.C. 3803 (g)(1)(2)(E))

§ 33.37 Initial decision.

(a) The ALJ shall issue an initial decision, based only on the record, that contains findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact must include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions of the complaint, violate § 33.3.

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that the ALJ finds in the case, such as those described in § 33.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Department head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reasons for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the Department head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the Department head and shall be final and binding on the parties 30 days after it is issued by the ALJ.

(Authority: 31 U.S.C. 3803(h)(i))

§ 33.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt is presumed to

be five days from the date of mailing in the absence of contrary proof.

(b) Every motion under paragraph (a) of this section must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. The motion must be accompanied by a supporting brief.

(c) Responses to the motion are allowed only upon request to the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the Department head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the Department head in accordance with § 33.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the Department head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Department head in accordance with § 33.39.

(Authority: 31 U.S.C. 3809)

§ 33.39 Appeal to Department head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal the decision to the Department head by filing a notice of appeal with the Department head in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues a final decision. However, if another party files a motion for reconsideration under § 33.38, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The Department head may extend the initial 30-day period for an additional 30 days if the defendant files with the Department head a request for an extension within the initial 30-day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the Department head, and the time for filing motions for reconsideration under § 33.38 has expired, the ALJ shall forward the record of the proceeding to the Department head.

(d) A notice of appeal must be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Department head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the Department head does not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Department head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present that evidence at the hearing, the Department head shall remand the matter to the ALJ for consideration of the additional evidence.

(j) The Department head affirms, reduces, reverses, compromises, remands, or settles any penalty or assessment, determined by the ALJ in any initial decision.

(Authority: 31 U.S.C. 3803(i))

(k) The Department head promptly serves each party to the appeal with a copy of the decision of the Department head and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

(Authority: 31 U.S.C. 3803(i)(2))

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805, after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Department head serves the defendant with a copy of the Department head's decision, a determination that a defendant is liable under § 33.3 is final and is not subject to judicial review.

(Authority: 31 U.S.C. 3805(a)(2))

§ 33.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Department head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the Department head stays the process immediately. The Department head orders the process resumed only upon receipt of the written authorization of the Attorney General.

(Authority: 31 U.S.C. 3803(b)(3))

§ 33.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Department head.

(b) No administrative stay is available following a final decision of the Department head.

(Authority: 31 U.S.C. 3809)

§ 33.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the Department head imposing penalties or assessments under this part and specifies the procedures for the review.

(Authority: 31 U.S.C. 3805)

§ 33.43 Collection of civil penalties and assessments.

Section 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for those actions.

(Authority: 31 U.S.C. 3808(b))

§ 33.44 Right to administrative offset.

The amount of any penalty or assessment that has become final, or for which a judgment has been entered under § 33.42 or § 33.43, or any amount agreed upon in a compromise or settlement under § 33.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be under this section against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

(Authority: 31 U.S.C. 3806)

§ 33.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part are deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

(Authority: 31 U.S.C. 3807(b))

§ 33.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(Authority: 31 U.S.C. 3809)

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(Authority: 31 U.S.C. 3803(j))

(c) The Department head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 33.42 or during the pendency of any action to collect penalties and assessments under § 33.43.

(Authority: 31 U.S.C. 3803(i)(2)(C))

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 33.42 or of

any action to recover penalties and assessments under 31 U.S.C. 3806.

(Authority: 31 U.S.C. 3806(f))

(e) The investigating official may recommend settlement terms to the reviewing official, the Department head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Department head, or the Attorney General, as appropriate.

(Authority: 31 U.S.C. 3809)

(f) Any compromise or settlement must be in writing.

(Authority: 31 U.S.C. 3809)

§ 33.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 33.8 within six years after the date on which the claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 33.10(b) is deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

(Authority: 31 U.S.C. 3808)

PART 34—ADMINISTRATIVE WAGE GARNISHMENT

Sec.

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AUTHORITY: 31 U.S.C. 3720D, unless otherwise noted.

SOURCE: 68 FR 8142, Feb. 19, 2003, unless otherwise noted.

§ 34.1 Purpose of this part.

This part establishes procedures the Department of Education uses to collect money from a debtor's disposable pay by means of administrative wage garnishment to satisfy delinquent debt owed to the United States.

(Authority: 31 U.S.C. 3720D)

§ 34.2 Scope of this part.

(a) This part applies to collection of any financial obligation owed to the United States that arises under a program we administer.

(b) This part applies notwithstanding any provision of State law.

(c) We may compromise or suspend collection by garnishment of a debt in accordance with applicable law.

(d) We may use other debt collection remedies separately or in conjunction with administrative wage garnishment to collect a debt.

(e) To collect by offset from the salary of a Federal employee, we use the procedures in 34 CFR part 31, not those in this part.

(Authority: 31 U.S.C. 3720D)

§ 34.3 Definitions.

As used in this part, the following definitions apply:

Administrative debt means a debt that does not arise from an individual's obligation to repay a loan or an overpayment of a grant received under a student financial assistance program authorized under Title IV of the Higher Education Act.

Business day means a day Monday through Friday, unless that day is a Federal holiday.

Certificate of service means a certificate signed by an authorized official of the U.S. Department of Education (the Department) that indicates the nature of the document to which it pertains, the date we mail the document, and to whom we are sending the document.

Day means calendar day. For purposes of computation, the last day of a period will be included unless that day is a Saturday, a Sunday, or a Federal legal holiday; in that case, the last day of the period is the next business day after the end of the period.

Debt or *claim* means any amount of money, funds, or property that an appropriate official of the Department has determined an individual owes to the United States under a program we administer.

Debtor means an individual who owes a delinquent nontax debt to the United States under a program we administer.

Disposable pay. This term—

(a)(1) Means that part of a debtor's compensation for personal services, whether or not denominated as wages, from an employer that remains after the deduction of health insurance premiums and any amounts required by law to be withheld.

(2) For purposes of this part, ''amounts required by law to be withheld'' include amounts for deductions such as social security taxes and withholding taxes, but do not include any amount withheld under a court order; and

(b) Includes, but is not limited to, salary, bonuses, commissions, or vacation pay.

Employer. This term—

(a) Means a person or entity that employs the services of another and that pays the latter's wages or salary;

(b) Includes, but is not limited to, State and local governments; and

(c) Does not include an agency of the Federal Government.

Financial hardship means an inability to meet basic living expenses for goods and services necessary for the survival of the debtor and his or her spouse and dependents.

Garnishment means the process of withholding amounts from an employee's disposable pay and paying those amounts to a creditor in satisfaction of a withholding order.

We means the United States Department of Education.

Withholding order. (a) This term means any order for withholding or garnishment of pay issued by this Department, another Federal agency, a State or private non-profit guaranty agency, or a judicial or administrative body.

(b) For purposes of this part, the terms ''wage garnishment order'' and ''garnishment order'' have the same meaning as ''withholding order.''

You means the debtor.

(Authority: 31 U.S.C. 3720D)

§ 34.4 Notice of proposed garnishment.

(a) We may start proceedings to garnish your wages whenever we determine that you are delinquent in paying a debt owed to the United States under a program we administer.

(b) We start garnishment proceedings by sending you a written notice of the proposed garnishment.

(c) At least 30 days before we start garnishment proceedings, we mail the notice by first class mail to your last known address.

(d)(1) We keep a copy of a certificate of service indicating the date of mailing of the notice.

(2) We may retain this certificate of service in electronic form.

(Authority: 31 U.S.C. 3720D)

§ 34.5 Contents of a notice of proposed garnishment.

In a notice of proposed garnishment, we inform you of—

(a) The nature and amount of the debt;

(b) Our intention to collect the debt through deductions from pay until the debt and all accumulated interest, penalties, and collection costs are paid in full; and

(c) An explanation of your rights, including those in §34.6, and the time frame within which you may exercise your rights.

(Authority: 31 U.S.C. 3720D)

§34.6 Rights in connection with garnishment.

Before starting garnishment, we provide you the opportunity—

(a) To inspect and copy our records related to the debt;

(b) To enter into a written repayment agreement with us to repay the debt under terms we consider acceptable;

(c) For a hearing in accordance with §34.8 concerning—

(1) The existence, amount, or current enforceability of the debt;

(2) The rate at which the garnishment order will require your employer to withhold pay; and

(3) Whether you have been continuously employed less than 12 months after you were involuntarily separated from employment.

(Authority: 31 U.S.C. 3720D)

§34.7 Consideration of objection to the rate or amount of withholding.

(a) We consider objections to the rate or amount of withholding only if the objection rests on a claim that withholding at the proposed rate or amount would cause financial hardship to you and your dependents.

(b) We do not provide a hearing on an objection to the rate or amount of withholding if the rate or amount we propose to be withheld does not exceed the rate or amount agreed to under a repayment agreement reached within the preceding six months after a previous notice of proposed garnishment.

(c) We do not consider an objection to the rate or amount of withholding based on a claim that by virtue of 15 U.S.C. 1673, no amount of wages are available for withholding by the employer.

(Authority: 31 U.S.C. 3720D)

§34.8 Providing a hearing.

(a) We provide a hearing if you submit a written request for a hearing concerning the existence, amount, or enforceability of the debt or the rate of wage withholding.

(b) At our option the hearing may be an oral hearing under §34.9 or a paper hearing under §34.10.

(Authority: 31 U.S.C. 3720D)

§34.9 Conditions for an oral hearing.

(a) We provide an oral hearing if you—

(1) Request an oral hearing; and

(2) Show in the request a good reason to believe that we cannot resolve the issues in dispute by review of the documentary evidence, by demonstrating that the validity of the claim turns on the credibility or veracity of witness testimony.

(b) If we determine that an oral hearing is appropriate, we notify you how to receive the oral hearing.

(c)(1) At your option, an oral hearing may be conducted either in-person or by telephone conference.

(2) We provide an in-person oral hearing with regard to administrative debts only in Washington D.C.

(3) We provide an in-person oral hearing with regard to debts based on student loan or grant obligations only at our regional service centers in Atlanta, Chicago, or San Francisco.

(4) You must bear all travel expenses you incur in connection with an in-person hearing.

(5) We bear the cost of any telephone calls we place in order to conduct an oral hearing by telephone.

(d)(1) To arrange the time and location of the oral hearing, we ordinarily attempt to contact you first by telephone call to the number you provided to us.

(2) If we are unable to contact you by telephone, we leave a message directing you to contact us within 5 business days to arrange the time and place of the hearing.

(3) If we can neither contact you directly nor leave a message with you by telephone—

(i) We notify you in writing to contact us to arrange the time and place of the hearing; or

(ii) We select a time and place for the hearing, and notify you in writing of the time and place set for the hearing.

(e) We consider you to have withdrawn the request for an oral hearing if—

(1) Within 15 days of the date of a written notice to contact us, we receive no response to that notice; or

(2) Within five business days of the date of a telephone message to contact us, we receive no response to that message.

(Authority: 31 U.S.C. 3720D)

§ 34.10 Conditions for a paper hearing.

We provide a paper hearing—

(a) If you request a paper hearing;

(b) If you requested an oral hearing, but we determine under § 34.9(e) that you have withdrawn that request;

(c) If you fail to appear for a scheduled oral hearing, as provided in § 34.15; or

(d) If we deny a request for an oral hearing because we conclude that, by a review of the written record, we can resolve the issues raised by your objections.

(Authority: 31 U.S.C. 3720D)

§ 34.11 Timely request for a hearing.

(a) A hearing request is timely if—

(1) You mail the request to the office designated in the garnishment notice and the request is postmarked not later than the 30th day following the date of the notice; or

(2) The designated office receives the request not later than the 30th day following the date of the garnishment notice.

(b) If we receive a timely written request from you for a hearing, we will not issue a garnishment order before we—

(1) Provide the requested hearing; and

(2) Issue a written decision on the objections you raised.

(c) If your written request for a hearing is not timely—

(1) We provide you a hearing; and

(2) We do not delay issuance of a garnishment order unless—

(i) We determine from credible representations in the request that the delay in filing the request for hearing was caused by factors over which you had no control; or

(ii) We have other good reason to delay issuing a garnishment order.

(d) If we do not complete a hearing within 60 days of an untimely request, we suspend any garnishment order until we have issued a decision.

(Authority: 31 U.S.C. 3720D)

§ 34.12 Request for reconsideration.

(a) If you have received a decision on an objection to garnishment you may file a request for reconsideration of that decision.

(b) We do not suspend garnishment merely because you have filed a request for reconsideration.

(c) We consider your request for reconsideration if we determine that—

(1) You base your request on grounds of financial hardship, and your financial circumstances, as shown by evidence submitted with the request, have materially changed since we issued the decision so that we should reduce the amount to be garnished under the order; or

(2)(i) You submitted with the request evidence that you did not previously submit; and

(ii) This evidence demonstrates that we should reconsider your objection to the existence, amount, or enforceability of the debt.

(d)(1) If we agree to reconsider the decision, we notify you.

(2)(i) We may reconsider based on the request and supporting evidence you have presented with the request; or

(ii) We may offer you an opportunity for a hearing to present evidence.

(Authority: 31 U.S.C. 3720D)

§ 34.13 Conduct of a hearing.

(a)(1) A hearing official conducts any hearing under this part.

(2) The hearing official may be any qualified employee of the Department whom the Department designates to conduct the hearing.

(b)(1) The hearing official conducts any hearing as an informal proceeding.

(2) A witness in an oral hearing must testify under oath or affirmation.

(3) The hearing official maintains a summary record of any hearing.

(c) Before the hearing official considers evidence we obtain that was not included in the debt records available

for inspection when we sent notice of proposed garnishment, we notify you that additional evidence has become available, may be considered by the hearing official, and is available for inspection or copying.

(d) The hearing official considers any objection you raise and evidence you submit—

(1) In or with the request for a hearing;

(2) During an oral hearing;

(3) By the date that we consider, under § 34.9(e), that a request for an oral hearing has been withdrawn; or

(4) Within a period we set, ordinarily not to exceed seven business days, after—

(i) We provide you access to our records regarding the debt, if you requested access to records within 20 days after the date of the notice under § 34.4;

(ii) We notify you that we have obtained and intend to consider additional evidence;

(iii) You request an extension of time in order to submit specific relevant evidence that you identify to us in the request; or

(iv) We notify you that we deny your request for an oral hearing.

(Authority: 31 U.S.C. 3720D)

§ 34.14 Burden of proof.

(a)(1) We have the burden of proving the existence and amount of a debt.

(2) We meet this burden by including in the record and making available to the debtor on request records that show that—

(i) The debt exists in the amount stated in the garnishment notice; and

(ii) The debt is currently delinquent.

(b) If you dispute the existence or amount of the debt, you must prove by a preponderance of the credible evidence that—

(1) No debt exists;

(2) The amount we claim to be owed on the debt is incorrect, or

(3) You are not delinquent with respect to the debt.

(c)(1) If you object that the proposed garnishment rate would cause financial hardship, you bear the burden of proving by a preponderance of the credible evidence that withholding the amount of wages proposed in the notice would leave you unable to meet the basic living expenses of you and your dependents.

(2) The standards for proving financial hardship are those in § 34.24.

(d)(1) If you object on the ground that applicable law bars us from collecting the debt by garnishment at this time, you bear the burden of proving the facts that would establish that claim.

(2) Examples of applicable law that may prevent collection by garnishment include the automatic stay in bankruptcy (11 U.S.C. 362(a)), and the preclusion of garnishment action against a debtor who was involuntarily separated from employment and has been reemployed for less than a continuous period of 12 months (31 U.S.C. 3720D(b)(6)).

(e) The fact that applicable law may limit the amount that an employer may withhold from your pay to less than the amount or rate we state in the garnishment order does not bar us from issuing the order.

(Authority: 31 U.S.C. 3720D)

§ 34.15 Consequences of failure to appear for an oral hearing.

(a) If you do not appear for an in-person hearing you requested, or you do not answer a telephone call convening a telephone hearing, at the time set for the hearing, we consider you to have withdrawn your request for an oral hearing.

(b) If you do not appear for an oral hearing but you demonstrate that there was good cause for not appearing, we may reschedule the oral hearing.

(c) If you do not appear for an oral hearing you requested and we do not reschedule the hearing, we provide a paper hearing to review your objections, based on the evidence in your file and any evidence you have already provided.

(Authority: 31 U.S.C. 3720D)

§ 34.16 Issuance of the hearing decision.

(a) *Date of decision.* The hearing official issues a written opinion stating his or her decision, as soon as practicable, but not later than 60 days after the

date on which we received the request for hearing.

(b) If we do not provide you with a hearing and render a decision within 60 days after we receive your request for a hearing—

(1) We do not issue a garnishment order until the hearing is held and a decision rendered; or

(2) If we have already issued a garnishment order to your employer, we suspend the garnishment order beginning on the 61st day after we receive the hearing request until we provide a hearing and issue a decision.

(Authority: 31 U.S.C. 3720D)

§ 34.17 Content of decision.

(a) The written decision is based on the evidence contained in the hearing record. The decision includes—

(1) A description of the evidence considered by the hearing official;

(2) The hearing official's findings, analysis, and conclusions regarding objections raised to the existence or amount of the debt;

(3) The rate of wage withholding under the order, if you objected that withholding the amount proposed in the garnishment notice would cause an extreme financial hardship; and

(4) An explanation of your rights under this part for reconsideration of the decision.

(b) The hearing official's decision is the final action of the Secretary for the purposes of judicial review under the Administrative Procedure Act (5 U.S.C. 701 *et seq.*).

(Authority: 31 U.S.C. 3720D)

§ 34.18 Issuance of the wage garnishment order.

(a)(1) If you fail to make a timely request for a hearing, we issue a garnishment order to your employer within 30 days after the deadline for timely requesting a hearing.

(2) If you make a timely request for a hearing, we issue a withholding order within 30 days after the hearing official issues a decision to proceed with garnishment.

(b)(1) The garnishment order we issue to your employer is signed by an official of the Department designated by the Secretary.

(2) The designated official's signature may be a computer-generated facsimile.

(c)(1) The garnishment order contains only the information we consider necessary for your employer to comply with the order and for us to ensure proper credit for payments received from your employer.

(2) The order includes your name, address, and social security number, as well as instructions for withholding and information as to where your employer must send the payments.

(d)(1) We keep a copy of a certificate of service indicating the date of mailing of the order.

(2) We may create and maintain the certificate of service as an electronic record.

(Authority: 31 U.S.C. 3720D)

§ 34.19 Amounts to be withheld under a garnishment order.

(a)(1) After an employer receives a garnishment order we issue, the employer must deduct from all disposable pay of the debtor during each pay period the amount directed in the garnishment order unless this section or § 34.20 requires a smaller amount to be withheld.

(2) The amount specified in the garnishment order does not apply if other law, including this section, requires the employer to withhold a smaller amount.

(b) The employer must comply with our garnishment order by withholding the lesser of—

(1) The amount directed in the garnishment order; or—

(2) The amount specified in 15 U.S.C. 1673(a)(2) (Restriction on Garnishment); that is, the amount by which a debtor's disposable pay exceeds an amount equal to 30 times the minimum wage. (See 29 CFR 870.10.)

(Authority: 31 U.S.C. 3720D)

§ 34.20 Amount to be withheld under multiple garnishment orders.

If a debtor's pay is subject to several garnishment orders, the employer must comply with our garnishment order as follows:

(a) Unless other Federal law requires a different priority, the employer must

pay us the amount calculated under § 34.19(b) before the employer complies with any later garnishment orders, except a family support withholding order.

(b) If an employer is withholding from a debtor's pay based on a garnishment order served on the employer before our order, or if a withholding order for family support is served on an employer at any time, the employer must comply with our garnishment order by withholding an amount that is the smaller of—

(1) The amount calculated under § 34.19(b); or

(2) An amount equal to 25 percent of the debtor's disposable pay less the amount or amounts withheld under the garnishment order or orders with priority over our order.

(c)(1) If a debtor owes more than one debt arising from a program we administer, we may issue multiple garnishment orders.

(2) The total amount withheld from the debtor's pay for orders we issue under paragraph (c)(1) of this section does not exceed the amounts specified in the orders, the amount specified in § 34.19(b)(2), or 15 percent of the debtor's disposable pay, whichever is smallest.

(d) An employer may withhold and pay an amount greater than that amount in paragraphs (b) and (c) of this section if the debtor gives the employer written consent.

(Authority: 31 U.S.C. 3720D)

§ 34.21 Employer certification.

(a) Along with a garnishment order, we send to an employer a certification in a form prescribed by the Secretary of the Treasury.

(b) The employer must complete and return the certification to us within the time stated in the instructions for the form.

(c) The employer must include in the certification information about the debtor's employment status, payment frequency, and disposable pay available for withholding.

(Authority: 31 U.S.C. 3720D)

§ 34.22 Employer responsibilities.

(a)(1) Our garnishment order indicates a reasonable period of time within which an employer must start withholding under the order.

(2) The employer must promptly pay to the Department all amounts the employer withholds according to the order.

(b) The employer may follow its normal pay and disbursement cycles in complying with the garnishment order.

(c) The employer must withhold the appropriate amount from the debtor's wages for each pay period until the employer receives our notification to discontinue wage garnishment.

(d) The employer must disregard any assignment or allotment by an employee that would interfere with or prohibit the employer from complying with our garnishment order, unless that assignment or allotment was made for a family support judgment or order.

(Authority: 31 U.S.C. 3720D)

§ 34.23 Exclusions from garnishment.

(a) We do not garnish your wages if we have credible evidence that you—

(1) Were involuntarily separated from employment; and

(2) Have not yet been reemployed continuously for at least 12 months.

(b) You have the burden of informing us of the circumstances surrounding an involuntary separation from employment.

(Authority: 31 U.S.C. 3720D)

§ 34.24 Claim of financial hardship by debtor subject to garnishment.

(a) You may object to a proposed garnishment on the ground that withholding the amount or at the rate stated in the notice of garnishment would cause financial hardship to you and your dependents. (See § 34.7)

(b) You may, at any time, object that the amount or the rate of withholding which our order specifies your employer must withhold causes financial hardship.

(c)(1) We consider an objection to an outstanding garnishment order and provide you an opportunity for a hearing on your objection only after the

order has been outstanding for at least six months.

(2) We may provide a hearing in extraordinary circumstances earlier than six months if you show in your request for review that your financial circumstances have substantially changed after the notice of proposed garnishment because of an event such as injury, divorce, or catastrophic illness.

(d)(1) You bear the burden of proving a claim of financial hardship by a preponderance of the credible evidence.

(2) You must prove by credible documentation—

(i) The amount of the costs incurred by you, your spouse, and any dependents, for basic living expenses; and

(ii) The income available from any source to meet those expenses.

(e)(1) We consider your claim of financial hardship by comparing—

(i) The amounts that you prove are being incurred for basic living expenses; against

(ii) The amounts spent for basic living expenses by families of the same size and similar income to yours.

(2) We regard the standards published by the Internal Revenue Service under 26 U.S.C. 7122(c)(2) (the ''National Standards'') as establishing the average amounts spent for basic living expenses for families of the same size as, and with family incomes comparable to, your family.

(3) We accept as reasonable the amount that you prove you incur for a type of basic living expense to the extent that the amount does not exceed the amount spent for that expense by families of the same size and similar income according to the National Standards.

(4) If you claim for any basic living expense an amount that exceeds the amount in the National Standards, you must prove that the amount you claim is reasonable and necessary.

(Authority: 31 U.S.C. 3720D)

§ 34.25 Determination of financial hardship.

(a)(1) If we conclude that garnishment at the amount or rate proposed in a notice would cause you financial hardship, we reduce the amount of the proposed garnishment to an amount that we determine will allow you to meet proven basic living expenses.

(2) If a garnishment order is already in effect, we notify your employer of any change in the amount the employer must withhold or the rate of withholding under the order.

(b) If we determine that financial hardship would result from garnishment based on a finding by a hearing official or under a repayment agreement we reached with you, this determination is effective for a period not longer than six months after the date of the finding or agreement.

(c)(1) After the effective period referred to in paragraph (b) of this section, we may require you to submit current information regarding your family income and living expenses.

(2) If we conclude from a review of that evidence that we should increase the rate of withholding or payment, we—

(i) Notify you; and

(ii) Provide you with an opportunity to contest the determination and obtain a hearing on the objection under the procedures in § 34.24.

(Authority: 31 U.S.C. 3720D)

§ 34.26 Ending garnishment.

(a)(1) A garnishment order we issue is effective until we rescind the order.

(2) If an employer is unable to honor a garnishment order because the amount available for garnishment is insufficient to pay any portion of the amount stated in the order, the employer must—

(i) Notify us; and

(ii) Comply with the order when sufficient disposable pay is available.

(b) After we have fully recovered the amounts owed by the debtor, including interest, penalties, and collection costs, we send the debtor's employer notification to stop wage withholding.

(Authority: 31 U.S.C. 3720D)

§ 34.27 Actions by employer prohibited by law.

An employer may not discharge, refuse to employ, or take disciplinary action against a debtor due to the issuance of a garnishment order under this part.

(Authority: 31 U.S.C. 3720D)

§ 34.28 Refunds of amounts collected in error.

(a) If a hearing official determines under §§ 34.16 and 34.17 that a person does not owe the debt described in our notice or that an administrative wage garnishment under this part was barred by law at the time of the collection action, we promptly refund any amount collected by means of this garnishment.

(b) Unless required by Federal law or contract, we do not pay interest on a refund.

(Authority: 31 U.S.C. 3720D)

§ 34.29 Enforcement action against employer for noncompliance with garnishment order.

(a) If an employer fails to comply with § 34.22 to withhold an appropriate amount from wages owed and payable to an employee, we may sue the employer for that amount.

(b)(1) We do not file suit under paragraph (a) of this section before we terminate action to enforce the debt as a personal liability of the debtor.

(2) However, the provision of paragraph (b)(1) of this section may not apply if earlier filing of a suit is necessary to avoid expiration of any applicable statute of limitations.

(c)(1) For purposes of this section, termination of an action to enforce a debt occurs when we terminate collection action in accordance with the FCCS, other applicable standards, or paragraph (c)(2) of this section.

(2) We regard termination of the collection action to have occurred if we have not received for one year any payments to satisfy the debt, in whole or in part, from the particular debtor whose wages were subject to garnishment.

(Authority: 31 U.S.C. 3720D)

§ 34.30 Application of payments and accrual of interest.

We apply payments received through a garnishment in the following order—

(a) To costs incurred to collect the debt;

(b) To interest accrued on the debt at the rate established by—

(1) The terms of the obligation under which it arises; or

(2) Applicable law; and

(c) To outstanding principal of the debt.

(Authority: 31 U.S.C. 3720D)

PART 35—TORT CLAIMS AGAINST THE GOVERNMENT

Subpart A—General

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AUTHORITY: Sec. 1(a), 80 Stat. 306; 28 U.S.C. 2672; 28 CFR, part 14.

SOURCE: 45 FR 30834, May 9, 1980, unless otherwise noted.

Subpart A—General

§ 35.1 Scope of regulations.

The regulations in this part shall apply only to claims asserted under the Federal Tort Claims Act, as amended, 28 U.S.C. 2671–2680, for money damages against the United States for damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Department of Education while acting within the scope of his office or employment.

Subpart B—Procedures

§ 35.2 Administrative claim; when presented; place of filing.

(a) For purposes of the regulations in this part, a claim shall be deemed to have been presented when the Department of Education receives, at a place designated in paragraph (b) of this section, an executed Standard Form 95 or other written notification of an incident accompanied by a claim for money damages in a sum certain for

damage to or loss of property, for personal injury, or for death, alleged to have occurred by reason of the incident. A claim which should have been presented to the Department but which was mistakenly addressed to or filed with another Federal agency, shall be deemed to be presented to the Department as of the date that the claim is received by the Department. A claim mistakenly addressed to or filed with the Department shall forthwith be transferred to the appropriate Federal agency, if ascertainable, or returned to the claimant.

(b) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final action by the Secretary or prior to the exercise of the claimant's option to bring suit under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the Department shall have 6 months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of an amendment.

(c) Forms may be obtained and claims may be filed, with the Department of Education Claims Officer, Washington, DC 20202.

§ 35.3 Administrative claim; who may file.

(a) A claim for injury to or loss of property may be presented by the owner of the property interest which is the subject of the claim, his duly authorized agent, or his legal representative.

(b) A claim for personal injury may be presented by the injured person, his duly authorized agent, or his legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decedent's estate or by any other person legally entitled to assert such a claim under applicable state law.

(d) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the insurer or the insured individually, as their respective interests appear, or jointly. Whenever an insurer presents a claim asserting the rights of a subrogee, he shall present with his claim appropriate evidence that he has the rights of a subrogee.

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

§ 35.4 Administrative claim; evidence and information to be submitted.

(a) *Death.* In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Decedent's employment or occupation at time of death, including his monthly or yearly salary or earnings (if any), and the duration of his last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death.

(4) Degree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payments for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain and the decedent's physical condition in the interval between injury and death.

(8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or the damages claimed.

(b) *Personal injury*. In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed or designated by the Department. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that claimant has, upon request, furnished the report referred to in the first sentence of this paragraph and has made or agrees to make available to the Department any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim.

(2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals the necessity for future treatment, a statement of expected duration of and expenses for such treatment.

(4) If a claim is made for loss of time from employment, a written statement from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amount of earnings actually lost.

(6) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

(c) *Property damage*. In support of a claim for damage to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price, market value of the property as of date of damage, and salvage value, where repair is not economical.

(5) Any other evidence or information which may have a bearing either on the responsibility of the United States for the injury to or loss of property or the damages claimed.

(d) *Time limit*. All evidence required to be submitted by this section shall be furnished by the claimant within a reasonable time. Failure of a claimant to furnish evidence necessary to a determination of his claim within three months after a request therefor has been mailed to his last known address may be deemed an abandonment of the claim. The claim may be thereupon disallowed.

§ 35.5 Investigation of claims.

When a claim is received, the Department will make such investigation as may be necessary or appropriate for a determination of the validity of the claim.

§ 35.6 Final denial of claim.

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the Department's action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.

(b) Prior to the commencement of suit and prior to the expiration of the 6-month period after the date of mailing, by certified or registered mail of notice of final denial of the claim as

provided in 28 U.S.C. 2401(b), a claimant, his duly authorized agent, or legal representative, may file a written request with the Department for reconsideration of a final denial of a claim under paragraph (a) of this section. Upon the timely filing of a request for reconsideration the Department shall have 6 months from the date of filing in which to make a final disposition of the claim and the claimant's option under 28 U.S.C. 2675(a) to bring suit shall not accrue until 6 months after the filing of a request for reconsideration. Final Department action on a request for reconsideration shall be effected in accordance with the provisions of paragraph (a) of this section.

§ 35.7 Payment of approved claims.

(a) Upon allowance of his claim, claimant or his duly authorized agent shall sign the voucher for payment, Standard Form 1145, before payment is made.

(b) When the claimant is represented by an attorney, the voucher for payment (SF 1145) shall designate both the claimant and his attorney as ''payees.'' The check shall be delivered to the attorney whose address shall appear on the voucher.

§ 35.8 Release.

Acceptance by the claimant, his agent or legal representative, of any award, compromise or settlement made hereunder, shall be final and conclusive on the claimant, his agent or legal representative and any other person on whose behalf or for whose benefit the claim has been presented, and shall constitute a complete release of any claim against the United States and against any employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 35.9 Penalties.

A person who files a false claim or makes a false or fraudulent statement in a claim against the United States may be liable to a fine of not more than $10,000 or to imprisonment of not more than 5 years, or both (18 U.S.C. 287.1001), and, in addition, to a forfeiture of $2,000 and a penalty of double the loss or damage sustained by the United States (31 U.S.C. 231).

§ 35.10 Limitation on Department's authority.

(a) An award, compromise or settlement of a claim hereunder in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. For the purposes of this paragraph, a principal claim and any derivative or subrogated claim shall be treated as a single claim.

(b) An administrative claim may be adjusted, determined, compromised or settled hereunder only after consultation with the Department of Justice when, in the opinion of the Department:

(1) A new precedent or a new point of law is involved; or

(2) A question of policy is or may be involved; or

(3) The United States is or may be entitled to indemnity or contribution from a third party and the Department is unable to adjust the third party claim; or

(4) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed $25,000.

(c) An administrative claim may be adjusted, determined, compromised or settled only after consultation with the Department of Justice when it is learned that the United States or an employee, agent or cost plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

PART 36—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

Sec.
36.1 Purpose.
36.2 Penalty adjustment.

AUTHORITY: 20 U.S.C. 1221e–3 and 3474; 28 U.S.C. 2461 note, as amended by § 701 of Pub. Law 114–74, unless otherwise noted.

SOURCE: 67 FR 69655, Nov. 18, 2002, unless otherwise noted.

§ 36.1 Purpose.

The purpose of this part is to make inflation adjustments to the civil monetary penalties within the jurisdiction of the Department of Education. These penalties are subject to review and adjustment as necessary at least once every 4 years in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

(Authority: 20 U.S.C. 1221e–3 and 3474; 28 U.S.C. 2461 note, as amended by § 701 of Pub. Law 114–74.)

[67 FR 69655, Nov. 18, 2002, as amended at 77 FR 60049, Oct. 2, 2012; 81 FR 50323, Aug. 1, 2016]

§ 36.2 Penalty adjustment.

The citations for the adjusted penalty provisions, a brief description of the penalty, and the adjusted maximum (and minimum, if applicable) penalty amounts are listed in Table 1 of this section.

TABLE I—§ 36.2.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

Statute	Description	New maximum (and minimum, if applicable) penalty amount
20 U.S.C. 1015(c)(5) (Section 131(c)(5) of the Higher Education Act of 1965 (HEA)).	Provides for a fine, as set by Congress in 1998, of up to $25,000 for failure by an institution of higher education (IHE) to provide information on the cost of higher education to the Commissioner of Education Statistics.	$42,163
20 U.S.C. 1022d(a)(3) (Section 205(a)(3) of the HEA).	Provides for a fine, as set by Congress in 2008, of up to $27,500 for failure by an IHE to provide information to the State and the public regarding its teacher-preparation programs.	35,119
20 U.S.C. 1082(g) (Section 432(g) of the HEA).	Provides for a civil penalty, as set by Congress in 1986, of up to $25,000 for violations by lenders and guaranty agencies of Title IV of the HEA, which authorizes the Federal Family Education Loan Program.	62,689
20 U.S.C. 1094(c)(3)(B) (Section 487(c)(3)(B) of the HEA).	Provides for a civil penalty, as set by Congress in 1986, of up to $25,000 for an IHE's violation of Title IV of the HEA, which authorizes various programs of student financial assistance.	62,689
20 U.S.C. 1228c(c)(2)(E) (Section 429 of the General Education Provisions Act).	Provides for a civil penalty, as set by Congress in 1994, of up to $1,000 for an educational organization's failure to disclose certain information to minor students and their parents.	1,850
31 U.S.C. 1352(c)(1) and (c)(2)(A) ...	Provides for a civil penalty, as set by Congress in 1989, of $10,000 to $100,000 for recipients of Government grants, contracts, etc. that improperly lobby Congress or the Executive Branch with respect to the award of Government grants and contracts.	22,021 to 220,213
31 U.S.C. 3802(a)(1) and (a)(2)	Provides for a civil penalty, as set by Congress in 1986, of up to $5,000 for false claims and statements made to the Government.	12,537

[67 FR 69655, Nov. 18, 2002, as amended at 70 FR 298, Jan. 4, 2005; 77 FR 60049, Oct. 2, 2012; 81 FR 50323, Aug. 1, 2016; 82 FR 18562, Apr. 20, 2017; 83 FR 2064, Jan. 16, 2018; 84 FR 974, Feb. 1, 2019; 85 FR 2036, Jan. 14, 2020; 86 FR 7977, Feb. 3, 2021; 87 FR 23452, Apr. 20, 2022]

PART 60—INDEMNIFICATION OF DEPARTMENT OF EDUCATION EMPLOYEES

Sec.

60.1 What are the policies of the Department regarding indemnification?
60.2 What procedures apply to requests for indemnification?

AUTHORITY: 20 U.S.C. 3411, 3461, 3471, and 3474.

SOURCE: 54 FR 7148, Feb. 16, 1989, unless otherwise noted.

§ 60.1 What are the policies of the Department regarding indemnification?

(a)(1) The Department of Education may indemnify, in whole or in part, an employee for any verdict, judgment, or other monetary award rendered against the employee if—

(i) The conduct giving rise to the verdict, judgment, or award occurred

within the scope of his or her employment with the Department; and

(ii) The indemnification is in the interest of the United States, as determined by the Secretary.

(2) The regulations in this part apply to an action pending against an ED employee as of March 30, 1989, as well as to any action commenced after that date.

(3) As used in this part, the term *employee* includes—

(i) A present or former officer or employee of the Department or of an advisory committee to the Department, including a special Government employee;

(ii) An employee of another Federal agency on detail to the Department; or

(iii) A student volunteer under 5 U.S.C. 3111.

(4) As used in this part the term *Secretary* means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

(b)(1) The Department may pay, in whole or in part, to settle or compromise a personal damage claim against an employee if—

(i) The alleged conduct giving rise to the personal damage claim occurred within the scope of employment; and

(ii) The settlement or compromise is in the interest of the United States, as determined by the Secretary.

(2) Payment under paragraph (b)(1) of this section may include reimbursement, in whole or in part, of an employee for prior payment made by the employee under a settlement or compromise that meets the requirements of this section.

(c) The Department does not indemnify or settle a personal damage claim before entry of an adverse verdict, judgment, or monetary award unless the Secretary determines that exceptional circumstances justify the earlier indemnification or settlement.

(d) Any payment under this part, either to indemnify a Department of Education employee or to settle a personal damage claim, is contingent upon the availability of appropriated funds.

(Authority: 20 U.S.C. 3411, 3461, 3471, and 3474)

§ 60.2 What procedures apply to requests for indemnification?

(a) When an employee of the Department of Education becomes aware that an action has been filed against the employee in his or her individual capacity as a result of conduct taken within the scope of his or her employment, the employee shall immediately notify the head of his or her principal operating component and shall cooperate with appropriate officials of the Department in the defense of the action.

(b) As part of the notification in paragraph (a) of this section or at a later time, the employee may request—

(1) Indemnification to satisfy a verdict, judgment, or award entered against the employee; or

(2) Payment to satisfy the requirements of a settlement proposal.

(c)(1) The employee's request must be in writing to the head of his or her principal operating component and must be accompanied by copies of the complaint and other documents filed in the action, including the verdict, judgment, award, settlement, or settlement proposal, as appropriate.

(2)(i) As used in this section, the term *principal operating component* means an office in the Department headed by an Assistant Secretary, a Deputy Under Secretary, or an equivalent departmental officer who reports directly to the Secretary.

(ii) The term also includes the Office of the Secretary and the Office of the Under Secretary.

(d) The head of the employee's principal operating component submits to the General Counsel, in a timely manner, the request, together with a recommended disposition of the request.

(e) The General Counsel forwards to the Secretary for decision—

(1) The employee's request;

(2) The recommendation of the head of the employee's principal operating component; and

(3) The General Counsel's recommendation.

(Authority: 20 U.S.C. 3411, 3461, 3471, and 3474)

PART 73—STANDARDS OF CONDUCT

Sec.
73.1 Cross-reference to employee ethical conduct standards and financial disclosure regulations.
73.2 Conflict of interest waiver.
APPENDIX TO PART 73—CODE OF ETHICS FOR GOVERNMENT SERVICE

AUTHORITY: 5 U.S.C. 301, 7301; 18 U.S.C. 208; and E.O. 12674, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 3 CFR, 1990 Comp., p. 306.

SOURCE: 60 FR 5818, Jan. 30, 1995, unless otherwise noted.

§ 73.1 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

Employees of the Department of Education are subject to the executive branch-wide Standards of Ethical Conduct at 5 CFR part 2635 and to the Department of Education regulation at 5 CFR part 6301 which supplements the executive branch-wide standards with a requirement for employees to obtain prior approval to participate in certain outside activities. In addition, employees are subject to the executive branch-wide financial disclosure regulations at 5 CFR part 2634.

§ 73.2 Conflict of interest waiver.

If a financial interest arises from ownership by an employee—or other person or enterprise referred to in 5 CFR 2635.402(b)(2)—of stock in a widely diversified mutual fund or other regulated investment company that in turn owns stock in another enterprise, that financial interest is exempt from the prohibition in 5 CFR 2635.402(a).

APPENDIX TO PART 73—CODE OF ETHICS FOR GOVERNMENT SERVICE

Any person in Government service should:

Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

Uphold the Constitution, laws, and regulations of the United States and of all governments therein and never be a party to their evasion.

Give a full day's labor for a full day's pay; giving earnest effort and best thought to the performance of duties.

Seek to find and employ more efficient and economical ways of getting tasks accomplished.

Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of governmental duties.

Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.

Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of governmental duties.

Never use any information gained confidentially in the performance of governmental duties as a means of making private profit.

Expose corruption wherever discovered.

Uphold these principles, ever conscious that public office is a public trust.

(This Code of Ethics was unanimously passed by the United States Congress on June 27, 1980, and signed into law as Public Law 96–303 by the President on July 3, 1980.)

PART 75—DIRECT GRANT PROGRAMS

Subpart A—General

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APPENDIX A TO PART 75—NOTICE OF ANNOUNCEMENT OF AWARD OPPORTUNITIES
APPENDIX B TO PART 75—NOTICE OF AWARD OR CONTRACT

AUTHORITY: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

SOURCE: 45 FR 22497, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980.

Subpart A—General

REGULATIONS THAT APPLY TO DIRECT GRANT PROGRAMS

§ 75.1 Programs to which part 75 applies.

(a) The regulations in part 75 apply to each direct grant program of the Department of Education.

(b) If a direct grant program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent consistent with the authorizing statute, under the General Education Provisions Act and the regulations in this part. For the purposes of this part, the term ''direct grant program'' includes any grant program of the Department other than a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States. With respect to Public Law 81–874 (the Impact Aid Program), the term ''direct grant program'' includes only the entitlement increase for children with disabilities under section 3(d)(2)(C) of Public Law 81–874 (20 U.S.C. 238(d)(2)(C) and disaster assistance under section 7 of that law (20 U.S.C. 241–1).

NOTE: See part 76 for the general regulations that apply to programs that allocate funds among eligible States. For a description of the two kinds of direct grant programs see § 75.200. Paragraph (b) of that section describes discretionary grant programs. Paragraph (c) of that section describes formula grant programs. Also see §§ 75.201, 75.209, and 75.210 for the selection criteria for discretionary grant programs that do not have implementing regulations or whose implementing regulations do not include selection criteria.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980, as amended at 45 FR 28669, Apr. 29, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 84059, Dec. 22, 1980, 50 FR 29330, July 18, 1985; 52 FR 27803, July 24, 1987; 57 FR 30336, July 8, 1992; 60 FR 63873, Dec. 12, 1995]

§ 75.2 Exceptions in program regulations to part 75.

If a program has regulations that are not consistent with part 75, the implementing regulations for that program identify the sections of part 75 that do not apply.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.4 Department contracts.

(a) A Federal contract made by the Department is governed by—

(1) Chapters 1 and 34 of title 48 of the Code of Federal Regulations (Federal Acquisition Regulation and Education Department Acquisition Regulation).

(2) Any applicable program regulations; and

(3) The request for proposals for the procurement, if any, referenced in *Commerce Business Daily*.

(b) The regulations in part 75 do not apply to a contract of the Department unless regulations in part 75 or a program's regulations specifically provide otherwise.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30336, July 8, 1992]

ELIGIBILITY FOR A GRANT

§ 75.50 How to find out whether you are eligible.

Eligibility to apply for a grant under a program of the Department is governed by the authorizing statute and implementing regulations for that program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27803, July 24, 1987]

§ 75.51 How to prove nonprofit status.

(a) Under some programs, an applicant must show that it is a nonprofit organization. (See the definition of *nonprofit* in 34 CFR 77.1.)

(b) An applicant may show that it is a nonprofit organization by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State taxing body or the State attorney general certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant;

(4) Any item described in paragraphs (b)(1) through (3) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate; or

(5) For an entity that holds a sincerely held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code, evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization under paragraphs (b)(1) through (4) of this section.

[45 FR 22497, Apr. 3, 1980, as amended at 85 FR 82126, Dec. 17, 2020]

§ 75.52 Eligibility of faith-based organizations for a grant and nondiscrimination against those organizations.

(a)(1) A faith-based organization is eligible to apply for and to receive a grant under a program of the Department on the same basis as any other organization, with respect to programs for which such other organizations are eligible and considering any permissible accommodation. The Department shall provide such religious accommodation as is consistent with Federal law, the Attorney General's Memorandum of October 6, 2017 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution.

(2) In the selection of grantees, the Department may not discriminate for or against a private organization on the basis of the organization's religious character, affiliation, or exercise and must ensure that all decisions about grant awards are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or the lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations that receive grants under a program of the Department, including organizations with religious character or affiliation, must carry out eligible activities in accordance with all program requirements, subject to any required or appropriate religious accommodation, and other

applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department shall disqualify faith-based organizations from applying for or receiving grants under a program of the Department because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise.

(b) The provisions of § 75.532 apply to a faith-based organization that receives a grant under a program of the Department.

(c)(1) A private organization that applies for and receives a grant under a program of the Department and engages in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those activities separately in time or location from any programs or services funded by a grant from the Department. Attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services funded by the grant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by ''indirect Federal financial assistance.''

(3) For purposes of 2 CFR 3474.15, this section, § 75.714, and appendices A and B to this part, the following definitions apply:

(i) *Direct Federal financial assistance* means financial assistance received by an entity selected by the Government or a pass-through entity (under this part) to carry out a service (e.g., by contract, grant, or cooperative agreement). References to *Federal financial assistance* will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of *indirect Federal financial assistance*.

(ii) *Indirect Federal financial assistance* means financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other similar means of government-funded payment provided to a beneficiary who is able to make a choice of a service provider. Federal financial assistance provided to an organization is *indirect* under this definition if—

(A) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion; and

(B) The organization receives the assistance as the result of the genuine, independent choice of the beneficiary.

(iii) *Federal financial assistance* does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.

(iv) *Pass-through entity* means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts direct Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(v) *Religious exercise* has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

(vi) *Discriminate against an organization on the basis of the organization's religious exercise* means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect because of:

(A) Conduct that would not be considered grounds to disfavor a secular organization,

(B) Conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution, or

(C) The actual or suspected religious motivation of the organization's religious exercise.

NOTE 1 TO PARAGRAPH (C)(3): The definitions of *direct Federal financial assistance* and *indirect Federal financial assistance* do not change the extent to which an organization is considered a recipient of Federal financial assistance as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

(d)(1) A faith-based organization that applies for or receives a grant under a program of the Department will retain its independence, autonomy, right of expression, religious character, and authority over its governance. A faith-based organization that receives Federal financial assistance from the Department does not lose the protections of law.

NOTE 1 TO PARAGRAPH (D)(1): Memorandum for All Executive Departments and Agencies, From the Attorney General, ''Federal Law Protections for Religious Liberty'' (Oct. 6, 2017) (describing Federal law protections for religious liberty).

(2) A faith-based organization that applies for or receives a grant under a program of the Department may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without concealing, removing, or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and employees on the basis of their acceptance of or adherence to the religious tenets of the organization; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) An organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services or in outreach activities on the basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program and may require attendance at all activities that are fundamental to the program.

(f) If a grantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement federally funded activities, the grantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives financial assistance from the Department. An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization.

(h) The Department shall not construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

[85 FR 82126, Dec. 17, 2020]

INELIGIBILITY OF CERTAIN INDIVIDUALS TO RECEIVE ASSISTANCE

SOURCE: Sections 75.60 through 75.62 appear at 57 FR 30337, July 8, 1992, unless otherwise noted.

§ 75.60 Individuals ineligible to receive assistance.

(a) An individual is ineligible to receive a fellowship, scholarship, or discretionary grant funded by the Department if the individual—

(1) Is not current in repaying a debt or is in default, as that term is used in 34 CFR part 668, on a debt—

(i) Under a program listed in paragraph (b) of this section; or

(ii) To the Federal Government under a nonprocurement transaction; and

(2) Has not made satisfactory arrangements to repay the debt.

(b) An individual who is not current in repaying a debt, or is in default, as that term is used in 34 CFR part 668, on a debt under a fellowship, scholarship, discretionary grant, or loan program, as included in the following list, and who has not made satisfactory arrangements to repay the debt, is ineligible under paragraph (a) of this section:

(1) A grant awarded under the Pell Grant (20 U.S.C. 1070a, *et seq.*), National Early Intervention Scholarship and Partnership (NEISP) Program (20 U.S.C. 1070a–21, *et seq.*), Supplemental Educational Opportunity Grant (SEOG) (20 U.S.C. 1070b, *et seq.*), or State Student Incentive Grant (SSIG) (20 U.S.C. 1070c, *et seq.*) program, or a scholarship awarded under the Robert C. Byrd Honors Scholarship Program (20 U.S.C. 1070d–31, *et seq.*), a fellowship awarded under the Jacob K. Javits Fellows Program (20 U.S.C. 1134h–1134k), or a fellowship awarded under the Patricia Roberts Harris Fellowship Program (20 U.S.C. 1134d–1134f).

(2) A fellowship awarded under the Christa McAuliffe Fellowship Program (20 U.S.C. 1113–1113e), the Bilingual Education Fellowship Program (20 U.S.C. 3221–3262), or the Rehabilitation Long-Term Training Program (29 U.S.C. 774(b)).

(3) A loan made under the Perkins Loan Program (20 U.S.C. 1087aa, *et seq.*), the Income Contingent Direct Loan Demonstration Project (20 U.S.C. 1087a, *et seq.*), the Stafford Loan Program, Supplemental Loans for Students (SLS), PLUS, or Consolidation Loan Program (20 U.S.C. 1071, *et seq.*), or the Cuban Student Loan Program (22 U.S.C. 2601, *et seq.*).

(4) A scholarship or repayment obligation incurred under the Paul Douglas Teacher Scholarship Program (20 U.S.C. 1111, *et seq.*).

(5) A grant, or a loan, made under the Law Enforcement Education Program (42 U.S.C. 3775).

(6) A stipend awarded under the Indian Fellowship Program (29 U.S.C. 774(b)).

(7) A scholarship awarded under the Teacher Quality Enhancement Grants Program (20 U.S.C. 1021 *et seq.*).

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30337, July 8, 1992, as amended at 59 FR 24870, May 12, 1994; 65 FR 19609, Apr. 11, 2000]

§ 75.61 Certification of eligibility; effect of ineligibility.

(a) An individual who applies for a fellowship, scholarship, or discretionary grant from the Department shall provide with his or her application a certification under the penalty of perjury—

(1) That the individual is eligible under § 75.60; and

(2) That the individual has not been debarred or suspended by a judge under section 5301 of the Anti-Drug Abuse Act of 1988 (21 U.S.C. 853a).

(b) The Secretary specifies the form of the certification required under paragraph (a) of this section.

(c) The Secretary does not award a fellowship, scholarship, or discretionary grant to an individual who—

(1) Fails to provide the certification required under paragraph (a) of this section; or

(2) Is ineligible, based on information available to the Secretary at the time the award is made.

(d) If a fellowship, scholarship, or discretionary grant is made to an individual who provided a false certification under paragraph (a) of this section, the individual is liable for recovery of the funds made available under the certification, for civil damages or penalties imposed for false representation, and for criminal prosecution under 18 U.S.C. 1001.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.62 Requirements applicable to entities making certain awards.

(a) An entity that provides a fellowship, scholarship, or discretionary grant to an individual under a grant from, or an agreement with, the Secretary shall require the individual who applies for such an award to provide with his or her application a certification under the penalty of perjury—

(1) That the individual is eligible under § 75.60; and

(2) That the individual has not been debarred or suspended by a judge under section 5301 of the Anti-Drug Abuse Act of 1988 (21 U.S.C. 853a).

(b) An entity subject to this section may not award a fellowship, scholarship, or discretionary grant to an individual if—

(1) The individual fails to provide the certification required under paragraph (a) of this section; or

(2) The Secretary informs the entity that the individual is ineligible under § 75.60.

(c) If a fellowship, scholarship, or discretionary grant is made to an individual who provided a false certification under paragraph (a) of this section, the individual is liable for recovery of the funds made available under the certification, for civil damages or penalties imposed for false representation, and for criminal prosecution under 18 U.S.C. 1001.

(d) The Secretary may require an entity subject to this section to provide a list of the individuals to whom fellowship, scholarship, or discretionary grant awards have been made or are proposed to be made by the entity.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.63 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 82128, Dec. 17, 2020]

Subpart B [Reserved]

Subpart C—How To Apply for a Grant

THE APPLICATION NOTICE

§ 75.100 Publication of an application notice; content of the notice.

(a) Each fiscal year the Secretary publishes application notices in the FEDERAL REGISTER that explain what kind of assistance is available for new grants under the programs that the Secretary administers.

(b) The application notice for a program explains one or more of the following:

(1) How to apply for a new grant.

(2) If preapplications are used under the program, how to preapply for a new grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86297, Dec. 30, 1980; 51 FR 20824, June 9, 1986; 59 FR 30261, June 10, 1994]

§ 75.101 Information in the application notice that helps an applicant apply.

(a) The Secretary may include such information as the following in an application notice:

(1) How an applicant can get an application package that contains:

(i) Information about the program; and

(ii) The application form that the applicant must use.

(2) The amount of funds available for grants, the estimated number of those grants, the estimated amounts of those grants and, if appropriate, the maximum award amounts of those grants.

(3) If the Secretary plans to approve multi-year projects, the project period that will be approved.

(4) Any priorities established by the Secretary for the program for that year and the method the Secretary will use to implement the priorities. (See § 75.105 *Annual priorities*.)

(5) Where to find the regulations that apply to the program.

(6) The statutory authority for the program.

(7) The deadlines established under § 75.102 (Deadline date for applications.) and 34 CFR 79.8 (How does the Secretary provide States an opportunity to comment on proposed Federal financial assistance?)

(b) If the Secretary either requires or permits preapplications under a program, an application notice for the program explains how an applicant can get the preapplication form.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CROSS REFERENCE: See 34 CFR 77.1—definitions of ''budget period'' and ''project period.''

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 84059, Dec. 22, 1980; 46 FR 3205, Jan. 14, 1981; 51 FR 20824, June 9, 1986; 51 FR 21164, June 11, 1986; 60 FR 63873, Dec. 12, 1995; 61 FR 8455, Mar. 4, 1996]

§ 75.102 Deadline date for applications.

(a) The application notice for a program sets a deadline date for the transmittal of applications to the Department.

(b) If an applicant wants a new grant, the applicant must submit an application in accordance with the requirements in the application notice.

(c) [Reserved]

(d) If the Secretary allows an applicant to submit a paper application, the applicant must show one of the following as proof of mailing by the deadline date:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

(e) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

(Authority: 20 U.S.C. 1221e–3 and 3474)

NOTE: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

[45 FR 22497, Apr. 3, 1980, as amended at 51 FR 20824, June 9, 1986; 69 FR 41201, July 8, 2004]

§ 75.103 Deadline date for preapplications.

(a) If the Secretary invites or requires preapplications under a program, the application notice for the program sets a deadline date for preapplications.

(b) An applicant shall submit its preapplication in accordance with the procedures for applications in § 75.102(b) and (d).

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.104 Applicants must meet procedural rules.

(a) The Secretary may make a grant only to an eligible party that submits an application.

(b) If a maximum award amount is established in a notice published in the FEDERAL REGISTER, the Secretary may reject without consideration or evaluation any application that proposes a project funding level that exceeds the stated maximum award amount.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[61 FR 8455, Mar. 4, 1996]

§ 75.105 Annual priorities.

(a) *What programs are covered by this section?* This section applies to any program for which the Secretary establishes priorities for selection of applications in a particular fiscal year.

(b) *How does the Secretary establish annual priorities?* (1) The Secretary establishes final annual priorities by publishing the priorities in a notice in the FEDERAL REGISTER, usually in the application notice for that program.

(2) The Secretary publishes proposed annual priorities for public comment, unless:

(i) The final annual priorities will be implemented only by inviting applications that meet the priorities (Cross-reference: See 34 CFR 75.105(c)(1));

(ii) The final annual priorities are chosen from a list of priorities already established in the program's regulations;

(iii) Publishing proposed annual priorities would seriously interfere with an orderly, responsible grant award process or would otherwise be impracticable, unnecessary, or contrary to the public interest;

(iv) The program statute requires or authorizes the Secretary to establish specified priorities; or

(v) The annual priorities are chosen from allowable activities specified in the program statute.

(c) *How does the Secretary implement an annual priority?* The Secretary may choose one or more of the following

methods to implement an annual priority:

(1) *Invitations*. The Secretary may simply invite applications that meet a priority. If the Secetary chooses this method, an application that meets the priority receives no competitive or absolute preference over applications that do not meet the priority.

(2) *Competitive preference*. The Secretary may give one of the following kinds of competitive preference to applications that meet a priority.

(i) The Secretary may award some or all bonus points to an application depending on the extent to which the application meets the priority. These points are in addition to any points the applicant earns under the selection criteria (see § 75.200(b)). The notice states the maximum number of additional points that the Secretary may award to an application depending upon how well the application meets the priority.

(ii) The Secretary may select an application that meets a priority over an application of comparable merit that does not meet the priority.

(3) *Absolute preference*. The Secretary may give an absolute preference to applications that meet a priority. The Secretary establishes a separate competition for applications that meet the priority and reserves all or part of a program's funds solely for that competition. The Secretary may adjust the amount reserved for the priority after determining the number of high quality applications received.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[46 FR 3205, Jan. 14, 1981, as amended at 57 FR 30337, July 8, 1992; 60 FR 63873, Dec. 12, 1995]

APPLICATION CONTENTS

CROSS REFERENCE: See § 75.200 for a description of discretionary and formula grant programs.

§ 75.109 Changes to application; number of copies.

(a) Each applicant that submits a paper application shall submit an original and two copies to the Department, including any information that the applicant supplies voluntarily.

(b) An applicant may make changes to its application on or before the deadline date for submitting applications under the program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CROSS REFERENCE: See § 75.200 How applications for new grants are selected for funding.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 69 FR 41201, July 8, 2004]

§ 75.110 Information regarding performance measurement.

(a) The Secretary may establish in an application notice for a competition one or more performance measurement requirements, including requirements for performance measures, baseline data, or performance targets, and a requirement that applicants propose in their applications one or more of their own performance measures, baseline data, or performance targets.

(b) If an application notice requires applicants to propose project-specific performance measures, baseline data, or performance targets, the application must include the following, as required by the application notice:

(1) *Performance measures*. How each proposed performance measure would accurately measure the performance of the project and how the proposed performance measure would be consistent with the performance measures established for the program funding the competition.

(2) *Baseline data*. (i) Why each proposed baseline is valid; or

(ii) If the applicant has determined that there are no established baseline data for a particular performance measure, an explanation of why there is no established baseline and of how and when, during the project period, the applicant would establish a valid baseline for the performance measure.

(3) *Performance targets*. Why each proposed performance target is ambitious yet achievable compared to the baseline for the performance measure and when, during the project period, the applicant would meet the performance target(s).

(c) If the application notice establishes performance measurement requirements, the applicant must also describe in the application—

(1)(i) The data collection and reporting methods the applicant would use

and why those methods are likely to yield reliable, valid, and meaningful performance data; and

(ii) If the Secretary requires applicants to collect data after the substantive work of a project is complete regarding the attainment of certain performance targets, the data collection and reporting methods the applicant would use during the post-performance period and why those methods are likely to yield reliable, valid, and meaningful performance data.

(2) The applicant's capacity to collect and report reliable, valid, and meaningful performance data, as evidenced by high-quality data collection, analysis, and reporting in other projects or research.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[78 FR 49352, Aug. 13, 2013]

§ 75.112 Include a proposed project period and a timeline.

(a) An application must propose a project period for the project.

(b) An application must include a narrative that describes how and when, in each budget period of the project, the applicant plans to meet each objective of the project.

(Approved by the Office of Management and Budget under control number 1875–0102)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 30261, June 10, 1994]

§ 75.117 Information needed for a multi-year project.

An applicant that proposes a multi-year project shall include in its application:

(a) Information that shows why a multi-year project is needed;

(b) A budget narrative accompanied by a budget form prescribed by the Secretary, that provides budget information for each budget period of the proposed project period.

(Approved by the Office of Management and Budget under control number 1875–0102)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 30261, June 10, 1994]

§ 75.118 Requirements for a continuation award.

(a) A recipient that wants to receive a continuation award shall submit a performance report that provides the most current performance and financial expenditure information, as directed by the Secretary, that is sufficient to meet the reporting requirements of 2 CFR 200.327 and 200.328 and 34 CFR 75.590 and 75.720.

(b) If a recipient fails to submit a performance report that meets the requirements of paragraph (a) of this section, the Secretary denies continued funding for the grant.

(Approved by the Office of Management and Budget under control number 1875–0102)

(Authority: 20 U.S.C. 1221e–3(a)(1) and 3474)

CROSS REFERENCE: See 2 CFR 200.327, Financial reporting, and 200.328, Monitoring and reporting program performance; and 34 CFR 75.117, Information needed for a multi-year project, 75.250 through 75.253, Approval of multi-year projects, 75.590, Evaluation by the grantee, and 75.720, Financial and performance reports.

[59 FR 30261, June 10, 1994, as amended at 64 FR 50391, Sept. 16, 1999; 79 FR 76091, Dec. 19, 2014]

§ 75.119 Information needed if private school students participate.

If a program requires the applicant to provide an opportunity for participation of students enrolled in private schools, the application must include the information required of subgrantees under 34 CFR 76.656.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

SEPARATE APPLICATIONS—ALTERNATIVE PROGRAMS

§ 75.125 Submit a separate application to each program.

An applicant shall submit a separate application to each program under which it wants a grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27803, July 24, 1987; 60 FR 46493, Sept. 6, 1995]

§ 75.126 Application must list all programs to which it is submitted.

If an applicant is submitting an application for the same project under more than one Federal program, the applicant shall list these programs in its application. The Secretary uses this information to avoid duplicate grants for the same project.

(Authority: 20 U.S.C. 1221e–3 and 3474)

GROUP APPLICATIONS

§ 75.127 Eligible parties may apply as a group.

(a) Eligible parties may apply as a group for a grant.

(b) Depending on the program under which a group of eligible parties seeks assistance, the term used to refer to the group may vary. The list that follows contains some of the terms used to identify a group of eligible parties:

(1) Combination of institutions of higher education.

(2) Consortium.

(3) Joint applicants.

(4) Cooperative arrangements.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.128 Who acts as applicant; the group agreement.

(a) If a group of eligible parties applies for a grant, the members of the group shall either:

(1) Designate one member of the group to apply for the grant; or

(2) Establish a separate, eligible legal entity to apply for the grant.

(b) The members of the group shall enter into an agreement that:

(1) Details the activities that each member of the group plans to perform; and

(2) Binds each member of the group to every statement and assurance made by the applicant in the application.

(c) The applicant shall submit the agreement with its application.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.129 Legal responsibilities of each member of the group.

(a) If the Secretary makes a grant to a group of eligible applicants, the applicant for the group is the grantee and is legally responsible for:

(1) The use of all grant funds;

(2) Ensuring that the project is carried out by the group in accordance with Federal requirements; and

(3) Ensuring that indirect cost funds are determined as required under § 75.564(e).

(b) Each member of the group is legally responsible to:

(1) Carry out the activities it agrees to perform; and

(2) Use the funds that it receives under the agreement in accordance with Federal requirements that apply to the grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 59581, Nov. 17, 1994]

COMPETITION EXCEPTIONS

§ 75.135 Competition exception for proposed implementation sites, implementation partners, or service providers.

(a) When entering into a contract with implementation sites or partners, an applicant is not required to comply with the competition requirements in 2 CFR 200.320(c) and (d), if—

(1) The contract is with an entity that agrees to provide a site or sites where the applicant would conduct the project activities under the grant;

(2) The implementation sites or partner entities that the applicant proposes to use are identified in the application for the grant; and

(3) The implementation sites or partner entities are included in the application in order to meet a regulatory, statutory, or priority requirement related to the competition.

(b) When entering into a contract for data collection, data analysis, evaluation services, or essential services, an applicant may select a provider using the informal, small-purchase procurement procedures in 2 CFR 200.320(b), regardless of whether that applicant would otherwise be subject to that part or whether the evaluation contract would meet the standards for a small purchase order, if—

(1) The contract is with the data collection, data analysis, evaluation service, or essential service provider;

(2) The data collection, data analysis, evaluation service, or essential service

provider that the applicant proposes to use is identified in the application for the grant; and

(3) The data collection, data analysis, evaluation service, or essential service provider is identified in the application in order to meet a statutory, regulatory, or priority requirement related to the competition.

(c) If the grantee relied on the exceptions under paragraph (a) or (b) of this section, the grantee must certify in its application that any employee, officer, or agent participating in the selection, award, or administration of a contract is free of any real or apparent conflict of interest and, if the grantee relied on the exceptions of paragraph (b) of this section, that the grantee used small purchase procedures to obtain the product or service.

(d) A grantee must obtain the Secretary's prior approval for any change to an implementation site, implementation partner, or data collection, data analysis, evaluation service, or essential service provider, if the grantee relied on the exceptions under paragraph (a) or (b) of this section to select the entity.

(e) The exceptions in paragraphs (a) and (b) of this section do not extend to the other procurement requirements in 2 CFR part 200 regarding contracting by grantees and subgrantees.

(f) For the purposes of this section, *essential service* means a product or service directly related to the grant that would, if not provided, have a detrimental effect on the grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[78 FR 49352, Aug. 13, 2013, as amended at 79 FR 76091, Dec. 19, 2014; 80 FR 67264, Nov. 2, 2015]

STATE COMMENT PROCEDURES

§ 75.155 Review procedures if State may comment on applications: Purpose of §§ 75.156–75.158.

If the authorizing statute for a program requires that a specific State agency be given an opportunity to comment on each application, the State and the applicant shall use the procedures in §§ 75.156–75.158 for that purpose.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CROSS REFERENCE: See 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities) for the regulations implementing the application review procedures that States may use under E.O. 12372.

[57 FR 30338, July 8, 1992]

§ 75.156 When an applicant under § 75.155 must submit its application to the State; proof of submission.

(a) Each applicant under a program covered by § 75.155 shall submit a copy of its application to the State on or before the deadline date for submitting its application to the Department.

(b) The applicant shall attach to its application a copy of its letter that requests the State to comment on the application.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.157 The State reviews each application.

A State that receives an application under § 75.156 may review and comment on the application.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 3474)

§ 75.158 Deadlines for State comments.

(a) The Secretary may establish a deadline date for receipt of State comments on applications.

(b) The State shall make its comments in a written statement signed by an appropriate State official.

(c) The appropriate State official shall submit comments to the Secretary by the deadline date for State comments. The procedures in § 75.102 (b) and (d) (how to meet a deadline) of this part apply to this submission.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.159 Effect of State comments or failure to comment.

(a) The Secretary considers those comments of the State that relate to:

(1) Any selection criterion that applies under the program; or

(2) Any other matter that affects the selection of projects for funding under the program.

(b) If the State fails to comment on an application on or before the deadline date for the appropriate program, the State waives its right to comment.

(c) If the applicant does not give the State an opportunity to comment, the Secretary does not select that project for a grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

DEVELOPMENT OF CURRICULA OR INSTRUCTIONAL MATERIALS

§ 75.190 Consultation.

Each applicant that intends to develop curricula or instructional materials under a grant is encouraged to assure that the curricula or materials will be developed in a manner conducive to dissemination, through continuing consultations with publishers, personnel of State and local educational agencies, teachers, administrators, community representatives, and other individuals experienced in dissemination.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.191 Consultation costs.

An applicant may budget reasonable consultation fees or planning costs in connection with the development of curricula or instructional materials.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.192 Dissemination.

If an applicant proposes to publish and disseminate curricula or instructional materials under a grant, the applicant shall include an assurance in its application that the curricula or materials will reach the populations for which the curricula or materials were developed.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Subpart D—How Grants Are Made

SELECTION OF NEW PROJECTS

§ 75.200 How applications for new grants and cooperative agreements are selected for funding; standards for use of cooperative agreements.

(a) *Direct grant programs.* The Department administers two kinds of direct grant programs. A direct grant program is either a discretionary grant or a formula grant program.

(b) *Discretionary grant programs.* (1) A discretionary grant program is one that permits the Secretary to use discretionary judgment in selecting applications for funding.

CROSS REFERENCE: See § 75.219 Exceptions to the procedures under § 75.217.

(2) The Secretary uses selection criteria to evaluate the applications submitted for new grants under a discretionary grant program.

(3) To evaluate the applications for new grants under the program the Secretary may use:

(i) Selection criteria established under § 75.209.

(ii) Selection criteria in program-specific regulations.

(iii) Selection criteria established under § 75.210.

(iv) Any combination of criteria from paragraphs (b)(3)(i), (b)(3)(ii), and (b)(3)(iii) of this section.

(4) The Secretary may award a cooperative agreement instead of a grant if the Secretary determines that substantial involvement between the Department and the recipient is necessary to carry out a collaborative project.

(5) The Secretary uses the selection procedures in this subpart to select recipients of cooperative agreements.

(c) *Formula grant programs.* (1) A formula grant program is one that entitles certain applicants to receive grants if they meet the requirements of the program. Applicants do not compete with each other for the funds, and each grant is either for a set amount or for an amount determined under a formula.

(2) The Secretary applies the program statute and regulations to fund projects under a formula grant program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27803, July 24, 1987; 57 FR 30338, July 8, 1992; 60 FR 63873, Dec. 12, 1995; 62 FR 10401, Mar. 6, 1997]

§ 75.201 How the selection criteria will be used.

(a) In the application package or a notice published in the FEDERAL REGISTER, the Secretary informs applicants of—

(1) The selection criteria chosen; and

(2) The factors selected for considering the selection criteria, if any.

(b) If points or weights are assigned to the selection criteria, the Secretary informs applicants in the application package or a notice published in the FEDERAL REGISTER of—

(1) The total possible score for all of the criteria for a program; and

(2) The assigned weight or the maximum possible score for each criterion or factor under that criterion.

(c) If no points or weights are assigned to the selection criteria and selected factors, the Secretary evaluates each criterion equally and, within each criterion, each factor equally.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[62 FR 10401, Mar. 6, 1997]

§§ 75.202–75.206 [Reserved]

§ 75.209 Selection criteria based on statutory or regulatory provisions.

The Secretary may establish selection criteria and factors based on statutory or regulatory provisions that apply to the authorized program, which may include, but are not limited to criteria and factors that reflect—

(a) Criteria contained in the program statute or regulations;

(b) Criteria in § 75.210;

(c) Allowable activities specified in the program statute or regulations;

(d) Application content requirements specified in the program statute or regulations;

(e) Program purposes, as described in the program statute or regulations; or

(f) Other pre-award and post-award conditions specified in the program statute or regulations.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[78 FR 49353, Aug. 13, 2013]

§ 75.210 General selection criteria.

In determining the selection criteria to evaluate applications submitted in a grant competition, the Secretary may select one or more of the following criteria and may select from among the list of optional factors under each criterion. The Secretary may define a selection criterion by selecting one or more specific factors within a criterion or assigning factors from one criterion to another criterion.

(a) *Need for project.* (1) The Secretary considers the need for the proposed project.

(2) In determining the need for the proposed project, the Secretary considers one or more of the following factors:

(i) The magnitude or severity of the problem to be addressed by the proposed project.

(ii) The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project.

(iii) The extent to which the proposed project will provide services or otherwise address the needs of students at risk of educational failure.

(iv) The extent to which the proposed project will focus on serving or otherwise addressing the needs of disadvantaged individuals.

(v) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.

(vi) The extent to which the proposed project will prepare personnel for fields in which shortages have been demonstrated.

(b) *Significance.* (1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers one or more of the following factors:

(i) The national significance of the proposed project.

(ii) The significance of the problem or issue to be addressed by the proposed project.

(iii) The potential contribution of the proposed project to increased knowledge or understanding of educational problems, issues, or effective strategies.

(iv) The potential contribution of the proposed project to increased knowledge or understanding of rehabilitation problems, issues, or effective strategies.

(v) The likelihood that the proposed project will result in system change or improvement.

(vi) The potential contribution of the proposed project to the development

and advancement of theory, knowledge, and practices in the field of study.

(vii) The potential for generalizing from the findings or results of the proposed project.

(viii) The extent to which the proposed project is likely to yield findings that may be utilized by other appropriate agencies and organizations.

(ix) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population.

(x) The extent to which the proposed project involves the development or demonstration of promising new strategies that build on, or are alternatives to, existing strategies.

(xi) The likely utility of the products (such as information, materials, processes, or techniques) that will result from the proposed project, including the potential for their being used effectively in a variety of other settings.

(xii) The extent to which the results of the proposed project are to be disseminated in ways that will enable others to use the information or strategies.

(xiii) The potential replicability of the proposed project or strategies, including, as appropriate, the potential for implementation in a variety of settings.

(xiv) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement.

(xv) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in employment, independent living services, or both, as appropriate.

(xvi) The importance or magnitude of the results or outcomes likely to be attained by the proposed project.

(c) *Quality of the project design.* (1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers one or more of the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(ii) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(iii) The extent to which there is a conceptual framework underlying the proposed research or demonstration activities and the quality of that framework.

(iv) The extent to which the proposed activities constitute a coherent, sustained program of research and development in the field, including, as appropriate, a substantial addition to an ongoing line of inquiry.

(v) The extent to which the proposed activities constitute a coherent, sustained program of training in the field.

(vi) The extent to which the proposed project is based upon a specific research design, and the quality and appropriateness of that design, including the scientific rigor of the studies involved.

(vii) The extent to which the proposed research design includes a thorough, high-quality review of the relevant literature, a high-quality plan for research activities, and the use of appropriate theoretical and methodological tools, including those of a variety of disciplines, if appropriate.

(viii) The extent to which the design of the proposed project includes a thorough, high-quality review of the relevant literature, a high-quality plan for project implementation, and the use of appropriate methodological tools to ensure successful achievement of project objectives.

(ix) The quality of the proposed demonstration design and procedures for documenting project activities and results.

(x) The extent to which the design for implementing and evaluating the proposed project will result in information to guide possible replication of project activities or strategies, including information about the effectiveness of the approach or strategies employed by the project.

(xi) The extent to which the proposed development efforts include adequate quality controls and, as appropriate, repeated testing of products.

(xii) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance.

(xiii) The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practice.

(xiv) The extent to which the proposed project represents an exceptional approach for meeting statutory purposes and requirements.

(xv) The extent to which the proposed project represents an exceptional approach to the priority or priorities established for the competition.

(xvi) The extent to which the proposed project will integrate with or build on similar or related efforts to improve relevant outcomes (as defined in 34 CFR 77.1(c)), using existing funding streams from other programs or policies supported by community, State, and Federal resources.

(xvii) The extent to which the proposed project will establish linkages with other appropriate agencies and organizations providing services to the target population.

(xviii) The extent to which the proposed project is part of a comprehensive effort to improve teaching and learning and support rigorous academic standards for students.

(xix) The extent to which the proposed project encourages parental involvement.

(xx) The extent to which the proposed project encourages consumer involvement.

(xxi) The extent to which performance feedback and continuous improvement are integral to the design of the proposed project.

(xxii) The quality of the methodology to be employed in the proposed project.

(xxiii) The extent to which fellowship recipients or other project participants are to be selected on the basis of academic excellence.

(xxiv) The extent to which the applicant demonstrates that it has the resources to operate the project beyond the length of the grant, including a multi-year financial and operating model and accompanying plan; the demonstrated commitment of any partners; evidence of broad support from stakeholders (e.g., State educational agencies, teachers' unions) critical to the project's long-term success; or more than one of these types of evidence.

(xxv) The potential and planning for the incorporation of project purposes, activities, or benefits into the ongoing work of the applicant beyond the end of the grant.

(xxvi) The extent to which the proposed project will increase efficiency in the use of time, staff, money, or other resources in order to improve results and increase productivity.

(xxvii) The extent to which the proposed project will integrate with or build on similar or related efforts in order to improve relevant outcomes (as defined in 34 CFR 77.1(c)), using non-public funds or resources.

(xxviii) The extent to which the proposed project is supported by promising evidence (as defined in 34 CFR 77.1(c)).

(xxix) The extent to which the proposed project demonstrates a rationale (as defined in 34 CFR 77.1(c)).

(xxx) The extent to which the proposed project represents a faithful adaptation of the evidence cited in support of the proposed project.

(d) *Quality of project services.* (1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers one or more of the following factors:

(i) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(ii) The extent to which entities that are to be served by the proposed technical assistance project demonstrate support for the project.

(iii) The extent to which the services to be provided by the proposed project

reflect up-to-date knowledge from research and effective practice.

(iv) The likely impact of the services to be provided by the proposed project on the intended recipients of those services.

(v) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(vi) The extent to which the training or professional development services to be provided by the proposed project are likely to alleviate the personnel shortages that have been identified or are the focus of the proposed project.

(vii) The likelihood that the services to be provided by the proposed project will lead to improvements in the achievement of students as measured against rigorous academic standards.

(viii) The likelihood that the services to be provided by the proposed project will lead to improvements in the skills necessary to gain employment or build capacity for independent living.

(ix) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(x) The extent to which the technical assistance services to be provided by the proposed project involve the use of efficient strategies, including the use of technology, as appropriate, and the leveraging of non-project resources.

(xi) The extent to which the services to be provided by the proposed project are focused on those with greatest needs.

(xii) The quality of plans for providing an opportunity for participation in the proposed project of students enrolled in private schools.

(e) *Quality of project personnel.* (1) The Secretary considers the quality of the personnel who will carry out the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers one or more of the following factors:

(i) The qualifications, including relevant training and experience, of the project director or principal investigator.

(ii) The qualifications, including relevant training and experience, of key project personnel.

(iii) The qualifications, including relevant training and experience, of project consultants or subcontractors.

(f) *Adequacy of resources.* (1) The Secretary considers the adequacy of resources for the proposed project.

(2) In determining the adequacy of resources for the proposed project, the Secretary considers one or more of the following factors:

(i) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization.

(ii) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project.

(iii) The extent to which the budget is adequate to support the proposed project.

(iv) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(v) The extent to which the costs are reasonable in relation to the number of persons to be served and to the anticipated results and benefits.

(vi) The potential for continued support of the project after Federal funding ends, including, as appropriate, the demonstrated commitment of appropriate entities to such support.

(vii) The potential for the incorporation of project purposes, activities, or benefits into the ongoing program of the agency or organization at the end of Federal funding.

(g) *Quality of the management plan.* (1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed

project, the Secretary considers one or more of the following factors:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(ii) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(iii) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project.

(iv) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(v) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

(h) *Quality of the project evaluation.* (1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers one or more of the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(ii) The extent to which the methods of evaluation are appropriate to the context within which the project operates.

(iii) The extent to which the methods of evaluation provide for examining the effectiveness of project implementation strategies.

(iv) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(v) The extent to which the methods of evaluation will provide timely guidance for quality assurance.

(vi) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

(vii) The extent to which the evaluation will provide guidance about effective strategies suitable for replication or testing in other settings.

(viii) The extent to which the methods of evaluation will, if well implemented, produce evidence about the project's effectiveness that would meet the What Works Clearinghouse standards without reservations as described in the What Works Clearinghouse Handbook (as defined in 34 CFR 77.1(c)).

(ix) The extent to which the methods of evaluation will, if well implemented, produce evidence about the project's effectiveness that would meet the What Works Clearinghouse standards with or without reservations as described in the What Works Clearinghouse Handbook (as defined in 34 CFR 77.1(c)).

(x) The extent to which the methods of evaluation will, if well implemented, produce promising evidence (as defined in 34 CFR 77.1(c)) about the project's effectiveness.

(xi) The extent to which the evaluation plan clearly articulates the key project components, mediators, and outcomes, as well as a measurable threshold for acceptable implementation.

(xii) The qualifications, including relevant training, experience, and independence, of the evaluator.

(xiii) The extent to which the proposed project plan includes sufficient resources to conduct the project evaluation effectively.

(xiv) The extent to which the methods of evaluation will provide valid and reliable performance data on relevant outcomes.

(i) *Strategy to scale.* (1) The Secretary considers the applicant's strategy to scale the proposed project.

(2) In determining the applicant's capacity to scale the proposed project, the Secretary considers one or more of the following factors:

(i) The applicant's capacity (e.g., in terms of qualified personnel, financial

resources, or management capacity) to bring the proposed project to scale on a national or regional level (as defined in 34 CFR 77.1(c)) working directly, or through partners, during the grant period.

(ii) The applicant's capacity (e.g., in terms of qualified personnel, financial resources, or management capacity) to further develop and bring to scale the proposed process, product, strategy, or practice, or to work with others to ensure that the proposed process, product, strategy, or practice can be further developed and brought to scale, based on the findings of the proposed project.

(iii) The feasibility of successful replication of the proposed project, if favorable results are obtained, in a variety of settings and with a variety of populations.

(iv) The mechanisms the applicant will use to broadly disseminate information on its project so as to support further development or replication.

(v) The extent to which the applicant demonstrates there is unmet demand for the process, product, strategy, or practice that will enable the applicant to reach the level of scale that is proposed in the application.

(vi) The extent to which the applicant identifies a specific strategy or strategies that address a particular barrier or barriers that prevented the applicant, in the past, from reaching the level of scale that is proposed in the application.

(Approved by the Office of Management and Budget under control number 1875–0102)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[62 FR 10401, Mar. 6, 1997, as amended at 78 FR 49353, Aug. 13, 2013; 80 FR 2608, Jan. 20, 2015; 82 FR 35448, July 31, 2017; 83 FR 18421, Apr. 27, 2018]

§ 75.211 Selection criteria for unsolicited applications.

(a) If the Secretary considers an unsolicited application under 34 CFR 75.222(a)(2)(ii), the Secretary uses the selection criteria and factors, if any, used for the competition under which the application could have been funded.

(b) If the Secretary considers an unsolicited application under 34 CFR 75.222(a)(2)(iii), the Secretary selects from among the criteria in § 75.210(b), and may select from among the specific factors listed under each criterion, the criteria that are most appropriate to evaluate the activities proposed in the application.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[62 FR 10403, Mar. 6, 1997]

SELECTION PROCEDURES

§ 75.215 How the Department selects a new project: purpose of §§ 75.216–75.222.

Sections 75.216–75.222 describe the process the Secretary uses to select applications for new grants. All of these sections apply to a discretionary grant program. However, only § 75.216 applies also to a formula grant program.

CROSS REFERENCE: See § 75.200(b) Discretionary grant program, and (c) Formula grant program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.216 Applications not evaluated for funding.

The Secretary does not evaluate an application if—

(a) The applicant is not eligible;

(b) The applicant does not comply with all of the procedural rules that govern the submission of the application;

(c) The application does not contain the information required under the program; or

(d) The proposed project cannot be funded under the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30338, July 8, 1992]

§ 75.217 How the Secretary selects applications for new grants.

(a) The Secretary selects applications for new grants on the basis of the authorizing statute, the selection criteria, and any priorities or other requirements that have been published in the FEDERAL REGISTER and apply to the selection of those applications.

(b)(1) The Secretary may use experts to evaluate the applications submitted under a program.

(2) These experts may include persons who are not employees of the Federal Government.

(c) The Secretary prepares a rank order of the applications based solely on the evaluation of their quality according to the selection criteria.

(d) The Secretary then determines the order in which applications will be selected for grants. The Secretary considers the following in making these determinations:

(1) The information in each application.

(2) The rank ordering of the applications.

(3) Any other information—

(i) Relevant to a criterion, priority, or other requirement that applies to the selection of applications for new grants;

(ii) Concerning the applicant's performance and use of funds under a previous award under any Department program; and

(iii) Concerning the applicant's failure under any Department program to submit a performance report or its submission of a performance report of unacceptable quality.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[52 FR 27804, July 24, 1987, as amended at 62 FR 4167, Jan. 29, 1997]

§ 75.218 Applications not evaluated or selected for funding.

(a) The Secretary informs an applicant if its application—

(1) Is not evaluated; or

(2) Is not selected for funding.

(b) If an applicant requests an explanation of the reason its application was not evaluated or selected, the Secretary provides that explanation.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30338, July 8, 1992]

§ 75.219 Exceptions to the procedures under § 75.217.

The Secretary may select an application for funding without following the procedures in § 75.217 if:

(a) The objectives of the project cannot be achieved unless the Secretary makes the grant before the date grants can be made under the procedures in § 75.217;

(b)(1) The application was evaluated under the preceding competition of the program;

(2) The application rated high enough to deserve selection under § 75.217; and

(3) The application was not selected for funding because the application was mishandled by the Department; or

(c) The Secretary receives an unsolicited application that meets the requirements of § 75.222.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987; 60 FR 12096, Mar. 3, 1995]

§ 75.220 Procedures the Department uses under § 75.219(a).

If the special circumstances of § 75.219(a) appear to exist for an application, the Secretary uses the following procedures:

(a) The Secretary assembles a board to review the application.

(b) The board consists of:

(1) A program officer of the program under which the applicant wants a grant;

(2) An employee from the Office of the Chief Financial Officer (OCFO) with responsibility for grant policy; and

(3) A Department employee who is not a program officer of the program but who is qualified to evaluate the application.

(c) The board reviews the application to decide if:

(1) The special circumstances under § 75.219(a) are satisfied;

(2) The application rates high enough, based on the selection criteria, priorities, and other requirements that apply to the program, to deserve selection; and

(3) Selection of the application will not have an adverse impact on the budget of the program.

(d) The board forwards the results of its review to the Secretary.

(e) If each of the conditions in paragraph (c) of this section is satisfied, the Secretary may select the application for funding.

(f) Even if the Secretary does not select the application for funding, the applicant may submit its application

under the procedures in Subpart C of this part.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86297, Dec. 30, 1980; 64 FR 50391, Sept. 16, 1999]

§ 75.221 Procedures the Department uses under § 75.219(b).

If the special circumstances of § 75.219(b) appear to exist for an application, the Secretary may select the application for funding if:

(a) The Secretary has documentary evidence that the special circumstances of § 75.219(b) exist; and

(b) The Secretary has a statement that explains the circumstances of the mishandling.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987. Redesignated at 60 FR 12096, Mar. 3, 1995]

§ 75.222 Procedures the Department uses under § 75.219(c).

If the Secretary receives an unsolicited application, the Secretary may consider the application under the following procedures unless the Secretary has published a notice in the FEDERAL REGISTER stating that the program that would fund the application would not consider unsolicited applications:

(a)(1) The Secretary determines whether the application could be funded under a competition planned or conducted for the fiscal year under which funds would be used to fund the application.

(2)(i) If the application could be funded under a competition described in paragraph (a)(1) of this section and the deadline for submission of applications has not passed, the Secretary refers the application to the appropriate competition for consideration under the procedures in § 75.217.

(ii)(A) If the application could have been funded under a competition described in paragraph (a)(1) of this section and the deadline for submission of applications has passed, the Secretary may consider the application only in exceptional circumstances, as determined by the Secretary.

(B) If the Secretary considers an application under paragraph (a)(2)(ii) of this section, the Secretary considers the application under paragraphs (b) through (e) of this section.

(iii) If the application could not be funded under a competition described in paragraph (a)(1) of this section, the Secretary considers the application under paragraphs (b) through (e) of this section.

(b) If an application may be considered under paragraphs (a)(2)(ii) or (iii) of this section, the Secretary determines if—

(1) There is a substantial likelihood that the application is of exceptional quality and national significance for a program administered by ED;

(2) The application meets the requirements of all applicable statutes and codified regulations that apply to the program; and

(3) Selection of the project will not have an adverse impact on the funds available for other awards planned for the program.

(c) If the Secretary determines that the criteria in paragraph (b) of this section have been met, the Secretary assembles a panel of experts that does not include any employees of the Department to review the application.

(d) The experts—

(1) Evaluate the application based on the selection criteria; and

(2) Determine whether the application is of such exceptional quality and national significance that it should be funded as an unsolicited application.

(e) If the experts highly rate the application and determine that the application is of such exceptional quality and national significance that it should be funded as an unsolicited application, the Secretary may fund the application.

NOTE TO § 75.222: To assure prompt consideration, applicants submitting unsolicited applications should send the application, marked ''Unsolicited Application'' on the outside, to the Chief, Application Control Center, U.S. Department of Education, Washington, DC 20202–4725.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[60 FR 12096, Mar. 3, 1995]

§ 75.223 [Reserved]

§ 75.224 What are the procedures for using a multiple tier review process to evaluate applications?

(a) The Secretary may use a multiple tier review process to evaluate applications.

(b) The Secretary may refuse to review applications in any tier that do not meet a minimum cut-off score established for the prior tier.

(c) The Secretary may establish the minimum cut-off score—

(1) In the application notice published in the FEDERAL REGISTER; or

(2) After reviewing the applications to determine the overall range in the quality of applications received.

(d) The Secretary may, in any tier—

(1) Use more than one group of experts to gain different perspectives on an application; and

(2) Refuse to consider an application if the application is rejected under paragraph (b) of this section by any one of the groups used in the prior tier.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[66 FR 60138, Nov. 30, 2001]

§ 75.225 What procedures does the Secretary use if the Secretary decides to give special consideration to novice applications?

(a) As used in this section, ''novice applicant'' means—

(1) Any applicant for a grant from ED that—

(i) Has never received a grant or subgrant under the program from which it seeks funding;

(ii) Has never been a member of a group application, submitted in accordance with §§ 75.127–75.129, that received a grant under the program from which it seeks funding; and

(iii) Has not had an active discretionary grant from the Federal Government in the five years before the deadline date for applications under the program.

(2) In the case of a group application submitted in accordance with §§ 75.127–75.129, a group that includes only parties that meet the requirements of paragraph (a)(1) of this section.

(b) For the purposes of paragraph (a)(1)(iii) of this section, a grant is active until the end of the grant's project or funding period, including any extensions of those periods that extend the grantee's authority to obligate funds.

(c) If the Secretary determines that special consideration of novice applications is appropriate, the Secretary may either—

(1) Establish a separate competition for novice applicants; or

(2) Give competitive preference to novice applicants under the procedures in 34 CFR 75.105(c)(2).

(d) Before making a grant to a novice applicant, the Secretary imposes special conditions, if necessary, to ensure the grant is managed effectively and project objectives are achieved.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[66 FR 60138, Nov. 30, 2001; 67 FR 4316, Jan. 29, 2002]

§ 75.226 What procedures does the Secretary use if the Secretary decides to give special consideration to applications supported by strong, moderate, or promising evidence?

(a) As used in this section, ''strong evidence'' is defined in 34 CFR 77.1(c).

(b) As used in this section, ''moderate evidence'' is defined in 34 CFR 77.1(c).

(c) As used in this section, ''promising evidence'' is defined in 34 CFR 77.1(c).

(d) If the Secretary determines that special consideration of applications supported by strong, moderate, or promising evidence is appropriate, the Secretary may establish a separate competition under the procedures in 34 CFR 75.105(c)(3), or provide competitive preference under the procedures in 34 CFR 75.105(c)(2), for applications supported by—

(1) Evidence that meets the conditions in the definition of ''strong evidence'';

(2) Evidence that meets the conditions in the definition of ''moderate evidence''; or

(3) Evidence that meets the conditions in the definition of ''promising evidence.''

[82 FR 35449, July 31, 2017]

PROCEDURES TO MAKE A GRANT

§ 75.230 How the Department makes a grant; purpose of §§ 75.231–75.236.

If the Secretary selects an application under §§ 75.217, 75.220, or 75.222, the Secretary follows the procedures in §§ 75.231–75.236 to set the amount and determine the conditions of a grant. Sections 75.235–75.236 also apply to grants under formula grant programs.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CROSS REFERENCE: See § 75.200 How applications for new grants are selected for funding.

§ 75.231 Additional information.

After selecting an application for funding, the Secretary may require the applicant to submit additional information.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.232 The cost analysis; basis for grant amount.

(a) Before the Secretary sets the amount of a new grant, the Secretary does a cost analysis of the project. The Secretary:

(1) Verifies the cost data in the detailed budget for the project;

(2) Evaluates specific elements of costs; and

(3) Examines costs to determine if they are necessary, reasonable, and allowable under applicable statutes and regulations.

(b) The Secretary uses the cost analysis as a basis for determining the amount of the grant to the applicant. The cost analysis shows whether the applicant can achieve the objectives of the project with reasonable efficiency and economy under the budget in the application.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 30261, June 10, 1994]

§ 75.233 Setting the amount of the grant.

(a) Subject to any applicable matching or cost-sharing requirements, the Secretary may fund up to 100 percent of the allowable costs in the applicant's budget.

(b) In deciding what percentage of the allowable costs to fund, the Secretary may consider any other financial resources available to the applicant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30338, July 8, 1992]

§ 75.234 The conditions of the grant.

(a) The Secretary makes a grant to an applicant only after determining—

(1) The approved costs; and

(2) Any special conditions.

(b) In awarding a cooperative agreement, the Secretary includes conditions that state the explicit character and extent of anticipated collaboration between the Department and the recipient.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30338, July 8, 1992]

§ 75.235 The notification of grant award.

(a) To make a grant, the Secretary issues a notification of grant award and sends it to the grantee.

(b) The notification of grant award sets the amount of the grant award and establishes other specific conditions, if any.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30338, July 8, 1992]

§ 75.236 Effect of the grant.

The grant obligates both the Federal Government and the grantee to the requirements that apply to the grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CROSS REFERENCE: See 2 CFR 200.308, Revision of budget and program plans.

APPROVAL OF MULTI-YEAR PROJECTS

§ 75.250 Maximum funding period.

(a) The Secretary may approve a project period of up to 60 months to perform the substantive work of a grant.

(b) The Secretary may approve a data collection period for a grant for a period of up to 72 months after the end of the project period and provide funding for the data collection period for the sole purpose of collecting, analyzing,

and reporting performance measurement data regarding the project. The Secretary may inform applicants of the Secretary's intent to approve data collection periods in the application notice published for a competition or may decide to fund data collection periods after grantees have started their project periods.

(Authority: 20 U.S.C. 1221e–3 and 3474.)

[78 FR 49353, Aug. 13, 2013]

§ 75.251 Budget periods.

(a) The Secretary usually approves a budget period of not more than 12 months, even if the project has a multi-year project period.

(b) If the Secretary approves a multi-year project period, the Secretary:

(1) Makes a grant to the project for the initial budget period; and

(2) Indicates his or her intention to make contination awards to fund the remainder of the project period.

(c) If the Secretary funds a multi-year data collection period, the Secretary may fund the data collection period through separate budget periods and fund those budget periods in the same manner as those periods are funded during the project period.

[45 FR 22497, Apr. 3, 1980, as amended at 78 FR 49354, Aug. 13, 2013]

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.253 Continuation of a multi-year project after the first budget period.

(a) The Secretary may make a continuation award for a budget period after the first budget period of an approved multi-year project if:

(1) The Congress has appropriated sufficient funds under the program;

(2) The grantee has either—

(i) Made substantial progress in achieving—

(A) The goals and objectives of the project; and

(B) If the Secretary established performance measurement requirements for the grant in the application notice, the performance targets in the grantee's approved application; or

(ii) Obtained the Secretary's approval for changes to the project that—

(A) Do not increase the amount of funds obligated to the project by the Secretary; and

(B) Enable the grantee to achieve the goals and objectives of the project and meet the performance targets of the project, if any, without changing the scope or objectives of the project.

(3) The recipient has submitted all reports as required by § 75.118, and

(4) Continuation of the project is in the best interest of the Federal Government.

(5) The grantee has maintained financial and administrative management systems that meet the requirements in 2 CFR 200.302, Financial management, and 200.303, Internal controls.

(b) In deciding whether a grantee has made substantial progress, the Secretary may consider any information relevant to the authorizing statute, a criterion, a priority, or a performance measure, or to a financial or other requirement that applies to the selection of applications for new grants.

(c) Subject to the criteria in paragraph (a) of this section, in selecting applications for funding under a program the Secretary gives priority to contination awards over new grants.

(d)(1) Notwithstanding any regulatory requirements in 2 CFR part 200, a grantee may expend funds that have not been obligated at the end of a budget period for obligations of the subsequent budget period if—

(i) The obligation is for an allowable cost that falls within the scope and objectives of the project; and

(ii) ED regulations, including those in title 2 of the CFR, statutes, or the conditions of the grant do not prohibit the obligation.

NOTE: See 2 CFR 200.308(d)(2).

(2) The Secretary may—

(i) Require the grantee to send a written statement describing how the funds made available under this section will be used; and

(ii) Determine the amount of new funds that the Department will make available for the subsequent budget period after considering the statement the grantee provides under paragraph (c)(2)(i) of this section or any other information available to the Secretary about the use of funds under the grant.

(3) In determining the amount of new funds to make available to a grantee under this section, the Secretary considers whether the unobligated funds made available are needed to complete activities that were planned for completion in the prior budget period.

(e)(1) If the Secretary decides, under this section, not to make a continuation award, the Secretary may authorize a no-cost extension of the last budget period of the grant in order to provide for the orderly closeout of the grant.

(2) If the Secretary makes a continuation award under this section—

(i) The Secretary makes the award under §§ 75.231–75.236; and

(ii) The new budget period begins on the day after the previous budget period ends.

(f) Unless prohibited by the program statute or regulations, a grantee that is in the final budget period of its project period may seek continued assistance for the project as required under the procedures for selecting new projects for grants.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CROSS REFERENCES: 1. See Subpart C—How to Apply for a Grant.

2. See § 75.117 Information needed for a multi-year project; and § 75.118 Application for a continuation award.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30338, July 8, 1992; 59 FR 30261, June 10, 1994; 62 FR 40424, July 28, 1997; 78 FR 49354, Aug. 13, 2013; 79 FR 76092, Dec. 19, 2014]

§ 75.254 [Reserved]

MISCELLANEOUS

§ 75.260 Allotments and reallotments.

(a) Under some of the programs covered by this part, the Secretary allots funds under a statutory or regulatory formula.

(b) Any reallotment to other grantees will be made by the Secretary in accordance with the authorizing statute for that program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987]

§ 75.261 Extension of a project period.

(a) *General rule.* A grantee may extend the project period of an award one time for a period up to twelve months without the prior approval of the Secretary, if—

(1) The grantee meets the requirements for extension in 2 CFR 200.308(d)(2); and

(2) ED statutes, regulations other than those in 2 CFR part 200, or the conditions of an award do not prohibit the extension.

(b) *Specific rule for certain programs of the National Institute on Disability and Rehabilitation Research.* Notwithstanding paragraph (a) of this section, grantees under the following programs of NIDRR must request prior approval to extend their grants under paragraph (c) of this section:

(1) The Knowledge Dissemination and Utilization Centers and Disability and Technical Assistance Centers authorized under 29 U.S.C. 761a(b)(2), (4), (5), (6), and (11) and implemented at 34 CFR part 350, subpart B, §§ 350.17–350.19.

(2) The Rehabilitation Research and Training Centers program authorized under 29 U.S.C. 762(b) and implemented at 34 CFR part 350, subpart C.

(3) The Rehabilitation Engineering Research Centers authorized under 29 U.S.C. 762(b)(3) and implemented at 34 CFR part 350, subpart D.

(4) The Special Projects and Demonstrations for Spinal Cord Injuries authorized under 29 U.S.C. 762(b)(4) and implemented at 34 CFR part 359.

(c) *Other regulations.* If ED regulations other than the regulations in 2 CFR part 200 or the conditions of the award require the grantee to obtain prior approval to extend the project period, the Secretary may permit the grantee to extend the project period if—

(1) The extension does not violate any statute or regulations;

(2) The extension does not involve the obligation of additional Federal funds;

(3) The extension is to carry out the activities in the approved application; and

(4)(i) The Secretary determines that, due to special or unusual circumstances applicable to a class of

grantees, the project periods for the grantees should be extended; or

(ii)(A) The Secretary determines that special or unusual circumstances would delay completion of the project beyond the end of the project period;

(B) The grantee requests an extension of the project at least 45 calendar days before the end of the project period; and

(C) The grantee provides a written statement before the end of the project period giving the reasons why the extension is appropriate under paragraph (c)(4)(ii)(A) of this section and the period for which the project needs extension.

(d) *Waiver*. The Secretary may waive the requirement in paragraph (a)(4)(ii)(B) of this section if—

(1) The grantee could not reasonably have known of the need for the extension on or before the start of the 45-day time period; or

(2) The failure to give notice on or before the start of the 45-day time period was unavoidable.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30338, July 8, 1992, as amended at 62 FR 40424, July 28, 1997; 79 FR 76092, Dec. 19, 2014]

§ 75.262 Conversion of a grant or a cooperative agreement.

(a)(1) The Secretary may convert a grant to a cooperative agreement or a cooperative agreement to a grant at the time a continuation award is made under § 75.253.

(2) In deciding whether to convert a grant to a cooperative agreement or a cooperative agreement to a grant, the Secretary considers the factors included in § 75.200(b) (4) and (5).

(b) The Secretary and a recipient may agree at any time to convert a grant to a cooperative agreement or a cooperative agreement to a grant, subject to the factors included in § 75.200(b) (4) and (5).

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30339, July 8, 1992]

§ 75.263 Pre-award costs; waiver of approval.

A grantee may, notwithstanding any requirement in 2 CFR part 200, incur pre-award costs as specified in 2 CFR 200.308(d)(1) unless—

(a) ED regulations other than 2 CFR part 200 or a statute prohibit these costs; or

(b) The conditions of the award prohibit these costs.

(Authority: 20 U.S.C. 1221e–3 and 3474; 2 CFR 200.308(d)(1))

[80 FR 67264, Nov. 2, 2015]

§ 75.264 Transfers among budget categories.

A grantee may make transfers as specified in 2 CFR 200.308 unless—

(a) ED regulations other than those in 2 CFR part 200 or a statute prohibit these transfers; or

(b) The conditions of the grant prohibit these transfers.

(Authority 20 U.S.C. 1221e–3, 3474, 2 CFR part 200)

[79 FR 76092, Dec. 19, 2014]

Subpart E—What Conditions Must Be Met by a Grantee?

NONDISCRIMINATION

§ 75.500 Constitutional rights, freedom of inquiry, and Federal statutes and regulations on nondiscrimination.

(a) Each grantee shall comply with the following statutes and regulations:

TABLE 1 TO § 75.500(a)

Subject	Statute	Regulation
Discrimination on the basis of race, color, or national origin.	Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d through 2000d–4).	34 CFR part 100.
Discrimination on the basis of sex	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681–1683).	34 CFR part 106.
Discrimination on the basis of handicap	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).	34 CFR part 104.
Discrimination on the basis of age.	The Age Discrimination Act (42 U.S.C. 6101 *et seq.*).	34 CFR part 110.

(b)(1) Each grantee that is an institution of higher education, as defined in 20 U.S.C. 1002(a), that is public and that is legally required to abide by the First Amendment to the U.S. Constitution (hereinafter ''public institution''), must also comply with the First Amendment to the U.S. Constitution, including protections for freedom of speech, association, press, religion, assembly, petition, and academic freedom, as a material condition of the Department's grant. The Department will determine that a public institution has not complied with the First Amendment only if there is a final, non-default judgment by a State or Federal court that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment. A final judgment is a judgment that the public institution chooses not to appeal or that is not subject to further appeal. Absent such a final, non-default judgment, the Department will deem the public institution to be in compliance with the First Amendment.

(2) Each grantee that is a public institution also must submit to the Secretary a copy of the final, non-default judgment by that State or Federal court to conclude the lawsuit no later than 45 calendar days after such final, non-default judgment is entered.

(c)(1) Each grantee that is an institution of higher education, as defined in 20 U.S.C. 1002(a), that is private (hereinafter ''private institution'') must comply with its stated institutional policies regarding freedom of speech, including academic freedom, as a material condition of the Department's grant. The Department will determine that a private institution has not complied with these stated institutional policies only if there is a final, non-default judgment by a State or Federal court to the effect that the private institution or an employee of the private institution, acting on behalf of the private institution, violated its stated institutional policy regarding freedom of speech or academic freedom. A final judgment is a judgment that the private institution chooses not to appeal or that is not subject to further appeal. Absent such a final, non-default judgment, the Department will deem the private institution to be in compliance with its stated institutional policies.

(2) Each grantee that is a private institution also must submit to the Secretary a copy of the final, non-default judgment by that State or Federal court to conclude the lawsuit no later than 45 calendar days after such final, non-default judgment is entered.

(d) As a material condition of the Department's grant, each grantee that is a public institution shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.

(e) A grantee that is a covered entity as defined in 34 CFR 108.3 shall comply with the nondiscrimination requirements of the Boy Scouts of America Equal Access Act, 20 U.S.C. 7905, 34 CFR part 108.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[85 FR 59978, Sept. 23, 2020]

PROJECT STAFF

§ 75.511 Waiver of requirement for a full-time project director.

(a) If regulations under a program require a full-time project director, the Secretary may waive that requirement under the following conditions:

(1) The project will not be adversely affected by the waiver.

(2)(i) The project director is needed to coordinate two or more related projects; or

(ii) The project director must teach a minimum number of hours to retain faculty status.

(b) The waiver either permits the grantee:

(1) To use a part-time project director; or

(2) Not to use any project director.

(c)(1) An applicant or a grantee may request the waiver.

(2) The request must be in writing and must demonstrate that a waiver is appropriate under this section.

(3) The Secretary gives the waiver in writing. The waiver is effective on the date the Secretary signs the waiver.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CROSS REFERENCE: See 2 CFR 200.308, Revision of budget and program plans.

§ 75.515 Use of consultants.

(a) Subject to Federal statutes and regulations, a grantee shall use its general policies and practices when it hires, uses, and pays a consultant as part of the project staff.

(b) The grantee may not use its grant to pay a consultant unless:

(1) There is a need in the project for the services of that consultant; and

(2) The grantee cannot meet that need by using an employee rather than a consultant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.516 Compensation of consultants—employees of institutions of higher education.

If an institution of higher education receives a grant for research or for educational services, it may pay a consultant's fee to one of its employees only in unusual circumstances and only if:

(a) The work performed by the consultant is in addition to his or her regular departmental load; and

(b)(1) The consultation is across departmental lines; or

(2) The consultation involves a separate or remote operation.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.517 [Reserved]

§ 75.519 Dual compensation of staff.

A grantee may not use its grantee to pay a project staff member for time or work for which that staff member is compensated from some other source of funds.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CONFLICT OF INTEREST

§ 75.524 Conflict of interest: Purpose of § 75.525.

(a) The conflict of interest regulations of the Department that apply to a grant are in § 75.525.

(b) These conflict of interest regulations do not apply to a ''local government,'' as defined in 2 CFR 200.64, or a ''State,'' as defined in 2 CFR 200.90.

(c) The regulations in § 75.525 do not apply to a grantee's procurement contracts. The conflict of interest regulations that cover those procurement contracts are in 2 CFR part 200.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980, as amended at 64 FR 50391, Sept. 16, 1999; 79 FR 76092, Dec. 19, 2014]

§ 75.525 Conflict of interest: Participation in a project.

(a) A grantee may not permit a person to participate in an administrative decision regarding a project if:

(1) The decision is likely to benefit that person or a member of his or her immediate family; and

(2) The person:

(i) Is a public official; or

(ii) Has a family or business relationship with the grantee.

(b) A grantee may not permit any person participating in the project to use his or her position for a purpose that is—or gives the appearance of being—motivated by a desire for a private financial gain for that person or for others.

(Authority: 20 U.S.C. 1221e–3 and 3474)

ALLOWABLE COSTS

§ 75.530 General cost principles.

The general principles to be used in determining costs applicable to grants and cost-type contracts under grants are specified at 2 CFR part 200, subpart E—Cost Principles.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CROSS REFERENCE: See 2 CFR part 200, subpart D—Post Federal Award Requirements.

[79 FR 76092, Dec. 19, 2014]

§ 75.531 Limit on total cost of a project.

A grantee shall insure that the total cost to the Federal Government is not more than the amount stated in the notification of grant award.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.532 Use of funds for religion prohibited.

(a) No grantee may use its grant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(b) [Reserved]

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 69 FR 31711, June 4, 2004]

§ 75.533 Acquisition of real property; construction.

No grantee may use its grant for acquisition of real property or for construction unless specifically permitted by the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.534 Training grants—automatic increases for additional dependents.

The Secretary may increase a grant to cover the cost of additional dependents not specified in the notice of award under § 75.235 if—

(a) Allowances for dependents are authorized by the program statute and are allowable under the grant; and

(b) Appropriations are available to cover the cost.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30339, July 8, 1992]

INDIRECT COST RATES

§ 75.560 General indirect cost rates; exceptions.

(a) The differences between direct and indirect costs and the principles for determining the general indirect cost rate that a grantee may use for grants under most programs are specified in the cost principles for—

(1) All grantees, other than hospitals and commercial (for-profit) organizations, at 2 CFR part 200, subpart E—Cost Principles;

(2) Hospitals, at 45 CFR part 75, Appendix XI—Principles for Determining Cost Applicable to Research and Development Under Awards and Contracts with Hospitals; and

(3) Commercial (for-profit) organizations, at 48 CFR part 31 Contract Cost Principles and Procedures.

(b) A grantee must have obtained a current indirect cost rate agreement from its cognizant agency, to charge indirect costs to a grant. To obtain an indirect cost rate, a grantee must submit an indirect cost proposal to its cognizant agency within 90 days after the date the Department issues the Grant Award Notification (GAN).

(c) If a grantee does not have a federally recognized indirect cost rate agreement, the Secretary may permit the grantee to charge its grant for indirect costs at a temporary rate of 10 percent of budgeted direct salaries and wages.

(d)(1) If a grantee fails to submit an indirect cost rate proposal to its cognizant agency within the required 90 days, the grantee may not charge indirect costs to its grant from the end of the 90-day period until it obtains a federally recognized indirect cost rate agreement applicable to the grant.

(2) If the Secretary determines that exceptional circumstances warrant continuation of a temporary indirect cost rate, the Secretary may authorize the grantee to continue charging indirect costs to its grant at the temporary rate specified in paragraph (c) of this section even though the grantee has not submitted its indirect cost rate proposal within the 90-day period.

(3) Once a grantee obtains a federally recognized indirect cost rate that is applicable to the affected grant, the grantee may use that indirect cost rate to claim indirect cost reimbursement for expenditures made on or after the date the grantee submitted its indirect cost proposal to its cognizant agency or the start of the project period,

whichever is later. However, this authority is subject to the following limitations:

(i) The total amount of funds recovered by the grantee under the federally recognized indirect cost rate is reduced by the amount of indirect costs previously recovered under the temporary indirect cost rate.

(ii) The grantee must obtain prior approval from the Secretary to shift direct costs to indirect costs in order to recover indirect costs at a higher negotiated indirect cost rate.

(iii) The grantee may not request additional funds to recover indirect costs that it cannot recover by shifting direct costs to indirect costs.

(e) The Secretary accepts an indirect cost rate negotiated by a grantee's cognizant agency, but may establish a restricted indirect cost rate for a grantee to satisfy the statutory requirements of certain programs administered by the Department.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30339, July 8, 1992; 59 FR 59582, Nov. 17, 1994; 72 FR 69147, Dec. 7, 2007; 79 FR 76092, Dec. 19, 2014]

§ 75.561 Approval of indirect cost rates.

(a) If the Department of Education is the cognizant agency, the Secretary approves an indirect cost rate for a grantee other than a local educational agency. For the purposes of this section, the term local educational agency does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so. These rates may be for periods longer than a year if rates are sufficiently stable to justify a longer period.

(c) The Secretary generally approves indirect cost rate agreements annually. Indirect cost rate agreements may be approved for periods longer than a year if the Secretary determines that rates will be sufficiently stable to justify a longer rate period.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[59 FR 59583, Nov. 17, 1994]

§ 75.562 Indirect cost rates for educational training projects.

(a) Educational training grants provide funding for training or other educational services. Examples of the work supported by training grants are summer institutes, training programs for selected participants, the introduction of new or expanded courses, and similar instructional undertakings that are separately budgeted and accounted for by the sponsoring institution. These grants do not usually support activities involving research, development, and dissemination of new educational materials and methods. Training grants largely implement previously developed materials and methods and require no significant adaptation of techniques or instructional services to fit different circumstances.

(b) The Secretary uses the definition in paragraph (a) to determine which grants are educational training grants.

(c)(1) Indirect cost reimbursement on a training grant is limited to the recipient's actual indirect costs, as determined in its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less.

NOTE TO PARAGRAPH (c)(1): If the grantee did not have a federally recognized indirect cost rate agreement on the date the training grant was awarded, indirect cost recovery is also limited to the amount authorized under § 75.560(d)(3).

(2) For the purposes of this section, a modified total direct cost base consists of total direct costs minus the following:

(i) The amount of each sub-award in excess of $25,000.

(ii) Stipends.

(iii) Tuition and related fees.

(iv) Equipment, as defined in 2 CFR 200.33.

NOTE TO PARAGRAPH (c)(2)(iv): If the grantee has established a threshold for equipment that is lower than $5,000 for other purposes, it must use that threshold to exclude equipment under the modified total direct cost base for the purposes of this section.

(3) The eight percent indirect cost reimbursement limit specified in paragraph (c)(1) of this section also applies

to sub-awards that fund training, as determined by the Secretary under paragraph (b) of this section.

(4) The eight percent limit does not apply to agencies of Indian tribal governments, local governments, and States as defined in 2 CFR 200.54, 200.200.64, and 200.90, respectively.

(5) Indirect costs in excess of the eight percent limit may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

(d) A grantee using the training rate of eight percent is required to have documentation available for audit that shows that its negotiated indirect cost rate is at least eight percent.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[59 FR 59582, Nov. 17, 1994, as amended at 72 FR 69147, Dec. 7, 2007; 79 FR 76092, Dec. 19, 2014]

§ 75.563 Restricted indirect cost rate—programs covered.

If a grantee decides to charge indirect costs to a program that has a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds, the grantee shall use a restricted indirect cost rate computed under 34 CFR 76.564 through 76.569.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[59 FR 59583, Nov. 17, 1994]

§ 75.564 Reimbursement of indirect costs.

(a) Reimbursement of indirect costs is subject to the availability of funds and statutory or administrative restrictions.

(b) The application of the rates and the determination of the direct cost base by a grantee must be in accordance with the indirect cost rate agreement approved by the grantee's cognizant agency.

(c) Indirect cost reimbursement is not allowable under grants for—

(1) Fellowships and similar awards if Federal financing is exclusively in the form of fixed amounts such as scholarships, stipend allowances, or the tuition and fees of an institution;

(2) Construction grants;

(3) Grants to individuals;

(4) Grants to organizations located outside the territorial limits of the United States;

(5) Grants to Federal organizations; and

(6) Grants made exclusively to support conferences.

(d) Indirect cost reimbursement on grants received under programs with statutory restrictions or other limitations on indirect costs must be made in accordance with the restrictions in 34 CFR 76.564 through 76.569.

(e)(1) Indirect costs for a group of eligible parties (See §§ 75.127 through 75.129) are limited to the amount derived by applying the rate of the applicant, or a restricted rate when applicable, to the direct cost base for the grant in keeping with the terms of the applicant's federally recognized indirect cost rate agreement.

(2) If a group of eligible parties applies for a training grant under the group application procedures in §§ 75.127 through 75.129, the grant funds allocated among the members of the group are not considered sub-awards for the purposes of applying the indirect cost rate in § 75.562(c).

(Authority: 20 U.S.C. 1221e–3 and 3474)

[59 FR 59583, Nov. 17, 1994, as amended at 72 FR 69148, Dec. 7, 2007]

§ 75.580 Coordination with other activities.

A grantee shall, to the extent possible, coordinate its project with other activities that are in the same geographic area served by the project and that serve similar purposes and target groups.

(Authority: 20 U.S.C. 1221e–3, 2890, and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30339, July 8, 1992]

EVALUATION

§ 75.590 Evaluation by the grantee.

(a) If the application notice for a competition required applicants to describe how they would evaluate their projects, each grantee under that competition must demonstrate to the Department that—

(1) The evaluation meets the standards of the evaluation in the approved application for the project; and

(2) The performance measurement data collected by the grantee and used in the evaluation meet the performance measurement requirements of the approved application.

(b) If the application notice for a competition did not require applicants to describe how they would evaluate their projects, each grantee must provide information in its performance report demonstrating—

(1) The progress made by the grantee in the most recent budget period, including progress based on the performance measurement requirements for the grant, if any;

(2) The effectiveness of the grant, including fulfilling the performance measurement requirements of the approved application, if any; and

(3) The effect of the project on the participants served by the project, if any.

(Authority: 20 U.S.C. 1221e–3 and 3474.)

[78 FR 49354, Aug. 13, 2013]

§ 75.591 Federal evaluation—cooperation by a grantee.

A grantee shall cooperate in any evaluation of the program by the Secretary.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 86297, Dec. 30, 1980]

§ 75.592 Federal evaluation—satisfying requirement for grantee evaluation.

If a grantee cooperates in a Federal evaluation of a program, the Secretary may determine that the grantee meets the evaluation requirements of the program, including § 75.590.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CONSTRUCTION

CROSS REFERENCE: See 2 CFR part 200.317–200.326 for procurement requirements.

§ 75.600 Use of a grant for construction: Purpose of §§ 75.601–75.615.

Sections 75.601–75.615 apply to:

(a) An applicant that requests funds for construction; and

(b) A grantee whose grant includes funds for construction.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.601 Applicant's assessment of environmental impact.

An applicant shall include with its application its assessment of the impact of the proposed construction on the quality of the environment in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 and Executive Order 11514 (34 FR 4247).

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.602 Preservation of historic sites must be described in the application.

(a) An applicant shall describe in its application the relationship of the proposed construction to and probable effect on any district, site, building, structure, or object that is:

(1) Included in the National Register of Historic Places; or

(2) Eligible under criteria established by the Secretary of Interior for inclusion in the National Register of Historic Places.

CROSS REFERENCE: See 36 CFR part 60 for these criteria.

(b) In deciding whether to make a grant, the Secretary considers:

(1) The information provided by the applicant under paragraph (a) of this section; and

(2) Any comments by the Advisory Council on Historic Preservation.

CROSS REFERENCE: See 36 CFR part 800, which provides for comments from the Council.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.603 Grantee's title to site.

A grantee must have or obtain a full title or other interest in the site, including right of access, that is sufficient to insure the grantee's undisturbed use and possession of the facilities for 50 years or the useful life of the facilities, whichever is longer.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.604 Availability of cost-sharing funds.

A grantee shall ensure that sufficient funds are available to meet any non-Federal share of the cost of constructing the facility.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.605 Beginning the construction.

(a) A grantee shall begin work on construction within a reasonable time after the grant for the construction is made.

(b) Before construction is advertised or placed on the market for bidding, the grantee shall get approval by the Secretary of the final working drawings and specifications.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.606 Completing the construction.

(a) A grantee shall complete its construction within a reasonable time.

(b) The grantee shall complete the construction in accordance with the application and approved drawings and specifications.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.607 General considerations in designing facilities and carrying out construction.

(a) A grantee shall insure that the construction is:

(1) Functional;

(2) Economical; and

(3) Not elaborate in design or extravagant in the use of materials, compared with facilities of a similar type constructed in the State or other applicable geographic area.

(b) The grantee shall, in developing plans for the facilities, consider excellence of architecture and design and inclusion of works of art. The grantee may not spend more than one percent of the cost of the project on inclusion of works of art.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.608 Areas in the facilities for cultural activities.

A grantee may make reasonable provision, consistent with the other uses to be made of the facilities, for areas in the facilities that are adaptable for artistic and other cultural activities.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30339, July 8, 1992]

§ 75.609 Comply with safety and health standards.

In planning for and designing facilities, a grantee shall observe:

(a) The standards under the Occupational Safety and Health Act of 1970 (Pub. L. 91–576) (See 36 CFR part 1910); and

(b) State and local codes, to the extent that they are more stringent.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.610 Access by the handicapped.

A grantee shall comply with the Federal regulations on access by the handicapped that apply to construction and alteration of facilities. These regulations are:

(a) For residential facilities—24 CFR part 40; and

(b) For non-residential facilities—41 CFR subpart 101–19.6.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.611 Avoidance of flood hazards.

In planning the construction, a grantee shall, in accordance with the provisions of Executive Order 11988 of February 10, 1978 (43 FR 6030) and rules and regulations that may be issued by the Secretary to carry out those provisions:

(a) Evaluate flood hazards in connection with the construction; and

(b) As far as practicable, avoid uneconomic, hazardous, or unnecessary use of flood plains in connection with the construction.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.612 Supervision and inspection by the grantee.

A grantee shall maintain competent architectural engineering supervision and inspection at the construction site to insure that the work conforms to the approved drawings and specifications.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.613 Relocation assistance by the grantee.

A grantee is subject to the regulations on relocation assistance and real property acquisition in 34 CFR part 15.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.614 Grantee must have operational funds.

A grantee shall insure that, when construction is completed, sufficient funds will be available for effective operation and maintenance of the facilities.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.615 Operation and maintenance by the grantee.

A grantee shall operate and maintain the facilities in accordance with applicable Federal, State, and local requirements.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.616 Energy conservation.

(a) To the extent feasible, a grantee shall design and construct facilities to maximize the efficient use of energy.

(b) The following standards of the American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) are incorporated by reference in this section:

(1) ASHRAE–90 A–1980 (Sections 1–9).

(2) ASHRAE–90 B–1975 (Sections 10–11).

(3) ASHRAE–90 C–1977 (Section 12).

Incorporation by reference of these provisions has been approved by the Director of the Office of the Federal Register pursuant to the Director's authority under 5 U.S.C. 552 (a) and 1 CFR part 51. The incorporated document is on file at the Department of Education, Grants and Contracts Service, rm. 3636 ROB–3, 400 Maryland Avenue, SW., Washington, DC 20202–4700 or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. These standards may be obtained from the publication sales department at the American Society of Heating, Refrigerating, and Air Conditioning Engineers, Inc., 1791 Tullie Circle, NE., Atlanta, Georgia 30329.

(c) A grantee shall comply with ASHRAE standards listed in paragraph (b) of this section in designing and constructing facilities built with project funds.

(Authority: 20 U.S.C. 1221e–3 and 3474, 42 U.S.C. 8373(b), and E.O. 12185)

[57 FR 30339, July 8, 1992, as amended at 69 FR 18803, Apr. 9, 2004]

§ 75.617 Compliance with the Coastal Barrier Resources Act.

A recipient may not use, within the Coastal Barrier Resources System, funds made available under a program administered by the Secretary for any purpose prohibited by 31 U.S.C. chapter 55 (sections 3501–3510).

(Authority: 20 U.S.C. 1221e–3 and 3474, 31 U.S.C. 3504, 3505)

[57 FR 30339, July 8, 1992]

EQUIPMENT AND SUPPLIES

CROSS REFERENCE: See 2 CFR 200.311, Real property; 200.313, Equipment; 200.314, Supplies; and 200.59, Intangible property; and 200.315, Intangible property.

§ 75.618 Charges for use of equipment or supplies.

A grantee may not charge students or school personnel for the ordinary use of equipment or supplies purchased with grant funds.

(Authority: 20 U.S.C. 1221e–3 and 3474)

PUBLICATIONS AND COPYRIGHTS

§ 75.620 General conditions on publication.

(a) *Content of materials.* Subject to any specific requirements that apply to its grant, a grantee may decide the format and content of project materials that it publishes or arranges to have published.

(b) *Required statement.* The grantee shall ensure that any publication that contains project materials also contains the following statements:

The contents of this (insert type of publication; e.g., book, report, film) were developed under a grant from the Department of Education. However, those contents do not

necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86297, Dec. 30, 1980]

§ 75.621 [Reserved]

§ 75.622 Definition of "project materials."

As used in §§ 75.620–75.621, ''project materials'' means a copyrightable work developed with funds from a grant of the Department.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30339, July 8, 1992]

INVENTIONS AND PATENTS

CROSS REFERENCE: See 2 CFR 200.307, Program income.

§ 75.626 Show Federal support; give papers to vest title.

Any patent application filed by a grantee for an invention made under a grant must include the following statement in the first paragraph:

The invention described in this application was made under a grant from the Department of Education.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86297, Dec. 30, 1980; 57 FR 30339, July 8, 1992]

OTHER REQUIREMENTS FOR CERTAIN PROJECTS

CROSS REFERENCE: See 2 CFR 200.302, Financial management, and 200.326, Contract provisions.

§ 75.650 Participation of students enrolled in private schools.

If the authorizing statute for a program requires a grantee to provide for participation by students enrolled in private schools, the grantee shall provide a genuine opportunity for equitable participation in accordance with the requirements that apply to subgrantees under 34 CFR 76.650–76.662.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.681 Protection of human research subjects.

If a grantee uses a human subject in a research project, the grantee shall protect the person from physical, psychological, or social injury resulting from the project.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CROSS REFERENCE: See 34 CFR part 97—Protection of Human Subjects.

§ 75.682 Treatment of animals.

If a grantee uses an animal in a project, the grantee shall provide the animal with proper care and humane treatment in accordance with the Animal Welfare Act of 1970.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.683 Health or safety standards for facilities.

A grantee shall comply with any Federal health or safety requirements that apply to the facilities that the grantee uses for the project.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.684 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[85 FR 59979, Sept. 23, 2020]

Subpart F—What Are the Administrative Responsibilities of a Grantee?

GENERAL ADMINISTRATIVE RESPONSIBILITIES

§ 75.700 Compliance with the U.S. Constitution, statutes, regulations, stated institutional policies, and applications.

A grantee shall comply with § 75.500, applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, and applications.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[85 FR 59979, Sept. 23, 2020]

§ 75.701 The grantee administers or supervises the project.

A grantee shall directly administer or supervise the administration of the project.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.702 Fiscal control and fund accounting procedures.

A grantee shall use fiscal control and fund accounting procedures that insure proper disbursement of, and accounting for, Federal funds as required in 2 CFR part 200, subpart D—Post Federal Award Requirements.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[79 FR 76093, Dec. 19, 2014]

§ 75.703 Obligation of funds during the grant period.

A grantee may use grant funds only for obligations it makes during the grant period.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.707 When obligations are made.

The following table shows when a grantee makes obligations for various kinds of property and services.

If the obligation is for—	The obligation is made—
(a) Acquisition of real or personal property.	On the date the grantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the grantee.	When the services are performed.
(c) Personnal services by a contractor who is not an employee of the grantee.	On the date on which the grantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services.	On the date on which the grantee makes a binding written commitment to obtain the work.
(e) Public utility services	When the grantee receives the services.
(f) Travel	When the travel is taken.
(g) Rental of real or personal property.	When the grantee uses the property.
(h) A pre-agreement cost that was properly approved by the Secretary under the cost principles in 2 CFR part 200, Subpart E—Cost Principles.	On the first day of the project period.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30340, July 8, 1992; 79 FR 76093, Dec. 19, 2014]

§ 75.708 Subgrants.

(a) A grantee may not make a subgrant under a program covered by this part unless authorized by statute or by paragraph (b) of this section.

(b) The Secretary may, through an announcement in the FEDERAL REGISTER, authorize subgrants when necessary to meet the purposes of a program. In this announcement, the Secretary will—

(1) Designate the types of entities, e.g., State educational agencies, local educational agencies, institutions of higher education, and nonprofit organizations, to which subgrants can be awarded; and

(2) Indicate whether subgrants can be made to entities identified in an approved application or, without regard to whether the entity is identified in an approved application, have to be selected through a competitive process set out in subgranting procedures established by the grantee.

(c) If authorized under paragraph (b) of this section, a subgrant is allowed if it will be used by that entity to directly carry out project activities described in that application.

(d) The grantee, in awarding subgrants under paragraph (b) of this section, must—

(1) Ensure that subgrants are awarded on the basis of an approved budget that is consistent with the grantee's approved application and all applicable Federal statutory, regulatory, and other requirements;

(2) Ensure that every subgrant includes any conditions required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation, including the Federal anti-discrimination laws enforced by the Department.

(e) A grantee may contract for supplies, equipment, construction, and other services, in accordance with 2 CFR part 200, subpart D—Post Federal

Award Requirements (2 CFR 200.317–200.326, Procurement Standards).

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987; 64 FR 50392, Sept. 16, 1999; 78 FR 49534, Aug. 13, 2013; 79 FR 76093, Dec. 19, 2014]

§§ 75.712–75.713 [Reserved]

§ 75.714 Subgrants, contracts, and other agreements with faith-based organizations.

If a grantee under a discretionary grant program of the Department has the authority under the grant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 75.52 and 75.532, appendices A and B to this part, and 2 CFR 3474.15. If the pass-through entity is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

[85 FR 82128, Dec. 17, 2020]

REPORTS

CROSS REFERENCE: See 2 CFR 200.327–200.337, which appear after the undesignated center heading ''Performance and Financial Monitoring and Reporting.''

§ 75.720 Financial and performance reports.

(a) This section applies to the reports required under—

(1) 2 CFR 200.327 (Financial reporting); and

(2) 2 CFR 200.328 (Monitoring and reporting program performance).

(b) A grantee shall submit these reports annually, unless the Secretary allows less frequent reporting.

(c) The Secretary may require a grantee to report more frequently than annually, as authorized under 2 CFR 200.207, Specific conditions, and may impose high-risk conditions in appropriate circumstances under 2 CFR 3474.10.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[79 FR 76093, Dec. 19, 2014]

§ 75.721 [Reserved]

RECORDS

CROSS REFERENCE: See 2 CFR 200.333–200.337, which follow the undesignated center heading ''Record Retention and Access.''

§ 75.730 Records related to grant funds.

A grantee shall keep records that fully show:

(a) The amount of funds under the grant;

(b) How the grantee uses the funds;

(c) The total cost of the project;

(d) The share of that cost provided from other sources; and

(e) Other records to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

§ 75.731 Records related to compliance.

A grantee shall keep records to show its compliance with program requirements.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.732 Records related to performance.

(a) A grantee shall keep records of significant project experiences and results.

(b) The grantee shall use the records under paragraph (a) to:

(1) Determine progress in accomplishing project objectives; and

(2) Revise those objectives, if necessary.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3 and 3474)

CROSS REFERENCE: See 2 CFR 200.308, Revision of budget and program plans.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

§ 75.733 [Reserved]

PRIVACY

§ 75.740 Protection of and access to student records; student rights in research, experimental programs, and testing.

(a) Most records on present or past students are subject to the requirements of section 444 of GEPA and its implementing regulations in 34 CFR part 99. (Section 444 is the Family Educational Rights and Privacy Act of 1974.)

(b) Under most programs administered by the Secretary, research, experimentation, and testing are subject to the requirements of section 445 of GEPA and its implementing regulations at 34 CFR part 98.

(Authority: 20 U.S.C. 1221e–3, 1232g, 1232h, and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30340, July 8, 1992; 60 FR 46493, Sept. 6, 1995]

§ 75.741 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[85 FR 59979, Sept. 23, 2020]

Subpart G—What Procedures Does the Department Use To Get Compliance?

CROSS REFERENCE: See 2 CFR 200.338–200.342 which follow the undesignated center heading ''Remedies for Noncompliance.''

§ 75.900 Waiver of regulations prohibited.

(a) No official, agent, or employee of ED may waive any regulation that applies to a Department program, unless the regulation specifically provides that it may be waived.

(b) No act or failure to act by an official, agent, or employee of ED can affect the authority of the Secretary to enforce regulations.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.901 Suspension and termination.

The Secretary may use the Office of Administrative Law Judges to resolve disputes that are not subject to other procedures. See, for cross-reference, the following:

(a) 2 CFR 200.338 (Remedies for noncompliance).

(b) 2 CFR 200.339 (Termination).

(c) 2 CFR 200.340 (Notification of termination requirement).

(d) 2 CFR 200.341 (Opportunities to object, hearings and appeals).

(e) 2 CFR 200.342 (Effects of suspension and termination).

(f) 2 CFR 200.344 (Post-closeout adjustments and continuing responsibilities).

(Authority: 20 U.S.C. 1221e–3 and 3474)

[79 FR 76093, Dec. 19, 2014]

§ 75.902 [Reserved]

§ 75.903 Effective date of termination.

Termination is effective on the latest of:

(a) The date of delivery to the grantee of the notice of termination;

(b) The termination date given in the notice of termination; or

(c) The date of a final decision of the Secretary under part 81 of this title.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 79 FR 76093, Dec. 19, 2014]

§ 75.910 [Reserved]

APPENDIX A TO PART 75—NOTICE OR ANNOUNCEMENT OF AWARD OPPORTUNITIES

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at, and subject to the protections and requirements of, this part and 42 U.S.C. 2000bb *et seq*. The Department will not, in the selection of recipients, discriminate against an organization on the

basis of the organization's religious character, affiliation, or exercise.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the Constitution, 42 U.S.C. 2000bb *et seq.*, 238n, 18113, 2000e–1(a) and 2000e–2(e), and 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based organization may not use direct financial assistance from the Department in contravention of the Establishment Clause or any other applicable requirements. Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

[85 FR 82128, Dec. 17, 2020]

APPENDIX B TO PART 75—NOTICE OF AWARD OR CONTRACT

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the Constitution, 42 U.S.C. 2000bb *et seq.*, 238n, 18113, 2000e–1(a) and 2000e–2(e), and 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(b) A faith-based organization may not use direct financial assistance from the Department in contravention of the Establishment Clause or any other applicable requirements. Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

[85 FR 82128, Dec. 17, 2020]

PART 76—STATE-ADMINISTERED PROGRAMS

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AUTHORITY: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

SOURCE: 45 FR 22517, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980.

Subpart A—General

REGULATIONS THAT APPLY TO STATE-ADMINISTERED PROGRAMS

§ 76.1 Programs to which part 76 applies.

(a) The regulations in part 76 apply to each State-administered program of the Department.

(b) If a State formula grant program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent consistent with the authorizing statute, under the General Education Provisions Act and the regulations in this part. For the purposes of this part, the term *State formula grant program* means a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 84059, Dec. 22, 1980; 50 FR 29330, July 18, 1985; 52 FR 27804, July 24, 1987; 54 FR 21776, May 19, 1989; 55 FR 14816, Apr. 18, 1990]

§ 76.2 Exceptions in program regulations to part 76.

If a program has regulations that are not consistent with part 76, the implementing regulations for that program identify the sections of part 76 that do not apply.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 54 FR 21776, May 19, 1989]

ELIGIBILITY FOR A GRANT OR SUBGRANT

§ 76.50 Statutes determine eligibility and whether subgrants are made.

(a) Under a program covered by this part, the Secretary makes a grant:

(1) To the State agency designated by the authorizing statute for the program; or

(2) To the State agency designated by the State in accordance with the authorizing statute.

(b) The authorizing statute determines the extent to which a State may:

(1) Use grant funds directly; and

(2) Make subgrants to eligible applicants.

(c) The regulations in part 76 on subgrants apply to a program only if subgrants are authorized under that program.

(d) The authorizing statute determines the eligibility of an applicant for a subgrant.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987; 54 FR 21776, May 19, 1989]

§ 76.51 A State distributes funds by formula or competition.

If a program statute authorizes a State to make subgrants, the statute:

(a) Requires the State to use a formula to distribute funds;

(b) Gives the State discretion to select subgrantees through a competition among the applicants or through some other procedure; or

(c) Allows some combination of these procedures.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 54 FR 21776, May 19, 1989]

§ 76.52 Eligibility of faith-based organizations for a subgrant and nondiscrimination against those organizations.

(a)(1) A faith-based organization is eligible to apply for and to receive a subgrant under a program of the Department on the same basis as any other private organization, with respect to programs for which such other organizations are eligible and considering any permissible accommodation. A State pass-through entity shall provide such religious accommodation as would be required to a recipient under Federal law, the Attorney General's Memorandum of October 6, 2017 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the

First Amendment to the U.S. Constitution.

(2) In the selection of subgrantees and contractors, States may not discriminate for or against a private organization on the basis of the organization's religious character, affiliation, or exercise and must ensure that all decisions about subgrants are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or a lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to 34 CFR part 75.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States in administering a program of the Department shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of subgrant funds shall apply equally to faith-based and non-faith-based organizations. All organizations that receive a subgrant from a State under a State-Administered Formula Grant program of the Department, including organizations with religious character or affiliation, must carry out eligible activities in accordance with all program requirements, subject to any required or appropriate religious accommodation, and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance in contravention of the Establishment Clause.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States shall disqualify faith-based organizations from applying for or receiving subgrants under a State-Administered Formula Grant program of the Department because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise.

(b) The provisions of § 76.532 apply to a faith-based organization that receives a subgrant from a State under a State-Administered Formula Grant program of the Department.

(c)(1) A private organization that applies for and receives a subgrant under a program of the Department and engages in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those activities separately in time or location from any programs or services funded by a subgrant from a State under a State-Administered Formula Grant program of the Department. Attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the subgrant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by ''indirect Federal financial assistance.''

(3) For purposes of 2 CFR 3474.15, this section, and § 76.714, the following definitions apply:

(i) *Direct Federal financial assistance* means financial assistance received by an entity selected by the Government or a pass-through entity (under this part) to carry out a service (e.g., by contract, grant, or cooperative agreement). References to ''Federal financial assistance'' will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of ''indirect Federal financial assistance.''

(ii) *Indirect Federal financial assistance* means financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other means of government-funded payment provided to a beneficiary who is able to make a choice of service provider. Federal financial assistance provided to an organization is *indirect* under this definition if—

(A) The government program through which the beneficiary receives the voucher, certificate, or other similar

means of government-funded payment is neutral toward religion; and

(B) The organization receives the assistance as the result of the genuine, independent choice of the beneficiary.

(iii) *Federal financial assistance* does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.

(iv) *Pass-through entity* means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts direct Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(v) *Religious exercise* has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

(vi) *Discriminate against an organization on the basis of the organization's religious exercise* means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect because of:

(A) Conduct that would not be considered grounds to disfavor a secular organization,

(B) Conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution, or

(C) The actual or suspected religious motivation of the organization's religious exercise.

NOTE 1 TO PARAGRAPH (C)(3): The definitions of *direct Federal financial assistance* and *indirect Federal financial assistance* do not change the extent to which an organization is considered a *recipient* of *Federal financial assistance* as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

(d)(1) A faith-based organization that applies for or receives a subgrant from a State under a State-Administered Formula Grant program of the Department will retain its independence, autonomy, right of expression, religious character, and authority over its governance. A faith-based organization that receives Federal financial assistance from the Department does not lose the protection of law.

NOTE 1 TO PARAGRAPH (D)(1): Memorandum for All Executive Departments and Agencies, From the Attorney General, ''Federal Law Protections for Religious Liberty'' (Oct. 6, 2017) (describing Federal law protections for religious liberty).

(2) A faith-based organization that applies for or receives a subgrant from a State under a State-Administered Formula Grant program of the Department may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without concealing, removing, or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and employees on the basis of their acceptance of or adherence to the religious tenets of the organization; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) An organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services or in outreach activities on the basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program and may require attendance at all activities that are fundamental to the program.

(f) If a State or subgrantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement federally

funded activities, the State or subgrantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives Federal financial assistance from the Department. An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization.

(h) The Department shall not construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

[85 FR 82128, Dec. 17, 2020]

§ 76.53 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 82130, Dec. 17, 2020]

Subpart B—How a State Applies for a Grant

STATE PLANS AND APPLICATIONS

§ 76.100 Effect of this subpart.

This subpart establishes general requirements that a State must meet to apply for a grant under a program covered by this part. Additional requirements are in the authorizing statute and the implementing regulations for the program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[52 FR 27804, July 24, 1987]

§ 76.101 The general State application.

A State that makes subgrants to local educational agencies under a program subject to this part shall have on file with the Secretary a general application that meets the requirements of section 441 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1221e–3, 1232d, and 3474)

[52 FR 27804, July 24, 1987, as amended at 60 FR 46493, Sept. 6, 1995]

§ 76.102 Definition of "State plan" for part 76.

As used in this part, *State plan* means any of the following documents:

Document	Program	Authorizing statute	Principal Office
State plan	Assistance to States for Education of Handicapped Children.	Part B (except section 619), Individuals with Disabilities Education Act (20 U.S.C. 1411–1420).	OSERS
Application	Preschool Grants	Section 619, Individuals with Disabilities Education Act (20 U.S.C. 1419).	OSERS
Application	Handicapped Infants and Toddlers.	Part H, Individuals with Disabilities Education Act (20 U.S.C. 1471–1485).	OSERS
Application or written request for assistance.	Client Assistance Program	Section 112, Rehabilitation Act of 1973 (29 U.S.C. 732).	OSERS
Application	Removal of Architectural Barriers to the Handicapped Program.	Section 607, Individuals with Disabilities Education Act (20 U.S.C. 1406).	OSERS
State plan	State Vocational Rehabilitation Services Program.	Title I, Parts A-C, Rehabilitation Act of 1973 (29 U.S.C. 720–741).	OSERS
State plan supplement	State Supported Employment Services Program.	Title VI, Part C, Rehabilitation Act of 1973 (29 U.S.C. 795j–795r).	OSERS
State plan	State Independent Living Services Program.	Title VII, Part A, Rehabilitation Act of 1973 (29 U.S.C. 796–796d).	OSERS
State plan	State Vocational Education Program.	Title I, Part B, Carl D. Perkins Vocational Education Act (20 U.S.C. 2321–2325).	OVAE
State plan and application	State-Administered Adult Education Program.	Section 341, Adult Education Act (20 U.S.C. 1206).	OVAE

Document	Program	Authorizing statute	Principal Office
State plan	Even Start Family Literacy Program.	Title I, Chapter 1, Part B of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2741–2749).	OESE
State application	State Grants for Strengthening Instruction in Mathematics and Science.	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981–2993).	OESE
State application	Federal, State and Local Partnership for Educational Improvement.	Title I, Chapter 2, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2911–2952 and 2971–2976).	OESE
State plan or application	Migrant Education Program	Sections 1201, 1202, Chapter 1, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2781 and 2782).	OESE
Application	State Student Incentive Grant Program.	Section 415C, Higher Education Act of 1965 (20 U.S.C. 1070c–2).	OPE
Application	Paul Douglas Teacher Scholarship Program.	Section 553, Higher Education Act of 1965 (20 U.S.C. 1111b).	OPE
Basic State plan, long-range program, and annual program.	The Library Services and Construction Act State-Administered Program.	Library Services and Construction Act (20 U.S.C. 351–355e–3).	OERI
Application	Emergency Immigrant Education Program.	Emergency Immigrant Education Act (20 U.S.C. 3121–3130).	OBEMLA
Application	Transition Program for Refugee Children.	Section 412(d) Immigration and Naturalization Act (8 U.S.C. 1522 (d)).	OBEMLA
Any document that the authorizing statute for a State-administered program requires a State to submit to receive funds.	Any State-administered program without implementing regulations.	Section 408(a)(1), General Education Provisions Act and Section 414, Department of Education Organization Act (20 U.S.C. 1221e–3(a)(1) and 3474).	Dept-wide

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30340, July 8, 1992]

§ 76.103 Multi-year State plans.

(a) Beginning with fiscal year 1996, each State plan will be effective for a period of more than one fiscal year, to be determined by the Secretary or by regulations.

(b) If the Secretary determines that the multi-year State plans under a program should be submitted by the States on a staggered schedule, the Secretary may require groups of States to submit or resubmit their plans in different years.

(c) This section does not apply to:

(1) The annual accountability report under part A of title I of the Vocational Education Act;

(2) The annual programs under the Library Services and Construction Act;

(3) The application under sections 141–143 of the Elementary and Secondary Education Act; and

(4) The State application under section 209 of title II of the Education for Economic Security Act.

(d) A State may submit an annual State plan under the Vocational Education Act. If a State submits an annual plan under that program, this section does not apply to that plan.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA ''shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act.'' Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under section 427 or other applicable law.

(Authority: 20 U.S.C. 1231g(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980; 50 FR 43545, Oct. 25, 1985; 60 FR 46493, Sept. 6, 1995]

§ 76.104 A State shall include certain certifications in its State plan.

(a) A State shall include the following certifications in each State plan:

(1) That the plan is submitted by the State agency that is eligible to submit the plan.

(2) That the State agency has authority under State law to perform the functions of the State under the program.

(3) That the State legally may carry out each provision of the plan.

(4) That all provisions of the plan are consistent with State law.

(5) That a State officer, specified by title in the certification, has authority under State law to receive, hold, and disburse Federal funds made available under the plan.

(6) That the State officer who submits the plan, specified by title in the certification, has authority to submit the plan.

(7) That the agency that submits the plan has adopted or otherwise formally approved the plan.

(8) That the plan is the basis for State operation and administration of the program.

(b) [Reserved]

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.106 State documents are public information.

A State shall make the following documents available for public inspection:

(a) All State plans and related official materials.

(b) All approved subgrant applications.

(c) All documents that the Secretary transmits to the State regarding a program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CONSOLIDATED GRANT APPLICATIONS FOR INSULAR AREAS

AUTHORITY: Title V, Pub. L. 95–134, 91 Stat. 1159 (48 U.S.C. 1469a).

§ 76.125 What is the purpose of these regulations?

(a) Sections 76.125 through 76.137 of this part contain requirements for the submission of an application by an Insular Area for the consolidation of two or more grants under the programs described in paragraph (c) of this section.

(b) For the purpose of §§ 76.125–76.137 of this part the term *Insular Area* means the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Commonwealth of the Northern Mariana Islands.

(c) The Secretary may make an annual consolidated grant to assist an Insular Area in carrying out one or more State-administered formula grant programs of the Department.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[47 FR 17421, Apr. 22, 1982, as amended at 54 FR 21776, May 19, 1989; 57 FR 30341, July 8, 1992]

§ 76.126 What regulations apply to the consolidated grant applications for insular areas?

The following regulations apply to those programs included in a consolidated grant:

(a) The regulations in §§ 76.125 through 76.137; and

(b) The regulations that apply to each specific program included in a consolidated grant for which funds are used.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.127 What is the purpose of a consolidated grant?

An Insular Area may apply for a consolidated grant for two or more of the programs listed in § 76.125(c). This procedure is intended to:

(a) Simplify the application and reporting procedures that would otherwise apply for each of the programs included in the consolidated grant; and

(b) Provide the Insular Area with flexibility in allocating the funds under the consolidated grant to achieve any of the purposes to be served by the programs that are consolidated.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.128 What is a consolidated grant?

A consolidated grant is a grant to an Insular Area for any two or more of the programs listed in § 76.125(c). The amount of the consolidated grant is the sum of the allocations the Insular Area receives under each of the programs included in the consolidated grant if there had been no consolidation.

Example. Assume the Virgin Islands applies for a consolidated grant that includes programs under the Adult Education Act, Vocational Education Act, and Chapter 1 of the Education Consolidation and Improvement Act. If the Virgin Islands' allocation under the formula for each of these three programs is $150,000; the total consolidated grant to the Virgin Islands would be $450,000.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.129 How does a consolidated grant work?

(a) An Insular Area shall use the funds it receives under a consolidated grant to carry out, in its jurisdiction, one or more of the programs included in the grant.

Example. Assume that Guam applies for a consolidated grant under the Vocational Education Act, the Handicapped Preschool and School Programs-Incentive Grants, and the Adult Education Act and that the sum of the allocations under these programs is $700,000. Guam may choose to allocate this $700,000 among all of the programs authorized under the three programs. Alternatively, it may choose to allocate the entire $700,000 to one or two of the programs; for example, the Adult Education Act Program.

(b) An Insular Area shall comply with the statutory and regulatory requirements that apply to each program under which funds from the consolidated grant are expended.

Example. Assume that American Samoa uses part of the funds under a consolidated grant for the State program under the Adult Education Act. American Samoa need not submit to the Secretary a State plan that requires policies and procedures to assure all students equal access to adult education programs. However, in carrying out the program, American Samoa must meet and be able to demonstrate compliance with this equal access requirement.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.130 How are consolidated grants made?

(a) The Secretary annually makes a single consolidated grant to each Insular Area that meets the requirements of §§ 76.125 through 76.137 and each program under which the grant funds are to be used and administered.

(b) The Secretary may decide that one or more programs cannot be included in the consolidated grant if the Secretary determines that the Insular Area failed to meet the program objectives stated in its plan for the previous fiscal year in which it carried out the programs.

(c) Under a consolidated grant, an Insular Area may use a single advisory council for any or all of the programs that require an advisory council.

(d) Although Pub. L. 95–134 authorizies the Secretary to consolidate grant funds that the Department awards to an Insular Area, it does not confer eligibility for any grant funds. The eligibility of a particular Insular Area to receive grant funds under a Federal education program is determined under the statute and regulations for that program.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.131 How does an insular area apply for a consolidated grant?

(a) An Insular Area that desires to apply for a grant consolidating two or more programs listed in § 76.125(c) shall submit to the Secretary an application that:

(1) Contains the assurances in § 76.132; and

(2) Meets the application requirements in paragraph (c) of this section.

(b) The submission of an application that contains these requirements and assurances takes the place of a separate State plan or other similar document required by this part or by the authorizing statutes and regulations for programs included in the consolidated grant.

(c) An Insular Area shall include in its consolidated grant application a program plan that:

(1) Contains a list of the programs in § 76.125(c) to be included in the consolidated grant;

(2) Describes the program or programs in § 76.125(c) under which the consolidated grant funds will be used and administered;

(3) Describes the goals, objectives, activities, and the means of evaluating program outcomes for the programs for which the Insular Area will use the funds received under the consolidated

grant during the fiscal year for which it submits the application, including needs of the population that will be met by the consolidation of funds; and

(4) Contains a budget that includes a description of the allocation of funds—including any anticipated carryover funds of the program in the consolidated grant from the preceding year—among the programs to be included in the consolidated grant.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982, as amended at 53 FR 49143, Dec. 6, 1988]

§ 76.132 What assurances must be in a consolidated grant application?

(a) An Insular Area shall include in its consolidated grant application assurances to the Secretary that it will:

(1) Follow policies and use administrative practices that will insure that non-Federal funds will not be supplanted by Federal funds made available under the authority of the programs in the consolidated grant;

(2) Comply with the requirements (except those relating to the submission of State plans or similar documents) in the authorizing statutes and implementing regulations for the programs under which funds are to be used and administered, (except requirements for matching funds);

(3) Provide for proper and efficient administration of funds in accordance with the authorizing statutes and implementing regulations for those programs under which funds are to be used and administered;

(4) Provide for fiscal control and fund accounting procedures to assure proper disbursement of, and accounting for, Federal funds received under the consolidated grant;

(5) Submit an annual report to the Secretary containing information covering the program or programs for which the grant is used and administered, including the financial and program performance information required under 2 CFR 200.327 and 200.328.

(6) Provide that funds received under the consolidated grant will be under control of, and that title to property acquired with these funds will be in, a public agency, institution, or organization. The public agency shall administer these funds and property;

(7) Keep records, including a copy of the State Plan or application document under which funds are to be spent, which show how the funds received under the consolidated grant have been spent.

(8) Adopt and use methods of monitoring and providing technical assistance to any agencies, organizations, or institutions that carry out the programs under the consolidated grant and enforce any obligations imposed on them under the applicable statutes and regulations.

(9) Evaluate the effectiveness of these programs in meeting the purposes and objectives in the authorizing statutes under which program funds are used and administered;

(10) Conduct evaluations of these programs at intervals and in accordance with procedures the Secretary may prescribe; and

(11) Provide appropriate opportunities for participation by local agencies, representatives of the groups affected by the programs, and other interested institutions, organizations, and individuals in planning and operating the programs.

(b) These assurances remain in effect for the duration of the programs they cover.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982, as amended at 64 FR 50392, Sept. 16, 1999; 79 FR 76093, Dec. 19, 2014]

§ 76.133 What is the reallocation authority?

(a) After an Insular Area receives a consolidated grant, it may reallocate the funds in a manner different from the allocation described in its consolidated grant application. However, the funds cannot be used for purposes that are not authorized under the programs in the consolidated grant under which funds are to be used and administered.

(b) If an Insular Area decides to reallocate the funds it receives under a consolidated grant, it shall notify the

Secretary by amending its original application to include an update of the information required under § 76.131.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.134 What is the relationship between consolidated and non-consolidated grants?

(a) An Insular Area may request that any number of programs in § 76.125(c) be included in its consolidated grant and may apply separately for assistance under any other programs listed in § 76.125(c) for which it is eligible.

(b) Those programs that an Insular Area decides to exclude from consolidation—for which it must submit separate plans or applications—are implemented in accordance with the applicable program statutes and regulations. The excluded programs are not subject to the provisions for allocation of funds among programs in a consolidated grant.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.135 Are there any requirements for matching funds?

The Secretary waives all requirements for matching funds for those programs that are consolidated by an Insular Area in a consolidated grant application.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.136 Under what programs may consolidated grant funds be spent?

Insular Areas may only use and administer funds under programs described in § 76.125(c) during a fiscal year for which the Insular Area is entitled to receive funds under an appropriation for that program.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982, as amended at 57 FR 30341, July 8, 1992]

§ 76.137 How may carryover funds be used under the consolidated grant application?

Any funds under any applicable program which are available for obligation and expenditure in the year succeeding the fiscal year for which they are appropriated must be obligated and expended in accordance with the consolidated grant application submitted by the Insular Area for that program for the succeeding fiscal year.

(Authority: 20 U.S.C. 1225(b); 48 U.S.C. 1469a)

AMENDMENTS

§ 76.140 Amendments to a State plan.

(a) If the Secretary determines that an amendment to a State plan is essential during the effective period of the plan, the State shall make the amendment.

(b) A State shall also amend a State plan if there is a significant and relevant change in:

(1) The information or the assurances in the plan;

(2) The administration or operation of the plan; or

(3) The organization, policies, or operations of the State agency that received the grant, if the change materially affects the information or assurances in the plan.

(Authority: 20 U.S.C. 1221e–3, 1231g(a), and 3474)

§ 76.141 An amendment requires the same procedures as the document being amended.

If a State amends a State plan under § 76.140, the State shall use the same procedures as those it must use to prepare and submit a State plan.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.142 An amendment is approved on the same basis as the document being amended.

The Secretary uses the same procedures to approve an amendment to a State plan—or any other document a State submits—as the Secretary uses to approve the original document.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Subpart C—How a Grant Is Made to a State

APPROVAL OR DISAPPROVAL BY THE SECRETARY

§ 76.201 A State plan must meet all statutory and regulatory requirements.

The Secretary approves a State plan if it meets the requirements of the Federal statutes and regulations that apply to the plan.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.202 Opportunity for a hearing before a State plan is disapproved.

The Secretary may disapprove a State plan only after:

(a) Notifying the State;

(b) Offering the State a reasonable opportunity for a hearing; and

(c) Holding the hearing, if requested by the State.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.235 The notification of grant award.

(a) To make a grant to a State, the Secretary issues and sends to the State a notification of grant award.

(b) The notification of grant award tells the amount of the grant and provides other information about the grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

ALLOTMENTS AND REALLOTMENTS OF GRANT FUNDS

§ 76.260 Allotments are made under program statute or regulations.

(a) The Secretary allots program funds to a State in accordance with the authorizing statute or implementing regulations for the program.

(b) Any reallotment to other States will be made by the Secretary in accordance with the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 3474(a))

[50 FR 29330, July 18, 1985]

§ 76.261 Reallotted funds are part of a State's grant.

Funds that a State receives as a result of a reallotment are part of the State's grant for the appropriate fiscal year. However, the Secretary does not consider a reallotment in determining the maximum or minimum amount to which a State is entitled for a following fiscal year.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Subpart D—How To Apply to the State for a Subgrant

§ 76.300 Contact the State for procedures to follow.

An applicant for a subgrant can find out the procedures it must follow by contacting the State agency that administers the program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

CROSS REFERENCE: See subparts E and G of this part for the general responsibilities of the State regarding applications for subgrants.

§ 76.301 Local educational agency general application.

A local educational agency that applies for a subgrant under a program subject to this part shall have on file with the State a general application that meets the requirements of Section 442 of the General Education Provisions Act.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 1232d, and 3474)

[52 FR 27804, July 24, 1987, as amended at 53 FR 49143, Dec. 6, 1988; 60 FR 46493, Sept. 6, 1995]

§ 76.302 The notice to the subgrantee.

A State shall notify a subgrantee in writing of:

(a) The amount of the subgrant;

(b) The period during which the subgrantee may obligate the funds; and

(c) The Federal requirements that apply to the subgrant.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

§ 76.303 Joint applications and projects.

(a) Two or more eligible parties may submit a joint application for a subgrant.

(b) If the State must use a formula to distribute subgrant funds (see § 76.51), the State may not make a subgrant that exceeds the sum of the entitlements of the separate subgrantees.

(c) If the State funds the application, each subgrantee shall:

(1) Carry out the activities that the subgrantee agreed to carry out; and

(2) Use the funds in accordance with Federal requirements.

(d) Each subgrantee shall use an accounting system that permits identification of the costs paid for under its subgrant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.304 Subgrantee shall make subgrant application available to the public.

A subgrantee shall make any application, evaluation, periodic program plan, or report relating to each program available for public inspection.

(Authority: 20 U.S.C. 1221e–3, 1232e, and 3474)

Subpart E—How a Subgrant Is Made to an Applicant

§ 76.400 State procedures for reviewing an application.

A State that receives an application for a subgrant shall take the following steps:

(a) *Review*. The State shall review the application.

(b) *Approval—entitlement programs*. The State shall approve an application if:

(1) The application is submitted by an applicant that is entitled to receive a subgrant under the program; and

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program.

(c) *Approval—discretionary programs*. The State may approve an application if:

(1) The application is submitted by an eligible applicant under a program in which the State has the discretion to select subgrantees;

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program; and

(3) The State determines that the project should be funded under the authorizing statute and implementing regulations for the program.

(d) *Disapproval—entitlement and discretionary programs*. If an application does not meet the requirements of the Federal statutes and regulations that apply to a program, the State shall not approve the application.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.401 Disapproval of an application—opportunity for a hearing.

(a) *State agency hearing before disapproval*. Under the programs listed in the chart below, the State agency that administers the program shall provide an applicant with notice and an opportunity for a hearing before it may disapprove the application.

Program	Authorizing statute	Implementing regulations Title 34 CFR Part
Chapter 1, Program in Local Educational Agencies	Title I, Chapter 1, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2701–2731, 2821–2838, 2851–2854, and 2891–2901).	200
Chapter 1, Program for Neglected and Delinquent Children	Title 1, Chapter 1, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2801–2804).	203

Program	Authorizing statute	Implementing regulations Title 34 CFR Part
State Grants for Strengthening Instruction in Mathematics and Science.	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981–2993).	208
Federal, State, and Local Partnership for Educational Improvement.	Title I, Chapter 2, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2911–2952 and 2971–2976).	298
Assistance to States for Education of Handicapped Children	Part B, Individuals with Disabilities Education Act (except Section 619) (20 U.S.C. 1411–1420).	300
Preschool Grants	Section 619, Individuals with Disabilities Education Act (20 U.S.C. 1419).	301
Chapter 1, State-Operated or Supported Programs for Handicapped Children.	Title 1, Chapter 1, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2791–2795).	302
Transition Program for Refugee Children	Section 412(d), Immigration and Naturalization Act (8 U.S.C. 1522(d)).	538
Emergency Immigrant Education Program	Emergency Immigrant Education Act (20 U.S.C. 3121–3130).	581
Financial Assistance for Construction, Reconstruction, or Renovation of Higher Education Facilities.	Section 711, Higher Education Act of 1965 (20 U.S.C. 1132b).	617

(b) *Other programs—hearings not required*. Under other programs covered by this part, a State agency—other than a State educational agency—is not required to provide an opportunity for a hearing regarding the agency's disapproval of an application.

(c) If an applicant for a subgrant alleges that any of the following actions of a State educational agency violates a State or Federal statute or regulation, the State educational agency and the applicant shall use the procedures in paragraph (d) of this section:

(1) Disapproval of or failure to approve the application or project in whole or in part.

(2) Failure to provide funds in amounts in accordance with the requirements of statutes and regulations.

(d) *State educational agency hearing procedures*. (1) If the applicant applied under a program listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing before the agency disapproves the application.

(2) If the applicant applied under a program not listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing either before or after the agency disapproves the application.

(3) The applicant shall request the hearing within 30 days of the action of the State educational agency.

(4)(i) Within 30 days after it receives a request, the State educational agency shall hold a hearing on the record and shall review its action.

(ii) No later than 10 days after the hearing the agency shall issue its written ruling, including findings of fact and reasons for the ruling.

(iii) If the agency determines that its action was contrary to State or Federal statutes or regulations that govern the applicable program, the agency shall rescind its action.

(5) If the State educational agency does not rescind its final action after a review under this paragraph, the applicant may appeal to the Secretary. The applicant shall file a notice of the appeal with the Secretary within 20 days after the applicant has been notified by the State educational agency of the results of the agency's review. If supported by substantial evidence, findings of fact of the State educational agency are final.

(6)(i) The Secretary may also issue interim orders to State educational agencies as he or she may decide are necessary and appropriate pending appeal or review.

(ii) If the Secretary determines that the action of the State educational agency was contrary to Federal statutes or regulations that govern the applicable program, the Secretary issues

an order that requires the State educational agency to take appropriate action.

(7) Each State educational agency shall make available at reasonable times and places to each applicant all records of the agency pertaining to any review or appeal the applicant is conducting under this section, including records of other applicants.

(8) If a State educational agency does not comply with any provision of this section, or with any order of the Secretary under this section, the Secretary terminates all assistance to the State educational agency under the applicable program or issues such other orders as the Secretary deems appropriate to achieve compliance.

(e) *Other State agency hearing procedures.* State agencies that are required to provide a hearing under paragraph (a) of this section—other than State educational agencies—are not required to use the procedures in paragraph (d) of this section.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA ''shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act.'' Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1221e–3, 1231b–2, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980; 50 FR 43545, Oct. 25, 1985; 52 FR 27805, July 24, 1987; 54 FR 21775, May 19, 1989; 55 FR 14816, Apr. 18, 1990; 57 FR 30341, July 8, 1992; 60 FR 46493, Sept. 6, 1995]

Subpart F—What Conditions Must Be Met by the State and Its Subgrantees?

NONDISCRIMINATION

§ 76.500 Constitutional rights, freedom of inquiry, and Federal statutes and regulations on nondiscrimination.

(a) A State and a subgrantee shall comply with the following statutes and regulations:

TABLE 1 TO § 76.500(a)

Subject	Statute	Regulation
Discrimination on the basis of race, color, or national origin.	Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d through 2000d–4).	34 CFR part 100.
Discrimination on the basis of sex	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681–1683).	34 CFR part 106.
Discrimination on the basis of handicap	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).	34 CFR part 104.
Discrimination on the basis of age	The Age Discrimination Act (42 U.S.C. 6101 *et seq.*).	34 CFR part 110.

(b)(1) Each State or subgrantee that is an institution of higher education, as defined in 20 U.S.C. 1002(a), that is public and that is legally required to abide by the First Amendment to the U.S. Constitution (hereinafter ''public institution''), must also comply with the First Amendment to the U.S. Constitution, including protections for freedom of speech, association, press, religion, assembly, petition, and academic freedom, as a material condition of the Department's grant. The Department will determine that a public institution has not complied with the First Amendment only if there is a final, non-default judgment by a State or Federal court that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment. A final judgment is a judgment that the public institution chooses not to appeal or that is not subject to further appeal. Absent such a final, non-default judgment, the Department will deem the public institution to be in compliance with the First Amendment.

(2) Each State or subgrantee that is a public institution also must submit to the Secretary a copy of the final, non-

default judgment by that State or Federal court to conclude the lawsuit no later than 45 calendar days after such final, non-default judgment is entered.

(c)(1) Each State or subgrantee that is an institution of higher education, as defined in 20 U.S.C. 1002(a), that is private (hereinafter ''private institution'') must comply with its stated institutional policies regarding freedom of speech, including academic freedom. The Department will determine that a private institution has not complied with these stated institutional policies only if there is a final, non-default judgment by a State or Federal court to the effect that the private institution or an employee of the private institution, acting on behalf of the private institution, violated its stated institutional policy regarding freedom of speech or academic freedom, as a material condition of the Department's grant. A final judgment is a judgment that the private institution chooses not to appeal or that is not subject to further appeal. Absent such a final, non-default judgment, the Department will deem the private institution to be in compliance with its stated institutional policies.

(2) Each State or subgrantee that is a private institution also must submit to the Secretary a copy of the final, non-default judgment by that State or Federal court to conclude the lawsuit no later than 45 calendar days after such final, non-default judgment is entered.

(d) As a material condition of the Department's grant, each State or subgrantee that is a public institution shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.

(e) A State or subgrantee that is a covered entity as defined in 34 CFR 108.3 shall comply with the nondiscrimination requirements of the Boy Scouts of America Equal Access Act, 20 U.S.C. 7905, 34 CFR part 108.

(Authority: 20 U.S.C. 1221e–3, 3474)

[85 FR 59979, Sept. 23, 2020]

ALLOWABLE COSTS

§ 76.530 General cost principles.

The general principles to be used in determining costs applicable to grants, subgrants, and cost-type contracts under grants and subgrants are specified at 2 CFR part 200, subpart E—Cost Principles.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[79 FR 76093, Dec. 19, 2014]

§ 76.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(b) [Reserved]

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 69 FR 31711, June 4, 2004]

§ 76.533 Acquisition of real property; construction.

No State or subgrantee may use its grant or subgrant for acquisition of real property or for construction unless specifically permitted by the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

§ 76.534 Use of tuition and fees restricted.

No State or subgrantee may count tuition and fees collected from students toward meeting matching, cost

sharing, or maintenance of effort requirements of a program.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

INDIRECT COST RATES

§ 76.560 General indirect cost rates; exceptions.

(a) The differences between direct and indirect costs and the principles for determining the general indirect cost rate that a grantee may use for grants under most programs are specified in the cost principles for—

(1) All grantees, other than hospitals and commercial (for-profit) organizations, at 2 CFR part 200, subpart E—Cost Principles;

(2) Hospitals, at 45 CFR part 75, Appendix XI, Principles for Determining Costs Applicable to Research and Development Under Awards and Contracts With Hospitals; and

(3) Commercial (for-profit) organizations, at 48 CFR part 31, Contract Cost Principles and Procedures.

(b) A grantee must have a current indirect cost rate agreement to charge indirect costs to a grant. To obtain an indirect cost rate, a grantee must submit an indirect cost proposal to its cognizant agency and negotiate an indirect cost rate agreement.

(c) The Secretary may establish a temporary indirect cost rate for a grantee that does not have an indirect cost rate agreement with its cognizant agency.

(d) The Secretary accepts an indirect cost rate negotiated by a grantee's cognizant agency, but may establish a restricted indirect cost rate for a grantee to satisfy the statutory requirements of certain programs administered by the Department.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[57 FR 30341, July 8, 1992, as amended at 59 FR 59582, Nov. 17, 1994; 79 FR 76094, Dec. 19, 2014]

§ 76.561 Approval of indirect cost rates.

(a) If the Department of Education is the cognizant agency, the Secretary approves an indirect cost rate for a State agency and for a subgrantee other than a local educational agency. For the purposes of this section, the term local educational agency does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so. These rates may be for periods longer than a year if rates are sufficiently stable to justify a longer period.

(c) The Secretary generally approves indirect cost rate agreements annually. Indirect cost rate agreements may be approved for periods longer than a year if the Secretary determines that rates will be sufficiently stable to justify a longer rate period.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[59 FR 59583, Nov. 17, 1994]

§ 76.563 Restricted indirect cost rate—programs covered.

Sections 76.564 through 76.569 apply to agencies of State and local governments that are grantees under programs with a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds, and to their subgrantees under these programs.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[59 FR 59583, Nov. 17, 1994]

§ 76.564 Restricted indirect cost rate—formula.

(a) An indirect cost rate for a grant covered by § 76.563 or 34 CFR 75.563 is determined by the following formula:

Restricted indirect cost rate = (General management costs + Fixed costs) ÷ (Other expenditures)

(b) General management costs, fixed costs, and other expenditures must be determined under §§ 76.565 through 76.567.

(c) Under the programs covered by § 76.563, a subgrantee of an agency of a State or a local government (as those terms are defined in 2 CFR 200.90 and 200.64, respectively), or a grantee subject to 34 CFR 75.563 that is not a State or local government agency may use—

(1) An indirect cost rate computed under paragraph (a) of this section; or

(2) An indirect cost rate of eight percent unless the Secretary determines that the subgrantee or grantee would have a lower rate under paragraph (a) of this section.

(d) Indirect costs that are unrecovered as a result of these restrictions may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59583, Nov. 17, 1994, as amended at 79 FR 76094, Dec. 19, 2014]

§ 76.565 General management costs—restricted rate.

(a) As used in § 76.564, *general management costs* means the costs of activities that are for the direction and control of the grantee's affairs that are organization-wide. An activity is not organization-wide if it is limited to one activity, one component of the grantee, one subject, one phase of operations, or other single responsibility.

(b) General management costs include the costs of performing a service function, such as accounting, payroll preparation, or personnel management, that is normally at the grantee's level even if the function is physically located elsewhere for convenience or better management. The term also includes certain occupancy and space maintenance costs as determined under § 76.568.

(c) The term does not include expenditures for—

(1) Divisional administration that is limited to one component of the grantee;

(2) The governing body of the grantee;

(3) Compensation of the chief executive officer of the grantee;

(4) Compensation of the chief executive officer of any component of the grantee; and

(5) Operation of the immediate offices of these officers.

(d) For purposes of this section—

(1) The chief executive officer of the grantee is the individual who is the head of the executive office of the grantee and exercises overall responsibility for the operation and management of the organization. The chief executive officer's immediate office includes any deputy chief executive officer or similar officer along with immediate support staff of these individuals. The term does not include the governing body of the grantee, such as a board or a similar elected or appointed governing body; and

(2) Components of the grantee are those organizational units supervised directly or indirectly by the chief executive officer. These organizational units generally exist one management level below the executive office of the grantee. The term does not include the office of the chief executive officer or a deputy chief executive officer or similar position.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59583, Nov. 17, 1994]

§ 76.566 Fixed costs—restricted rate.

As used in § 76.564, *fixed costs* means contributions of the grantee to fringe benefits and similar costs, but only those associated with salaries and wages that are charged as indirect costs, including—

(a) Retirement, including State, county, or local retirement funds, Social Security, and pension payments;

(b) Unemployment compensation payments; and

(c) Property, employee, health, and liability insurance.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59583, Nov. 17, 1994]

§ 76.567 Other expenditures—restricted rate.

(a) As used in § 76.564, *other expenditures* means the grantee's total expenditures for its federally- and non-federally-funded activities in the most recent year for which data are available. The term also includes direct occupancy and space maintenance costs as determined under § 76.568 and costs related to the chief executive officers of the grantee and components of the grantee and their offices (see § 76.565(c) and (d)).

(b) The term does not include—

(1) General management costs determined under § 76.565;

(2) Fixed costs determined under § 76.566;
(3) Subgrants;
(4) Capital outlay;
(5) Debt service;
(6) Fines and penalties;
(7) Contingencies; and
(8) Election expenses. However, the term does include election expenses that result from elections required by an applicable Federal statute.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59583, Nov. 17, 1994]

§ 76.568 Occupancy and space maintenance costs—restricted rate.

(a) As used in the calculation of a restricted indirect cost rate, *occupancy and space maintenance costs* means such costs as—
(1) Building costs whether owned or rented;
(2) Janitorial services and supplies;
(3) Building, grounds, and parking lot maintenance;
(4) Guard services;
(5) Light, heat, and power;
(6) Depreciation, use allowances, and amortization; and
(7) All other related space costs.
(b) Occupancy and space maintenance costs associated with organization-wide service functions (accounting, payroll, personnel) may be included as general management costs if a space allocation or use study supports the allocation.
(c) Occupancy and space maintenance costs associated with functions that are not organization-wide must be included with other expenditures in the indirect cost formula. These costs may be charged directly to affected programs only to the extent that statutory supplanting prohibitions are not violated. This reimbursement must be approved in advance by the Secretary.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59584, Nov. 17, 1994]

§ 76.569 Using the restricted indirect cost rate.

(a) Under the programs referenced in § 76.563, the maximum amount of indirect costs under a grant is determined by the following formula:

Indirect costs = (Restricted indirect cost rate) × (Total direct costs of the grant minus capital outlays, subgrants, and other distorting or unallowable items as specified in the grantee's indirect cost rate agreement)

(b) If a grantee uses a restricted indirect cost rate, the general management and fixed costs covered by that rate must be excluded by the grantee from the direct costs it charges to the grant.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59584, Nov. 17, 1994]

§ 76.580 Coordination with other activities.

A State and a subgrantee shall, to the extent possible, coordinate each of its projects with other activities that are in the same geographic area served by the project and that serve similar purposes and target groups.

(Authority: 20 U.S.C. 1221e–3, 2890, and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30341, July 8, 1992]

EVALUATION

§ 76.591 Federal evaluation—cooperation by a grantee.

A grantee shall cooperate in any evaluation of the program by the Secretary.

(Authority: 20 U.S.C. 1221e–3, 1226c, 1231a, 3474, and 6511(a))

[45 FR 86298, Dec. 30, 1980, as amended at 57 FR 30341, July 8, 1992]

§ 76.592 Federal evaluation—satisfying requirement for State or subgrantee evaluation.

If a State or a subgrantee cooperates in a Federal evaluation of a program, the Secretary may determine that the State or subgrantee meets the evaluation requirements of the program.

(Authority: 20 U.S.C. 1226c; 1231a)

CONSTRUCTION

§ 76.600 Where to find construction regulations.

(a) A State or a subgrantee that requests program funds for construction,

or whose grant or subgrant includes funds for construction, shall comply with the rules on construction that apply to applicants and grantees under 34 CFR 75.600–75.617.

(b) The State shall perform the functions that the Secretary performs under §§ 75.602 (Preservation of historic sites) and 75.605 (Approval of drawings and specifications) of this title.

(c) The State shall provide to the Secretary the information required under 34 CFR 75.602(a) (Preservation of historic sites).

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 57 FR 30341, July 8, 1992]

PARTICIPATION OF STUDENTS ENROLLED IN PRIVATE SCHOOLS

§ 76.650 Private schools; purpose of §§ 76.651–76.662.

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Sections 76.651–76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

(b) If any other rules for participation of students enrolled in private schools apply under a particular program, they are in the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

NOTE: Some program statutes authorize the Secretary—under certain circumstances—to provide benefits directly to private school students. These ''bypass'' provisions—where they apply—are implemented in the individual program regulations.

§ 76.651 Responsibility of a State and a subgrantee.

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§ 76.652–76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each subgrantee complies with the requirements in §§ 76.651–76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.652 Consultation with representatives of private school students.

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

(1) Which children will receive benefits under the project;

(2) How the children's needs will be identified;

(3) What benefits will be provided;

(4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.654 Benefits for private school students.

(a) *Comparable benefits.* The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) *Same benefits.* If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) *Different benefits.* If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.655 Level of expenditures for students enrolled in private schools.

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with § 76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.658 Funds not to benefit a private school.

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities:

(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.660 Use of private school personnel.

A subgrantee may use program funds to pay for the services of an employee of a private school if:

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.661 Equipment and supplies.

(a) Under some program statutes, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the subgrantee acquires with program funds. This public agency is usually the subgrantee.

(b) The subgrantee may place equipment and supplies in a private school for the period of time needed for the project.

(c) The subgrantee shall insure that the equipment or supplies placed in a private school:

(1) Are used only for the purposes of the project; and

(2) Can be removed from the private school without remodeling the private school facilities.

(d) The subgrantee shall remove equipment or supplies from a private school if:

(1) The equipment or supplies are no longer needed for the purposes of the project; or

(2) Removal is necessary to avoid use of the equipment of supplies for other than project purposes.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.662 Construction.

A subgrantee shall insure that program funds are not used for the construction of private school facilities.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§§ 76.663–76.664 [Reserved]

EQUITABLE SERVICES UNDER THE CARES ACT

§ 76.665 Providing equitable services to students and teachers in non-public schools.

(a) *In general.* (1) A local educational agency (LEA) receiving funds under a CARES Act program must provide equitable services to students and teachers in non-public elementary and secondary schools in the LEA ''in the same manner'' as provided under section 1117 of the Elementary and Secondary Education Act of 1965 (ESEA), as determined in consultation with representatives of non-public schools.

(2) For purposes of this section, the CARES Act programs are the Governor's Emergency Education Relief (GEER) Fund (Section 18002), formula grants to LEAs under the Elementary and Secondary School Emergency Relief (ESSER) Fund (Section 18003(c)), and ESSER SEA Reserve (Section 18003(e)).

(b) *Consultation.* (1) An LEA must promptly consult with representatives of non-public elementary and secondary schools during the design and development of the LEA's plans to spend funds from a CARES Act program and before the LEA makes any decision affecting the opportunities of students and teachers in non-public schools to benefit from those funds. As provided in section 1117(b)(1) of the ESEA, the LEA and non-public school officials shall both have the goal of reaching timely agreement on how to provide equitable and effective programs for non-public school students and teachers.

(2) Consultation must occur in accordance with section 1117(b) of the

ESEA, except to the extent inconsistent with the CARES Act and this section, such as section 1117(b)(1)(E) and (J)(ii).

(c) *Determining proportional share.* (1) To determine the proportional share of funds for equitable services to students and teachers in non-public elementary and secondary schools for each CARES Act program, an LEA must use one of the following measures. The LEA need not use the same measure for each CARES Act program.

(i) An LEA using *all* its funds under a CARES Act program to serve *only* students and teachers in public schools participating under Title I, Part A of the ESEA may calculate the proportional share in accordance with paragraph (c)(1)(ii) of this section or by using—

(A) The proportional share of Title I, Part A funds it calculated under section 1117(a)(4)(A) of the ESEA for the 2019–2020 school year; or

(B) The number of children, ages 5 through 17, who attend each non-public school in the LEA that will participate under a CARES Act program and are from low-income families compared to the total number of children, ages 5 through 17, who are from low-income families in both Title I schools and participating non-public elementary and secondary schools in the LEA.

(ii) Any other LEA must calculate the proportional share based on enrollment in participating non-public elementary and secondary schools in the LEA compared to the total enrollment in both public and participating non-public elementary and secondary schools in the LEA.

(2) An LEA must determine the proportional share of funds available for services for students and teachers in non-public elementary and secondary schools based on the total amount of CARES Act funds received by the LEA under a CARES Act program prior to any allowable expenditures or transfers by the LEA.

(3) An LEA using funds from a CARES Act program in Title I schools under paragraph (c)(1)(i) of this section must comply with the supplement not supplant requirement in section 1118(b) of the ESEA, which would prohibit the LEA from allocating CARES Act funds to Title I schools and then redirecting State or local funds to non-Title I schools, among other things.

(d) *Equity.* (1) Educational services and other benefits for students and teachers in non-public elementary and secondary schools must be equitable in comparison to services and other benefits for public school students and teachers participating in CARES Act programs, and must be provided in a timely manner.

(2) The measure an LEA uses to determine the proportional share under paragraph (c)(1) of this section does not limit the obligation of the LEA to provide the opportunity to receive services to students and teachers in any non-public elementary or secondary school in the LEA.

(e) *Secular, neutral, and nonideological.* Educational services and benefits, including materials and equipment, an LEA provides to students and teachers in non-public elementary and secondary schools under the CARES Act programs must be secular, neutral, and nonideological.

(f) *Public control of funds.* An LEA must—

(1) Maintain control of CARES Act funds;

(2) Keep title to and exercise continuing administrative control of all materials, equipment, and property purchased with CARES Act funds; and

(3) Provide services with CARES Act funds directly or through a contract with a public or private entity.

(*Authority:* 20 U.S.C. 6320, 6321(b); section 18005 of the CARES Act)

[85 FR 39488, July 1, 2020]

§§ 76.666–76.669 [Reserved]

PROCEDURES FOR BYPASS

§ 76.670 Applicability and filing requirements.

(a) The regulations in §§ 76.671 through 76.677 apply to the following programs under which the Secretary is authorized to waive the requirements for providing services to private school children and to implement a bypass:

CFDA number and name of program	Authorizing statute	Implementing regulations title 34 CFR part
84.010 Chapter 1 Program in Local Educational Agencies.	Chapter 1, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2701 *et seq.*).	200
84.151 Federal, State, and Local Partnership for Educational Improvement.	Chapter 2, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2911–2952, 2971–2976).	298
84.164 Mathematics and Science Education	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981–2993).	208
84.186 State and Local Programs	Part B, Drug Free Schools and Communities Act of 1986 (20 U.S.C. 3191–3197).	None

(b) *Filing requirements.* (1) Any written submission under §§ 76.671 through 76.675 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(3) The filing date for a written submission is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(5) If a document is filed by facsimile transmission, the Secretary or the hearing officer, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(Authority: 20 U.S.C. 2727(b), 2972(d)–(e), 2990(c), 3223(c))

[54 FR 21775, May 19, 1989, as amended at 57 FR 56795, Nov. 30, 1992]

§ 76.671 Notice by the Secretary.

(a) Before taking any final action to implement a bypass under a program listed in § 76.670, the Secretary provides the affected grantee and subgrantee, if appropriate, with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed bypass in sufficient detail to allow the grantee and subgrantee to respond;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Advises the grantee and subgrantee that they—

(i) Have at least 45 days after receiving the written notice to submit written objections to the proposed bypass; and

(ii) May request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the grantee and subgrantee by certified mail with return receipt requested.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21775, May 19, 1989]

§ 76.672 Bypass procedures.

Sections 76.673 through 76.675 contain the procedures that the Secretary uses in conducting a show cause hearing. The hearing officer may modify the procedures for a particular case if all parties agree the modification is appropriate.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.673 Appointment and functions of a hearing officer.

(a) If a grantee or subgrantee requests a hearing to show cause why the Secretary should not implement a bypass, the Secretary appoints a hearing officer and notifies appropriate representatives of the affected private school children that they may participate in the hearing.

(b) The hearing officer has no authority to require or conduct discovery or

to rule on the validity of any statute or regulation.

(c) The hearing officer notifies the grantee, subgrantee, and representatives of the private school children of the time and place of the hearing.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.674 Hearing procedures.

(a) The following procedures apply to a show cause hearing regarding implementation of a bypass:

(1) The hearing officer arranges for a transcript to be taken.

(2) The grantee, subgrantee, and representatives of the private school children each may—

(i) Be represented by legal counsel; and

(ii) Submit oral or written evidence and arguments at the hearing.

(b) Within 10 days after the hearing, the hearing officer—

(1) Indicates that a decision will be issued on the basis of the existing record; or

(2) Requests further information from the grantee, subgrantee, representatives of the private school children, or Department officials.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.675 Posthearing procedures.

(a)(1) Within 120 days after the record of a show cause hearing is closed, the hearing officer issues a written decision on whether a bypass should be implemented.

(2) The hearing officer sends copies of the decision to the grantee, subgrantee, representatives of the private school children, and the Secretary.

(b) Within 30 days after receiving the hearing officer's decision, the grantee, subgrantee, and representatives of the private school children may each submit to the Secretary written comments on the decision.

(c) The Secretary may adopt, reverse, modify, or remand the hearing officer's decision.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.676 Judicial review of a bypass action.

If a grantee or subgrantee is dissatisfied with the Secretary's final action after a proceeding under §§ 76.672 through 76.675, it may, within 60 days after receiving notice of that action, file a petition for review with the United States Court of Appeals for the circuit in which the State is located.

(Authority: 20 U.S.C. 2727(b)(4)(B)–(D), 2972(h)(2)–(4), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.677 Continuation of a bypass.

The Secretary continues a bypass until the Secretary determines that the grantee or subgrantee will meet the requirements for providing services to private school children.

(Authority: 20 U.S.C. 1221e–3, 2727(b)(3)(D), 2972(f), and 3474)

[54 FR 21776, May 19, 1989]

OTHER REQUIREMENTS FOR CERTAIN PROGRAMS

§ 76.681 Protection of human subjects.

If a State or a subgrantee uses a human subject in a research project, the State or subgrantee shall protect the person from physical, psychological, or social injury resulting from the project.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30341, July 8, 1992]

§ 76.682 Treatment of animals.

If a State or a subgrantee uses an animal in a project, the State or subgrantee shall provide the animal with proper care and humane treatment in accordance with the Animal Welfare Act of 1970.

(Authority: Pub. L. 89–544, as amended)

§ 76.683 Health or safety standards for facilities.

A State and a subgrantee shall comply with any Federal health or safety requirements that apply to the facilities that the State or subgrantee uses for a project.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

Subpart G—What Are the Administrative Responsibilities of the State and Its Subgrantees?

GENERAL ADMINISTRATIVE RESPONSIBILITIES

§ 76.684 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

(Authority: 20 U.S.C. 1221e–3, 3474)

[85 FR 59980, Sept. 23, 2020]

§ 76.700 Compliance with the U.S. Constitution, statutes, regulations, stated institutional policies, and applications.

A State and a subgrantee shall comply with § 76.500, the State plan, applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, plan, and applications.

(Authority: 20 U.S.C. 1221e–3, 3474)

[85 FR 59980, Sept. 23, 2020]

§ 76.701 The State or subgrantee administers or supervises each project.

A State or a subgrantee shall directly administer or supervise the administration of each project.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

§ 76.702 Fiscal control and fund accounting procedures.

A State and a subgrantee shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

§ 76.703 When a State may begin to obligate funds.

(a)(1) The Secretary may establish, for a program subject to this part, a date by which a State must submit for review by the Department a State plan and any other documents required to be submitted under guidance provided by the Department under paragraph (b)(3) of this section.

(2) If the Secretary does not establish a date for the submission of State plans and any other documents required under guidance provided by the Department, the date for submission is three months before the date the Secretary may begin to obligate funds under the program.

(b)(1) This paragraph (b) describes the circumstances under which the submission date for a State plan may be deferred.

(2) If a State asks the Secretary in writing to defer the submission date for a State plan because of a Presidentially declared disaster that has occurred in that State, the Secretary may defer the submission date for the State plan and any other document required under guidance provided by the Department if the Secretary determines that the disaster significantly impairs the ability of the State to submit a timely State plan or other document required under guidance provided by the Department.

(3)(i) The Secretary establishes, for a program subject to this part, a date by which the program office must deliver guidance to the States regarding the contents of the State plan under that program.

(ii) The Secretary may only establish a date for the delivery of guidance to the States so that there are at least as many days between that date and the date that State plans must be submitted to the Department as there are days between the date that State plans must be submitted to the Department and the date that funds are available for obligation by the Secretary on July 1, or October 1, as appropriate.

(iii) If a State does not receive the guidance by the date established under paragraph (b)(3)(i) of this section, the submission date for the State plan under the program is deferred one day for each day that the guidance is late in being received by the State.

NOTE: The following examples describe how the regulations in § 76.703(b)(3) would act to defer the date that a State would have to submit its State plan.

Example 1. The Secretary decides that State plans under a forward-funded program must be submitted to the Department by May first. The Secretary must provide guidance to the States under this program by March first, so that the States have at least as many days between the guidance date and the submission date (60) as the Department has between the submission date and the date that funds are available for obligation (60). If the program transmits guidance to the States on February 15, specifying that State plans must be submitted by May first, States generally would have to submit State plans by that date. However, if, for example, a State did not receive the guidance until March third, that State would have until May third to submit its State plan because the submission date of its State plan would be deferred one day for each day that the guidance to the State was late.

Example 2. If a program publishes the guidance in the FEDERAL REGISTER on March third, the States would be considered to have received the guidance on that day. Thus, the guidance could not specify a date for the submission of State plans before May second, giving the States 59 days between the date the guidance is published and the submission date and giving the Department 58 days between the submission date and the date that funds are available for obligation.

(c)(1) For the purposes of this section, the submission date of a State plan or other document is the date that the Secretary receives the plan or document.

(2) The Secretary does not determine whether a State plan is substantially approvable until the plan and any documents required under guidance provided by the Department have been submitted.

(3) The Secretary notifies a State when the Department has received the State plan and all documents required under guidance provided by the Department.

(d) If a State submits a State plan in substantially approvable form (or an amendment to the State plan that makes it substantially approvable), and submits any other document required under guidance provided by the Department, on or before the date the State plan must be submitted to the Department, the State may begin to obligate funds on the date that the funds are first available for obligation by the Secretary.

(e) If a State submits a State plan in substantially approvable form (or an amendment to the State plan that makes it substantially approvable) or any other documents required under guidance provided by the Department after the date the State plan must be submitted to the Department, and—

(1) The Department determines that the State plan is substantially approvable on or before the date that the funds are first available for obligation by the Secretary, the State may begin to obligate funds on the date that the funds are first available for obligation by the Secretary; or

(2) The Department determines that the State plan is substantially approvable after the date that the funds are first available for obligation by the Secretary, the State may begin to obligate funds on the earlier of the two following dates:

(i) The date that the Secretary determines that the State plan is substantially approvable.

(ii) The date that is determined by adding to the date that funds are first available for obligation by the Secretary—

(A) The number of days after the date the State plan must be submitted to the Department that the State plan or other document required under guidance provided by the Department is submitted; and

(B) If applicable, the number of days after the State receives notice that the State plan is not substantially approvable that the State submits additional information that makes the plan substantially approvable.

(f) Additional information submitted under paragraph (e)(2)(ii)(B) of this section must be signed by the person who submitted the original State plan (or an authorized delegate of that officer).

(g)(1) If the Department does not complete its review of a State plan during the period established for that review, the Secretary will grant pre-award costs for the period after funds become available for obligation by the Secretary and before the State plan is found substantially approvable.

(2) The period established for the Department's review of a plan does not include any day after the State has received notice that its plan is not substantially approvable.

NOTE: The following examples describe how the regulations in § 76.703 would be applied in certain circumstances. For the purpose of these examples, assume that the grant program established an April 1 due date for the submission of the State plan and that funds are first available for obligation by the Secretary on July 1.

Example 1. Paragraph (d): A State submits a plan in substantially approvable form by April 1. The State may begin to obligate funds on July 1.

Example 2. Paragraph (e)(1): A State submits a plan in substantially approvable form on May 15, and the Department notifies the State that the plan is substantially approvable on June 20. The State may begin to obligate funds on July 1.

Example 3. Paragraph (e)(2)(i): A State submits a plan in substantially approvable form on May 15, and the Department notifies the State that the plan is substantially approvable on July 15. The State may begin to obligate funds on July 15.

Example 4. Paragraph (e)(2)(ii)(A): A State submits a plan in substantially approvable form on May 15, and the Department notifies the State that the plan is substantially approvable on August 21. The State may begin to obligate funds on August 14. (In this example, the plan is 45 days late. By adding 45 days to July 1, we reach August 14, which is earlier than the date, August 21, that the Department notifies the State that the plan is substantially approvable. Therefore, if the State chose to begin drawing funds from the Department on August 14, obligations made on or after that date would generally be allowable.)

Example 5. Paragraph (e)(2)(i): A State submits a plan on May 15, and the Department notifies the State that the plan is not substantially approvable on July 10. The State submits changes that make the plan substantially approvable on July 20 and the Department notifies the State that the plan is substantially approvable on July 25. The State may begin to obligate funds on July 25. (In this example, the original submission is 45 days late. In addition, the Department notifies the State that the plan is not substantially approvable and the time from that notification until the State submits changes that make the plan substantially approvable is an additional 10 days. By adding 55 days to July 1, we reach August 24. However, since the Department notified the State that the plan was substantially approvable on July 25, that is the date that the State may begin to obligate funds.)

Example 6. Paragraph (e)(2)(ii)(B): A State submits a plan on May 15, and the Department notifies the State that the plan is not substantially approvable on August 1. The State submits changes that make the plan substantially approvable on August 20, and the Department notifies the State that the plan is substantially approvable on September 5. The State may choose to begin drawing funds from the Department on September 2, and obligations made on or after that date would generally be allowable. (In this example, the original submission is 45 days late. In addition, the Department notifies the State that the plan is not substantially approvable and the time from that notification until the State submits changes that make the plan substantially approvable is an additional 19 days. By adding 64 days to July 1, we reach September 2, which is earlier than September 5, the date that the Department notifies the State that the plan is substantially approvable.)

Example 7. Paragraph (g): A State submits a plan on April 15 and the Department notifies the State that the plan is not substantially approvable on July 16. The State makes changes to the plan and submits a substantially approvable plan on July 30. The Department had until July 15 to decide whether the plan was substantially approvable because the State was 15 days late in submitting the plan. The date the State may begin to obligate funds under the regulatory deferral is July 29 (based on the 15 day deferral for late submission plus a 14 day deferral for the time it took to submit a substantially approvable plan after having received notice). However, because the Department was one day late in completing its review of the plan, the State would get pre-award costs to cover the period of July 1 through July 29.

(h) After determining that a State plan is in substantially approvable form, the Secretary informs the State of the date on which it could begin to obligate funds. Reimbursement for those obligations is subject to final approval of the State plan.

(Authority: 20 U.S.C. 1221e–3, 3474, 6511(a) and 31 U.S.C. 6503)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 60 FR 41294, Aug. 11, 1995; 61 FR 14484, Apr. 2, 1996]

§ 76.704 New State plan requirements that must be addressed in a State plan.

(a) This section specifies the State plan requirements that must be addressed in a State plan if the State plan requirements established in statutes or regulations change on a date close to the date that State plans are due for submission to the Department.

(b)(1) A State plan must meet the following requirements:

(i) Every State plan requirement in effect three months before the date the State plan is due to be submitted to the Department under 34 CFR 76.703; and

(ii) Every State plan requirement included in statutes or regulations that will be effective on or before the date that funds become available for obligation by the Secretary and that have been signed into law or published in the FEDERAL REGISTER as final regulations three months before the date the State plan is due to be submitted to the Department under 34 CFR 76.703.

(2) If a State plan does not have to meet a new State plan requirement under paragraph (b)(1) of this section, the Secretary takes one of the following actions:

(i) Require the State to submit assurances and appropriate documentation to show that the new requirements are being followed under the program.

(ii) Extend the date for submission of State plans and approve pre-award costs as necessary to hold the State harmless.

(3) If the Secretary requires a State to submit assurances under paragraph (b)(2) of this section, the State shall incorporate changes to the State plan as soon as possible to comply with the new requirements. The State shall submit the necessary changes before the start of the next obligation period.

(Authority: 20 U.S.C. 1221e–3, 3474, 6511(a) and 31 U.S.C. 6503)

[60 FR 41296, Aug. 11, 1995]

§ 76.707 When obligations are made.

The following table shows when a State or a subgrantee makes obligations for various kinds of property and services.

If the obligation is for—	The obligation is made—
(a) Acquisition of real or personal property.	On the date on which the State or subgrantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the State or subgrantee.	When the services are performed.
(c) Personal services by a contractor who is not an employee of the State or subgrantee.	On the date on which the State or subgrantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services.	On the date on which the State or subgrantee makes a binding written commitment to obtain the work.
(e) Public utility services	When the State or subgrantee receives the services.
(f) Travel	When the travel is taken.
(g) Rental of real or personal property.	When the State or subgrantee uses the property.
(h) A pre-agreement cost that was properly approved by the Secretary under the cost principles in 2 CFR part 200, Subpart E—Cost Principles.	On the first day of the grant or subgrant performance period.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 55 FR 14817, Apr. 18, 1990; 57 FR 30342, July 8, 1992; 79 FR 76094, Dec. 19, 2014]

§ 76.708 When certain subgrantees may begin to obligate funds.

(a) If the authorizing statute for a program requires a State to make subgrants on the basis of a formula (see § 76.5), the State may not authorize an applicant for a subgrant to obligate funds until the later of the following two dates:

(1) The date that the State may begin to obligate funds under § 76.703; or

(2) The date that the applicant submits its application to the State in substantially approvable form.

(b) Reimbursement for obligations under paragraph (a) of this section is subject to final approval of the application.

(c) If the authorizing statute for a program gives the State discretion to select subgrantees, the State may not authorize an applicant for a subgrant to obligate funds until the subgrant is made. However, the State may approve pre-agreement costs in accordance with

the cost principles in 2 CFR part 200, subpart E–Cost Principles.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980. Further redesignated at 60 FR 41295, Aug. 11, 1995; 79 FR 76094, Dec. 19, 2014]

§ 76.709 Funds may be obligated during a "carryover period."

(a) If a State or a subgrantee does not obligate all of its grant or subgrant funds by the end of the fiscal year for which Congress appropriated the funds, it may obligate the remaining funds during a carryover period of one additional fiscal year.

(b) The State shall return to the Federal Government any carryover funds not obligated by the end of the carryover period by the State and its subgrantees.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA ''shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act.'' Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under section 427 or other applicable law.

(Authority: U.S.C. 1221e–3, 1225(b), and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980. Redesignated at 60 FR 41295, Aug. 11, 1995]

§ 76.710 Obligations made during a carryover period are subject to current statutes, regulations, and applications.

A State and a subgrantee shall use carryover funds in accordance with:

(a) The Federal statutes and regulations that apply to the program and are in effect for the carryover period; and

(b) Any State plan, or application for a subgrant, that the State or subgrantee is required to submit for the carryover period.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA ''shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act.'' Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under section 427 or other applicable law.

(Authority: U.S.C. 1221e–3, 1225(b), and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980. Redesignated at 60 FR 41295, Aug. 11, 1995]

§ 76.711 Requesting funds by CFDA number.

If a program is listed in the Catalog of Federal Domestic Assistance (CFDA), a State, when requesting funds under the program, shall identify that program by the CFDA number.

(Authority: 20 U.S.C. 1221e–3, 6511(a), 3474, 31 U.S.C. 6503)

[60 FR 41296, Aug. 11, 1995]

§§ 76.712–76.713 [Reserved]

§ 76.714 Subgrants, contracts, and other agreements with faith-based organizations.

If a grantee under a State-Administered Formula Grant program of the Department has the authority under the grant or subgrant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 76.52 and 76.532 and 2 CFR 3474.15. If the pass-through entity is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

[85 FR 82130, Dec. 17, 2020]

REPORTS

§ 76.720 State reporting requirements.

(a) This section applies to a State's reports required under 2 CFR 200.327 (Financial reporting) and 2 CFR 200.328 (Monitoring and reporting program performance), and other reports required by the Secretary and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

(b) A State must submit these reports annually unless—

(1) The Secretary allows less frequent reporting; or

(2) The Secretary requires a State to report more frequently than annually, including reporting under 2 CFR 3474.10 and 2 CFR 200.207 (Specific conditions) and 2 CFR 3474.10 (Clarification regarding 2 CFR 200.207) or 2 CFR 200.302 Financial management and 200.303 Internal controls.

(c)(1) A State must submit these reports in the manner prescribed by the Secretary, including submitting any of these reports electronically and at the quality level specified in the data collection instrument.

(2) Failure by a State to submit reports in accordance with paragraph (c)(1) of this section constitutes a failure, under section 454 of the General Education Provisions Act, 20 U.S.C. 1234c, to comply substantially with a requirement of law applicable to the funds made available under that program.

(3) For reports that the Secretary requires to be submitted in an electronic manner, the Secretary may establish a transition period of up to two years following the date the State otherwise would be required to report the data in the electronic manner, during which time a State will not be required to comply with that specific electronic submission requirement, if the State submits to the Secretary—

(i) Evidence satisfactory to the Secretary that the State will not be able to comply with the electronic submission requirement specified by the Secretary in the data collection instrument on the first date the State otherwise would be required to report the data electronically;

(ii) Information requested in the report through an alternative means that is acceptable to the Secretary, such as through an alternative electronic means; and

(iii) A plan for submitting the reports in the required electronic manner and at the level of quality specified in the data collection instrument no later than the date two years after the first date the State otherwise would be required to report the data in the electronic manner prescribed by the Secretary.

(Authority: 20 U.S.C. 1221e–3, 1231a, and 3474)

[72 FR 3702, Jan. 25, 2007, as amended at 79 FR 76094, Dec. 19, 2014]

§ 76.722 Subgrantee reporting requirements.

A State may require a subgrantee to submit reports in a manner and format that assists the State in complying with the requirements under 34 CFR 76.720 and in carrying out other responsibilities under the program.

(Authority: 20 U.S.C. 1221e–3, 1231a, and 3474)

[72 FR 3703, Jan. 25, 2007]

RECORDS

§ 76.730 Records related to grant funds.

A State and a subgrantee shall keep records that fully show:

(a) The amount of funds under the grant or subgrant;

(b) How the State or subgrantee uses the funds;

(c) The total cost of the project;

(d) The share of that cost provided from other sources; and

(e) Other records to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1232f)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

§ 76.731 Records related to compliance.

A State and a subgrantee shall keep records to show its compliance with program requirements.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

PRIVACY

§ 76.740 Protection of and access to student records; student rights in research, experimental programs, and testing.

(a) Most records on present or past students are subject to the requirements of section 438 of GEPA and its implementing regulations under 34 CFR part 99. (Section 438 is the Family Educational Rights and Privacy Act of 1974.)

(b) Under most programs administered by the Secretary, research, experimentation, and testing are subject to the requirements of section 439 of GEPA and its implementing regulations at 34 CFR part 98.

(Authority: 20 U.S.C. 1221e-3, 1232g, 1232h, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30342, July 8, 1992]

USE OF FUNDS BY STATES AND SUBGRANTEES

§ 76.760 More than one program may assist a single activity.

A State or a subgrantee may use funds under more than one program to support different parts of the same project if the State or subgrantee meets the following conditions:

(a) The State or subgrantee complies with the requirements of each program with respect to the part of the project assisted with funds under that program.

(b) The State or subgrantee has an accounting system that permits identification of the costs paid for under each program.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

§ 76.761 Federal funds may pay 100 percent of cost.

A State or a subgrantee may use program funds to pay up to 100 percent of the cost of a project if:

(a) The State or subgrantee is not required to match the funds; and

(b) The project can be assisted under the authorizing statute and implementing regulations for the program.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

STATE ADMINISTRATIVE RESPONSIBILITIES

§ 76.770 A State shall have procedures to ensure compliance.

Each State shall have procedures for reviewing and approving applications for subgrants and amendments to those applications, for providing technical assistance, for evaluating projects, and for performing other administrative responsibilities the State has determined are necessary to ensure compliance with applicable statutes and regulations.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[57 FR 30342, July 8, 1992]

§ 76.783 State educational agency action—subgrantee's opportunity for a hearing.

(a) A subgrantee may request a hearing if it alleges that any of the following actions by the State educational agency violated a State or Federal statute or regulation:

(1) Ordering, in accordance with a final State audit resolution determination, the repayment of misspent or misapplied Federal funds; or

(2) Terminating further assistance for an approved project.

(b) The procedures in § 76.401(d)(2)–(7) apply to any request for a hearing under this section.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in

this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under section 427 or other applicable law.

(Authority: 20 U.S.C. 1231b–2)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980; 57 FR 30342, July 8, 1992]

§ 76.784 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[85 FR 59980, Sept. 23, 2020]

Subpart H—How Does a State or Local Educational Agency Allocate Funds to Charter Schools?

SOURCE: 64 FR 71965, Dec. 22, 1999, unless otherwise noted.

GENERAL

§ 76.785 What is the purpose of this subpart?

The regulations in this subpart implement section 10306 of the Elementary and Secondary Education Act of 1965 (ESEA), which requires States to take measures to ensure that each charter school in the State receives the funds for which it is eligible under a covered program during its first year of operation and during subsequent years in which the charter school expands its enrollment.

(Authority: 20 U.S.C. 8065a)

§ 76.786 What entities are governed by this subpart?

The regulations in this subpart apply to—

(a) State educational agencies (SEAs) and local educational agencies (LEAs) that fund charter schools under a covered program, including SEAs and LEAs located in States that do not participate in the Department's Public Charter Schools Program;

(b) State agencies that are not SEAs, if they are responsible for administering a covered program. State agencies that are not SEAs must comply with the provisions in this subpart that are applicable to SEAs; and

(c) Charter schools that are scheduled to open or significantly expand their enrollment during the academic year and wish to participate in a covered program.

(Authority: 20 U.S.C. 8065a)

§ 76.787 What definitions apply to this subpart?

For purposes of this subpart—

Academic year means the regular school year (as defined by State law, policy, or practice) and for which the State allocates funds under a covered program.

Charter school has the same meaning as provided in title X, part C of the ESEA.

Charter school LEA means a charter school that is treated as a local educational agency for purposes of the applicable covered program.

Covered program means an elementary or secondary education program administered by the Department under which the Secretary allocates funds to States on a formula basis, except that the term does not include a program or portion of a program under which an SEA awards subgrants on a discretionary, noncompetitive basis.

Local educational agency has the same meaning for each covered program as provided in the authorizing statute for the program.

Significant expansion of enrollment means a substantial increase in the number of students attending a charter school due to a significant event that is unlikely to occur on a regular basis, such as the addition of one or more grades or educational programs in major curriculum areas. The term also includes any other expansion of enrollment that the SEA determines to be significant.

(Authority: 20 U.S.C. 8065a)

REPONSIBILITIES FOR NOTICE AND INFORMATION

§ 76.788 What are a charter school LEA's responsibilities under this subpart?

(a) *Notice*. At least 120 days before the date a charter school LEA is scheduled to open or significantly expand its enrollment, the charter school LEA or its authorized public chartering agency must provide its SEA with written notification of that date.

(b) *Information*. (1) In order to receive funds, a charter school LEA must provide to the SEA any available data or information that the SEA may reasonably require to assist the SEA in estimating the amount of funds the charter school LEA may be eligible to receive under a covered program.

(2)(i) Once a charter school LEA has opened or significantly expanded its enrollment, the charter school LEA must provide actual enrollment and eligibility data to the SEA at a time the SEA may reasonably require.

(ii) An SEA is not required to provide funds to a charter school LEA until the charter school LEA provides the SEA with the required actual enrollment and eligibility data.

(c) *Compliance*. Except as provided in § 76.791(a), or the authorizing statute or implementing regulations for the applicable covered program, a charter school LEA must establish its eligibility and comply with all applicable program requirements on the same basis as other LEAs.

(Approved by the Office of Management and Budget under control number 1810–0623)

(Authority: 20 U.S.C. 8065a)

§ 76.789 What are an SEA's responsibilities under this subpart?

(a) *Information*. Upon receiving notice under § 76.788(a) of the date a charter school LEA is scheduled to open or significantly expand its enrollment, an SEA must provide the charter school LEA with timely and meaningful information about each covered program in which the charter school LEA may be eligible to participate, including notice of any upcoming competitions under the program.

(b) *Allocation of Funds*. (1) An SEA must allocate funds under a covered program in accordance with this subpart to any charter school LEA that—

(i) Opens for the first time or significantly expands its enrollment during an academic year for which the State awards funds by formula or through a competition under the program;

(ii) In accordance with § 76.791(a), establishes its eligibility and complies with all applicable program requirements; and

(iii) Meets the requirements of § 76.788(a).

(2) In order to meet the requirements of this subpart, an SEA may allocate funds to, or reserve funds for, an eligible charter school LEA based on reasonable estimates of projected enrollment at the charter school LEA.

(3)(i) The failure of an eligible charter school LEA or its authorized public chartering agency to provide notice to its SEA in accordance with § 76.788(a) relieves the SEA of any obligation to allocate funds to the charter school within five months.

(ii) Except as provided in § 76.792(c), an SEA that receives less than 120 days' actual notice of the date an eligible charter school LEA is scheduled to open or significantly expand its enrollment must allocate funds to the charter school LEA on or before the date the SEA allocates funds to LEAs under the applicable covered program for the succeeding academic year.

(iii) The SEA may provide funds to the charter school LEA from the SEA's allocation under the applicable covered program for the academic year in which the charter school LEA opened or significantly expanded its enrollment, or from the SEA's allocation under the program for the succeeding academic year.

(Approved by the Office of Management and Budget under control number 1810–0623)

(Authority: 20 U.S.C. 8065a)

ALLOCATION OF FUNDS BY STATE EDUCATIONAL AGENCIES

§ 76.791 On what basis does an SEA determine whether a charter school LEA that opens or significantly expands its enrollment is eligible to receive funds under a covered program?

(a) For purposes of this subpart, an SEA must determine whether a charter school LEA is eligible to receive funds under a covered program based on actual enrollment or other eligibility data for the charter school LEA on or after the date the charter school LEA opens or significantly expands its enrollment.

(b) For the year the charter school LEA opens or significantly expands its enrollment, the eligibility determination may not be based on enrollment or eligibility data from a prior year, even if the SEA makes eligibility determinations for other LEAs under the program based on enrollment or eligibility data from a prior year.

(Authority: 20 U.S.C. 8065a)

§ 76.792 How does an SEA allocate funds to eligible charter school LEAs under a covered program in which the SEA awards subgrants on a formula basis?

(a) For each eligible charter school LEA that opens or significantly expands its enrollment on or before November 1 of an academic year, the SEA must implement procedures that ensure that the charter school LEA receives the proportionate amount of funds for which the charter school LEA is eligible under each covered program.

(b) For each eligible charter school LEA that opens or significantly expands its enrollment after November 1 but before February 1 of an academic year, the SEA must implement procedures that ensure that the charter school LEA receives at least a *pro rata* portion of the proportionate amount of funds for which the charter school LEA is eligible under each covered program. The *pro rata* amount must be based on the number of months or days during the academic year the charter school LEA will participate in the program as compared to the total number of months or days in the academic year.

(c) For each eligible charter school LEA that opens or significantly expands its enrollment on or after February 1 of an academic year, the SEA may implement procedures to provide the charter school LEA with a *pro rata* portion of the proportionate amount of funds for which the charter school LEA is eligible under each covered program.

(Authority: 20 U.S.C. 8065a)

§ 76.793 When is an SEA required to allocate funds to a charter school LEA under this subpart?

Except as provided in §§ 76.788(b) and 76.789(b)(3):

(a) For each eligible charter school LEA that opens or significantly expands its enrollment on or before November 1 of an academic year, the SEA must allocate funds to the charter school LEA within five months of the date the charter school LEA opens or significantly expands its enrollment; and

(b)(1) For each eligible charter school LEA that opens or significantly expands its enrollment after November 1, but before February 1 of an academic year, the SEA must allocate funds to the charter school LEA on or before the date the SEA allocates funds to LEAs under the applicable covered program for the succeeding academic year.

(2) The SEA may provide funds to the charter school LEA from the SEA's allocation under the program for the academic year in which the charter school LEA opened or significantly expanded its enrollment, or from the SEA's allocation under the program for the succeeding academic year.

(Authority: 20 U.S.C. 8065a)

§ 76.794 How does an SEA allocate funds to charter school LEAs under a covered program in which the SEA awards subgrants on a discretionary basis?

(a) *Competitive programs.* (1) For covered programs in which the SEA awards subgrants on a competitive basis, the SEA must provide each eligible charter school LEA in the State that is scheduled to open on or before the closing date of any competition under the program a full and fair opportunity to apply to participate in the program.

(2) An SEA is not required to delay the competitive process in order to allow a charter school LEA that has not yet opened or significantly expanded its enrollment to compete for funds under a covered program.

(b) *Noncompetitive discretionary programs*. The requirements in this subpart do not apply to discretionary programs or portions of programs under which the SEA does not award subgrants through a competition.

(Authority: 20 U.S.C. 8065a)

ADJUSTMENTS

§ 76.796 What are the consequences of an SEA allocating more or fewer funds to a charter school LEA under a covered program than the amount for which the charter school LEA is eligible when the charter school LEA actually opens or significantly expands its enrollment?

(a) An SEA that allocates more or fewer funds to a charter school LEA than the amount for which the charter school LEA is eligible, based on actual enrollment or eligibility data when the charter school LEA opens or significantly expands its enrollment, must make appropriate adjustments to the amount of funds allocated to the charter school LEA as well as to other LEAs under the applicable program.

(b) Any adjustments to allocations to charter school LEAs under this subpart must be based on actual enrollment or other eligibility data for the charter school LEA on or after the date the charter school LEA first opens or significantly expands its enrollment, even if allocations or adjustments to allocations to other LEAs in the State are based on enrollment or eligibility data from a prior year.

(Authority: 20 U.S.C. 8065a)

§ 76.797 When is an SEA required to make adjustments to allocations under this subpart?

(a) The SEA must make any necessary adjustments to allocations under a covered program on or before the date the SEA allocates funds to LEAs under the program for the succeeding academic year.

(b) In allocating funds to a charter school LEA based on adjustments made in accordance with paragraph (a) of this section, the SEA may use funds from the SEA's allocation under the applicable covered program for the academic year in which the charter school LEA opened or significantly expanded its enrollment, or from the SEA's allocation under the program for the succeeding academic year.

(Authority: 20 U.S.C. 8065a)

APPLICABILITY OF THIS SUBPART TO LOCAL EDUCATIONAL AGENCIES

§ 76.799 Do the requirements in this subpart apply to LEAs?

(a) Each LEA that is responsible for funding a charter school under a covered program must comply with the requirements in this subpart on the same basis as SEAs are required to comply with the requirements in this subpart.

(b) In applying the requirements in this subpart (except for §§ 76.785, 76.786, and 76.787) to LEAs, references to SEA (or State), charter school LEA, and LEA must be read as references to LEA, charter school, and public school, respectively.

(Authority: 20 U.S.C. 8065a)

Subpart I—What Procedures Does the Secretary Use To Get Compliance?

SOURCE: 45 FR 22517, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980, and further redesignated at 64 FR 71965, Dec. 22, 1999.

§ 76.900 Waiver of regulations prohibited.

(a) No official, agent, or employee of ED may waive any regulation that applies to a Department program unless the regulation specifically provide that it may be waived.

(b) No act or failure to act by an official, agent, or employee of ED can affect the authority of the Secretary to enforce regulations.

(Authority: 43 Dec. Comp. Gen. 31(1963))

§ 76.901 Office of Administrative Law Judges.

(a) The Office of Administrative Law Judges, established under Part E of GEPA, has the following functions:

(1) Recovery of funds hearings under section 452 of GEPA.

(2) Withholding hearings under section 455 of GEPA.

(3) Cease and desist hearings under section 456 of GEPA.

(4) Any other proceeding designated by the Secretary under section 451 of GEPA.

(b) The regulations of the Office of Administrative Law Judges are at 34 CFR part 81.

(Authority: 20 U.S.C. 1234)

[57 FR 30342, July 8, 1992]

§ 76.902 Judicial review.

After a hearing by the Secretary, a State is usually entitled—generally by the statute that required the hearing—to judicial review of the Secretary's decision.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

§ 76.910 Cooperation with audits.

A grantee or subgrantee shall cooperate with the Secretary and the Comptroller General of the United States or any of their authorized representatives in the conduct of audits authorized by Federal law. This cooperation includes access without unreasonable restrictions to records and personnel of the grantee or subgrantee for the purpose of obtaining relevant information.

(Authority: 5 U.S.C. appendix 3, sections 4(a)(1), 4(b)(1)(A), and 6(a)(1); 20 U.S.C. 1221e–3(a)(1), 1232f)

[54 FR 21776, May 19, 1989]

PART 77—DEFINITIONS THAT APPLY TO DEPARTMENT REGULATIONS

77.1 Definitions that apply to all Department programs.
77.2 Incorporation by Reference.

AUTHORITY: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

§ 77.1 Definitions that apply to all Department programs.

(a) [Reserved]

(b) Unless a statute or regulation provides otherwise, the following definitions in 2 CFR part 200 apply to the regulations in subtitles A and B of this title. The section of 2 CFR part 200 that contains the definition is given in parentheses as well as references to the term or terms used in title 34 that are consistent with the term defined in title 2.

Contract (2 CFR 200.22).

Equipment (2 CFR 200.33).

Federal award (2 CFR 200.38) (The terms ''award,'' ''grant,'' and ''subgrant'', as defined in paragraph (c) of this section, have the same meaning, depending on the context, as ''Federal award'' in 2 CFR 200.38.).

Period of performance (2 CFR 200.77) (For discretionary grants, ED uses the term ''project period,'' as defined in paragraph (c) of this section, instead of ''period of performance'' to describe the period during which funds can be obligated.).

Personal property (2 CFR 200.78).

Real property (2 CFR 200.85).

Recipient (2 CFR 200.86).

Subaward (2 CFR 200.92) (The term ''subgrant,'' as defined in paragraph (c) of this section, has the same meaning as ''subaward'' in 2 CFR 200.92).

Supplies (2 CFR 200.94).

(c) Unless a statute or regulation provides otherwise, the following definitions also apply to the regulations in subtitles A and B of this title:

Acquisition means taking ownership of property, receiving the property as a gift, entering into a lease-purchase arrangement, or leasing the property. The term includes processing, delivery, and installation of property.

Ambitious means promoting continued, meaningful improvement for program participants or for other individuals or entities affected by the grant, or representing a significant advancement in the field of education research, practices, or methodologies. When used to describe a performance target, whether a performance target is ambitious depends upon the context of the relevant performance measure and the baseline for that measure.

Applicant means a party requesting a grant or subgrant under a program of the Department.

Application means a request for a grant or subgrant under a program of the Department.

Award has the same meaning as the definition of ''Grant'' in this paragraph (c).

Baseline means the starting point from which performance is measured and targets are set.

Budget means that recipient's financial plan for carrying out the project or program.

Budget period means an interval of time into which a project period is divided for budgetary purposes.

Demonstrates a rationale means a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

Department means the U.S. Department of Education.

Direct grant program means any grant program of the Department other than a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States.

Cross Reference: See 34 CFR 75.1(b).

Director of the Institute of Musuem Services means the Director of the Institute of Museum Services or an officer or employee of the Institute of Museum Services acting for the Director under a delegation of authority.

Director of the National Institute of Education means the Director of the National Institute of Education or an officer or employee of the National Institute of Education acting for the Director under a delegation of authority.

ED means the U.S. Department of Education.

EDGAR means the Education Department General Administrative Regulations (34 CFR parts 75, 76, 77, 79, 81, 82, 84, 86, 97, 98, and 99).

Elementary school means a day or residential school that provides elementary education, as determined under State law.

Evidence-based means the proposed project component is supported by one or more of strong evidence, moderate evidence, promising evidence, or evidence that demonstrates a rationale.

Experimental study means a study that is designed to compare outcomes between two groups of individuals (such as students) that are otherwise equivalent except for their assignment to either a treatment group receiving a project component or a control group that does not. Randomized controlled trials, regression discontinuity design studies, and single-case design studies are the specific types of experimental studies that, depending on their design and implementation (*e.g.*, sample attrition in randomized controlled trials and regression discontinuity design studies), can meet What Works Clearinghouse (WWC) standards without reservations as described in the WWC Handbooks:

(i) A randomized controlled trial employs random assignment of, for example, students, teachers, classrooms, or schools to receive the project component being evaluated (the treatment group) or not to receive the project component (the control group).

(ii) A regression discontinuity design study assigns the project component being evaluated using a measured variable (*e.g.*, assigning students reading below a cutoff score to tutoring or developmental education classes) and controls for that variable in the analysis of outcomes.

(iii) A single-case design study uses observations of a single case (*e.g.*, a student eligible for a behavioral intervention) over time in the absence and presence of a controlled treatment manipulation to determine whether the outcome is systematically related to the treatment.

Facilities means one or more structures in one or more locations.

Fiscal year means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30.

GEPA means The General Education Provisions Act.

Grant means financial assistance, including cooperative agreements, that provides support or stimulation to accomplish a public purpose. 2 CFR part 200, as adopted in 2 CFR part 3474, uses the broader, undefined term ''Award'' to cover grants, subgrants, and other agreements in the form of money or property, in lieu of money, by the Federal Government to an eligible recipient. The term does not include—

(i) Technical assistance, which provides services instead of money;

(ii) Other assistance in the form of loans, loan guarantees, interest subsidies, or insurance;

(iii) Direct payments of any kind to individuals; and

(iv) Contracts that are required to be entered into and administered under procurement laws and regulations.

Grantee means the legal entity to which a grant is awarded and that is accountable to the Federal Government for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award notice (GAN). For example, a GAN may name as the grantee one school or campus of a university. In this case, the granting agency usually intends, or actually intends, that the named component assume primary or sole responsibility for administering the grant-assisted project or program. Nevertheless, the naming of a component of a legal entity as the grantee in a grant award document shall not be construed as relieving the whole legal entity from accountability to the Federal Government for the use of the funds provided. (This definition is not intended to affect the eligibility provision of grant programs in which eligibility is limited to organizations that may be only components of a legal entity.) The term ''grantee'' does not include any secondary recipients, such as subgrantees and contractors, that may receive funds from a grantee pursuant to a subgrant or contract.

Grant period means the period for which funds have been awarded.

Local educational agency means:

(i) A public board of education or other public authority legally constituted within a State for either administrative control of or direction of, or to perform service functions for, public elementary or secondary schools in:

(A) A city, county, township, school district, or other political subdivision of a State; or

(B) Such combination of school districts or counties a State recognizes as an administrative agency for its public elementary or secondary schools; or

(ii) Any other public institution or agency that has administrative control and direction of a public elementary or secondary school.

(iii) As used in 34 CFR parts 400, 408, 525, 526 and 527 (vocational education programs), the term also includes any other public institution or agency that has administrative control and direction of a vocational education program.

Logic model (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.*, the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

Minor remodeling means minor alterations in a previously completed building. The term also includes the extension of utility lines, such as water and electricity, from points beyond the confines of the space in which the minor remodeling is undertaken but within the confines of the previously completed building. The term does not include building construction, stuctural alterations to buildings, building maintenance, or repairs.

Moderate evidence means that there is evidence of effectiveness of a key project component in improving a relevant outcome for a sample that overlaps with the populations or settings proposed to receive that component, based on a relevant finding from one of the following:

(i) A practice guide prepared by the WWC using version 2.1, 3.0, 4.0, or 4.1 of the WWC Handbooks reporting a ''strong evidence base'' or ''moderate evidence base'' for the corresponding practice guide recommendation;

(ii) An intervention report prepared by the WWC using version 2.1, 3.0, 4.0, or 4.1 of the WWC Handbooks reporting a ''positive effect'' or ''potentially positive effect'' on a relevant outcome based on a ''medium to large'' extent of evidence, with no reporting of a ''negative effect'' or ''potentially negative effect'' on a relevant outcome; or

(iii) A single experimental study or quasi-experimental design study reviewed and reported by the WWC using

version 2.1, 3.0, 4.0, or 4.1 of the WWC Handbooks, or otherwise assessed by the Department using version 4.1 of the WWC Handbooks, as appropriate, and that—

(A) Meets WWC standards with or without reservations;

(B) Includes at least one statistically significant and positive (*i.e.*, favorable) effect on a relevant outcome;

(C) Includes no overriding statistically significant and negative effects on relevant outcomes reported in the study or in a corresponding WWC intervention report prepared under version 2.1, 3.0, 4.0, or 4.1 of the WWC Handbooks; and

(D) Is based on a sample from more than one site (*e.g.*, State, county, city, school district, or postsecondary campus) and includes at least 350 students or other individuals across sites. Multiple studies of the same project component that each meet requirements in paragraphs (iii)(A), (B), and (C) of this definition may together satisfy the requirement in this paragraph (iii)(D).

National level describes the level of scope or effectiveness of a process, product, strategy, or practice that is able to be effective in a wide variety of communities, including rural and urban areas, as well as with different groups (e.g., economically disadvantaged, racial and ethnic groups, migrant populations, individuals with disabilities, English learners, and individuals of each gender).

Nonprofit, as applied to an agency, organization, or institution, means that it is owned and operated by one or more corporations or associations whose net earnings do not benefit, and cannot lawfully benefit, any private shareholder or entity.

Nonpublic, as applied to an agency, organization, or institution, means that the agency, organization, or institution is nonprofit and is not under Federal or public supervision or control.

Performance measure means any quantitative indicator, statistic, or metric used to gauge program or project performance.

Performance target means a level of performance that an applicant would seek to meet during the course of a project or as a result of a project.

Preschool means the educational level from a child's birth to the time at which the State provides elementary education.

Private, as applied to an agency, organization, or institution, means that it is not under Federal or public supervision or control.

Project means the activity described in an application.

Project component means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.*, training teachers on instructional practices for English learners and follow-on coaching for these teachers).

Project period means the period established in the award document during which Federal sponsorship begins and ends (See, 2 CFR 200.77 Period of performance).

Promising evidence means that there is evidence of the effectiveness of a key project component in improving a relevant outcome, based on a relevant finding from one of the following:

(i) A practice guide prepared by WWC reporting a ''strong evidence base'' or ''moderate evidence base'' for the corresponding practice guide recommendation;

(ii) An intervention report prepared by the WWC reporting a ''positive effect'' or ''potentially positive effect'' on a relevant outcome with no reporting of a ''negative effect'' or ''potentially negative effect'' on a relevant outcome; or

(iii) A single study assessed by the Department, as appropriate, that—

(A) Is an experimental study, a quasi-experimental design study, or a well-designed and well-implemented correlational study with statistical controls for selection bias (*e.g.*, a study using regression methods to account for differences between a treatment group and a comparison group); and

(B) Includes at least one statistically significant and positive (*i.e.*, favorable) effect on a relevant outcome.

Public, as applied to an agency, organization, or institution, means that the agency, organization, or institution is under the administrative supervision

or control of a government other than the Federal Government.

Quasi-experimental design study means a study using a design that attempts to approximate an experimental study by identifying a comparison group that is similar to the treatment group in important respects. This type of study, depending on design and implementation (*e.g.*, establishment of baseline equivalence of the groups being compared), can meet WWC standards with reservations, but cannot meet WWC standards without reservations, as described in the WWC Handbooks.

Regional level describes the level of scope or effectiveness of a process, product, strategy, or practice that is able to serve a variety of communities within a State or multiple States, including rural and urban areas, as well as with different groups (e.g., economically disadvantaged, racial and ethnic groups, migrant populations, individuals with disabilities, English learners, and individuals of each gender). For an LEA-based project, to be considered a regional-level project, a process, product, strategy, or practice must serve students in more than one LEA, unless the process, product, strategy, or practice is implemented in a State in which the State educational agency is the sole educational agency for all schools.

Relevant outcome means the student outcome(s) or other outcome(s) the key project component is designed to improve, consistent with the specific goals of the program.

Secondary school means a day or residential school that provides secondary education as determined under State law. In the absence of State law, the Secretary may determine, with respect to that State, whether the term includes education beyond the twelfth grade.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Service function, with respect to a local educational agency:

(i) Means an educational service that is performed by a legal entity—such as an intermediate agency:

(A)(*1*) Whose jurisdiction does not extend to the whole State; and

(*2*) That is authorized to provide consultative, advisory, or educational services to public elementary or secondary schools; or

(B) That has regulatory functions over agencies having administrative control or direction of public elementary or secondary schools.

(ii) The term does not include a service that is performed by a cultural or educational resource.

State means any of the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

State educational agency means the State board of education or other agency or officer primarily responsible for the supervision of public elementary and secondary schools in a State. In the absence of this officer or agency, it is an officer or agency designated by the Governor or State law.

Strong evidence means that there is evidence of the effectiveness of a key project component in improving a relevant outcome for a sample that overlaps with the populations and settings proposed to receive that component, based on a relevant finding from one of the following:

(i) A practice guide prepared by the WWC using version 2.1, 3.0, 4.0, or 4.1 of the WWC Handbooks reporting a ''strong evidence base'' for the corresponding practice guide recommendation;

(ii) An intervention report prepared by the WWC using version 2.1, 3.0, 4.0, or 4.1 of the WWC Handbooks reporting a ''positive effect'' on a relevant outcome based on a ''medium to large'' extent of evidence, with no reporting of a ''negative effect'' or ''potentially negative effect'' on a relevant outcome; or

(iii) A single experimental study reviewed and reported by the WWC using version 2.1, 3.0, 4.0, or 4.1 of the WWC Handbooks, or otherwise assessed by the Department using version 4.1 of the WWC Handbooks, as appropriate, and that—

(A) Meets WWC standards without reservations;

(B) Includes at least one statistically significant and positive (*i.e.*, favorable) effect on a relevant outcome;

(C) Includes no overriding statistically significant and negative effects on relevant outcomes reported in the study or in a corresponding WWC intervention report prepared under version 2.1, 3.0, 4.0, or 4.1 of the WWC Handbooks; and

(D) Is based on a sample from more than one site (*e.g.*, State, county, city, school district, or postsecondary campus) and includes at least 350 students or other individuals across sites. Multiple studies of the same project component that each meet requirements in paragraphs (iii)(A), (B), and (C) of this definition may together satisfy the requirement in this paragraph (iii)(D).

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual or any other form of legal agreement, but does not include procurement purchases, nor does it include any form of assistance that is excluded from the definition of ''grant or award'' in this part (See 2 CFR 200.92, ''Subaward'').

Subgrantee means the government or other legal entity to which a subgrant is awarded and that is accountable to the grantee for the use of the funds provided.

What Works Clearinghouse (WWC) Handbooks (WWC Handbooks) means the standards and procedures set forth in the WWC Standards Handbook, Versions 4.0 or 4.1, and WWC Procedures Handbook, Versions 4.0 or 4.1, or in the WWC Procedures and Standards Handbook, Version 3.0 or Version 2.1 (all incorporated by reference, see §77.2). Study findings eligible for review under WWC standards can meet WWC standards without reservations, meet WWC standards with reservations, or not meet WWC standards. WWC practice guides and intervention reports include findings from systematic reviews of evidence as described in the WWC Handbooks documentation.

Work of art means an item that is incorporated into facilities primarily because of its aesthetic value.

[45 FR 22529, Apr. 3, 1980, as amended at 45 FR 37442, June 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 54 FR 21776, May 19, 1989; 57 FR 30342, July 8, 1992; 59 FR 34739, July 6, 1994; 64 FR 50392, Sept. 16, 1999; 77 FR 18679, Mar. 28, 2012; 78 FR 49355, Aug. 13, 2013; 79 FR 76094, Dec. 19, 2014; 80 FR 2608, Jan. 20, 2015; 82 FR 35449, July 31, 2017; 83 FR 18421, Apr. 27, 2018; 85 FR 62611, Oct. 5, 2020]

§77.2 Incorporation by Reference.

(a) Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at Institute of Education Sciences, National Center for Education Evaluation and Regional Assistance by email at *Contact.WWC@ed.gov*, and is available from the sources listed in paragraph (b) of this section. It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov*, or go to *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

(b) Institute of Education Sciences, 550 12th Street SW, Washington, DC 20202, (202) 245–6940, *http://ies.ed.gov/ncee/wwc/Handbooks*.

(1) What Works Clearinghouse Standards Handbook, Version 4.1, January 2020, IBR approved for §77.1.

(2) What Works Clearinghouse Procedures Handbook, Version 4.1, January 2020, IBR approved for §77.1.

(3) What Works Clearinghouse Standards Handbook, Version 4.0, October 2017, IBR approved for §77.1.

(4) What Works Clearinghouse Procedures Handbook, Version 4.0, October 2017, IBR approved for §77.1.

(5) What Works Clearinghouse Procedures and Standards Handbook, Version 3.0, March 2014, IBR approved for §77.1.

(6) What Works Clearinghouse Procedures and Standards Handbook,

Version 2.1, September 2011, IBR approved for § 77.1.

[82 FR 35450, July 31, 2017, as amended at 85 FR 62612, Oct. 5, 2020]

PART 79—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF EDUCATION PROGRAMS AND ACTIVITIES

Sec.

79.1 What is the purpose of these regulations?
79.2 What definitions apply to these regulations?
79.3 What programs and activities of the Department are subject to these regulations?
79.4 What are the Secretary's general responsibilities under the Order?
79.5 What is the Secretary's obligation with respect to Federal interagency coordinations?
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79.7 How does the Secretary communicate with State and local officials concerning the Department's programs and activities?
79.8 How does the Secretary provide States an opportunity to comment on proposed Federal financial assistance?
79.9 How does the Secretary receive and respond to comments?
79.10 How does the Secretary make efforts to accommodate intergovernmental concerns?
79.11 What are the Secretary's obligations in interstate situations?
79.12 How may a State simplify, consolidate, or substitute federally required State plans?
79.13 [Reserved]

AUTHORITY: 31 U.S.C. 6506; 42 U.S.C. 3334; and E.O. 12372, unless otherwise noted.

SOURCE: 48 FR 29166, June 24, 1983, unless otherwise noted.

§ 79.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of Section 401 of the Intergovernmental Cooperation Act of 1968 and Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on state processes and on state, areawide, regional, and local coordination for review of proposed federal financial assistance.

(c) These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

(Authority: E.O. 12372)

§ 79.2 What definitions apply to these regulations?

Department means the U.S. Department of Education.

Order means Executive Order 12372, issued July 14, 1982, amended April 8, 1983, and titled ''Intergovernmental Review of Federal Programs.''

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

State means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

(Authority: E.O. 12372)

§ 79.3 What programs and activities of the Department are subject to these regulations?

(a) The Secretary publishes in the FEDERAL REGISTER a list of the Department's programs and activities that are subject to these regulations and identifies which of these are subject to the requirements of section 204 of the Demonstration Cities and Metropolitan Development Act.

(b) If a program or activity of the Department that provides Federal financial assistance does not have implementing regulations, the regulations in this part apply to that program or activity.

(c) The following programs and activities are excluded from coverage under this part:

(1) Proposed legislation.

(2) Regulation and budget formulation.

(3) National security matters.

(4) Procurement.

(5) Direct payments to individuals.

(6) Financial transfers for which the Department has no funding discretion or direct authority to approve specific sites or projects (e.g., block grants under Chapter 2 of the Education Consolidation and Improvement Act of 1981).

(7) Research and development national in scope.

(8) Assistance to federally recognized Indian tribes.

(d) In addition to the programs and activities excluded in paragraph (c) of this section, the Secretary may only exclude a Federal financial assistance program or activity from coverage under this part if the program or activity does not directly affect State or local governments.

(Authority: E.O. 12372)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20824, June 9, 1986]

§ 79.4 What are the Secretary's general responsibilities under the Order?

(a) The Secretary provides opportunities for consultation by elected officials of those state and local governments that would provide the nonfederal funds for, or that would be directly affected by, proposed federal financial assistance from the Department.

(b) If a state adopts a process under the Order to review and coordinate proposed federal financial assistance, the Secretary, to the extent permitted by law:

(1) Uses the state process to determine official views of state and local elected officials;

(2) Communicates with state and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Makes efforts to accommodate state and local elected official's concerns with proposed federal financial assistance that are communicated through the state process;

(4) Allows the states to simplify and consolidate existing federally required state plan submissions;

(5) Where state planning and budgeting systems are sufficient and where permitted by law, encourages the substitution of state plans for federally required state plans;

(6) Seeks the coordination of views of affected state and local elected officials in one state with those of another state when proposed federal financial assistance has an impact on interstate metropolitan urban centers or other interstate areas; and

(7) Supports state and local governments by discouraging the reauthorization or creation of any planning organization which is federally funded, which has a limited purpose, and which is not adequately representative of, or accountable to, state or local elected officials.

(Authority: E.O. 12372, Sec. 2)

§ 79.5 What is the Secretary's obligation with respect to Federal interagency coordination?

The Secretary, to the maximum extent practicable, consults with and seeks advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

(Authority: E.O. 12372)

§ 79.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A state may select any program or activity published in the FEDERAL REGISTER in accordance with § 79.3 for intergovernmental review under these regulations. Each state, before selecting programs and activities, shall consult with local elected officials.

(b) Each state that adopts a process shall notify the Secretary of the Department's programs and activities selected for that process.

(c) A state may notify the Secretary of changes in its selections at any time. For each change, the state shall submit to the Secretary an assurance that the state has consulted with local elected officials regarding the change. The Department may establish deadlines by which states are required to

inform the Secretary of changes in their program selections.

(d) The Secretary uses a state's process as soon as feasible, depending on individual programs and activities, after the Secretary is notified of its selections.

(Authority: E.O. 12372, sec. 2)

§ 79.7 How does the Secretary communicate with State and local officials concerning the Department's programs and activities?

(a) [Reserved]

(b)(1) The Secretary provides notice to directly affected state, areawide, regional, and local entities in a state of proposed federal financial assistance if:

(i) The state has not adopted a process under the Order; or

(ii) The assistance involves a program or activity not selected for the state process.

(2) This notice may be made by publication in the FEDERAL REGISTER or other means which the Secretary determine appropriate.

(Authority: E.O. 12372, Sec. 2)

§ 79.8 How does the Secretary provide States an opportunity to comment on proposed Federal financial assistance?

(a) Except in unusual circumstances, the Secretary gives State processes or directly affected State, areawide, regional, and local officials and entities—

(1) At least 30 days to comment on proposed Federal financial assistance in the form of noncompeting continuation awards; and

(2) At least 60 days to comment on proposed Federal financial assistance other than noncompeting continuation awards.

(b) The Secretary establishes a date for mailing or hand-delivering comments under paragraph (a) of this section using one of the following two procedures:

(1) If the comments relate to continuation award applications, the Secretary notifies each applicant and each State Single Point of Contact (SPOC) of the date by which SPOC comments should be submitted.

(2) If the comments relate to applications for new grants, the Secretary establishes the date in a notice published in the FEDERAL REGISTER.

(c) This section also applies to comments in cases in which the review, coordination, and communication with the Department have been delegated.

(d) Applicants for programs and activities subject to Section 204 of the Demonstration Cities and Metropolitan Act shall allow areawide agencies a 60-day opportunity for review and comment.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20825, June 9, 1986]

§ 79.9 How does the Secretary receive and respond to comments?

(a) The Secretary follows the procedure in § 79.10 if:

(1) A state office or official is designated to act as a single point of contact between a state process and all federal agencies, and

(2) That office or official transmits a State process recommendation, and identifies it as such, for a program selected under § 79.6.

(b)(1) The single point of contact is not obligated to transmit comments from state, areawide, regional, or local officials and entities if there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, areawide, regional, and local officials and entities may submit comments to the Department.

(d) If a program or activity is not selected for a state process, state, areawide, regional, and local officials and entities may submit comments to the Department. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the Department by the single point of contact, the Secretary follows the procedures of § 79.10.

(e) The Secretary considers comments which do not constitute a state process recommendation submitted under these regulations and for which

the Secretary is not required to apply the procedures of § 79.10 of this part, if those comments are provided by a single point of contact, or directly to the Department by a commenting party.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20825, June 9, 1986]

§ 79.10 How does the Secretary make efforts to accommodate intergovernmental concerns?

(a) If a state process provides a state process recommendation to the Department through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with a written explanation of the decision in such form as the Secretary deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the single point of contact that:

(1) The Department will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of the notification.

(Authority: E.O. 12372, Sec. 2)

§ 79.11 What are the Secretary's obligations in interstate situations?

(a) The Secretary is responsible for:

(1) Identifying proposed federal financial assistance that has an impact on interstate areas;

(2) Notifying appropriate officials and entities in states which have adopted a process and which select the Department's program or activity.

(3) Making efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select the Department's program or activity;

(4) Responding under § 79.10 if the Secretary receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Department have been delegated.

(b) In an interstate situation subject to this section, the Secretary uses the procedures in § 79.10 if a state process provides a state process recommendation to the Department through a single point of contact.

(Authority: E.O. 12372, Sec. 2(e))

§ 79.12 How may a State simplify, consolidate, or substitute federally required State plans?

(a) As used in this section:

(1) *Simplify* means that a state may develop its own format, choose its own submission date, and select the planning period for a state plan.

(2) *Consolidate* means that a state may meet statutory and regulatory requirements by combining two or more plans into one document and that the state can select the format, submission date, and planning period for the consolidated plan.

(3) *Substitute* means that a state may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a state may decide to try to simplify, consolidate, or substitute federally required state plans without prior approval by the Secretary.

(c) The Secretary reviews each state plan that a state has simplified, consolidated, or substituted and accepts the plan only if its contents meet federal requirements.

(Authority: E.O. 12372, sec. 2)

§ 79.13 [Reserved]

PART 80 [RESERVED]

PART 81—GENERAL EDUCATION PROVISIONS ACT—ENFORCEMENT

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APPENDIX TO PART 81—ILLUSTRATIONS OF PROPORTIONALITY

AUTHORITY: 20 U.S.C. 1221e–3, 1234–1234i, and 3474(a), unless otherwise noted.

SOURCE: 54 FR 19512, May 5, 1989, unless otherwise noted.

Subpart A—General Provisions

§ 81.1 Purpose.

The regulations in this part govern the enforcement of legal requirements under applicable programs administered by the Department of Education and implement Part E of the General Education Provisions Act (GEPA).

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

§ 81.2 Definitions.

The following definitions apply to the terms used in this part:

Administrative Law Judge (ALJ) means a judge appointed by the Secretary in accordance with section 451 (b) and (c) of GEPA.

Applicable program means any program for which the Secretary of Education has administrative responsibility, except a program authorized by—

(a) The Higher Education Act of 1965, as amended;

(b) The Act of September 30, 1950 (Pub. L. 874, 81st Congress), as amended; or

(c) The Act of September 23, 1950 (Pub. L. 815, 81st Congress), as amended.

Department means the United States Department of Education.

Disallowance decision means the decision of an authorized Departmental official that a recipient must return funds because it made an expenditure of funds that was not allowable or otherwise failed to discharge its obligation to account properly for funds. Such a decision, referred to as a ''preliminary departmental decision'' in section 452 of GEPA, is subject to review by the Office of Administrative Law Judges.

OES means the OHA Electronic System or any successor system designated by the Department.

Party means either of the following:

(a) A recipient that appeals a decision.

(b) An authorized Departmental official who issues a decision that is appealed.

Recipient means the recipient of a grant or cooperative agreement under an applicable program.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting

for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1221e–3, 1234 (b), (c), and (f)(1), 1234a(a)(1), 1234i, and 3474(a))

[54 FR 19512, May 5, 1989, as amended at 58 FR 43473, Aug. 16, 1993; 86 FR 52832, Sept. 23, 2021]

§81.3 Jurisdiction of the Office of Administrative Law Judges.

(a) The Office of Administrative Law Judges (OALJ) established under section 451(a) of GEPA has jurisdiction to conduct the following proceedings concerning an applicable program:

(1) Hearings for recovery of funds.

(2) Withholding hearings.

(3) Cease and desist hearings.

(b) The OALJ also has jurisdiction to conduct other proceedings designated by the Secretary. If a proceeding or class of proceedings is so designated, the Department publishes a notice of the designation in the FEDERAL REGISTER.

(Authority: 5 U.S.C. 554, 20 U.S.C. 1234(a))

§81.4 Membership and assignment to cases.

(a) The Secretary appoints Administrative Law Judges as members of the OALJ.

(b) The Secretary appoints one of the members of the OALJ to be the chief judge. The chief judge is responsible for the efficient and effective administration of the OALJ.

(c) The chief judge assigns an ALJ to each case or class of cases within the jurisdiction of the OALJ.

(Authority: 20 U.S.C. 1221e–3, 1234 (b) and (c), and 3474(a))

§81.5 Authority and responsibility of an Administrative Law Judge.

(a) An ALJ assigned to a case conducts a hearing on the record. The ALJ regulates the course of the proceedings and the conduct of the parties to ensure a fair, expeditious, and economical resolution of the case in accordance with applicable law.

(b) An ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(c) An ALJ is disqualified in any case in which the ALJ has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or the party's attorney as to make it improper for the ALJ to be assigned to the case.

(d)(1) An ALJ may disqualify himself or herself at any time on the basis of the standards in paragraph (c) of this section.

(2) A party may file a motion to disqualify an ALJ under the standards in paragraph (c) of this section. A motion to disqualify must be accompanied by an affidavit that meets the requirements of 5 U.S.C. 556(b). Upon the filing of such a motion and affidavit, the ALJ decides the disqualification matter before proceeding further with the case.

(Authority: 5 U.S.C. 556(b); 20 U.S.C. 1221e–3, 1234 (d), (f)(1) and (g)(1), and 3474(a))

§81.6 Hearing on the record.

(a) A hearing on the record is a process for the orderly presentation of evidence and arguments by the parties.

(b) Except as otherwise provided in this part or in a notice of designation under §81.3(b), an ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless—

(1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or

(2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.

(c) At a party's request, the ALJ shall confer with the parties in person or by conference telephone call before determining whether an evidentiary hearing or an oral argument is needed.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e–3, 1234(f)(1), and 3474)

§81.7 Non-party participation.

(a) A person or organization, other than a party, that wishes to participate in a case shall file an application to participate with the ALJ assigned to the case. The application must—

(1) Identify the case in which participation is sought;

(2) State how the applicant's interest relates to the case;

(3) State how the applicant's participation would aid in the disposition of the case; and

(4) State how the applicant seeks to participate.

(b) The ALJ may permit an applicant to participate if the ALJ determines that the applicant's participation—

(1) Will aid in the disposition of the case;

(2) Will not unduly delay the proceedings; and

(3) Will not prejudice the adjudication of the parties' rights.

(c) If the ALJ permits an applicant to participate, the ALJ permits the applicant to file briefs.

(d)(1) In addition to the participation described in paragraph (c) of this section, the ALJ may permit the applicant to participate in any or all of the following ways:

(i) Submit documentary evidence.

(ii) Participate in an evidentiary hearing afforded the parties.

(iii) Participate in an oral argument afforded the parties.

(2) The ALJ may place appropriate limits on an applicant's participation to ensure the efficient conduct of the proceedings.

(e) A non-party participant shall comply with the requirements for parties in § 81.11 and § 81.12.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

§ 81.8 Representation.

A party to, or other participant in, a case may be represented by counsel.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

§ 81.9 Location of proceedings.

(a) An ALJ may hold conferences of the parties in person or by conference telephone call.

(b) Any conference, hearing, argument, or other proceeding at which the parties are required to appear in person is held in the Washington, DC metropolitan area unless the ALJ determines that the convenience and necessity of the parties or their representatives requires that it be held elsewhere.

(Authority: 5 U.S.C. 554(b); 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

§ 81.10 Ex parte communications.

A party to, or other participant in, a case may not communicate with an ALJ on any fact in issue in the case or on any matter relevant to the merits of the case unless the parties are given notice and an opportunity to participate.

(Authority: 5 U.S.C. 554(d)(1), 557(d)(1)(A); 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

§ 81.11 Motions.

(a) To obtain an order or a ruling from an ALJ, a party shall make a motion to the ALJ.

(b) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(c) Parties must file motions with the ALJ, and serve them upon the other party, as provided under § 81.12.

(d) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(e) The date of service of a motion is determined by the standards for determining a filing date in § 81.12(d).

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

[54 FR 19512, May 5, 1989, as amended at 57 FR 56795, Nov. 30, 1992; 86 FR 52832, Sept. 23, 2021]

§ 81.12 Filing requirements.

(a) *Method of filing.* (1) Any written submission to an ALJ or the OALJ under this part, including pleadings, petitions, and motions, must be filed by submission to OES unless a party shows the ALJ good cause why its written submission cannot be filed electronically. A party filing electronically is responsible for ensuring that a complete and legible document was successfully submitted in a format for electronic filing permitted under OHA procedures.

(2) If the ALJ permits a party to file a written submission in paper format, the filing party must file the written submission with the ALJ or the OALJ by hand-delivery or regular mail.

(b) *Filing date.* (1) The filing date for a written submission to an ALJ or the OALJ is the date the document is—

(i) Submitted to OES; or

(ii) Hand-delivered or mailed, if the ALJ has permitted the written submission to be filed in paper format.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next business day.

(c) *Service to other parties.* (1) The filing of a written submission to OES constitutes service on other parties.

(2) If a party is permitted by the ALJ to file a written submission in paper format, the party must serve a copy of the written submission on the other party on the filing date by hand-delivery or regular mail. Any such written submission to the ALJ or OALJ must be accompanied by a statement certifying that the material was served on the other party on the filing date.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

[86 FR 52832, Sept. 23, 2021]

§81.13 Mediation.

(a) Voluntary mediation is available for proceedings that are pending before the OALJ.

(b) A mediator must be independent of, and agreed to by, the parties to the case.

(c) A party may request mediation by filing a motion with the ALJ assigned to the case. The OALJ arranges for a mediator if the parties to the case agree to mediation.

(d) A party may terminate mediation at any time. Mediation is limited to 120 days unless the mediator informs the ALJ that—

(1) The parties are likely to resolve some or all of the dispute; and

(2) An extension of time will facilitate an agreement.

(e) The ALJ stays the proceedings during mediation.

(f)(1) Evidence of conduct or statements made during mediation is not admissible in any proceeding under this part. However, evidence that is otherwise discoverable may not be excluded merely because it was presented during mediation.

(2) A mediator may not disclose, in any proceeding under this part, information acquired as a part of his or her official mediation duties that relates to any fact in issue in the case or any matter relevant to the merits of the case.

(Authority: 20 U.S.C. 1221e–3, 1234 (f)(1) and (h), and 3474(a))

§81.14 Settlement negotiations.

(a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations, or for approval of a settlement agreement, the ALJ may grant a stay of the proceedings upon a finding of good cause.

(b) Evidence of conduct or statements made during settlement negotiations is not admissible in any proceeding under this part. However, evidence that is otherwise discoverable may not be excluded merely because it was presented during settlement negotiations.

(c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 554(c)(1), 1221e–3, 1234(f)(1), and 3474(a))

[54 FR 19512, May 5, 1989, as amended at 58 FR 43473, Aug. 16, 1993]

§81.15 Evidence.

(a) The Federal Rules of Evidence do not apply to proceedings under this part. However, the ALJ accepts only evidence that is—

(1) Relevant;

(2) Material;

(3) Not unduly repetitious; and

(4) Not inadmissible under §81.13 or §81.14.

(b) The ALJ may take official notice of facts that are generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(Authority: 5 U.S.C. 556 (d) and (e); 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

§ 81.16 Discovery.

(a) The parties to a case are encouraged to exchange relevant documents and information voluntarily.

(b) The ALJ, at a party's request, may order compulsory discovery described in paragraph (c) of this section if the ALJ determines that—

(1) The order is necessary to secure a fair, expeditious, and economical resolution of the case;

(2) The discovery requested is likely to elicit relevant information with respect to an issue in the case;

(3) The discovery request was not made primarily for the purposes of delay or harassment; and

(4) The order would serve the ends of justice.

(c) If a compulsory discovery is permissible under paragraph (b) of this section, the ALJ may order a party to do one or more of the following:

(1) Make relevant documents available for inspection and copying by the party making the request.

(2) Answer written interrogatories that inquire into relevant matters.

(3) Have depositions taken.

(d) The ALJ may issue a subpoena to enforce an order described in this section and may apply to the appropriate court of the United States to enforce the subpoena.

(e) The ALJ may not compel the discovery of information that is legally privileged.

(f)(1) The ALJ limits the period for discovery to not more than 90 days but may grant an extension for good cause.

(2) At a party's request, the ALJ may set a specific schedule for discovery.

(Authority: 20 U.S.C. 1234(f)(1) and (g))

§ 81.17 Privileges.

The privilege of a person or governmental organization not to produce documents or provide information in a proceeding under this part is governed by the principles of common law as interpreted by the courts of the United States.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

§ 81.18 The record.

(a) The ALJ arranges for any evidentiary hearing or oral argument to be recorded and transcribed and makes the transcript available to the parties. Transcripts are made available to non-Departmental parties at a cost not to exceed the actual cost of duplication.

(b) The record of a hearing on the record consists of—

(1) All papers filed in the proceeding;

(2) Documentary evidence admitted by the ALJ;

(3) The transcript of any evidentiary hearing or oral argument; and

(4) Rulings, orders, and subpoenas issued by the ALJ.

(Authority: 5 U.S.C. 556(e), 557(c); 20 U.S.C. 1221e–3(a)(1), 1234(f)(1), 3474(a))

[54 FR 19512, May 5, 1989, as amended at 58 FR 43473, Aug. 16, 1993]

§ 81.19 Costs and fees of parties.

The Equal Access to Justice Act, 5 U.S.C. 504, applies by its terms to proceedings under this part. Regulations under that statute are in 34 CFR part 21.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

§ 81.20 Interlocutory appeals to the Secretary from rulings of an ALJ.

(a) A ruling by an ALJ may not be appealed to the Secretary until the issuance of an initial decision, except that the Secretary may, at any time prior to the issuance of an initial decision, grant review of a ruling upon either an ALJ's certification of the ruling to the Secretary for review, or the filing of a petition seeking review of an interim ruling by one or both of the parties, if—

(1) That ruling involves a controlling question of substantive or procedural law; and

(2) The immediate resolution of the question will materially advance the final disposition of the proceeding or subsequent review will be an inadequate remedy.

(b)(1) A petition for interlocutory review of an interim ruling must include the following:

(i) A brief statement of the facts necessary to an understanding of the issue on which review is sought.

(ii) A statement of the issue.

(iii) A statement of the reasons showing that the ruling complained of involves a controlling question of substantive or procedural law and why immediate review of the ruling will materially advance the disposition of the case, or why subsequent review will be an inadequate remedy.

(2) A petition may not exceed 10 pages, double-spaced, and must be accompanied by a copy of the ruling and any findings and opinions relating to the ruling.

(3)(i) The petition must be filed electronically, and served upon the ALJ and other parties, by submission to OES on behalf of the Office of the Secretary unless a party shows the Secretary good cause why the petition cannot be filed electronically.

(ii) If the Secretary permits a party to file a petition in paper format, the filing party must file the petition with the Office of Hearings and Appeals (OHA) on behalf of the Secretary by hand-delivery or regular mail. The filing party must provide a copy of the petition to the ALJ at the time the petition is filed, and a copy of the petition must be served upon the other parties by hand-delivery or regular mail.

(c) If a party files a petition under this section, the ALJ may state to the Secretary a view as to whether review is appropriate by submitting a brief statement addressing the party's petition within 10 days of the ALJ's receipt of the petition for interlocutory review. The ALJ must serve a copy of the statement on all parties by submission to OES and, if the Secretary has permitted paper filing, by hand-delivery or regular mail.

(d)(1) A party's response, if any, to a petition or certification for interlocutory review must be filed within seven days after service of the petition or certification, and may not exceed 10 pages, double-spaced, in length.

(2) A copy of the response must be filed to OES unless the party shows the Secretary good cause why the response cannot be filed electronically. If the ALJ permits a party to file a petition in paper format, the filing party must file the petition with OHA on behalf of the Secretary by hand-delivery or regular mail.

(3) If the Secretary has permitted a party to file the response in paper format, the party must file a copy of the response with the ALJ, and serve a copy of the response on all parties, on the filing date by hand delivery or regular mail.

(e)(1) A party's response, if any, to a petition or certification for interlocutory review must be filed within seven days after service of the petition or certification, and may not exceed ten pages, double-spaced, in length. A copy of the response must be filed with the ALJ by hand delivery, by regular mail, or by facsimile transmission.

(2) A party shall serve a copy of its response on all parties on the filing date by hand-delivery or regular mail. If agreed upon by the parties, service of a copy of the response may be made upon the other parties by facsimile transmission.

(f) The filing of a request for interlocutory review does not automatically stay the proceedings. Rather, a stay during consideration of a petition for review may be granted by the ALJ if the ALJ has certified or stated to the Secretary that review of the ruling is appropriate. The Secretary may order a stay of proceedings at any time after the filing of a request for interlocutory review.

(g) The Secretary notifies the parties if a petition or certification for interlocutory review is accepted, and may provide the parties a reasonable time within which to submit written argument or other existing material in the administrative record with regard to the merit of the petition or certification.

(h) If the Secretary takes no action on a request for interlocutory review within 15 days of receipt of it, the request is deemed to be denied.

(i) The Secretary may affirm, modify, set aside, or remand the ALJ's ruling.

[58 FR 43473, Aug. 16, 1993, as amended at 86 FR 52832, Sept. 23, 2021; 87 FR 11310, Mar. 1, 2022]

Subpart B—Hearings for Recovery of Funds

§ 81.30 Basis for recovery of funds.

(a) Subject to the provisions of § 81.31, an authorized Departmental official requires a recipient to return funds to the Department if—

(1) The recipient made an unallowable expenditure of funds under a grant or cooperative agreement; or

(2) The recipient otherwise failed to discharge its obligation to account properly for funds under a grant or cooperative agreement.

(b) An authorized Departmental offcial may base a decision to require a recipient to return funds upon an audit report, an investigative report, a monitoring report, or any other evidence.

(Authority: 20 U.S.C. 1234a(a) (1) and (2))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.31 Measure of recovery.

A recipient that made an unallowable expenditure or otherwise failed to discharge its obligation to account properly for funds shall return an amount that—

(a) Meets the standards for proportionality in § 81.32;

(b) In the case of a State or local educational agency, excludes any amount attributable to mitigating circumstances under the standards in § 81.23; and

(c) Excludes any amount expended in a manner not authorized by law more than five years before the recipient received the notice of a disallowance decision under § 81.34.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(k), 1234b (a) and (b), and 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.32 Proportionality.

(a)(1) A recipient that made an unallowable expenditure or otherwise failed to account properly for funds shall return an amount that is proportional to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which it received the grant or cooperative agreement.

(2) An identifiable Federal interest under paragraph (a)(1) of this section includes, but is not limited to, the following:

(i) Serving only eligible beneficiaries.

(ii) Providing only authorized services or benefits.

(iii) Complying with expenditure requirements and conditions, such as set-aside, excess cost, maintenance of effort, comparability, supplement-not-supplant, and matching requirements.

(iv) Preserving the integrity of planning, application, recordkeeping, and reporting requirements.

(v) Maintaining accountability for the use of funds.

(b) The appendix to this part contains examples that illustrate how the standards for proportionality apply. The examples present hypothetical cases and do not represent interpretations of any actual program statute or regulation.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234b(a), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated at 58 FR 43473, Aug. 16, 1993]

§ 81.33 Mitigating circumstances.

(a) A recipient that is a State or local educational agency and that has made an unallowable expenditure or otherwise failed to account properly for funds is not required to return any amount that is attributable to the mitigating circumstances described in paragraph (b), (c), or (d) of this section.

(b) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by erroneous written guidance from the department. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The guidance was provided in response to a specific written request from the recipient that was submitted to the Department at the address provided by notice published in the FEDERAL REGISTER under this section;

(2) The guidance was provided by a Departmental official authorized to provide the guidance, as described by that notice;

(3) The recipient actually relied on the guidance as the basis for the conduct that constituted the violation; and

(4) The recipient's reliance on the guidance was reasonable.

(c) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the Department's failure to provide timely guidance. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The recipient in good faith submitted a written request for guidance with respect to the legality of a proposed expenditure or practice;

(2) The request was submitted to the Department at the address provided by notice published in the FEDERAL REGISTER under this section;

(3) The request—

(i) Accurately described the proposed expenditure or practice; and

(ii) Included the facts necessary for the Department's determination of its legality;

(4) The request contained the certification of the chief legal officer of the appropriate State educational agency that the officer—

(i) Examined the proposed expenditure or practice; and

(ii) Believed it was permissible under State and Federal law applicable at the time of the certification;

(5) The recipient reasonably believed the proposed expenditure or practice was permissible under State and Federal law applicable at the time it submitted the request to the Department;

(6) No Departmental official authorized to provide the requested guidance responded to the request within 90 days of its receipt by the Department; and

(7) The recipient made the proposed expenditure or engaged in the proposed practice after the expiration of the 90–day period.

(d) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the recipient's compliance with a judicial decree from a court of competent jurisdiction. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The recipient was legally bound by the decree;

(2) The recipient actually relied on the decree when it engaged in the conduct that constituted the violation; and

(3) The recipient's reliance on the decree was reasonable.

(e) If a Departmental official authorized to provide the requested guidance responds to a request described in paragraph (c) of this section more than 90 days after its receipt, the recipient that made the request shall comply with the guidance at the earliest practicable time.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234b(b), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated at 58 FR 43473, Aug. 16, 1993]

§81.34 Notice of a disallowance decision.

(a) If an authorized Departmental official decides that a recipient must return funds under §81.30, the official gives the recipient written notice of a disallowance decision. The official sends the notice by certified mail, return receipt requested, or other means that ensure proof of receipt.

(b)(1) The notice must establish a prima facie case for the recovery of funds, including an analysis reflecting the value of the program services actually obtained in a determination of harm to the Federal interest.

(2) For the purpose of this section, a prima facie case is a statement of the law and the facts that, unless rebutted, is sufficient to sustain the conclusion drawn in the notice. The facts may be set out in the notice or in a document that is identified in the notice and available to the recipient.

(3) A statement that the recipient failed to maintain records required by law or failed to allow an authorized representative of the Secretary access to those records constitutes a prima facie case for the recovery of the funds affected.

(i) If the recipient failed to maintain records, the statement must briefly describe the types of records that were not maintained and identify the recordkeeping requirement that was violated.

(ii) If the recipient failed to allow access to records, the statement must briefly describe the recipient's actions that constituted the failure and identify the access requirement that was violated.

(c) The notice must inform the recipient that it may—

(1) Obtain a review of the disallowance decision by the OALJ; and

(2) Request mediation under § 81.13.

(d) The notice must describe—

(1) The time available to apply for a review of the disallowance decision; and

(2) The procedure for filing an application for review.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(a), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993; 60 FR 46494, Sept. 6, 1995; 61 FR 14484, Apr. 2, 1996]

§ 81.35 Reduction of claims.

The Secretary or an authorized Departmental official as appropriate may, after the issuance of a disallowance decision, reduce the amount of a claim established under this subpart by—

(a) Redetermining the claim on the basis of the proper application of the law, including the standards for the measure of recovery under § 81.31, to the facts;

(b) Compromising the claim under the Federal Claims Collection Standards in 4 CFR part 103; or

(c) Compromising the claim under § 81.36, if applicable.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(j), and 3474(a); 31 U.S.C. 3711)

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.36 Compromise of claims under General Education Provisions Act.

(a) The Secretary or an authorized Departmental official as appropriate may compromise a claim established under this subpart without following the procedures in 4 CFR part 103 if—

(1)(i) The amount of the claim does not exceed $200,000; or

(ii) The difference between the amount of the claim and the amount agreed to be returned does not exceed $200,000; and

(2) The Secretary or the official determines that—

(i) The collection of the amount by which the claim is reduced under the compromise would not be practical or in the public interest; and

(ii) The practice that resulted in the disallowance decision has been corrected and will not recur.

(b) Not less than 45 days before compromising a claim under this section, the Department publishes a notice in the FEDERAL REGISTER stating—

(1) The intention to compromise the claim; and

(2) That interested persons may comment on the proposed compromise.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(j), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated at 58 FR 43473, Aug. 16, 1993]

§ 81.37 Application for review of a disallowance decision.

(a) If a recipient wishes to obtain review of a disallowance decision, the recipient shall file a written application for review with the Office of Administrative Law Judges, c/o Docket Clerk, Office of Hearings and Appeals, and, as required by § 81.12(b), shall serve a copy on the applicable Departmental official who made the disallowance decision.

(b) A recipient shall file an application for review not later than 60 days after the date it receives the notice of a disallowance decision.

(c) Within 10 days after receipt of a copy of the application for review, the authorized Departmental official who made the disallowance decision shall provide the ALJ with a copy of any document identified in the notice pursuant to § 81.34(b)(2).

(d) An application for review must contain—

(1) A copy of the disallowance decision of which review is sought;

(2) A statement certifying the date the recipient received the notice of that decision;

(3) A short and plain statement of the disputed issues of law and fact, the recipient's position with respect to these issues, and the disallowed funds the recipient contends need not be returned; and

(4) A statement of the facts and the reasons that support the recipient's position.

(e) The ALJ who considers a timely application for review that substantially complies with the requirements of paragraph (c) of this section may permit the recipient to supplement or amend the application with respect to issues that were timely raised. Any requirement to return funds that is not timely appealed becomes the final decision of the Department.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(b)(1), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, 43474, Aug. 16, 1993; 58 FR 51013, Sept. 30, 1993; 60 FR 46494, Sept. 6, 1995]

§81.38 Consideration of an application for review.

(a) The ALJ assigned to the case under §81.4 considers an application for review of a disallowance decision.

(b) The ALJ decides whether the notice of a disallowance decision meets the requirements of §81.34, as provided by section 451(e) of GEPA.

(1) If the notice does not meet those requirements, the ALJ—

(i) Returns the notice, as expeditiously as possible, to the authorized Departmental official who made the disallowance decision;

(ii) Gives the official the reasons why the notice does not meet the requirements of §81.34; and

(iii) Informs the recipient of the ALJ's decision by certified mail, return receipt requested.

(2) An authorized Departmental official may modify and reissue a notice that an ALJ returns.

(c) If the notice of a disallowance decision meets the requirements of §81.34, the ALJ decides whether the application for review meets the requirements of §81.37.

(1) If the application, including any supplements or amendments under §81.37(d), does not meet those requirements, the disallowance decision becomes the final decision of the Department.

(2) If the application meets those requirements, the ALJ—

(i) Informs the recipient and the authorized Departmental official that the OALJ has accepted jurisdiction of the case; and

(ii) Schedules a hearing on the record.

(3) The ALJ informs the recipient of the disposition of its application for review by certified mail, return receipt requested. If the ALJ decides that the application does not meet the requirements of §81.37, the ALJ informs the recipient of the reasons for the decision.

(Authority: 20 U.S.C. 1221e–3, 1234 (e) and (f)(1), 1234a(b), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§81.39 Submission of evidence.

(a) The ALJ schedules the submission of the evidence, whether oral or documentary, to occur within 90 days of the OALJ's receipt of an acceptable application for review under §81.37.

(b) The ALJ may waive the 90-day requirement for good cause.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(c), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§81.40 Burden of proof.

If the OALJ accepts jurisdiction of a case under §81.38, the recipient shall present its case first and shall have the burden of proving that the recipient is not required to return the amount of funds that the disallowance decision requires to be returned because—

(a) An expenditure identified in the disallowance decision as unallowable was allowable;

(b) The recipient discharged its obligation to account properly for the funds;

(c) The amount required to be returned does not meet the standards for proportionality in §81.32;

(d) The amount required to be returned includes an amount attributable to mitigating circumstances under the standards in §81.33; or

(e) The amount required to be returned includes an amount expended in a manner not authorized by law more

than five years before the recipient received the notice of the disallowance decision.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(b)(3), 1234b(b)(1), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.41 Initial decision.

(a) The ALJ makes an initial decision based on the record.

(b) The initial decision includes the ALJ's findings of fact, conclusions of law, and reasoning on all material issues.

(c) The OALJ transmits the initial decision to the Secretary and to the parties by submission to OES and, if filing in paper format was permitted by the ALJ, by certified mail, return receipt requested, or by another parcel service with delivery confirmation.

(d) For the purpose of this part, ''initial decision'' includes an ALJ's modified decision after the Secretary's remand of a case.

(Authority: 5 U.S.C. 557(c); 20 U.S.C 1221e–3, 1234(f)(1), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, 43474, Aug. 16, 1993; 86 FR 52832, Sept. 23, 2021]

§ 81.42 Petition for review of initial decision.

(a)(1) If a party seeks to obtain the Secretary's review of the initial decision of an ALJ, the party must file a petition for review by submission to OES on behalf of the Office of the Secretary unless the party shows the ALJ good cause why the petition cannot be filed electronically.

(2) If the ALJ permits a party to file a petition for review in paper format, the filing party must file the petition with the ALJ by hand-delivery or regular mail.

(b) A party must file a petition for review not later than 30 days after the date it receives the initial decision. The party is deemed to have received the initial decision on the date the initial decision is uploaded to OES or, if filing in paper format was permitted by the ALJ, the party is deemed to have received the initial decision on the delivery date indicated by the certified mail or parcel delivery records.

(c) Electronically filing a petition to OES for review constitutes service on the other party.

(d) If the ALJ has permitted the petition to be filed in paper format, then—

(1) The party must serve a copy of the petition on the other party on the filing date by hand delivery or by ''overnight'' or ''express'' mail. If agreed upon by the parties, service of a copy of the petition may be made upon the other party by a method approved by the ALJ.

(2) Any petition submitted under this section in paper format must be accompanied by a statement certifying the date that the petition was served on the other party.

(e) A petition for review of an initial decision must—

(1) Identify the initial decision for which review is sought; and

(2) Include a statement of the reasons asserted by the party for affirming, modifying, setting aside, or remanding the initial decision in whole or in part.

(f)(1) A party may respond to a petition for review of an initial decision by filing a statement of its views on the issues raised in the petition, as provided for in this section, not later than 15 days after the date it receives the petition.

(2) If the ALJ has permitted the written submission to be filed in paper format, a party must serve a copy of its statement of views on the other party by hand delivery or mail and certify that it has done so pursuant to the provisions of paragraph (d) of this section.

(g)(1) The filing date for petitions under this section is the date the document is—

(i) Electronically filed; or

(ii) Hand-delivered or mailed, if permitted to file in paper format.

(2) If a scheduled filing date falls on a Saturday, Sunday, or a Federal holiday, the filing deadline is the next business day.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(e), and 3474(a))

[86 FR 52832, Sept. 23, 2021]

§ 81.43 Review by the Secretary.

(a)(1) The Secretary's review of an initial decision is based on the record of the case, the initial decision, and

any proper submissions of the parties or other participants in the case.

(2) During the Secretary's review of the initial decision there shall not be any *ex parte* contact between the Secretary and individuals representing the Department or the recipient.

(b) The ALJ's findings of fact, if supported by substantial evidence, are conclusive.

(c) The Secretary may affirm, modify, set aside, or remand the ALJ's initial decision.

(1) If the Secretary modifies, sets aside, or remands an initial decision, in whole or in part, the Secretary's decision includes a statement of reasons that supports the Secretary's decision.

(2)(i) The Secretary may remand the case to the ALJ with instructions to make additional findings of fact or conclusions of law, or both, based on the evidence of record. The Secretary may also remand the case to the ALJ for further briefing or for clarification or revision of the initial decision.

(ii) If a case is remanded, the ALJ shall make new or modified findings of fact or conclusions of law or otherwise modify the initial decision in accordance with the Secretary's remand order.

(iii) A party may appeal a modified decision of the ALJ under the provisions of §§81.42 through 81.45. However, upon that review, the ALJ's new or modified findings, if supported by substantial evidence, are conclusive.

(3) The Secretary, for good cause shown, may remand the case to the ALJ to take further evidence, and the ALJ may make new or modified findings of fact and may modify the initial decision based on that new evidence. These new or modified findings of fact are likewise conclusive if supported by substantial evidence.

(Authority: 5 U.S.C. 557(b); 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(d), and 3474(a))

[58 FR 43474, Aug. 16, 1993, as amended at 60 FR 46494, Sept. 6, 1995]

§81.44 Final decision of the Department.

(a) The ALJ's initial decision becomes the final decision of the Department 60 days after the recipient receives the ALJ's decision unless the Secretary modifies, sets aside, or remands the decision during the 60-day period.

(b) If the Secretary modifies or sets aside the ALJ's initial decision, a copy of the Secretary's decision is provided to the parties by submission to OES. If the ALJ has permitted written submissions to be filed in paper format, the decision will be sent by certified mail, return receipt requested, or by another parcel service with delivery confirmation. The Secretary's decision becomes the final decision of the Department on the date it is electronically filed or, if sent via parcel delivery service, on the delivery date indicated by the certified mail or parcel delivery records.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(g), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, 43474, Aug. 16, 1993; 86 FR 52833, Sept. 23, 2021]

§81.45 Collection of claims.

(a) An authorized Departmental official collects a claim established under this subpart by using the standards and procedures in 34 CFR part 30.

(b) A claim established under this subpart may be collected—

(1) 30 days after a recipient receives notice of a disallowance decision if the recipient fails to file an acceptable application for review under §81.37; or

(2) On the date of the final decision of the Department under §81.44 if the recipient obtains review of a disallowance decision.

(c) The Department takes no collection action pending judicial review of a final decision of the Department under section 458 of GEPA.

(d) If a recipient obtains review of a disallowance decision under §81.38, the Department does not collect interest on the claim for the period between the date of the disallowance decision and the date of the final decision of the Department under §81.44.

(Authority: 20 U.S.C. 1234(f)(1); 1234a(f)(1) and (2), (i), and (1))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

APPENDIX TO PART 81—ILLUSTRATIONS OF PROPORTIONALITY

(1) *Ineligible beneficiaries.* A State uses 15 percent of its grant to meet the special educational needs of children who were migratory, but who have not migrated for more than five years as a Federal program statute requires for eligibility to participate in the program. Result: Recovery of 15 percent of the grant—all program funds spent for the benefit of those children. Although the services were authorized, the children were not eligible to receive them.

(2) *Ineligible beneficiaries.* A Federal program designed to meet the special educational needs of gifted and talented children requires that at least 80 percent of the children served in any project must be identified as gifted or talented. A local educational agency (LEA) conducts a project in which 76 students are identified as gifted or talented and 24 are not. The project was designed and implemented to meet the special educational needs of gifted and talented students. Result: The LEA must return five percent of the project costs. The LEA provided authorized services for a project in which the 76 target students had to constitute at least 80 percent of the total. Thus, the maximum number of non-target students permitted was 19. Project costs relating to the remaining five students must be returned.

(3) *Ineligible beneficiaries.* Same as the example in paragraph (2), except that only 15 percent of the children were identified as gifted or talented. On the basis of the low percentage of these children and other evidence, the authorized Departmental official finds that the project as a whole did not address their special educational needs and was outside the purpose of the statute. Result: The LEA must return its entire award. The difference between the required percentage of gifted and talented children and the percentage actually enrolled is so substantial that, if consistent with other evidence, the official may reasonably conclude the entire grant was misused.

(4) *Ineligible beneficiaries.* Same as the example in paragraph (2), except that 60 percent of the children were identified as gifted or talented, and it is not clear whether the project was designed or implemented to meet the special educational needs of these children. Result: If it is determined that the project was designed and implemented to serve their special educational needs, the LEA must return 25 percent of the project costs. A project that included 60 target children would meet the requirement that 80 percent of the children served be gifted and talented if it included no more than 15 other children. Thus, while the LEA provided authorized services, only 75 percent of the beneficiaries were authorized to participate in the project (60 target children and 15 others). If the authorized Departmental official, after examining all the relevant facts, determines that the project was not designed and implemented to serve the special educational needs of gifted or talented students, the LEA must return its entire award because it did not provide services authorized by the statute.

(5) *Unauthorized activities.* An LEA uses ten percent of its grant under a Federal program that authorizes activities only to meet the special educational needs of educationally deprived children to pay for health services that are available to all children in the LEA. All the children who use the Federally funded health services happen to be educationally deprived, and thus eligible to receive program services. Result: Recovery of ten percent of the grant—all program funds spent for the health services. Although the children were eligible to receive program services, the health services were unrelated to a special educational need and, therefore, not authorized by law.

(6) *Set-aside requirement.* A State uses 22 percent of its grant for one fiscal year under a Federal adult education program to provide programs of equivalency to a certificate of graduation from a secondary school. The adult education program statute restricts those programs to no more than 20 percent of the State's grant. Result: Two percent of the State's grant must be returned. Although all 22 percent of the funds supported adult education, the State had no authority to spend more than 20 percent on secondary school equivalency programs.

(7) *Set-aside requirement.* A State uses eight percent of its basic State grant under a Federal vocational education program to pay for the excess cost of vocational education services and activities for handicapped individuals. The program statute requires a State to use ten percent of its basic State grant for this purpose. Result: The State must return two percent of its basic State grant, regardless of how it was used. Because the State was required to spend that two percent on services and activities for handicapped individuals and did not do so, it diverted those funds from their intended purposes, and the Federal interest was harmed to that extent.

(8) *Excess cost requirement.* An LEA uses funds reserved for the disadvantaged under a Federal vocational education program to pay for the cost of the same vocational education services it provides to non-disadvantaged individuals. The program statute requires that funds reserved for the disadvantaged must be used to pay only for the supplemental or additional costs of vocational education services that are not provided to other individuals and that are required for disadvantaged individuals to participate in vocational education. Result: All the funds spent on the disadvantaged must be returned. Although

the funds were spent to serve the disadvantaged, the funds were available to pay for only the supplemental or additional costs of providing services to the disadvantaged.

(9) *Maintenance-of-effort requirement.* An LEA participates in a Federal program in fiscal year 1988 that requires it to maintain its expenditures from non-Federal sources for program purposes to receive its full allotment. The program statute requires that non-Federal funds expended in the first preceding fiscal year must be at least 90 percent of non-Federal funds expended in the second preceding fiscal year and provides for a reduction in grant amount proportional to the shortfall in expenditures. No waiver of the requirement is authorized. In fiscal year 1986 the LEA spent $100,000 from non-Federal sources for program purposes; in fiscal year 1987, only $87,000. Result: The LEA must return 1/30 of its fiscal year 1988 grant—the amount of its grant that equals the proportion of its shortfall ($3,000) to the required level of expenditures ($90,000). If, instead, the statute made maintenance of expenditures a clear condition of the LEA's eligibility to receive funds and did not provide for a proportional reduction in the grant award, the LEA would be required to return its entire grant.

(10) *Supplanting prohibition.* An LEA uses funds under a Federal drug education program to provide drug abuse prevention counseling to students in the eighth grade. The LEA is required to provide that same counseling under State law. Funds under the Federal program statute are subject to a supplement-not-supplant requirement. Result: All the funds used to provide the required counseling to the eighth-grade students must be returned. The Federal funds did not increase the total amount of spending for program purposes because the counseling would have been provided with non-Federal funds if the Federal funds were not available.

(11) *Matching requirement.* A State receives an allotment of $90,000 for fiscal year 1988 under a Federal adult education program. It expends its full allotment and $8,000 from its own resources for adult education. Under the Federal statute, the Federal share of expenditures for the State's program is 90 percent. Result: The State must return the unmatched Federal funds, or $18,000. Expenditure of a $90,000 Federal allotment required $10,000 in matching State expenditures, $2,000 more than the State's actual expenditures. At a ratio of one State dollar for every nine Federal dollars, $18,000 in Federal funds were unmatched.

(12) *Application requirements.* In order to receive funds under a Federal program that supports a wide range of activities designed to improve the quality of elementary and secondary education, an LEA submits an application to its State educational agency (SEA) for a subgrant to carry out school-level basic skills development programs. The LEA submits its application after conducting an assessment of the needs of its students in consultation with parents, teachers, community leaders, and interested members of the general public. The Federal program statute requires the application and consultation processes. The SEA reviews the LEA's application, determines that the proposed programs are sound and the application is in compliance with Federal law, and approves the application. After the LEA receives the subgrant, it unilaterally decides to use 20 percent of the funds for gifted and talented elementary school students—an authorized activity under the Federal statute. However, the LEA does not consult with interested parties and does not amend its application. Result: 20 percent of the LEA's subgrant must be returned. The LEA had no legal authority to use Federal funds for programs or activities other than those described in its approved application, and its actions with respect to 20 percent of the subgrant not only impaired the integrity of the application process, but caused significant harm to other Federal interests associated with the program as follows: the required planning process was circumvented because the LEA did not consult with the specified local interests; program accountability was impaired because neither the SEA nor the various local interests that were to be consulted had an opportunity to review and comment on the merits of the gifted and talented program activities, and the LEA never had to justify those activities to them; and fiscal accountability was impaired because the SEA and those various local interests were, in effect, misled by the LEA's unamended application regarding the expenditure of Federal funds.

(13) *Harmless violation.* Under a Federal program, a grantee is required to establish a 15-member advisory council of affected teachers, school administrators, parents, and students to assist in program design, monitoring, and evaluation. Although the law requires at least three student members of the council, a grantee's council contains only two. The project is carried out, and no damage to the project attributable to the lack of a third student member can be identified. Result: No financial recovery is required, although the grantee must take other appropriate steps to come into compliance with the law. The grantee's violation has not measurably harmed a Federal interest associated with the program.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234b(a), and 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989]

PART 82—NEW RESTRICTIONS ON LOBBYING

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APPENDIX A TO PART 82—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 82—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Pub. L. 101–121 (31 U.S.C. 1352); 20 U.S.C. 3474.

SOURCE: 55 FR 6737, 6752, Feb. 26, 1990, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

Subpart A—General

§ 82.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 82.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and

Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount

that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 82.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of

this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

Subpart B—Activities by Own Employees

§ 82.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 82.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative

agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 82.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 82.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 82.110(a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless

they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 82.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 82.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 82.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 82.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 82.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 82.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the

report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 82—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 82—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action: ☐ a. contract b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	**2. Status of Federal Action:** ☐ a. bid/offer/application b. initial award c. post-award	**3. Report Type:** ☐ a. initial filing b. material change **For Material Change Only:** year _____ quarter ____ date of last report _____
4. Name and Address of Reporting Entity: ☐ Prime ☐ Subawardee Tier ____, *if known*: **Congressional District,** *if known*:	**5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:** **Congressional District,** *if known*:	
6. Federal Department/Agency:	**7. Federal Program Name/Description:** CFDA Number, *if applicable*: _____	
8. Federal Action Number, *if known*:	**9. Award Amount,** *if known*: $	
10. a. Name and Address of Lobbying Entity *(if individual, last name, first name, MI)*:	**b. Individuals Performing Services** *(including address if different from No. 10a) (last name, first name, MI)*:	
(attach Continuation Sheet(s) SF-LLL-A, if necessary)		
11. Amount of Payment *(check all that apply)*: $ _____ ☐ actual ☐ planned	**13. Type of Payment** *(check all that apply)*: ☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: _____	
12. Form of Payment *(check all that apply)*: ☐ a. cash ☐ b. in-kind; specify: nature _____ value _____		
14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11: *(attach Continuation Sheet(s) SF-LLL-A, if necessary)*		
15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No		
16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.	**Signature:** _____ **Print Name:** _____ **Title:** _____ **Telephone No.:** _____ **Date:** _____	
Federal Use Only:		**Authorized for Local Reproduction Standard Form - LLL**

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ **Page** _____ **of** _____

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Standard Form - LLL-A

PART 84—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

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AUTHORITY: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327, unless otherwise noted.

SOURCE: 68 FR 66557, 66610, Nov. 26, 2003, unless otherwise noted.

Subpart A—Purpose and Coverage

§ 84.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

(1) A recipient of an assistance award from the Department of Education; or

(2) A(n) ED awarding official. (See definitions of award and recipient in §§ 84.605 and 84.660, respectively.)

(b) The following table shows the subparts that apply to you:

If you are . . .	see subparts . . .
(1) A recipient who is not an individual	A, B and E.
(2) A recipient who is an individual	A, C and E.
(3) A(n) ED awarding official	A, D and E.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the ED Deciding Official determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 84.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

Subpart B—Requirements for Recipients Other Than Individuals

§ 84.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

(1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 84.205 through 84.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 84.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 84.230).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 84.205 be given to each employee who will be engaged in the performance of any Federal award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 84.205 and an ongoing awareness program as described in § 84.215, you must publish the statement and establish the program by the time given in the following table:

If . . .	then you . . .
(a) The performance period of the award is less than 30 days	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) The performance period of the award is 30 days or more ...	must have the policy statement and program in place within 30 days after award.
(c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program.	may ask the ED awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 84.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must—

(1) Be in writing;

(2) Include the employee's position title;

(3) Include the identification number(s) of each affected award;

(4) Be sent within ten calendar days after you learn of the conviction; and

(5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either—

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each ED award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces—

(1) To the ED official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by ED officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (*e.g.*, all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the ED awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the ED awarding official.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

Subpart C—Requirements for Recipients Who Are Individuals

§ 84.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a(n) ED award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

(1) In writing.

(2) Within 10 calendar days of the conviction.

(3) To the ED awarding official or other designee for each award that you currently have, unless § 84.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.301 [Reserved]

Subpart D—Responsibilities of ED Awarding Officials

§ 84.400 What are my responsibilities as a(n) ED awarding official?

As a(n) ED awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in—

(a) Subpart B of this part, if the recipient is not an individual; or

(b) Subpart C of this part, if the recipient is an individual.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

Subpart E—Violations of this Part and Consequences

§ 84.500 How are violations of this part determined for recipients other than individuals?

A recipient other than an individual is in violation of the requirements of this part if the ED Deciding Official determines, in writing, that—

(a) The recipient has violated the requirements of subpart B of this part; or

(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.505 How are violations of this part determined for recipients who are individuals?

An individual recipient is in violation of the requirements of this part if the ED Deciding Official determines, in writing, that—

(a) The recipient has violated the requirements of subpart C of this part; or

(b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.510 What actions will the Federal Government take against a recipient determined to have violated this part?

If a recipient is determined to have violated this part, as described in § 84.500 or § 84.505, the Department of Education may take one or more of the following actions—

(a) Suspension of payments under the award;

(b) Suspension or termination of the award; and

(c) Suspension or debarment of the recipient under 34 CFR Part 85, for a period not to exceed five years.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.515 Are there any exceptions to those actions?

The ED Deciding Official may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the ED Deciding Official determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

Subpart F—Definitions

§ 84.605 Award.

Award means an award of financial assistance by the Department of Education or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 34 CFR Part 85 that implements OMB Circular A–102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veterans' benefits to individuals (*i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.610 Controlled substance.

Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.615 Conviction.

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.620 Cooperative agreement.

Cooperative agreement means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in § 84.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.625 Criminal drug statute.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.630 Debarment.

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.635 Drug-free workplace.

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (*e.g.*, volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.645 Federal agency or agency.

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.650 Grant.

Grant means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.655 Individual.

Individual means a natural person.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized,

that receives an award directly from a Federal agency.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

§ 84.670 Suspension.

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327)

PART 86—DRUG AND ALCOHOL ABUSE PREVENTION

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86.2 What Federal programs are covered by this part?
86.3 What actions shall an IHE take to comply with the requirements of this part?
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AUTHORITY: 20 U.S.C. 1145g, unless otherwise noted.

SOURCE: 55 FR 33581, Aug. 16, 1990, unless otherwise noted.

Subpart A—General

§ 86.1 What is the purpose of the Drug and Alcohol Abuse Prevention regulations?

The purpose of the Drug and Alcohol Abuse Prevention regulations is to implement section 22 of the Drug-Free Schools and Communities Act Amendments of 1989, which added section 1213 to the Higher Education Act. These amendments require that, as a condition of receiving funds or any other form of financial assistance under any Federal program, an institution of higher education (IHE) must certify that it has adopted and implemented a drug prevention program as described in this part.

(Authority: 20 U.S.C. 1145g)

[61 FR 66225, Dec. 17, 1996]

§ 86.2 What Federal programs are covered by this part?

The Federal programs covered by this part include—

(a) All programs administered by the Department of Education under which an IHE may receive funds or any other form of Federal financial assistance; and

(b) All programs administered by any other Federal agency under which an IHE may receive funds or any other form of Federal financial assistance.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.3 What actions shall an IHE take to comply with the requirements of this part?

(a) An IHE shall adopt and implement a drug prevention program as described in § 86.100 to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by all students and employees on school premises or as part of any of its activities.

(b) An IHE shall provide a written certification that it has adopted and implemented the drug prevention program described in § 86.100.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, 66226, Dec. 17, 1996]

§ 86.4 What are the procedures for submitting a drug prevention program certification?

An IHE shall submit to the Secretary the drug prevention program certification required by § 86.3(b).

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

§ 86.5 What are the consequences if an IHE fails to submit a drug prevention program certification?

(a) An IHE that fails to submit a drug prevention program certification is not eligible to receive funds or any other form of financial assistance under any Federal program.

(b) The effect of loss of eligibility to receive funds or any other form of Federal financial assistance is determined by the statute and regulations governing the Federal programs under which an IHE receives or desires to receive assistance.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.6 When must an IHE submit a drug prevention program certification?

(a) After October 1, 1990, except as provided in paragraph (b) of this section, an IHE is not eligible to receive funds or any other form of financial assistance under any Federal program until the IHE has submitted a drug prevention program certification.

(b)(1) The Secretary may allow an IHE until not later than April 1, 1991, to submit the drug prevention program certification, only if the IHE establishes that it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(2) An IHE that wants to receive an extension of time to submit its drug prevention program certification shall submit a written justification to the Secretary that—

(i) Describes each part of its drug prevention program, whether in effect or planned;

(ii) Provides a schedule to complete and implement its drug prevention program; and

(iii) Explains why it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(3) An IHE shall submit a request for an extension to the Secretary.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

§ 86.7 What definitions apply to this part?

(a) *Definitions in EDGAR*. The following terms used in this part are defined in 34 CFR part 77:

Department

EDGAR

Secretary

(b) *Other definitions*. The following terms used in this part are defined as follows:

Compliance agreement means an agreement between the Secretary and an IHE that is not in full compliance with its drug prevention program certification. The agreement specifies the steps the IHE will take to comply fully with its drug prevention program certification, and provides a schedule for the accomplishment of those steps. A compliance agreement does not excuse or remedy past violations of this part.

Institution of higher education means—

(1) An institution of higher education, as defined in 34 CFR 600.4;

(2) A proprietary institution of higher education, as defined in 34 CFR 600.5;

(3) A postsecondary vocational institution, as defined in 34 CFR 600.6; and

(4) A vocational school, as defined in 34 CFR 600.7.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

Subpart B—Institutions of Higher Education

§ 86.100 What must the IHE's drug prevention program include?

The IHE's drug prevention program must, at a minimum, include the following:

(a) The annual distribution in writing to each employee, and to each student who is taking one or more classes for any type of academic credit except for continuing education units, regardless of the length of the student's program of study, of—

(1) Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities;

(2) A description of the applicable legal sanctions under local, State, or Federal law for the unlawful possession or distribution of illicit drugs and alcohol;

(3) A description of the health risks associated with the use of illicit drugs and the abuse of alcohol;

(4) A description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and

(5) A clear statement that the IHE will impose disciplinary sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph (a)(1) of this section. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(b) A biennial review by the IHE of its program to—

(1) Determine its effectiveness and implement changes to the program if they are needed; and

(2) Ensure that the disciplinary sanctions described in paragraph (a)(5) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

§ 86.101 What review of IHE drug prevention programs does the Secretary conduct?

The Secretary annually reviews a representative sample of IHE drug prevention programs.

(Authority: 20 U.S.C. 1145g)

§ 86.102 What is required of an IHE that the Secretary selects for annual review?

If the Secretary selects an IHE for review under § 86.101, the IHE shall provide the Secretary access to personnel, records, documents and any other necessary information requested by the Secretary to review the IHE's adoption and implementation of its drug prevention program.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

§ 86.103 What records and information must an IHE make available to the Secretary and the public concerning its drug prevention program?

(a) Each IHE that provides the drug prevention program certification required by § 86.3(b) shall, upon request, make available to the Secretary and the public a copy of each item required by § 86.100(a) as well as the results of the biennial review required by § 86.100(b).

(b)(1) An IHE shall retain the following records for three years after the fiscal year in which the record was created:

(i) The items described in paragraph (a) of this section.

(ii) Any other records reasonably related to the IHE's compliance with the drug prevention program certification.

(2) If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the IHE shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

Subpart C [Reserved]

Subpart D—Responses and Sanctions Issued or Imposed by the Secretary for Violations by an IHE

§ 86.300 What constitutes a violation of this part by an IHE?

An IHE violates this part by—

(a) Receiving any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification in accordance with § 86.3(b); or

(b) Violating its certification. Violation of a certification includes failure of an IHE to—

(1) Adopt or implement its drug prevention program; or

(2) Consistently enforce its disciplinary sanctions for violations by students and employees of the standards of conduct adopted by an IHE under § 86.100(a)(1).

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

§ 86.301 What actions may the Secretary take if an IHE violates this part?

(a) If an IHE violates its certification, the Secretary may issue a response to the IHE. A response may include, but is not limited to—

(1) Provision of information and technical assistance; and

(2) Formulation of a compliance agreement designed to bring the IHE into full compliance with this part as soon as feasible.

(b) If an IHE receives any form of Federal financial assistance without having submitted a certification or violates its certification, the Secretary may impose one or more sanctions on the IHE, including—

(1) Repayment of any or all forms of Federal financial assistance received by the IHE when it was in violation of this part; and

(2) The termination of any or all forms of Federal financial assistance that—

(i)(A) Except as specified in paragraph (b)(2)(ii) of this section, ends an IHE's eligibility to receive any or all

forms of Federal financial assistance. The Secretary specifies which forms of Federal financial assistance would be affected; and

(B) Prohibits an IHE from making any new obligations against Federal funds; and

(ii) For purposes of an IHE's participation in the student financial assistance programs authorized by title IV of the Higher Education Act of 1965 as amended, has the same effect as a termination under 34 CFR 668.94.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.302 What are the procedures used by the Secretary for providing information or technical assistance?

(a) The Secretary provides information or technical assistance to an IHE in writing, through site visits, or by other means.

(b) The IHE shall inform the Secretary of any corrective action it has taken within a period specified by the Secretary.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.303 What are the procedures used by the Secretary for issuing a response other than the formulation of a compliance agreement or the provision of information or technical assistance?

(a) If the Secretary intends to issue a response other than the formulation of a compliance agreement or the provision of information or technical assistance, the Secretary notifies the IHE in writing of—

(1) The Secretary's determination that there are grounds to issue a response other than the formulation of a compliance agreement or providing information or technical assistance; and

(2) The response the Secretary intends to issue.

(b) An IHE may submit written comments to the Secretary on the determination under paragraph (a)(1) of this section and the intended response under paragraph (a)(2) of this section within 30 days after the date the IHE receives the notification of the Secretary's intent to issue a response.

(c) Based on the initial notification and the written comments of the IHE the Secretary makes a final determination and, if appropriate, issues a final response.

(d) The IHE shall inform the Secretary of the corrective action it has taken in order to comply with the terms of the Secretary's response within a period specified by the Secretary.

(e) If an IHE does not comply with the terms of a response issued by the Secretary, the Secretary may issue an additional response or impose a sanction on the IHE in accordance with the procedures in § 86.304.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.304 What are the procedures used by the Secretary to demand repayment of Federal financial assistance or terminate an IHE's eligibility for any or all forms of Federal financial assistance?

(a) A designated Department official begins a proceeding for repayment of Federal financial assistance or termination, or both, of an IHE's eligibility for any or all forms of Federal financial assistance by sending the IHE a notice by certified mail with return receipt requested. This notice—

(1) Informs the IHE of the Secretary's intent to demand repayment of Federal financial assistance or to terminate, describes the consequences of that action, and identifies the alleged violations that constitute the basis for the action;

(2) Specifies, as appropriate—

(i) The amount of Federal financial assistance that must be repaid and the date by which the IHE must repay the funds; and

(ii) The proposed effective date of the termination, which must be at least 30 days after the date of receipt of the notice of intent; and

(3) Informs the IHE that the repayment of Federal financial assistance will not be required or that the termination will not be effective on the date specified in the notice if the designated Department official receives, within a 30-day period beginning on the date the IHE receives the notice of intent described in this paragraph—

(i) Written material indicating why the repayment of Federal financial assistance or termination should not take place; or

(ii) A request for a hearing that contains a concise statement of disputed issues of law and fact, the IHE's position with respect to these issues, and, if appropriate, a description of which Federal financial assistance the IHE contends need not be repaid.

(b) If the IHE does not request a hearing but submits written material—

(1) The IHE receives no additional opportunity to request or receive a hearing; and

(2) The designated Department official, after considering the written material, notifies the IHE in writing whether—

(i) Any or all of the Federal financial assistance must be repaid; or

(ii) The proposed termination is dismissed or imposed as of a specified date.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

Subpart E—Appeal Procedures

§ 86.400 What is the scope of this subpart?

(a) The procedures in this subpart are the exclusive procedures governing appeals of decisions by a designated Department official to demand the repayment of Federal financial assistance or terminate the eligibility of an IHE to receive some or all forms of Federal financial assistance for violations of this part.

(b) An Administrative Law Judge (ALJ) hears appeals under this subpart.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.401 What are the authority and responsibility of the ALJ?

(a) The ALJ regulates the course of the proceeding and conduct of the parties during the hearing and takes all steps necessary to conduct a fair and impartial proceeding.

(b) The ALJ is not authorized to issue subpoenas.

(c) The ALJ takes whatever measures are appropriate to expedite the proceeding. These measures may include, but are not limited to—

(1) Scheduling of conferences;

(2) Setting time limits for hearings and submission of written documents; and

(3) Terminating the hearing and issuing a decision against a party if that party does not meet those time limits.

(d) The scope of the ALJ's review is limited to determining whether—

(1) The IHE received any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification; or

(2) The IHE violated its certification.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.402 Who may be a party in a hearing under this subpart?

(a) Only the designated Department official and the IHE that is the subject of the proposed termination or recovery of Federal financial assistance may be parties in a hearing under this subpart.

(b) Except as provided in this subpart, no person or organization other than a party may participate in a hearing under this subpart.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.403 May a party be represented by counsel?

A party may be represented by counsel.

(Authority: 20 U.S.C. 1145g)

§ 86.404 How may a party communicate with an ALJ?

(a) A party may not communicate with an ALJ on any fact at issue in the case or on any matter relevant to the merits of the case unless the other party is given notice and an opportunity to participate.

(b)(1) To obtain an order or ruling from an ALJ, a party shall make a motion to the ALJ.

(2) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(3) If a party files a written motion, the party shall do so in accordance with § 86.405.

(4) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(5) The date of service of a motion is determined by the standards for determining a filing date in § 86.405(d).

(Authority: 20 U.S.C. 1145g)

§ 86.405 What are the requirements for filing written submissions?

(a) Any written submission under this subpart must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) If a party files a brief or other document, the party shall serve a copy of the filed material on the other party on the filing date by hand-delivery or by mail. If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(c) Any written submission must be accompanied by a statement certifying the date that the filed material was filed and served on the other party.

(d)(1) The filing date for a written submission is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next Federal business day.

(e) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(f) If a document is filed by facsimile transmission, the Secretary or the designated Department official, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(Authority: 20 U.S.C. 1145g)

[57 FR 56795, Nov. 30, 1992]

§ 86.406 What must the ALJ do if the parties enter settlement negotiations?

(a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations or for the parties to obtain approval of a settlement agreement, the ALJ grants the stay.

(b) The following are not admissible in any proceeding under this part:

(1) Evidence of conduct during settlement negotiations.

(2) Statements made during settlement negotiations.

(3) Terms of settlement offers.

(c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 1145g)

§ 86.407 What are the procedures for scheduling a hearing?

(a) If the IHE requests a hearing by the time specified in § 86.304(a)(3), the designated Department official sets the date and the place.

(b)(1) The date is at least 15 days after the designated Department official receives the request and no later than 45 days after the request for hearing is received by the Department.

(2) On the motion of either or both parties, the ALJ may extend the period before the hearing is scheduled beyond the 45 days specified in paragraph (b)(1) of this section.

(c) No termination takes effect until after a hearing is held and a decision is issued by the Department.

(d) With the approval of the ALJ and the consent of the designated Department official and the IHE, any time

schedule specified in this section may be shortened.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.408 What are the procedures for conducting a pre-hearing conference?

(a)(1) A pre-hearing conference may be convened by the ALJ if the ALJ thinks that such a conference would be useful, or if requested by—

(i) The designated Department official; or

(ii) The IHE.

(2) The purpose of a pre-hearing conference is to allow the parties to settle, narrow, or clarify the dispute.

(b) A pre-hearing conference may consist of—

(1) A conference telephone call;

(2) An informal meeting; or

(3) The submission and exchange of written material.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.409 What are the procedures for conducting a hearing on the record?

(a) A hearing on the record is an orderly presentation of arguments and evidence conducted by an ALJ.

(b) An ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless—

(1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or

(2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.

(c) The hearing process may be expedited as agreed by the ALJ, the designated Department official, and the IHE. Procedures to expedite may include, but are not limited to, the following:

(1) A restriction on the number or length of submissions.

(2) The conduct of the hearing by telephone conference call.

(3) A review limited to the written record.

(4) A certification by the parties to facts and legal authorities not in dispute.

(d)(1) The formal rules of evidence and procedures applicable to proceedings in a court of law are not applicable.

(2) The designated Department official has the burden of persuasion in any proceeding under this subpart.

(3)(i) The parties may agree to exchange relevant documents and information.

(ii) The ALJ may not order discovery, as provided for under the Federal Rules of Civil Procedure, or any other exchange between the parties of documents or information.

(4) The ALJ accepts only evidence that is relevant and material to the proceeding and is not unduly repetitious.

(e) The ALJ makes a transcribed record of any evidentiary hearing or oral argument that is held, and makes the record available to—

(1) The designated Department official; and

(2) The IHE on its request and upon payment of a fee comparable to that prescribed under the Department of Education Freedom of Information Act regulations (34 CFR part 5).

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.410 What are the procedures for issuance of a decision?

(a)(1) The ALJ issues a written decision to the IHE, the designated Department official, and the Secretary by certified mail, return receipt requested, within 30 days after—

(i) The last brief is filed;

(ii) The last day of the hearing if one is held; or

(iii) The date on which the ALJ terminates the hearing in accordance with § 86.401(c)(3).

(2) The ALJ's decision states whether the violation or violations contained in the Secretary's notification occurred, and articulates the reasons for the ALJ's finding.

(3) The ALJ bases findings of fact only on evidence in the hearing record and on matters given judicial notice.

(b)(1) The ALJ's decision is the final decision of the agency. However, the Secretary reviews the decision on request of either party, and may review the decision on his or her own initiative.

(2) If the Secretary decides to review the decision on his or her own initiative, the Secretary informs the parties of his or her intention to review by written notice sent within 15 days of the Secretary's receipt of the ALJ's decision.

(c)(1) Either party may request review by the Secretary by submitting a brief or written materials to the Secretary within 20 days of the party's receipt of the ALJ's decision. The submission must explain why the decision of the ALJ should be modified, reversed, or remanded. The other party shall respond within 20 days of receipt of the brief or written materials filed by the opposing party.

(2) Neither party may introduce new evidence on review.

(d) The decision of the ALJ ordering the repayment of Federal financial assistance or terminating the eligibility of an IHE does not take effect pending the Secretary's review.

(e)(1) The Secretary reviews the ALJ's decision considering only evidence introduced into the record.

(2) The Secretary's decision may affirm, modify, reverse or remand the ALJ's decision and includes a statement of reasons for the decision.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.411 What are the procedures for requesting reinstatement of eligibility?

(a)(1) An IHE whose eligibility to receive any or all forms of Federal financial assistance has been terminated may file with the Department a request for reinstatement as an eligible entity no earlier than 18 months after the effective date of the termination.

(2) In order to be reinstated, the IHE must demonstrate that it has corrected the violation or violations on which the termination was based, and that it has met any repayment obligation imposed upon it under § 86.301(b)(1) of this part.

(b) In addition to the requirements of paragraph (a) of this section, the IHE shall comply with the requirements and procedures for reinstatement of eligibility applicable to any Federal program under which it desires to receive Federal financial assistance.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

PART 97—PROTECTION OF HUMAN SUBJECTS

Subpart A—Federal Policy for the Protection of Human Subjects (Basic ED Policy for Protection of Human Research Subjects)

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AUTHORITY: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; 42 U.S.C. 300v–1(b).

SOURCE: 56 FR 28012, 28021, June 18, 1991, unless otherwise noted.

Subpart A—Federal Policy for the Protection of Human Subjects (Basic ED Policy for Protection of Human Research Subjects)

SOURCE: 82 FR 7272, Jan. 19, 2017, unless otherwise noted.

§ 97.101 To what does this policy apply?

(a) Except as detailed in § 97.104, this policy applies to all research involving human subjects conducted, supported, or otherwise subject to regulation by any Federal department or agency that takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by Federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the Federal Government outside the United States. Institutions that are engaged in research described in this paragraph and institutional review boards (IRBs) reviewing research that is subject to this policy must comply with this policy.

(b) [Reserved]

(c) Department or agency heads retain final judgment as to whether a particular activity is covered by this policy and this judgment shall be exercised consistent with the ethical principles of the Belmont Report.[62]

(d) Department or agency heads may require that specific research activities or classes of research activities conducted, supported, or otherwise subject to regulation by the Federal department or agency but not otherwise covered by this policy comply with some or all of the requirements of this policy.

(e) Compliance with this policy requires compliance with pertinent federal laws or regulations that provide additional protections for human subjects.

(f) This policy does not affect any state or local laws or regulations (including tribal law passed by the official governing body of an American Indian or Alaska Native tribe) that may otherwise be applicable and that provide additional protections for human subjects.

(g) This policy does not affect any foreign laws or regulations that may otherwise be applicable and that provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve

[62] The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.– Belmont Report. Washington, DC: U.S. Department of Health and Human Services. 1979.

the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the department or agency head, notices of these actions as they occur will be published in the FEDERAL REGISTER or will be otherwise published as provided in department or agency procedures.

(i) Unless otherwise required by law, department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy, provided the alternative procedures to be followed are consistent with the principles of the Belmont Report.[63] Except when otherwise required by statute or Executive Order, the department or agency head shall forward advance notices of these actions to the Office for Human Research Protections, Department of Health and Human Services (HHS), or any successor office, or to the equivalent office within the appropriate Federal department or agency, and shall also publish them in the FEDERAL REGISTER or in such other manner as provided in department or agency procedures. The waiver notice must include a statement that identifies the conditions under which the waiver will be applied and a justification as to why the waiver is appropriate for the research, including how the decision is consistent with the principles of the Belmont Report.

(j) Federal guidance on the requirements of this policy shall be issued only after consultation, for the purpose of harmonization (to the extent appropriate), with other Federal departments and agencies that have adopted this policy, unless such consultation is not feasible.

(k) [Reserved]

(l) *Pre-2018 Requirements*. Compliance dates and transition provisions:

(1) For purposes of this section, the *pre-2018 Requirements* means this subpart as published in the 2016 edition of the Code of Federal Regulations.

(2) *2018 Requirements*. For purposes of this section, the *2018 Requirements* means the Federal Policy for the Protection of Human Subjects requirements contained in this subpart. The general compliance date for the 2018 Requirements is January 21, 2019. The compliance date for §97.114(b) (cooperative research) of the 2018 Requirements is January 20, 2020.

(3) *Research subject to pre-2018 requirements*. The pre-2018 Requirements shall apply to the following research, unless the research is transitioning to comply with the 2018 Requirements in accordance with paragraph (l)(4) of this section:

(i) Research initially approved by an IRB under the pre-2018 Requirements before January 21, 2019;

(ii) Research for which IRB review was waived pursuant to §97.101(i) of the pre-2018 Requirements before January 21, 2019; and

(iii) Research for which a determination was made that the research was exempt under §97.101(b) of the pre-2018 Requirements before January 21, 2019.

(4) *Transitioning research*. If, on or after July 19, 2018, an institution planning or engaged in research otherwise covered by paragraph (l)(3) of this section determines that such research instead will transition to comply with the 2018 Requirements, the institution or an IRB must document and date such determination.

(i) If the determination to transition is documented between July 19, 2018, and January 20, 2019, the research shall:

(A) Beginning on the date of such documentation through January 20, 2019, comply with the pre-2018 Requirements, except that the research shall comply with the following:

(*1*) Section 97.102(l) of the 2018 Requirements (definition of research) (instead of §97.102(d) of the pre-2018 Requirements);

(*2*) Section 97.103(d) of the 2018 Requirements (revised certification requirement that eliminates IRB review of application or proposal) (instead of §97.103(f) of the pre-2018 Requirements); and

(*3*) Section 97.109(f)(1)(i) and (iii) of the 2018 Requirements (exceptions to mandated continuing review) (instead

[63] *Id*.

of § 97.103(b), as related to the requirement for continuing review, and in addition to § 97.109, of the pre-2018 Requirements); and

(B) Beginning on January 21, 2019, comply with the 2018 Requirements.

(ii) If the determination to transition is documented on or after January 21, 2019, the research shall, beginning on the date of such documentation, comply with the 2018 Requirements.

(5) *Research subject to 2018 Requirements.* The 2018 Requirements shall apply to the following research:

(i) Research initially approved by an IRB on or after January 21, 2019;

(ii) Research for which IRB review is waived pursuant to paragraph (i) of this section on or after January 21, 2019; and

(iii) Research for which a determination is made that the research is exempt on or after January 21, 2019.

(m) Severability: Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances.

[82 FR 7272, Jan. 19, 2017, as amended at 83 FR 28516, June 19, 2018]

§ 97.102 Definitions for purposes of this policy.

(a) *Certification* means the official notification by the institution to the supporting Federal department or agency component, in accordance with the requirements of this policy, that a research project or activity involving human subjects has been reviewed and approved by an IRB in accordance with an approved assurance.

(b) *Clinical trial* means a research study in which one or more human subjects are prospectively assigned to one or more interventions (which may include placebo or other control) to evaluate the effects of the interventions on biomedical or behavioral health-related outcomes.

(c) *Department or agency head* means the head of any Federal department or agency, for example, the Secretary of HHS, and any other officer or employee of any Federal department or agency to whom the authority provided by these regulations to the department or agency head has been delegated.

(d) *Federal department or agency* refers to a federal department or agency (the department or agency itself rather than its bureaus, offices or divisions) that takes appropriate administrative action to make this policy applicable to the research involving human subjects it conducts, supports, or otherwise regulates (*e.g.*, the U.S. Department of Health and Human Services, the U.S. Department of Defense, or the Central Intelligence Agency).

(e)(1) *Human subject* means a living individual about whom an investigator (whether professional or student) conducting research:

(i) Obtains information or biospecimens through intervention or interaction with the individual, and uses, studies, or analyzes the information or biospecimens; or (ii) Obtains, uses, studies, analyzes, or generates identifiable private information or identifiable biospecimens.

(2) *Intervention* includes both physical procedures by which information or biospecimens are gathered (*e.g.*, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes.

(3) *Interaction* includes communication or interpersonal contact between investigator and subject.

(4) *Private information* includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information that has been provided for specific purposes by an individual and that the individual can reasonably expect will not be made public (*e.g.*, a medical record).

(5) *Identifiable private information* is private information for which the identity of the subject is or may readily be ascertained by the investigator or associated with the information.

(6) *An identifiable biospecimen* is a biospecimen for which the identity of the subject is or may readily be ascertained by the investigator or associated with the biospecimen.

(7) Federal departments or agencies implementing this policy shall:

(i) Upon consultation with appropriate experts (including experts in data matching and re-identification), reexamine the meaning of ''identifiable private information,'' as defined in paragraph (e)(5) of this section, and ''identifiable biospecimen,'' as defined in paragraph (e)(6) of this section. This reexamination shall take place within 1 year and regularly thereafter (at least every 4 years). This process will be conducted by collaboration among the Federal departments and agencies implementing this policy. If appropriate and permitted by law, such Federal departments and agencies may alter the interpretation of these terms, including through the use of guidance.

(ii) Upon consultation with appropriate experts, assess whether there are analytic technologies or techniques that should be considered by investigators to generate ''identifiable private information,'' as defined in paragraph (e)(5) of this section, or an ''identifiable biospecimen,'' as defined in paragraph (e)(6) of this section. This assessment shall take place within 1 year and regularly thereafter (at least every 4 years). This process will be conducted by collaboration among the Federal departments and agencies implementing this policy. Any such technologies or techniques will be included on a list of technologies or techniques that produce identifiable private information or identifiable biospecimens. This list will be published in the FEDERAL REGISTER after notice and an opportunity for public comment. The Secretary, HHS, shall maintain the list on a publicly accessible Web site.

(f) *Institution* means any public or private entity, or department or agency (including federal, state, and other agencies).

(g) *IRB* means an institutional review board established in accord with and for the purposes expressed in this policy.

(h) *IRB approval* means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

(i) *Legally authorized representative* means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research. If there is no applicable law addressing this issue, *legally authorized representative* means an individual recognized by institutional policy as acceptable for providing consent in the nonresearch context on behalf of the prospective subject to the subject's participation in the procedure(s) involved in the research.

(j) *Minimal risk* means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

(k) *Public health authority* means an agency or authority of the United States, a state, a territory, a political subdivision of a state or territory, an Indian tribe, or a foreign government, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate.

(l) *Research* means a systematic investigation, including research development, testing, and evaluation, designed to develop or contribute to generalizable knowledge. Activities that meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program that is considered research for other purposes. For example, some demonstration and service programs may include research activities. For purposes of this part, the following activities are deemed not to be research:

(1) Scholarly and journalistic activities (*e.g.*, oral history, journalism, biography, literary criticism, legal research, and historical scholarship), including the collection and use of information, that focus directly on the specific individuals about whom the information is collected.

(2) Public health surveillance activities, including the collection and testing of information or biospecimens, conducted, supported, requested, ordered, required, or authorized by a public health authority. Such activities are limited to those necessary to allow a public health authority to identify, monitor, assess, or investigate potential public health signals, onsets of disease outbreaks, or conditions of public health importance (including trends, signals, risk factors, patterns in diseases, or increases in injuries from using consumer products). Such activities include those associated with providing timely situational awareness and priority setting during the course of an event or crisis that threatens public health (including natural or man-made disasters).

(3) Collection and analysis of information, biospecimens, or records by or for a criminal justice agency for activities authorized by law or court order solely for criminal justice or criminal investigative purposes.

(4) Authorized operational activities (as determined by each agency) in support of intelligence, homeland security, defense, or other national security missions.

(m) *Written*, or *in writing*, for purposes of this part, refers to writing on a tangible medium (*e.g.*, paper) or in an electronic format.

§ 97.103 Assuring compliance with this policy—research conducted or supported by any Federal department or agency.

(a) Each institution engaged in research that is covered by this policy, with the exception of research eligible for exemption under § 97.104, and that is conducted or supported by a Federal department or agency, shall provide written assurance satisfactory to the department or agency head that it will comply with the requirements of this policy. In lieu of requiring submission of an assurance, individual department or agency heads shall accept the existence of a current assurance, appropriate for the research in question, on file with the Office for Human Research Protections, HHS, or any successor office, and approved for Federal-wide use by that office. When the existence of an HHS-approved assurance is accepted in lieu of requiring submission of an assurance, reports (except certification) required by this policy to be made to department and agency heads shall also be made to the Office for Human Research Protections, HHS, or any successor office. Federal departments and agencies will conduct or support research covered by this policy only if the institution has provided an assurance that it will comply with the requirements of this policy, as provided in this section, and only if the institution has certified to the department or agency head that the research has been reviewed and approved by an IRB (if such certification is required by § 97.103(d)).

(b) The assurance shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by this policy and shall be filed in such form and manner as the department or agency head prescribes.

(c) The department or agency head may limit the period during which any assurance shall remain effective or otherwise condition or restrict the assurance.

(d) Certification is required when the research is supported by a Federal department or agency and not otherwise waived under § 97.101(i) or exempted under § 97.104. For such research, institutions shall certify that each proposed research study covered by the assurance and this section has been reviewed and approved by the IRB. Such certification must be submitted as prescribed by the Federal department or agency component supporting the research. Under no condition shall research covered by this section be initiated prior to receipt of the certification that the research has been reviewed and approved by the IRB.

(e) For nonexempt research involving human subjects covered by this policy (or exempt research for which limited

IRB review takes place pursuant to § 97.104(d)(2)(iii), (d)(3)(i)(C), or (d)(7) or (8)) that takes place at an institution in which IRB oversight is conducted by an IRB that is not operated by the institution, the institution and the organization operating the IRB shall document the institution's reliance on the IRB for oversight of the research and the responsibilities that each entity will undertake to ensure compliance with the requirements of this policy (*e.g.*, in a written agreement between the institution and the IRB, by implementation of an institution-wide policy directive providing the allocation of responsibilities between the institution and an IRB that is not affiliated with the institution, or as set forth in a research protocol).

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§ 97.104 Exempt research.

(a) Unless otherwise required by law or by department or agency heads, research activities in which the only involvement of human subjects will be in one or more of the categories in paragraph (d) of this section are exempt from the requirements of this policy, except that such activities must comply with the requirements of this section and as specified in each category.

(b) Use of the exemption categories for research subject to the requirements of subparts B, C, and D: Application of the exemption categories to research subject to the requirements of 45 CFR part 46, subparts B, C, and D, is as follows:

(1) *Subpart B*. Each of the exemptions at this section may be applied to research subject to subpart B if the conditions of the exemption are met.

(2) *Subpart C*. The exemptions at this section do not apply to research subject to subpart C, except for research aimed at involving a broader subject population that only incidentally includes prisoners.

(3) *Subpart D*. The exemptions at paragraphs (d)(1), (4), (5), (6), (7), and (8) of this section may be applied to research subject to subpart D if the conditions of the exemption are met. Paragraphs (d)(2)(i) and (ii) of this section only may apply to research subject to subpart D involving educational tests or the observation of public behavior when the investigator(s) do not participate in the activities being observed. Paragraph (d)(2)(iii) of this section may not be applied to research subject to subpart D.

(c) [Reserved]

(d) Except as described in paragraph (a) of this section, the following categories of human subjects research are exempt from this policy:

(1) Research, conducted in established or commonly accepted educational settings, that specifically involves normal educational practices that are not likely to adversely impact students' opportunity to learn required educational content or the assessment of educators who provide instruction. This includes most research on regular and special education instructional strategies, and research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research that only includes interactions involving educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior (including visual or auditory recording) if at least one of the following criteria is met:

(i) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained, directly or through identifiers linked to the subjects;

(ii) Any disclosure of the human subjects' responses outside the research would not reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, educational advancement, or reputation; or

(iii) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects can readily be ascertained, directly or through identifiers linked to the subjects, and an IRB conducts a limited IRB review to make the determination required by § 97.111(a)(7).

(3)(i) Research involving benign behavioral interventions in conjunction with the collection of information from an adult subject through verbal or

written responses (including data entry) or audiovisual recording if the subject prospectively agrees to the intervention and information collection and at least one of the following criteria is met:

(A) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained, directly or through identifiers linked to the subjects;

(B) Any disclosure of the human subjects' responses outside the research would not reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, educational advancement, or reputation; or

(C) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects can readily be ascertained, directly or through identifiers linked to the subjects, and an IRB conducts a limited IRB review to make the determination required by § 97.111(a)(7).

(ii) For the purpose of this provision, benign behavioral interventions are brief in duration, harmless, painless, not physically invasive, not likely to have a significant adverse lasting impact on the subjects, and the investigator has no reason to think the subjects will find the interventions offensive or embarrassing. Provided all such criteria are met, examples of such benign behavioral interventions would include having the subjects play an online game, having them solve puzzles under various noise conditions, or having them decide how to allocate a nominal amount of received cash between themselves and someone else.

(iii) If the research involves deceiving the subjects regarding the nature or purposes of the research, this exemption is not applicable unless the subject authorizes the deception through a prospective agreement to participate in research in circumstances in which the subject is informed that he or she will be unaware of or misled regarding the nature or purposes of the research.

(4) Secondary research for which consent is not required: Secondary research uses of identifiable private information or identifiable biospecimens, if at least one of the following criteria is met:

(i) The identifiable private information or identifiable biospecimens are publicly available;

(ii) Information, which may include information about biospecimens, is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained directly or through identifiers linked to the subjects, the investigator does not contact the subjects, and the investigator will not re-identify subjects;

(iii) The research involves only information collection and analysis involving the investigator's use of identifiable health information when that use is regulated under 45 CFR parts 160 and 164, subparts A and E, for the purposes of ''health care operations'' or ''research'' as those terms are defined at 45 CFR 164.501 or for ''public health activities and purposes'' as described under 45 CFR 164.512(b); or

(iv) The research is conducted by, or on behalf of, a Federal department or agency using government-generated or government-collected information obtained for nonresearch activities, if the research generates identifiable private information that is or will be maintained on information technology that is subject to and in compliance with section 208(b) of the E-Government Act of 2002, 44 U.S.C. 3501 note, if all of the identifiable private information collected, used, or generated as part of the activity will be maintained in systems of records subject to the Privacy Act of 1974, 5 U.S.C. 552a, and, if applicable, the information used in the research was collected subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

(5) Research and demonstration projects that are conducted or supported by a Federal department or agency, or otherwise subject to the approval of department or agency heads (or the approval of the heads of bureaus or other subordinate agencies that have been delegated authority to conduct the research and demonstration projects), and that are designed to study, evaluate, improve, or otherwise

examine public benefit or service programs, including procedures for obtaining benefits or services under those programs, possible changes in or alternatives to those programs or procedures, or possible changes in methods or levels of payment for benefits or services under those programs. Such projects include, but are not limited to, internal studies by Federal employees, and studies under contracts or consulting arrangements, cooperative agreements, or grants. Exempt projects also include waivers of otherwise mandatory requirements using authorities such as sections 1115 and 1115A of the Social Security Act, as amended.

(i) Each Federal department or agency conducting or supporting the research and demonstration projects must establish, on a publicly accessible Federal Web site or in such other manner as the department or agency head may determine, a list of the research and demonstration projects that the Federal department or agency conducts or supports under this provision. The research or demonstration project must be published on this list prior to commencing the research involving human subjects.

(ii) [Reserved]

(6) Taste and food quality evaluation and consumer acceptance studies:

(i) If wholesome foods without additives are consumed, or

(ii) If a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

(7) Storage or maintenance for secondary research for which broad consent is required: Storage or maintenance of identifiable private information or identifiable biospecimens for potential secondary research use if an IRB conducts a limited IRB review and makes the determinations required by § 97.111(a)(8).

(8) Secondary research for which broad consent is required: Research involving the use of identifiable private information or identifiable biospecimens for secondary research use, if the following criteria are met:

(i) Broad consent for the storage, maintenance, and secondary research use of the identifiable private information or identifiable biospecimens was obtained in accordance with § 97.116(a)(1) through (4), (a)(6), and (d);

(ii) Documentation of informed consent or waiver of documentation of consent was obtained in accordance with § 97.117;

(iii) An IRB conducts a limited IRB review and makes the determination required by § 97.111(a)(7) and makes the determination that the research to be conducted is within the scope of the broad consent referenced in paragraph (d)(8)(i) of this section; and (iv) The investigator does not include returning individual research results to subjects as part of the study plan. This provision does not prevent an investigator from abiding by any legal requirements to return individual research results.

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§§ 97–97.106 [Reserved]

§ 97.107 IRB membership.

(a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members (professional competence), and the diversity of its members, including race, gender, and cultural backgrounds and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. The IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments (including policies and resources) and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews research that involves a category of subjects that is vulnerable to coercion or undue influence, such as children, prisoners, individuals with

impaired decision-making capacity, or economically or educationally disadvantaged persons, consideration shall be given to the inclusion of one or more individuals who are knowledgeable about and experienced in working with these categories of subjects.

(b) Each IRB shall include at least one member whose primary concerns are in scientific areas and at least one member whose primary concerns are in nonscientific areas.

(c) Each IRB shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

(d) No IRB may have a member participate in the IRB's initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the IRB.

(e) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of issues that require expertise beyond or in addition to that available on the IRB. These individuals may not vote with the IRB.

§ 97.108 IRB functions and operations.

(a) In order to fulfill the requirements of this policy each IRB shall:

(1) Have access to meeting space and sufficient staff to support the IRB's review and recordkeeping duties;

(2) Prepare and maintain a current list of the IRB members identified by name; earned degrees; representative capacity; indications of experience such as board certifications or licenses sufficient to describe each member's chief anticipated contributions to IRB deliberations; and any employment or other relationship between each member and the institution, for example, full-time employee, part-time employee, member of governing panel or board, stockholder, paid or unpaid consultant;

(3) Establish and follow written procedures for:

(i) Conducting its initial and continuing review of research and for reporting its findings and actions to the investigator and the institution;

(ii) Determining which projects require review more often than annually and which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review; and

(iii) Ensuring prompt reporting to the IRB of proposed changes in a research activity, and for ensuring that investigators will conduct the research activity in accordance with the terms of the IRB approval until any proposed changes have been reviewed and approved by the IRB, except when necessary to eliminate apparent immediate hazards to the subject.

(4) Establish and follow written procedures for ensuring prompt reporting to the IRB; appropriate institutional officials; the department or agency head; and the Office for Human Research Protections, HHS, or any successor office, or the equivalent office within the appropriate Federal department or agency of

(i) Any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with this policy or the requirements or determinations of the IRB; and

(ii) Any suspension or termination of IRB approval.

(b) Except when an expedited review procedure is used (as described in § 97.110), an IRB must review proposed research at convened meetings at which a majority of the members of the IRB are present, including at least one member whose primary concerns are in nonscientific areas. In order for the research to be approved, it shall receive the approval of a majority of those members present at the meeting.

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§ 97.109 IRB review of research.

(a) An IRB shall review and have authority to approve, require modifications in (to secure approval), or disapprove all research activities covered by this policy, including exempt research activities under § 97.104 for which limited IRB review is a condition of exemption (under § 97.104(d)(2)(iii), (d)(3)(i)(C), and (d)(7), and (8)).

(b) An IRB shall require that information given to subjects (or legally authorized representatives, when appropriate) as part of informed consent is in accordance with §97.116. The IRB may require that information, in addition to that specifically mentioned in §97.116, be given to the subjects when in the IRB's judgment the information would meaningfully add to the protection of the rights and welfare of subjects.

(c) An IRB shall require documentation of informed consent or may waive documentation in accordance with §97.117.

(d) An IRB shall notify investigators and the institution in writing of its decision to approve or disapprove the proposed research activity, or of modifications required to secure IRB approval of the research activity. If the IRB decides to disapprove a research activity, it shall include in its written notification a statement of the reasons for its decision and give the investigator an opportunity to respond in person or in writing.

(e) An IRB shall conduct continuing review of research requiring review by the convened IRB at intervals appropriate to the degree of risk, not less than once per year, except as described in §97.109(f).

(f)(1) Unless an IRB determines otherwise, continuing review of research is not required in the following circumstances:

(i) Research eligible for expedited review in accordance with §97.110;

(ii) Research reviewed by the IRB in accordance with the limited IRB review described in §97.104(d)(2)(iii), (d)(3)(i)(C), or (d)(7) or (8);

(iii) Research that has progressed to the point that it involves only one or both of the following, which are part of the IRB-approved study:

(A) Data analysis, including analysis of identifiable private information or identifiable biospecimens, or

(B) Accessing follow-up clinical data from procedures that subjects would undergo as part of clinical care.

(2) [Reserved]

(g) An IRB shall have authority to observe or have a third party observe the consent process and the research.

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§97.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.

(a) The Secretary of HHS has established, and published as a Notice in the FEDERAL REGISTER, a list of categories of research that may be reviewed by the IRB through an expedited review procedure. The Secretary will evaluate the list at least every 8 years and amend it, as appropriate, after consultation with other federal departments and agencies and after publication in the FEDERAL REGISTER for public comment. A copy of the list is available from the Office for Human Research Protections, HHS, or any successor office.

(b)(1) An IRB may use the expedited review procedure to review the following:

(i) Some or all of the research appearing on the list described in paragraph (a) of this section, unless the reviewer determines that the study involves more than minimal risk;

(ii) Minor changes in previously approved research during the period for which approval is authorized; or

(iii) Research for which limited IRB review is a condition of exemption under §97.104(d)(2)(iii), (d)(3)(i)(C), and (d)(7) and (8).

(2) Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the nonexpedited procedure set forth in §97.108(b).

(c) Each IRB that uses an expedited review procedure shall adopt a method for keeping all members advised of research proposals that have been approved under the procedure.

(d) The department or agency head may restrict, suspend, terminate, or choose not to authorize an institution's or IRB's use of the expedited review procedure.

§ 97.111 Criteria for IRB approval of research.

(a) In order to approve research covered by this policy the IRB shall determine that all of the following requirements are satisfied:

(1) Risks to subjects are minimized:

(i) By using procedures that are consistent with sound research design and that do not unnecessarily expose subjects to risk, and

(ii) Whenever appropriate, by using procedures already being performed on the subjects for diagnostic or treatment purposes.

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. In evaluating risks and benefits, the IRB should consider only those risks and benefits that may result from the research (as distinguished from risks and benefits of therapies subjects would receive even if not participating in the research). The IRB should not consider possible long-range effects of applying knowledge gained in the research (*e.g.*, the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.

(3) Selection of subjects is equitable. In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted. The IRB should be particularly cognizant of the special problems of research that involves a category of subjects who are vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons.

(4) Informed consent will be sought from each prospective subject or the subject's legally authorized representative, in accordance with, and to the extent required by, § 97.116.

(5) Informed consent will be appropriately documented or appropriately waived in accordance with § 97.117.

(6) When appropriate, the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects.

(7) When appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(i) The Secretary of HHS will, after consultation with the Office of Management and Budget's privacy office and other Federal departments and agencies that have adopted this policy, issue guidance to assist IRBs in assessing what provisions are adequate to protect the privacy of subjects and to maintain the confidentiality of data.

(ii) [Reserved]

(8) For purposes of conducting the limited IRB review required by § 97.104(d)(7)), the IRB need not make the determinations at paragraphs (a)(1) through (7) of this section, and shall make the following determinations:

(i) Broad consent for storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens is obtained in accordance with the requirements of § 97.116(a)(1)–(4), (a)(6), and (d);

(ii) Broad consent is appropriately documented or waiver of documentation is appropriate, in accordance with § 97.117; and

(iii) If there is a change made for research purposes in the way the identifiable private information or identifiable biospecimens are stored or maintained, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(b) When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.

§ 97.112 Review by Institution

Research covered by this policy that has been approved by an IRB may be subject to further appropriate review

and approval or disapproval by officials of the institution. However, those officials may not approve the research if it has not been approved by an IRB.

§ 97.113 Suspension or Termination of IRB Approval of Research.

An IRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the IRB's requirements or that has been associated with unexpected serious harm to subjects. Any suspension or termination of approval shall include a statement of the reasons for the IRB's action and shall be reported promptly to the investigator, appropriate institutional officials, and the department or agency head.

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§ 97.114 Cooperative Research.

(a) Cooperative research projects are those projects covered by this policy that involve more than one institution. In the conduct of cooperative research projects, each institution is responsible for safeguarding the rights and welfare of human subjects and for complying with this policy.

(b)(1) Any institution located in the United States that is engaged in cooperative research must rely upon approval by a single IRB for that portion of the research that is conducted in the United States. The reviewing IRB will be identified by the Federal department or agency supporting or conducting the research or proposed by the lead institution subject to the acceptance of the Federal department or agency supporting the research.

(2) The following research is not subject to this provision:

(i) Cooperative research for which more than single IRB review is required by law (including tribal law passed by the official governing body of an American Indian or Alaska Native tribe); or

(ii) Research for which any Federal department or agency supporting or conducting the research determines and documents that the use of a single IRB is not appropriate for the particular context.

(c) For research not subject to paragraph (b) of this section, an institution participating in a cooperative project may enter into a joint review arrangement, rely on the review of another IRB, or make similar arrangements for avoiding duplication of effort.

§ 97.115 IRB Records.

(a) An institution, or when appropriate an IRB, shall prepare and maintain adequate documentation of IRB activities, including the following:

(1) Copies of all research proposals reviewed, scientific evaluations, if any, that accompany the proposals, approved sample consent forms, progress reports submitted by investigators, and reports of injuries to subjects.

(2) Minutes of IRB meetings, which shall be in sufficient detail to show attendance at the meetings; actions taken by the IRB; the vote on these actions including the number of members voting for, against, and abstaining; the basis for requiring changes in or disapproving research; and a written summary of the discussion of controverted issues and their resolution.

(3) Records of continuing review activities, including the rationale for conducting continuing review of research that otherwise would not require continuing review as described in § 97.109(f)(1).

(4) Copies of all correspondence between the IRB and the investigators.

(5) A list of IRB members in the same detail as described in § 97.108(a)(2).

(6) Written procedures for the IRB in the same detail as described in § 97.108(a)(3) and (4).

(7) Statements of significant new findings provided to subjects, as required by § 97.116(c)(5).

(8) The rationale for an expedited reviewer's determination under § 97.110(b)(1)(i) that research appearing on the expedited review list described in § 97.110(a) is more than minimal risk.

(9) Documentation specifying the responsibilities that an institution and an organization operating an IRB each will undertake to ensure compliance with the requirements of this policy, as described in § 97.103(e).

(b) The records required by this policy shall be retained for at least 3 years, and records relating to research that is conducted shall be retained for at least 3 years after completion of the

research. The institution or IRB may maintain the records in printed form, or electronically. All records shall be accessible for inspection and copying by authorized representatives of the Federal department or agency at reasonable times and in a reasonable manner.

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§ 97.116 General Requirements for Informed Consent.

(a) *General.* General requirements for informed consent, whether written or oral, are set forth in this paragraph and apply to consent obtained in accordance with the requirements set forth in paragraphs (b) through (d) of this section. Broad consent may be obtained in lieu of informed consent obtained in accordance with paragraphs (b) and (c) of this section only with respect to the storage, maintenance, and secondary research uses of identifiable private information and identifiable biospecimens. Waiver or alteration of consent in research involving public benefit and service programs conducted by or subject to the approval of state or local officials is described in paragraph (e) of this section. General waiver or alteration of informed consent is described in paragraph (f) of this section. Except as provided elsewhere in this policy:

(1) Before involving a human subject in research covered by this policy, an investigator shall obtain the legally effective informed consent of the subject or the subject's legally authorized representative.

(2) An investigator shall seek informed consent only under circumstances that provide the prospective subject or the legally authorized representative sufficient opportunity to discuss and consider whether or not to participate and that minimize the possibility of coercion or undue influence.

(3) The information that is given to the subject or the legally authorized representative shall be in language understandable to the subject or the legally authorized representative.

(4) The prospective subject or the legally authorized representative must be provided with the information that a reasonable person would want to have in order to make an informed decision about whether to participate, and an opportunity to discuss that information.

(5) Except for broad consent obtained in accordance with paragraph (d) of this section:

(i) Informed consent must begin with a concise and focused presentation of the key information that is most likely to assist a prospective subject or legally authorized representative in understanding the reasons why one might or might not want to participate in the research. This part of the informed consent must be organized and presented in a way that facilitates comprehension.

(ii) Informed consent as a whole must present information in sufficient detail relating to the research, and must be organized and presented in a way that does not merely provide lists of isolated facts, but rather facilitates the prospective subject's or legally authorized representative's understanding of the reasons why one might or might not want to participate.

(6) No informed consent may include any exculpatory language through which the subject or the legally authorized representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution, or its agents from liability for negligence.

(b) *Basic elements of informed consent.* Except as provided in paragraph (d), (e), or (f) of this section, in seeking informed consent the following information shall be provided to each subject or the legally authorized representative:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures that are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others that may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject;

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled; and

(9) One of the following statements about any research that involves the collection of identifiable private information or identifiable biospecimens:

(i) A statement that identifiers might be removed from the identifiable private information or identifiable biospecimens and that, after such removal, the information or biospecimens could be used for future research studies or distributed to another investigator for future research studies without additional informed consent from the subject or the legally authorized representative, if this might be a possibility; or

(ii) A statement that the subject's information or biospecimens collected as part of the research, even if identifiers are removed, will not be used or distributed for future research studies.

(c) *Additional elements of informed consent.* Except as provided in paragraph (d), (e), or (f) of this section, one or more of the following elements of information, when appropriate, shall also be provided to each subject or the legally authorized representative:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) that are currently unforeseeable;

(2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's or the legally authorized representative's consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research that may relate to the subject's willingness to continue participation will be provided to the subject;

(6) The approximate number of subjects involved in the study;

(7) A statement that the subject's biospecimens (even if identifiers are removed) may be used for commercial profit and whether the subject will or will not share in this commercial profit;

(8) A statement regarding whether clinically relevant research results, including individual research results, will be disclosed to subjects, and if so, under what conditions; and

(9) For research involving biospecimens, whether the research will (if known) or might include whole genome sequencing (*i.e.*, sequencing of a human germline or somatic specimen with the intent to generate the genome or exome sequence of that specimen).

(d) *Elements of broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens.* Broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens (collected for either research studies other than the proposed research or nonresearch purposes) is permitted as an alternative to the informed consent requirements in paragraphs (b) and (c) of this section. If the

subject or the legally authorized representative is asked to provide broad consent, the following shall be provided to each subject or the subject's legally authorized representative:

(1) The information required in paragraphs (b)(2), (b)(3), (b)(5), and (b)(8) and, when appropriate, (c)(7) and (9) of this section;

(2) A general description of the types of research that may be conducted with the identifiable private information or identifiable biospecimens. This description must include sufficient information such that a reasonable person would expect that the broad consent would permit the types of research conducted;

(3) A description of the identifiable private information or identifiable biospecimens that might be used in research, whether sharing of identifiable private information or identifiable biospecimens might occur, and the types of institutions or researchers that might conduct research with the identifiable private information or identifiable biospecimens;

(4) A description of the period of time that the identifiable private information or identifiable biospecimens may be stored and maintained (which period of time could be indefinite), and a description of the period of time that the identifiable private information or identifiable biospecimens may be used for research purposes (which period of time could be indefinite);

(5) Unless the subject or legally authorized representative will be provided details about specific research studies, a statement that they will not be informed of the details of any specific research studies that might be conducted using the subject's identifiable private information or identifiable biospecimens, including the purposes of the research, and that they might have chosen not to consent to some of those specific research studies;

(6) Unless it is known that clinically relevant research results, including individual research results, will be disclosed to the subject in all circumstances, a statement that such results may not be disclosed to the subject; and

(7) An explanation of whom to contact for answers to questions about the subject's rights and about storage and use of the subject's identifiable private information or identifiable biospecimens, and whom to contact in the event of a research-related harm.

(e) *Waiver or alteration of consent in research involving public benefit and service programs conducted by or subject to the approval of state or local officials*—(1) *Waiver*. An IRB may waive the requirement to obtain informed consent for research under paragraphs (a) through (c) of this section, provided the IRB satisfies the requirements of paragraph (e)(3) of this section. If an individual was asked to provide broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens in accordance with the requirements at paragraph (d) of this section, and refused to consent, an IRB cannot waive consent for the storage, maintenance, or secondary research use of the identifiable private information or identifiable biospecimens.

(2) *Alteration*. An IRB may approve a consent procedure that omits some, or alters some or all, of the elements of informed consent set forth in paragraphs (b) and (c) of this section provided the IRB satisfies the requirements of paragraph (e)(3) of this section. An IRB may not omit or alter any of the requirements described in paragraph (a) of this section. If a broad consent procedure is used, an IRB may not omit or alter any of the elements required under paragraph (d) of this section.

(3) *Requirements for waiver and alteration*. In order for an IRB to waive or alter consent as described in this subsection, the IRB must find and document that:

(i) The research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine:

(A) Public benefit or service programs;

(B) Procedures for obtaining benefits or services under those programs;

(C) Possible changes in or alternatives to those programs or procedures; or

(D) Possible changes in methods or levels of payment for benefits or services under those programs; and

(ii) The research could not practicably be carried out without the waiver or alteration.

(f) *General waiver or alteration of consent*—(1) *Waiver*. An IRB may waive the requirement to obtain informed consent for research under paragraphs (a) through (c) of this section, provided the IRB satisfies the requirements of paragraph (f)(3) of this section. If an individual was asked to provide broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens in accordance with the requirements at paragraph (d) of this section, and refused to consent, an IRB cannot waive consent for the storage, maintenance, or secondary research use of the identifiable private information or identifiable biospecimens.

(2) *Alteration*. An IRB may approve a consent procedure that omits some, or alters some or all, of the elements of informed consent set forth in paragraphs (b) and (c) of this section provided the IRB satisfies the requirements of paragraph (f)(3) of this section. An IRB may not omit or alter any of the requirements described in paragraph (a) of this section. If a broad consent procedure is used, an IRB may not omit or alter any of the elements required under paragraph (d) of this section.

(3) *Requirements for waiver and alteration*. In order for an IRB to waive or alter consent as described in this subsection, the IRB must find and document that:

(i) The research involves no more than minimal risk to the subjects;

(ii) The research could not practicably be carried out without the requested waiver or alteration;

(iii) If the research involves using identifiable private information or identifiable biospecimens, the research could not practicably be carried out without using such information or biospecimens in an identifiable format;

(iv) The waiver or alteration will not adversely affect the rights and welfare of the subjects; and

(v) Whenever appropriate, the subjects or legally authorized representatives will be provided with additional pertinent information after participation.

(g) *Screening, recruiting, or determining eligibility*. An IRB may approve a research proposal in which an investigator will obtain information or biospecimens for the purpose of screening, recruiting, or determining the eligibility of prospective subjects without the informed consent of the prospective subject or the subject's legally authorized representative, if either of the following conditions are met:

(1) The investigator will obtain information through oral or written communication with the prospective subject or legally authorized representative, or

(2) The investigator will obtain identifiable private information or identifiable biospecimens by accessing records or stored identifiable biospecimens.

(h) *Posting of clinical trial consent form*. (1) For each clinical trial conducted or supported by a Federal department or agency, one IRB-approved informed consent form used to enroll subjects must be posted by the awardee or the Federal department or agency component conducting the trial on a publicly available Federal Web site that will be established as a repository for such informed consent forms.

(2) If the Federal department or agency supporting or conducting the clinical trial determines that certain information should not be made publicly available on a Federal Web site (*e.g.* confidential commercial information), such Federal department or agency may permit or require redactions to the information posted.

(3) The informed consent form must be posted on the Federal Web site after the clinical trial is closed to recruitment, and no later than 60 days after the last study visit by any subject, as required by the protocol.

(i) *Preemption*. The informed consent requirements in this policy are not intended to preempt any applicable Federal, state, or local laws (including tribal laws passed by the official governing body of an American Indian or Alaska Native tribe) that require additional information to be disclosed in order for informed consent to be legally effective.

(j) *Emergency medical care.* Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable Federal, state, or local law (including tribal law passed by the official governing body of an American Indian or Alaska Native tribe).

(Approved by the Office of Management and Budget under Control Number 0990–0260)

§ 97.117 Documentation of informed consent.

(a) Except as provided in paragraph (c) of this section, informed consent shall be documented by the use of a written informed consent form approved by the IRB and signed (including in an electronic format) by the subject or the subject's legally authorized representative. A written copy shall be given to the person signing the informed consent form.

(b) Except as provided in paragraph (c) of this section, the informed consent form may be either of the following:

(1) A written informed consent form that meets the requirements of § 97.116. The investigator shall give either the subject or the subject's legally authorized representative adequate opportunity to read the informed consent form before it is signed; alternatively, this form may be read to the subject or the subject's legally authorized representative.

(2) A short form written informed consent form stating that the elements of informed consent required by § 97.116 have been presented orally to the subject or the subject's legally authorized representative, and that the key information required by § 97.116(a)(5)(i) was presented first to the subject, before other information, if any, was provided. The IRB shall approve a written summary of what is to be said to the subject or the legally authorized representative. When this method is used, there shall be a witness to the oral presentation. Only the short form itself is to be signed by the subject or the subject's legally authorized representative. However, the witness shall sign both the short form and a copy of the summary, and the person actually obtaining consent shall sign a copy of the summary. A copy of the summary shall be given to the subject or the subject's legally authorized representative, in addition to a copy of the short form.

(c)(1) An IRB may waive the requirement for the investigator to obtain a signed informed consent form for some or all subjects if it finds any of the following:

(i) That the only record linking the subject and the research would be the informed consent form and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject (or legally authorized representative) will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern;

(ii) That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context; or

(iii) If the subjects or legally authorized representatives are members of a distinct cultural group or community in which signing forms is not the norm, that the research presents no more than minimal risk of harm to subjects and provided there is an appropriate alternative mechanism for documenting that informed consent was obtained.

(2) In cases in which the documentation requirement is waived, the IRB may require the investigator to provide subjects or legally authorized representatives with a written statement regarding the research.

(Approved by the Office of Management and Budget under Control Number 0990–0260)

§ 97.118 Applications and proposals lacking definite plans for involvement of human subjects.

Certain types of applications for grants, cooperative agreements, or contracts are submitted to Federal departments or agencies with the knowledge that subjects may be involved within the period of support, but definite plans would not normally be set forth in the application or proposal. These include activities such as institutional type grants when selection of specific projects is the institution's responsibility; research training grants in

which the activities involving subjects remain to be selected; and projects in which human subjects' involvement will depend upon completion of instruments, prior animal studies, or purification of compounds. Except for research waived under §97.101(i) or exempted under §97.104, no human subjects may be involved in any project supported by these awards until the project has been reviewed and approved by the IRB, as provided in this policy, and certification submitted, by the institution, to the Federal department or agency component supporting the research.

§97.119 Research undertaken without the intention of involving human subjects.

Except for research waived under §97.101(i) or exempted under §97.104, in the event research is undertaken without the intention of involving human subjects, but it is later proposed to involve human subjects in the research, the research shall first be reviewed and approved by an IRB, as provided in this policy, a certification submitted by the institution to the Federal department or agency component supporting the research, and final approval given to the proposed change by the Federal department or agency component.

§97.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal department or agency.

(a) The department or agency head will evaluate all applications and proposals involving human subjects submitted to the Federal department or agency through such officers and employees of the Federal department or agency and such experts and consultants as the department or agency head determines to be appropriate. This evaluation will take into consideration the risks to the subjects, the adequacy of protection against these risks, the potential benefits of the research to the subjects and others, and the importance of the knowledge gained or to be gained.

(b) On the basis of this evaluation, the department or agency head may approve or disapprove the application or proposal, or enter into negotiations to develop an approvable one.

§97.121 [Reserved]

§97.122 Use of Federal funds.

Federal funds administered by a Federal department or agency may not be expended for research involving human subjects unless the requirements of this policy have been satisfied.

§97.123 Early termination of research support: Evaluation of applications and proposals.

(a) The department or agency head may require that Federal department or agency support for any project be terminated or suspended in the manner prescribed in applicable program requirements, when the department or agency head finds an institution has materially failed to comply with the terms of this policy.

(b) In making decisions about supporting or approving applications or proposals covered by this policy the department or agency head may take into account, in addition to all other eligibility requirements and program criteria, factors such as whether the applicant has been subject to a termination or suspension under paragraph (a) of this section and whether the applicant or the person or persons who would direct or has/have directed the scientific and technical aspects of an activity has/have, in the judgment of the department or agency head, materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not the research was subject to federal regulation).

§97.124 Conditions.

With respect to any research project or any class of research projects the department or agency head of either the conducting or the supporting Federal department or agency may impose additional conditions prior to or at the time of approval when in the judgment of the department or agency head additional conditions are necessary for the protection of human subjects.

Subparts B–C [Reserved]

Subpart D—Additional ED Protections for Children Who Are Subjects in Research

SOURCE: 62 FR 63221, Nov. 26, 1997, unless otherwise noted.

§ 97.401 To what do these regulations apply?

(a) This subpart applies to all research involving children as subjects conducted or supported by the Department of Education.

(1) This subpart applies to research conducted by Department employees.

(2) This subpart applies to research conducted or supported by the Department of Education outside the United States, but in appropriate circumstances the Secretary may, under § 97.101(i), waive the applicability of some or all of the requirements of the regulations in this subpart for that research.

(b) Exemptions in § 97.101(b)(1) and (b)(3) through (b)(6) are applicable to this subpart. The exemption in § 97.101(b)(2) regarding educational tests is also applicable to this subpart. The exemption in § 97.101(b)(2) for research involving survey or interview procedures or observations of public behavior does not apply to research covered by this subpart, except for research involving observation of public behavior when the investigator or investigators do not participate in the activities being observed.

(c) The exceptions, additions, and provisions for waiver as they appear in § 97.101(c) through (i) are applicable to this subpart.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b)).

§ 97.402 Definitions.

The definitions in § 97.102 apply to this subpart. In addition, the following definitions also apply to this subpart:

(a) *Children* are persons who have not attained the legal age for consent to treatments or procedures involved in the research, under the applicable law of the jurisdiction in which the research will be conducted.

(b) *Assent* means a child's affirmative agreement to participate in research. Mere failure to object should not, absent affirmative agreement, be construed as assent.

(c) *Permission* means the agreement of parent(s) or guardian to the participation of their child or ward in research.

(d) *Parent* means a child's biological or adoptive parent.

(e) *Guardian* means an individual who is authorized under applicable State or local law to consent on behalf of a child to general medical care.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b)).

§ 97.403 IRB duties.

In addition to other responsibilities assigned to IRBs under this part, each IRB shall review research covered by this subpart and approve only research that satisfies the conditions of all applicable sections of this subpart.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b)).

§ 97.404 Research not involving greater than minimal risk.

ED conducts or funds research in which the IRB finds that no greater than minimal risk to children is presented, only if the IRB finds that adequate provisions are made for soliciting the assent of the children and the permission of their parents or guardians, as set forth in § 97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

§ 97.405 Research involving greater than minimal risk but presenting the prospect of direct benefit to the individual subjects.

ED conducts or funds research in which the IRB finds that more than minimal risk to children is presented by an intervention or procedure that holds out the prospect of direct benefit for the individual subject, or by a monitoring procedure that is likely to contribute to the subject's well-being, only if the IRB finds that—

(a) The risk is justified by the anticipated benefit to the subjects;

(b) The relation of the anticipated benefit to the risk is at least as favorable to the subjects as that presented by available alternative approaches; and

(c) Adequate provisions are made for soliciting the assent of the children and permission of their parents or guardians, as set forth in § 97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

§ 97.406 Research involving greater than minimal risk and no prospect of direct benefit to individual subjects, but likely to yield generalizable knowledge about the subject's disorder or condition.

ED conducts or funds research in which the IRB finds that more than minimal risk to children is presented by an intervention or procedure that does not hold out the prospect of direct benefit for the individual subject, or by a monitoring procedure which is not likely to contribute to the well-being of the subject, only if the IRB finds that—

(a) The risk represents a minor increase over minimal risk;

(b) The intervention or procedure presents experiences to subjects that are reasonably commensurate with those inherent in their actual or expected medical, dental, psychological, social, or educational situations;

(c) The intervention or procedure is likely to yield generalizable knowledge about the subjects' disorder or condition that is of vital importance for the understanding or amelioration of the subjects' disorder or condition; and

(d) Adequate provisions are made for soliciting assent of the children and permission of their parents or guardians, as set forth in § 97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

§ 97.407 Research not otherwise approvable which presents an opportunity to understand, prevent, or alleviate a serious problem affecting the health or welfare of children.

ED conducts or funds research that the IRB does not believe meets the requirements of § 97.404, § 97.405, or § 97.406 only if—

(a) The IRB finds that the research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children; and

(b) The Secretary, after consultation with a panel of experts in pertinent disciplines (for example: science, medicine, education, ethics, law) and following opportunity for public review and comment, has determined either that—

(1) The research in fact satisfies the conditions of § 97.404, § 97.405, or § 97.406, as applicable; or

(2)(i) The research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children;

(ii) The research will be conducted in accordance with sound ethical principles; and

(iii) Adequate provisions are made for soliciting the assent of children and the permission of their parents or guardians, as set forth in § 97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

§ 97.408 Requirements for permission by parents or guardians and for assent by children.

(a) In addition to the determinations required under other applicable sections of this subpart, the IRB shall determine that adequate provisions are made for soliciting the assent of the children, if in the judgment of the IRB the children are capable of providing assent. In determining whether children are capable of assenting, the IRB shall take into account the ages, maturity, and psychological state of the children involved. This judgment may be made for all children to be involved in research under a particular protocol, or for each child, as the IRB deems appropriate. If the IRB determines that the capability of some or all of the children is so limited that they cannot reasonably be consulted or that the intervention or procedure involved in the research holds out a prospect of direct benefit that is important to the health or well-being of the children and is available only in the context of the research, the assent of the children is not a necessary condition for proceeding with the research. Even if the IRB determines that the subjects are capable of assenting, the IRB may still waive the assent requirement under

circumstances in which consent may be waived in accord with § 97.116.

(b) In addition to the determinations required under other applicable sections of this subpart, the IRB shall determine, in accordance with and to the extent that consent is required by § 97.116, that adequate provisions are made for soliciting the permission of each child's parent(s) or guardian(s). If parental permission is to be obtained, the IRB may find that the permission of one parent is sufficient for research to be conducted under § 97.404 or § 97.405. If research is covered by §§ 97.406 and 97.407 and permission is to be obtained from parents, both parents must give their permission unless one parent is deceased, unknown, incompetent, or not reasonably available, or if only one parent has legal responsibility for the care and custody of the child.

(c) In addition to the provisions for waiver contained in § 97.116, if the IRB determines that a research protocol is designed for conditions or for a subject population for which parental or guardian permission is not a reasonable requirement to protect the subjects (for example, neglected or abused children), it may waive the consent requirements in subpart A of this part and paragraph (b) of this section, provided an appropriate mechanism for protecting the children who will participate as subjects in the research is substituted, and provided further that the waiver is not inconsistent with Federal, State, or local law. The choice of an appropriate mechanism depends upon the nature and purpose of the activities described in the protocol, the risk and anticipated benefit to the research subjects, and their age, maturity, status, and condition.

(d) Permission by parents or guardians must be documented in accordance with and to the extent required by § 97.117.

(e) If the IRB determines that assent is required, it shall also determine whether and how assent must be documented.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

§ 97.409 Wards.

(a) Children who are wards of the State or any other agency, institution, or entity may be included in research approved under § 97.406 or § 97.407 only if that research is—

(1) Related to their status as wards; or

(2) Conducted in schools, camps, hospitals, institutions, or similar settings in which the majority of children involved as subjects are not wards.

(b) If research is approved under paragraph (a) of this section, the IRB shall require appointment of an advocate for each child who is a ward, in addition to any other individual acting on behalf of the child as guardian or *in loco parentis*. One individual may serve as advocate for more than one child. The advocate must be an individual who has the background and experience to act in, and agrees to act in, the best interest of the child for the duration of the child's participation in the research and who is not associated in any way (except in the role as advocate or member of the IRB) with the research, the investigator or investigators, or the guardian organization.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

PART 98—STUDENT RIGHTS IN RESEARCH, EXPERIMENTAL PROGRAMS, AND TESTING

Sec.

98.1 Applicability of part.
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98.4 Protection of students' privacy in examination, testing, or treatment.
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98.9 Investigation and findings.
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AUTHORITY: Sec. 514(a) of Pub. L. 93–380, 88 Stat. 574 (20 U.S.C. 1232h(a)); sec. 1250 of Pub. L. 95–561, 92 Stat. 2355–2356 (20 U.S.C. 1232h(b)); and sec. 408(a)(1) of Pub. L. 90–247, 88 Stat. 559–560, as amended (20 U.S.C. 1221e–3(a)(1)); sec. 414(a) of Pub. L. 96–88, 93 Stat. 685 (20 U.S.C. 3474(a)), unless otherwise noted.

SOURCE: 49 FR 35321, Sept. 6, 1984, unless otherwise noted.

§ 98.1 Applicability of part.

This part applies to any program administered by the Secretary of Education that:

(a)(1) Was transferred to the Department by the Department of Education Organization Act (DEOA); and

(2) Was administered by the Education Division of the Department of Health, Education, and Welfare on the day before the effective date of the DEOA; or

(b) Was enacted after the effective date of the DEOA, unless the law enacting the new Federal program has the effect of making section 439 of the General Education Provisions Act inapplicable.

(c) The following chart lists the funded programs to which part 98 does not apply as of February 16, 1984.

Name of program	Authorizing statute	Implementing regulations
1. High School Equivalency Program and College Assistance Migrant Program.	Section 418A of the Higher Education Act of 1965 as amended by the Education Amendments of 1980 (Pub. L. 96–374) 20 U.S.C. 1070d–2).	part 206.
2. Programs administered by the Commissioner of the Rehabilitative Services Administration.	The Rehabilitation Act of 1973 as amended by Pub. L. 95–602 (29 U.S.C. 700, *et seq.*).	parts 351–356, 361, 362, 365, 366, 369–375, 378, 379, 385–390, and 395.
3. College housing	Title IV of the Housing Act of 1950 as amended (12 U.S.C. 1749, *et seq.*).	part 614.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1230, 1232h, 3487, 3507)

§ 98.2 Definitions.

(a) The following terms used in this part are defined in 34 CFR part 77; ''Department,'' ''Recipient,'' ''Secretary.''

(b) The following definitions apply to this part:

Act means the General Education Provisions Act.

Office means the information and investigation office specified in § 98.5.

(Authority: 20 U.S.C. 1221e–3(a)(1))

§ 98.3 Access to instructional material used in a research or experimentation program.

(a) All instructional material—including teachers' manuals, films, tapes, or other supplementary instructional material—which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project.

(b) For the purpose of this part *research or experimentation program or project* means any program or project in any program under § 98.1 (a) or (b) that is designed to explore or develop new or unproven teaching methods or techniques.

(c) For the purpose of the section *children* means persons not above age 21 who are enrolled in a program under § 98.1 (a) or (b) not above the elementary or secondary education level, as determined under State law.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h(a))

§ 98.4 Protection of students' privacy in examination, testing, or treatment.

(a) No student shall be required, as part of any program specified in § 98.1 (a) or (b), to submit without prior consent to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning one or more of the following:

(1) Political affiliations;

(2) Mental and psychological problems potentially embarrassing to the student or his or her family;

(3) Sex behavior and attitudes;

(4) Illegal, anti-social, self-incriminating and demeaning behavior;

(5) Critical appraisals of other individuals with whom the student has close family relationships;

(6) Legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or

(7) Income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program.

(b) As used in paragraph (a) of this section, *prior consent* means:

(1) Prior consent of the student, if the student is an adult or emancipated minor; or

(2) Prior written consent of the parent or guardian, if the student is an unemancipated minor.

(c) As used in paragraph (a) of this section:

(1) *Psychiatric or psychological examination or test* means a method of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings; and

(2) *Psychiatric or psychological treatment* means an activity involving the planned, systematic use of methods or techniques that are not directly related to academic instruction and that is designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group.

(Authority: 20 U.S.C. 1232h(b))

§ 98.5 Information and investigation office.

(a) The Secretary has designated an office to provide information about the requirements of section 439 of the Act, and to investigate, process, and review complaints that may be filed concerning alleged violations of the provisions of the section.

(b) The following is the name and address of the office designated under paragraph (a) of this section: Family Educational Rights and Privacy Act Office, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202.

(Authority: 20 U.S.C. 1231e–3(a)(1), 1232h)

§ 98.6 Reports.

The Secretary may require the recipient to submit reports containing information necessary to resolve complaints under section 439 of the Act and the regulations in this part.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h)

§ 98.7 Filing a complaint.

(a) Only a student or a parent or guardian of a student directly affected by a violation under Section 439 of the Act may file a complaint under this part. The complaint must be submitted in writing to the Office.

(b) The complaint filed under paragraph (a) of this section must—

(1) Contain specific allegations of fact giving reasonable cause to believe that a violation of either § 98.3 or § 98.4 exists; and

(2) Include evidence of attempted resolution of the complaint at the local level (and at the State level if a State complaint resolution process exists), including the names of local and State officials contacted and significant dates in the attempted resolution process.

(c) The Office investigates each complaint which the Office receives that meets the requirements of this section to determine whether the recipient or contractor failed to comply with the provisions of section 439 of the Act.

(Approved by the Office of Management and Budget under control number 1880–0507)

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h)

§ 98.8 Notice of the complaint.

(a) If the Office receives a complaint that meets the requirements of § 98.7, it provides written notification to the complainant and the recipient or contractor against which the violation has been alleged that the complaint has been received.

(b) The notice to the recipient or contractor under paragraph (a) of this section must:

(1) Include the substance of the alleged violation; and

(2) Inform the recipient or contractor that the Office will investigate the complaint and that the recipient or contractor may submit a written response to the complaint.

(Authority: 20 U.S.C. 1221e–3(A)(1), 1232h)

§ 98.9 Investigation and findings.

(a) The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigations, the Office provides to the complainant and recipient or contractor written notice of its findings and the basis for its findings.

(c) If the Office finds that the recipient or contractor has not complied with section 439 of the Act, the Office

includes in its notice under paragraph (b) of this section:

(1) A statement of the specific steps that the Secretary recommends the recipient or contractor take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the recipient or contractor may comply voluntarily.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h)

§ 98.10 Enforcement of the findings.

(a) If the recipient or contractor does not comply during the period of time set under § 98.9(c), the Secretary may either:

(1) For a recipient, take an action authorized under 34 CFR part 78, including:

(i) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(ii) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b), or 298.45(b), depending upon the applicable program under which the notice is issued; or

(iii) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued; or

(2) For a contractor, direct the contracting officer to take an appropriate action authorized under the Federal Acquisition Regulations, including either:

(i) Issuing a notice to suspend operations under 48 CFR 12.5; or

(ii) Issuing a notice to terminate for default, either in whole or in part under 48 CFR 49.102.

(b) If, after an investigation under § 98.9, the Secretary finds that a recipient or contractor has complied voluntarily with section 439 of the Act, the Secretary provides the complainant and the recipient or contractor written notice of the decision and the basis for the decision.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h)

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

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AUTHORITY: 20 U.S.C. 1232g, unless otherwise noted.

SOURCE: 53 FR 11943, Apr. 11, 1988, unless otherwise noted.

Subpart A—General

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996; 65 FR 41852, July 6, 2000]

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

NOTE TO § 99.2: 34 CFR 300.610 through 300.626 contain requirements regarding the confidentiality of information relating to children with disabilities who receive evaluations, services or other benefits under Part B of the Individuals with Disabilities Education Act (IDEA). 34 CFR 303.402 and 303.460 identify the confidentiality of information requirements regarding children and infants and toddlers with disabilities and their families who receive evaluations, services, or other benefits under Part C of IDEA. 34 CFR 300.610 through 300.627 contain the confidentiality of information requirements that apply to personally identifiable data,

information, and records collected or maintained pursuant to Part B of the IDEA.

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996; 73 FR 74851, Dec. 9, 2008]

§99.3 What definitions apply to these regulations?

The following definitions apply to this part:

Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

Attendance includes, but is not limited to—

(a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

Authorized representative means any entity or individual designated by a State or local educational authority or an agency headed by an official listed in §99.31(a)(3) to conduct—with respect to Federal- or State-supported education programs—any audit or evaluation, or any compliance or enforcement activity in connection with Federal legal requirements that relate to these programs.

(Authority: 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5))

Biometric record, as used in the definition of *personally identifiable information,* means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

(Authority: 20 U.S.C. 1232g)

Dates of attendance. (a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (*e.g.*, undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.

(b) Directory information does not include a student's—

(1) Social security number; or

(2) Student identification (ID) number, except as provided in paragraph (c) of this definition.

(c) In accordance with paragraphs (a) and (b) of this definition, directory information includes—

(1) A student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password or other factor known or possessed only by the authorized user; and

(2) A student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the

user's identity, such as a PIN, password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2))

Early childhood education program means—

(a) A Head Start program or an Early Head Start program carried out under the Head Start Act (42 U.S.C. 9831 *et seq.*), including a migrant or seasonal Head Start program, an Indian Head Start program, or a Head Start program or an Early Head Start program that also receives State funding;

(b) A State licensed or regulated child care program; or

(c) A program that—

(1) Serves children from birth through age six that addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development; and

(2) Is—

(i) A State prekindergarten program;

(ii) A program authorized under section 619 or part C of the Individuals with Disabilities Education Act; or

(iii) A program operated by a local educational agency.

Educational agency or institution means any public or private agency or institution to which this part applies under § 99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

Education program means any program that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(3), (b)(5))

Education records. (a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, ''treatment''

does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

(Authority: 20 U.S.C. 1232g(a)(4))

Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; ''secondary school level'' means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

Party means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

Personally Identifiable Information

The term includes, but is not limited to—

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

(Authority: 20 U.S.C. 1232g)

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1232g)

Student, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

[53 FR 11943, Apr. 11, 1988, as amended at 60 FR 3468, Jan. 17, 1995; 61 FR 59295, Nov. 21, 1996; 65 FR 41852, July 6, 2000; 73 FR 74851, Dec. 9, 2008; 76 FR 75641, Dec. 2, 2011]

§99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

§99.5 What are the rights of students?

(a)(1) When a student becomes an eligible student, the rights accorded to,

and consent required of, parents under this part transfer from the parents to the student.

(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.31(a).

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

(Authority: 20 U.S.C. 1232g(d))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3188, Jan. 7, 1993; 65 FR 41853, July 6, 2000; 73 FR 74852, Dec. 9, 2008]

§ 99.6 [Reserved]

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1880–0508)

(Authority: 20 U.S.C. 1232g (e) and (f))

[61 FR 59295, Nov. 21, 1996]

§ 99.8 What provisions apply to records of a law enforcement unit?

(a)(1) *Law enforcement unit* means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or noncommissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of §99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

(Authority: 20 U.S.C. 1232g(a)(4)(B)(ii))

[60 FR 3469, Jan. 17, 1995]

Subpart B—What Are the Rights of Inspection and Review of Education Records?

§99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under §99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to—

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall—

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of *Education records* in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A), (B), (C), and (D))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

Subpart C—What Are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(d) ''Signed and dated written consent'' under this part may include a record and signature in electronic form that—

(1) Identifies and authenticates a particular person as the source of the electronic consent; and

(2) Indicates such person's approval of the information contained in the electronic consent.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 69 FR 21671, Apr. 21, 2004]

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—

(*1*) Performs an institutional service or function for which the agency or institution would otherwise use employees;

(*2*) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

(*3*) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.

(ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

NOTE: Section 4155(b) of the No Child Left Behind Act of 2001, 20 U.S.C. 7165(b), requires each State to assure the Secretary of Education that it has a procedure in place to facilitate the transfer of disciplinary records with respect to a suspension or expulsion of a student by a local educational agency to

any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends, or is instructed to enroll.

(3) The disclosure is, subject to the requirements of §99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States;

(iii) The Secretary; or

(iv) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, *financial aid* means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of §99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) Nothing in the Act or this part prevents a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section from entering into agreements with organizations conducting studies under paragraph (a)(6)(i) of this section and redisclosing personally identifiable information from education records on behalf of educational agencies and institutions that disclosed the information to the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section in accordance with the requirements of §99.33(b).

(iii) An educational agency or institution may disclose personally identifiable information under paragraph (a)(6)(i) of this section, and a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section may redisclose personally identifiable information under paragraph (a)(6)(i) and (a)(6)(ii) of this section, only if—

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and

(C) The educational agency or institution or the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section enters into a written agreement with the organization that—

(*1*) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;

(*2*) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;

(*3*) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this

part, by anyone other than representatives of the organization with legitimate interests;

and

(*4*) Requires the organization to destroy all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be destroyed.

(iv) An educational agency or institution or State or local educational authority or Federal agency headed by an official listed in paragraph (a)(3) of this section is not required to initiate a study or agree with or endorse the conclusions or results of the study.

(v) For the purposes of paragraph (a)(6) of this section, the term *organization* includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An *ex parte* court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(iii)(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as ''directory information'', under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(16) The disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

(b)(1) *De-identified records and information.* An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by §99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

(2) An educational agency or institution, or a party that has received education records or information from education records under this part, may release de-identified student level data from education records for the purpose of education research by attaching a code to each record that may allow the recipient to match information received from the same source, provided that—

(i) An educational agency or institution or other party that releases de-identified data under paragraph (b)(2) of this section does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code;

(ii) The record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and

(iii) The record code is not based on a student's social security number or other personal information.

(c) An educational agency or institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records.

(d) Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party except for parties under paragraph (a)(12) of this section.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b), (h), (i), and (j)).

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 61 FR 59296, Nov. 21, 1996; 65 FR 41853, July 6, 2000; 73 FR 74852, Dec. 9, 2008; 74 FR 401, Jan. 6, 2009; 76 FR 75641, Dec. 2, 2011]

§99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each

student, as well as the names of State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under § 99.33(b).

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(4) An educational agency or institution must obtain a copy of the record of further disclosures maintained under paragraph (b)(2) of this section and make it available in response to a parent's or eligible student's request to review the record required under paragraph (a)(1) of this section.

(5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:

(i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and

(ii) The parties to whom the agency or institution disclosed the information.

(b)(1) Except as provided in paragraph (b)(2) of this section, if an educational agency or institution discloses personally identifiable information from education records with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(i) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(ii) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(2)(i) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that makes further disclosures of information from education records under § 99.33(b) must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests in the information under § 99.31 if the information was received from:

(A) An educational agency or institution that has not recorded the further disclosures under paragraph (b)(1) of this section; or

(B) Another State or local educational authority or Federal official or agency listed in § 99.31(a)(3).

(ii) A State or local educational authority or Federal official or agency that records further disclosures of information under paragraph (b)(2)(i) of this section may maintain the record by the student's class, school, district, or other appropriate grouping rather than by the name of the student.

(iii) Upon request of an educational agency or institution, a State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that maintains a record of further disclosures under paragraph (b)(2)(i) of this section must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving records in accordance with § 99.31(a)(9)(ii)(A) through (C).

(Approved by the Office of Management and Budget under control number 1880–0508)

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(4)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74853, Dec. 9, 2008]

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b)(1) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if—

(i) The disclosures meet the requirements of § 99.31; and

(ii)(A) The educational agency or institution has complied with the requirements of § 99.32(b); or

(B) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) has complied with the requirements of § 99.32(b)(2).

(2) A party that receives a court order or lawfully issued subpoena and rediscloses personally identifiable information from education records on behalf of an educational agency or institution in response to that order or subpoena under § 99.31(a)(9) must provide the notification required under § 99.31(a)(9)(ii).

(c) Paragraph (a) of this section does not apply to disclosures under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f) (Clery Act), to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(d) An educational agency or institution must inform a party to whom disclosure is made of the requirements of paragraph (a) of this section except for disclosures made under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Clery Act to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 65 FR 41853, July 6, 2000; 73 FR 74853, Dec. 9, 2008; 76 FR 75642, Dec. 2, 2011]

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The annual notification of the agency or institution under § 99.7 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll or is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74854, Dec. 9, 2008]

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a)(1) Authorized representatives of the officials or agencies headed by officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs.

(2) The State or local educational authority or agency headed by an official listed in § 99.31(a)(3) is responsible for using reasonable methods to ensure to the greatest extent practicable that any entity or individual designated as its authorized representative—

(i) Uses personally identifiable information only to carry out an audit or evaluation of Federal- or State-supported education programs, or for the enforcement of or compliance with Federal legal requirements related to these programs;

(ii) Protects the personally identifiable information from further disclosures or other uses, except as authorized in paragraph (b)(1) of this section; and

(iii) Destroys the personally identifiable information in accordance with the requirements of paragraphs (b) and (c) of this section.

(3) The State or local educational authority or agency headed by an official listed in § 99.31(a)(3) must use a written agreement to designate any authorized representative, other than an employee. The written agreement must—

(i) Designate the individual or entity as an authorized representative;

(ii) Specify—

(A) The personally identifiable information from education records to be disclosed;

(B) That the purpose for which the personally identifiable information from education records is disclosed to the authorized representative is to carry out an audit or evaluation of Federal- or State-supported education programs, or to enforce or to comply with Federal legal requirements that relate to those programs; and

(C) A description of the activity with sufficient specificity to make clear that the work falls within the exception of § 99.31(a)(3), including a description of how the personally identifiable information from education records will be used;

(iii) Require the authorized representative to destroy personally identifiable information from education records when the information is no longer needed for the purpose specified;

(iv) Specify the time period in which the information must be destroyed; and

(v) Establish policies and procedures, consistent with the Act and other Federal and State confidentiality and privacy provisions, to protect personally identifiable information from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of personally identifiable information from education records to only authorized representatives with legitimate interests in the audit or evaluation of a Federal- or State-supported education program or for compliance or enforcement of Federal legal requirements related to these programs.

(b) Information that is collected under paragraph (a) of this section must—

(1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) and their authorized representatives, except that the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of § 99.33(b); and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5))

[53 FR 11943, Apr. 11, 1988, as amended at 73 FR 74854, Dec. 9, 2008; 76 FR 75642, Dec. 2, 2011]

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

(Authority: 20 U.S.C. 1232g (b)(1)(I) and (h))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74854, Dec. 9, 2008]

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.

(c) A parent or eligible student may not use the right under paragraph (a)(2)

of this section to opt out of directory information disclosures to—

(1) Prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional email address in a class in which the student is enrolled; or

(2) Prevent an educational agency or institution from requiring a student to wear, to display publicly, or to disclose a student ID card or badge that exhibits information that may be designated as directory information under § 99.3 and that has been properly designated by the educational agency or institution as directory information in the public notice provided under paragraph (a)(1) of this section.

(d) In its public notice to parents and eligible students in attendance at the agency or institution that is described in paragraph (a) of this section, an educational agency or institution may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. When an educational agency or institution specifies that disclosure of directory information will be limited to specific parties, for specific purposes, or both, the educational agency or institution must limit its directory information disclosures to those specified in its public notice that is described in paragraph (a) of this section.

(e) An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in § 99.30 if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

[53 FR 11943, Apr. 11, 1988, as amended at 73 FR 74854, Dec. 9, 2008; 76 FR 75642, Dec. 2, 2011]

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

(Authority: 20 U.S.C. 1232g(b)(1)(J))

[61 FR 59297, Nov. 21, 1996]

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or nonforcible sex offenses?

As used in this part:

Alleged perpetrator of a crime of violence is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson
Assault offenses
Burglary
Criminal homicide—manslaughter by negligence
Criminal homicide—murder and nonnegligent manslaughter
Destruction/damage/vandalism of property
Kidnapping/abduction
Robbery
Forcible sex offenses.

Alleged perpetrator of a nonforcible sex offense means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

Sanction imposed means a description of the disciplinary action taken by the

institution, the date of its imposition, and its duration.

Violation committed means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

(Authority: 20 U.S.C. 1232g(b)(6))

[65 FR 41853, July 6, 2000]

Subpart E—What Are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, *Office* means the Office of the Chief Privacy Officer, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term *applicable program* is defined in section 400 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234)

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 82 FR 6253, Jan. 19, 2017]

§ 99.61 What responsibility does an educational agency or institution, a recipient of Department funds, or a third party outside of an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it must notify the Office within 45 days, giving the text and citation of the conflicting law. If another recipient of Department funds under any program administered by the Secretary or a third party to which personally identifiable information from education records has been non-consensually disclosed determines that it cannot comply with the Act or this part due to a conflict with State or local law, it also must notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g(f))

[76 FR 75642, Dec. 2, 2011]

§ 99.62 What information must an educational agency or institution or other recipient of Department funds submit to the Office?

The Office may require an educational agency or institution, other recipient of Department funds under any program administered by the Secretary to which personally identifiable information from education records is non-consensually disclosed, or any third party outside of an educational agency or institution to which personally identifiable information from education records is non-consensually disclosed to submit reports, information on policies and procedures, annual notifications, training materials, or other information necessary to carry out the Office's enforcement responsibilities under the Act or this part.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f), and (g))

[76 FR 75643, Dec. 2, 2011]

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202.

(Authority: 20 U.S.C. 1232g(g))

[65 FR 41854, July 6, 2000, as amended at 73 FR 74854, Dec. 9, 2008]

§ 99.64 What is the investigation procedure?

(a) A complaint must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred. A complaint does not have to allege that a

violation is based on a policy or practice of the educational agency or institution, other recipient of Department funds under any program administered by the Secretary, or any third party outside of an educational agency or institution.

(b) The Office investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether an educational agency or institution or other recipient of Department funds under any program administered by the Secretary has failed to comply with a provision of the Act or this part. If the Office determines that an educational agency or institution or other recipient of Department funds under any program administered by the Secretary has failed to comply with a provision of the Act or this part, it may also determine whether the failure to comply is based on a policy or practice of the agency or institution or other recipient. The Office also investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether a third party outside of the educational agency or institution has failed to comply with the provisions of § 99.31(a)(6)(iii)(B) or has improperly redisclosed personally identifiable information from education records in violation of § 99.33.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f) and (g))

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office may extend the time limit in this section for good cause shown.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f) and (g))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 65 FR 41854, July 6, 2000; 73 FR 74854, Dec. 9, 2008; 76 FR 75643, Dec. 2, 2011]

§ 99.65 What is the content of the notice of investigation issued by the Office?

(a) The Office notifies in writing the complainant, if any, and the educational agency or institution, the recipient of Department funds under any program administered by the Secretary, or the third party outside of an educational agency or institution if it initiates an investigation under § 99.64(b). The written notice—

(1) Includes the substance of the allegations against the educational agency or institution, other recipient, or third party; and

(2) Directs the agency or institution, other recipient, or third party to submit a written response and other relevant information, as set forth in § 99.62, within a specified period of time, including information about its policies and practices regarding education records.

(b) The Office notifies the complainant if it does not initiate an investigation because the complaint fails to meet the requirements of § 99.64.

(Authority: 20 U.S.C. 1232g(g))

[73 FR 74855, Dec. 9, 2008, as amended at 76 FR 75643, Dec. 2, 2011]

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews a complaint, if any, information submitted by the educational agency or institution, other recipient of Department funds under any program administered by the Secretary, or third party outside of an educational agency or institution, and any other relevant information. The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant, if any, and the educational agency or institution, other recipient, or third party a written notice of its findings and the basis for its findings.

(c) If the Office finds that an educational agency or institution or other recipient has not complied with a provision of the Act or this part, it may also find that the failure to comply was based on a policy or practice of the

agency or institution or other recipient. A notice of findings issued under paragraph (b) of this section to an educational agency or institution, or other recipient that has not complied with a provision of the Act or this part—

(1) Includes a statement of the specific steps that the agency or institution or other recipient must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution or other recipient may comply voluntarily.

(d) If the Office finds that a third party outside of an educational agency or institution has not complied with the provisions of § 99.31(a)(6)(iii)(B) or has improperly redisclosed personally identifiable information from education records in violation of § 99.33, the Office's notice of findings issued under paragraph (b) of this section—

(1) Includes a statement of the specific steps that the third party outside of the educational agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the third party may comply voluntarily.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f), and (g))

[76 FR 75643, Dec. 2, 2011]

§ 99.67 How does the Secretary enforce decisions?

(a) If an educational agency or institution or other recipient of Department funds under any program administered by the Secretary does not comply during the period of time set under § 99.66(c), the Secretary may take any legally available enforcement action in accordance with the Act, including, but not limited to, the following enforcement actions available in accordance with part D of the General Education Provisions Act—

(1) Withhold further payments under any applicable program;

(2) Issue a complaint to compel compliance through a cease and desist order; or

(3) Terminate eligibility to receive funding under any applicable program.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution, other recipient, or third party has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution, other recipient, or third party with written notice of the decision and the basis for the decision.

(c) If the Office finds that a third party, outside the educational agency or institution, violates § 99.31(a)(6)(iii)(B), then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the violation of § 99.31(a)(6)(iii)(B) access to personally identifiable information from education records for at least five years.

(d) If the Office finds that a State or local educational authority, a Federal agency headed by an official listed in § 99.31(a)(3), or an authorized representative of a State or local educational authority or a Federal agency headed by an official listed in § 99.31(a)(3), improperly rediscloses personally identifiable information from education records, then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the improper redisclosure access to personally identifiable information from education records for at least five years.

(e) If the Office finds that a third party, outside the educational agency or institution, improperly rediscloses personally identifiable information from education records in violation of § 99.33 or fails to provide the notification required under § 99.33(b)(2), then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the violation access to personally identifiable information from education records for at least five years.

(Authority: 20 U.S.C. 1232g(b)(4)(B) and (f); 20 U.S.C. 1234c)

[76 FR 75643, Dec. 2, 2011]

APPENDIX A TO PART 99—CRIMES OF VIOLENCE DEFINITIONS

ARSON

Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

ASSAULT OFFENSES

An unlawful attack by one person upon another.

NOTE: By definition there can be no ''attempted'' assaults, only ''completed'' assaults.

(a) *Aggravated Assault*. An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious injury if the crime were successfully completed.)

(b) *Simple Assault*. An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

(c) *Intimidation*. To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words or other conduct, or both, but without displaying a weapon or subjecting the victim to actual physical attack.

NOTE: This offense includes stalking.

BURGLARY

The unlawful entry into a building or other structure with the intent to commit a felony or a theft.

CRIMINAL HOMICIDE—MANSLAUGHTER BY NEGLIGENCE

The killing of another person through gross negligence.

CRIMINAL HOMICIDE—MURDER AND NONNEGLIGENT MANSLAUGHTER

The willful (nonnegligent) killing of one human being by another.

DESTRUCTION/DAMAGE/VANDALISM OF PROPERTY

To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

KIDNAPPING/ABDUCTION

The unlawful seizure, transportation, or detention of a person, or any combination of these actions, against his or her will, or of a minor without the consent of his or her custodial parent(s) or legal guardian.

NOTE: Kidnapping/Abduction includes hostage taking.

ROBBERY

The taking of, or attempting to take, anything of value under confrontational circumstances from the control, custody, or care of a person or persons by force or threat of force or violence or by putting the victim in fear.

NOTE: Carjackings are robbery offenses where a motor vehicle is taken through force or threat of force.

SEX OFFENSES, FORCIBLE

Any sexual act directed against another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent.

(a) *Forcible Rape* (Except ''Statutory Rape''). The carnal knowledge of a person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity (or because of his or her youth).

(b) *Forcible Sodomy*. Oral or anal sexual intercourse with another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(c) *Sexual Assault With An Object*. To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

NOTE: An ''object'' or ''instrument'' is anything used by the offender other than the offender's genitalia. Examples are a finger, bottle, handgun, stick, etc.

(d) *Forcible Fondling*. The touching of the private body parts of another person for the purpose of sexual gratification, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

NOTE: Forcible Fondling includes ''Indecent Liberties'' and ''Child Molesting.''

NONFORCIBLE SEX OFFENSES (EXCEPT ''PROSTITUTION OFFENSES'')

Unlawful, nonforcible sexual intercourse.

(a) *Incest*. Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

(b) *Statutory Rape*. Nonforcible sexual intercourse with a person who is under the statutory age of consent.

(Authority: 20 U.S.C. 1232g(b)(6) and 18 U.S.C. 16)

[65 FR 41854, July 6, 2000]

Subtitle B—Regulations of the Offices of the Department of Education

CHAPTER I—OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION

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PART 100—NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF EDUCATION EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

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APPENDIX A TO PART 100—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

APPENDIX B TO PART 100—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

AUTHORITY: Sec. 602, 78 Stat. 252; 42 U.S.C. 2000d–1, unless otherwise noted.

SOURCE: 45 FR 30918, May 9, 1980, unless otherwise noted.

§ 100.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the ''Act'') to the end that no person in the United States shall; on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Education.

(Authority: Sec. 601, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d)

§ 100.2 Application of this regulation.

This regulation applies to any program to which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal financial assistance listed in appendix A of this regulation. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary, or (d) any employment practice, or any employer, employment agency, or labor organization, except to the extent described in § 100.3. The fact that a type of Federal assistance is not listed in appendix A shall not mean, if title VI of the Act is otherwise applicable, that a program is not covered. Federal financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the FEDERAL REGISTER.

(Authority: Secs. 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253; 42 U.S.C. 2000d–1, 2000d–3)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68053, Nov. 13, 2000]

§ 100.3 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of

such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective:

(A) Projects under the Public Works Acceleration Act, Pub. L. 87–658, 42 U.S.C. 2641–2643.

(B) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371–1374.

(C) Programs assisted under laws listed in appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(D) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32–34, 41a and 41b.

(2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) *Indian health and Cuban refugee services.* An individual shall not be deemed subjected to discrimination by reason of his exclusion from benefits limited by Federal law to individuals of a particular race, color, or national origin different from his.

(e) *Medical emergencies.* Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraph (a) of this section.

(Authority: Sec. 601, 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253, 42 U.S.C. 2000d, 2000d–1, 2000d–3)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68053, Nov. 13, 2000]

§ 100.4 Assurances required.

(a) *General.* (1) Every application for Federal financial assistance to which this part applies, except an application to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The responsible Department official shall specify the form of the foregoing assurances, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other

participants. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) Where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government the instrument effecting or recording the transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property is involved but property is improved with Federal financial assistance, the recipient shall agree to include such a covenant to any subsequent transfer of the property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(b) *Continuing Federal financial assistance.* Every application by a State or a State agency for continuing Federal financial assistance to which this regulation applies (including the Federal financial assistance listed in part 2 of appendix A) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

(c) *Elementary and secondary schools.* The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible Department official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible Department official may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and the regulations in this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

(d) *Assurance from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans

or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1. Sec. 182; 80 Stat. 1209; 42 U.S.C. 2000d–5)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68053, Nov. 13, 2000]

§ 100.5 Illustrative application.

The following examples will illustrate the programs aided by Federal financial assistance of the Department. (In all cases the discrimination prohibited is discrimination on the ground of race, color, or national origin prohibited by title VI of the Act and this regulation, as a condition of the receipt of Federal financial assistance).

(a) In federally-affected area assistance (Pub. L. 815 and Pub. L. 874) for construction aid and for general support of the operation of elementary or secondary schools, or in more limited support to such schools such as for the acquisition of equipment, the provision of vocational education, or the provision of guidance and counseling services, discrimination by the recipient school district in any of its elementary or secondary schools in the admission of students, or in the treatment of its students in any aspect of the educational process, is prohibited. In this and the following illustrations the prohibition of discrimination in the treatment of students or other trainees includes the prohibition of discrimination among the students or trainees in the availability or use of any academic, dormitory, eating, recreational, or other facilities of the grantee or other recipient.

(b) In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university.

(c) In a training grant to a hospital or other nonacademic institution, discrimination is prohibited in the selection of individuals to be trained and in their treatment by the grantee during their training. In a research or demonstration grant to such an institution discrimination is prohibited with respect to any educational activity and any provision of medical or other services and any financial aid to individuals incident to the program.

(d) In grants to assist in the construction of facilities for the provision of health, educational or welfare services, assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. Thus, as a condition of grants for the construction of academic, research, or other facilities at institutions of higher education, assurances will be required that there will be no discrimination in the admission or treatment of students.

(e) Upon transfers of real or personal surplus property for educational uses, discrimination is prohibited to the same extent as in the case of grants for the construction of facilities or the provision of equipment for like purposes.

(f) Each applicant for a grant for the construction of educational television facilities is required to provide an assurance that it will, in its broadcast services, give due consideration to the interests of all significant racial or ethnic groups within the population to be served by the applicant.

(g) A recipient may not take action that is calculated to bring about indirectly what this regulation forbids it to accomplish directly. Thus, a State, in selecting or approving projects or sites for the construction of public libraries which will receive Federal financial assistance, may not base its selections or approvals on criteria which

have the effect of defeating or of substantially impairing accomplishments of the objectives of the Federal assistance as respects individuals of a particular race, color or national origin.

(h) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under §100.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in paragraph (i) of §100.3(b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(i) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68053, Nov. 13, 2000]

§ 100.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case in which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

(Approved by the Office of Management and Budget under control number 1870–0500)

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1)

[45 FR 30918, May 9, 1980, as amended at 53 FR 49143, Dec. 6, 1988; 65 FR 68053, Nov. 13, 2000]

§ 100.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 100.8.

(2) If an investigation does not warrant action pursuant to paragraph (1) of this paragraph (d) the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1)

§ 100.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking,

and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 100.4.* If an applicant fails or refuses to furnish an assurance required under § 100.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1. Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d–5)

§ 100.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 100.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 100.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, DC, at a time fixed by the responsible Department official unless he determines that

the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5–8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more Federal assistance statutes to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 100.10.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d–1)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 100.10 Decisions and notices.

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions

the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to §100.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with §100.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of §100.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered

pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d–1)

§ 100.11 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

(Authority: Sec. 603, 78 Stat. 253; 42 U.S.C. 2000d–2)

§ 100.12 Effect on other regulations; forms and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this regulation applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this regulation, except that nothing in this regulation shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this regulation. Nothing in this regulation, however, shall be deemed to supersede any of the following (including future amendments thereof):

(1) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such Order, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this regulation is inapplicable, or prohibit discrimination on any other ground; or

(2) Requirements for Emergency School Assistance as published in 35 FR 13442 and codified as 34 CFR part 280.

(b) *Forms and instructions.* The responsible Department official shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The responsible Department official may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of title VI of the Act and this regulation (other than responsibility for review as provided in § 100.10(e)), including the achievements of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of title VI and this regulation to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this section shall have the same effect as though such action had been taken by the responsible official of this Department.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d–1)

§ 100.13 Definitions.

As used in this part:

(a) The term *Department* means the Department of Education.

(b) The term *Secretary* means the Secretary of Education.

(c) The term *responsible Department official* means the Secretary or, to the extent of any delegation by the Secretary of authority to act in his stead under any one or more provisions of this part, any person or persons to whom the Secretary has heretofore delegated, or to whom the Secretary may hereafter delegate such authority.

(d) The term *reviewing authority* means the Secretary, or any person or persons (including a board or other body specially created for that purpose and also including the responsible Department official) acting pursuant to authority delegated by the Secretary to carry out responsibilities under § 100.10(a)–(d).

(e) The term *United States* means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term ''State'' means any one of the foregoing.

(f) The term *Federal financial assistance* includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(g) The term *program or activity* and the term *program* mean all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (g)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 42 U.S.C. 2000d–4)

(h) The term *facility* includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(i) The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary.

(j) The term *primary recipient* means any recipient which is authorized or required to extend Federal financial assistance to another recipient.

(k) The term *applicant* means one who submits an application, request, or plan required to be approved by a Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term *application* means such an application, request, or plan.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d–1)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

APPENDIX A TO PART 100—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

Part 1—Assistance Other Than Continuing Assistance to States

1. Loans for acquisition of equipment for academic subjects, and for minor remodeling (20 U.S.C. 445).
2. Construction of facilities for institutions of higher education (20 U.S.C. 701–758).
3. School Construction in federally-affected and in major disaster areas (20 U.S.C. 631–647).
4. Construction of educational broadcast facilities (47 U.S.C. 390–399).
5. Loan service of captioned films and educational media; research on, and production and distribution of, educational media for the handicapped, and training of persons in the use of such media for the handicapped (20 U.S.C. 1452).
6. Demonstration residential vocational education schools (20 U.S.C. 1321).
7. Research and related activities in education of handicapped children (20 U.S.C. 1441).
8. Educational research, dissemination and demonstration projects; research training; and construction under the Cooperation Research Act (20 U.S.C. 331–332(b)).
9. Research in teaching modern foreign languages (20 U.S.C. 512).
10. Training projects for manpower development and training (42 U.S.C. 2601, 2602, 2610a–2610c).
11. Research and training projects in Vocational Education (20 U.S.C. 1281(a), 1282–1284).
12. Allowances to institutions training NDEA graduate fellows (20 U.S.C. 461–465).
13. Grants for training in librarianship (20 U.S.C. 1031–1033).
14. Grants for training personnel for the education of handicapped children (20 U.S.C. 1431).
15. Allowances for institutions training teachers and related educational personnel in elementary and secondary education, or post-secondary vocational education (20 U.S.C. 1111–1118).
16. Recruitment, enrollment, training and assignment of Teacher Corps personnel (20 U.S.C. 1101–1107a).
17. Operation and maintenance of schools in Federally-affected and in major disaster areas (20 U.S.C. 236–241; 241–1; 242–244).
18. Grants or contracts for the operation of training institutes for elementary or secondary school personnel to deal with special educational problems occasioned by desegregation (42 U.S.C. 2000c–3).
19. Grants for in-service training of teachers and other schools personnel and employment of specialists in desegregation problems (42 U.S.C. 2000c–4).
20. Higher education students loan program (Title II, National Defense Education Act, 20 U.S.C. 421–429).
21. Educational Opportunity grants and assistance for State and private programs of low-interest insured loans and State loans to students in institutions of higher education (Title IV, Higher Education Act of 1965, 20 U.S.C. 1061–1087).
22. Grants and contracts for the conduct of Talent Search, Upward Bound, and Special Services Programs (20 U.S.C. 1068).
23. Land-grant college aid (7 U.S.C. 301–308; 321–326; 328–331).
24. Language and area centers (Title VI, National Defense Education Act, 20 U.S.C. 511).
25. American Printing House for the Blind (20 U.S.C. 101–105).
26. Future Farmers of America (36 U.S.C. 271–391) and similar programs.
27. Science clubs (Pub. L. 85–875, 20 U.S.C. 2, note).
28. Howard University (20 U.S.C. 121–129).
29. Gallaudet College (31 D.C. Code, Chapter 10).
30. Establishment and operation of a model secondary school for the deaf by Gallaudet College (31 D.C. Code 1051–1053; 80 Stat. 1027–1028).
31. Faculty development programs, workshops and institutes (20 U.S.C. 1131–1132).
32. National Technical Institute for the Deaf (20 U.S.C. 681–685).
33. Institutes and other programs for training educational personnel (parts D, E, and F, Title V, Higher Education Act of 1965) (20 U.S.C. 1119–1119c–4).
34. Grants and contracts for research and demonstration projects in librarianship (20 U.S.C. 1034).
35. Acquisition of college library resources (20 U.S.C. 1021–1028).
36. Grants for strengthening developing institutions of higher education (20 U.S.C. 1051–1054); National Fellowships for teaching at developing institutions (20 U.S.C. 1055), and grants to retired professors to teach at developing institutions (20 U.S.C. 1056).

37. College Work-Study Program (42 U.S.C. 2751–2757).

38. Financial assistance for acquisition of higher education equipment, and minor remodeling (20 U.S.C. 1121–1129).

39. Grants for special experimental demonstration projects and teacher training in adult education (20 U.S.C. 1208).

40. Grant programs for advanced and undergraduate international studies (20 U.S.C. 1171–1176; 22 U.S.C. 2452(b)).

41. Experimental projects for developing State leadership or establishment of special services (20 U.S.C. 865).

42. Grants to and arrangements with State educational and other agencies to meet special educational needs of migratory children of migratory agricultural workers (20 U.S.C. 241e(c)).

43. Grants by the Secretary to local educational agencies for supplementary educational centers and services; guidance, counseling, and testing (20 U.S.C. 841–844; 844b).

44. Resource centers for improvement of education of handicapped children (20 U.S.C. 1421) and centers and services for deaf-blind children (20 U.S.C. 1422).

45. Recruitment of personnel and dissemination of information on education of handicapped (20 U.S.C. 1433).

46. Grants for research and demonstrations relating to physical education or recreation for handicapped children (20 U.S.C. 1442) and training of physical educators and recreation personnel (20 U.S.C. 1434).

47. Dropout prevention projects (20 U.S.C. 887).

48. Bilingual education programs (20 U.S.C. 880b–880b–6).

49. Grants to agencies and organizations for Cuban refugees (22 U.S.C. 2601(b)(4)).

50. Grants and contracts for special programs for children with specific learning disabilities including research and related activities, training and operating model centers (20 U.S.C. 1461).

51. Curriculum development in vocational and technical education (20 U.S.C. 1391).

52. Establishment, including construction, and operation of a National Center on Educational Media and Materials for the Handicapped (20 U.S.C. 1453).

53. Grants and contracts for the development and operation of experimental preschool and early education programs for handicapped (20 U.S.C. 1423).

54. Grants to public or private non-profit agencies to carry on the Follow Through Program in kindergarten and elementary schools (42 U.S.C. 2809 (a)(2)).

55. Grants for programs of cooperative education and grants and contracts for training and research in cooperative education (20 U.S.C. 1087a–1087c).

56. Grants and contracts to encourage the sharing of college facilities and resources (network for knowledge) (20 U.S.C. 1133–1133b).

57. Grants, contracts, and fellowships to improve programs preparing persons for public service and to attract students to public service (20 U.S.C. 1134–1134b).

58. Grants for the improvement of graduate programs (20 U.S.C. 1135–1135c).

59. Contracts for expanding and improving law school clinical experience programs (20 U.S.C. 1136–1136b).

60. Exemplary programs and projects in vocational education (20 U.S.C. 1301–1305).

61. Grants to reduce borrowing cost for construction of residential schools and dormitories (20 U.S.C. 1323).

62. Surplus real and related personal property disposal for educational purposes (40 U.S.C. 484(k)).

Part 2—Continuing Assistance to States

1. Grants to States for public library service and construction, interlibrary cooperation and specialized State library services for certain State institutions and the physically handicapped (20 U.S.C. 351–355).

2. Grants to States for strengthening instruction in academic subjects (20 U.S.C. 441–444).

3. Grants to States for vocational education (20 U.S.C. 1241–1264).

4. Arrangements with State education agencies for training under the Manpower Development and Training Act (42 U.S.C. 2601–2602, 2610a).

5. Grants to States to assist in the elementary and secondary education of children of low-income families (20 U.S.C. 241a–242m).

6. Grants to States to provide for school library resources, textbooks and other instructional materials for pupils and teachers in elementary and secondary schools (20 U.S.C. 821–827).

7. Grants to States to strengthen State departments of education (20 U.S.C. 861–870).

8. Grants to States for community service programs (20 U.S.C. 1001–1011).

9. Grants to States for adult basic education and related research, teacher training and special projects (20 U.S.C. 1201–1211).

10. Grants to States educational agencies for supplementary educational centers and services, and guidance, counseling and testing (20 U.S.C. 841–847).

11. Grants to States for research and training in vocational education (20 U.S.C. 1281(b)).

12. Grants to States for exemplary programs and projects in vocational education (20 U.S.C. 1301–1305).

13. Grants to States for residential vocational education schools (20 U.S.C. 1321).

14. Grants to States for consumer and homemaking education (20 U.S.C. 1341).

15. Grants to States for cooperative vocational educational program (20 U.S.C. 1351–1355).

16. Grants to States for vocational work-study programs (20 U.S.C. 1371–1374).

17. Grants to States to attract and qualify teachers to meet critical teaching shortages (20 U.S.C. 1108–1110c).

18. Grants to States for education of handicapped children (20 U.S.C. 1411–1414).

19. Grants for administration of State plans and for comprehensive planning to determine construction needs of institutions of higher education (20 U.S.C. 715(b)).

[45 FR 30918, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

APPENDIX B TO PART 100—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

I. SCOPE AND COVERAGE

A. APPLICATION OF GUIDELINES

These Guidelines apply to recipients of any Federal financial assistance from the Department of Education that offer or administer programs of vocational education or training. This includes State agency recipients.

B. DEFINITION OF RECIPIENT

The definition of *recipient* of Federal financial assistance is established by Department regulations implementing Title VI, Title IX, and Section 504 (34 CFR 100.13(i), 106.2(h), 104.3(f).

For the purposes of Title VI:

The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee thereof, but such terms does not include any ultimate beneficiary [e.g., students] under any such program. (34 CFR 100.13(i)).

For the purposes of Title IX:

Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom Federal financial assistance is extended, directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof. (34 CFR 106.2(h)).

For the purposes of Section 504:

Recipient means any State or its political subdivision any instrumentality of a State or its political subdivision, any public or private agency, institution, or organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. (34 CFR 104.3(f)).

C. EXAMPLES OF RECIPIENTS COVERED BY THESE GUIDELINES

The following education agencies, when they provide vocational education, are examples of recipients covered by these Guidelines:

1. The board of education of a public school district and its administrative agency.

2. The administrative board of a specialized vocational high school serving students from more than one school district.

3. The administrative board of a technical or vocational school that is used exclusively or principally for the provision of vocational education to persons who have completed or left high school (including persons seeking a certificate or an associate degree through a vocational program offered by the school) and who are available for study in preparation for entering the labor market.

4. The administrative board of a postsecondary institution, such as a technical institute, skill center, junior college, community college, or four year college that has a department or division that provides vocational education to students seeking immediate employment, a certificate or an associate degree.

5. The administrative board of a proprietary (private) vocational education school.

6. A State agency recipient itself operating a vocational education facility.

D. EXAMPLES OF SCHOOLS TO WHICH THESE GUIDELINES APPLY

The following are examples of the types of schools to which these Guidelines apply.

1. A junior high school, middle school, or those grades of a comprehensive high school that offers instruction to inform, orient, or prepare students for vocational education at the secondary level.

2. A vocational education facility operated by a State agency.

3. A comprehensive high school that has a department exclusively or principally used for providing vocational education; or that offers at least one vocational program to secondary level students who are available for study in preparation for entering the labor market; or that offers adult vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market.

4. A comprehensive high school, offering the activities described above, that receives students on a contract basis from other school districts for the purpose of providing vocational education.

5. A specialized high school used exclusively or principally for the provision of vocational education, that enrolls students form one or more school districts for the purpose of providing vocational education.

6. A technical or vocational school that primarily provides vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market, including students seeking an associate degree or certificate through a course of vocational instruction offered by the school.

7. A junior college, a community college, or four-year college that has a department or division that provides vocational education to students seeking immediate employment, an associate degree or a certificate through a course of vocational instruction offered by the school.

8. A proprietary school, licensed by the State that offers vocational education.

NOTE: Subsequent sections of these Guidelines may use the term *secondary vocational education center* in referring to the institutions described in paragraphs 3, 4 and 5 above or the term *postsecondary vocational education center* in referring to institutions described in paragraphs 6 and 7 above or the term *vocational education center* in referring to any or all institutions described above.

II. RESPONSIBILITIES ASSIGNED ONLY TO STATE AGENCY RECIPIENTS

A. RESPONSIBILITIES OF ALL STATE AGENCY RECIPIENTS

State agency recipients, in addition to complying with all other provisions of the Guidelines relevant to them, may not require, approve of, or engage in any discrimination or denial of services on the basis of race, color, national origin, sex, or handicap in performing any of the following activities:

1. Establishment of criteria or formulas for distribution of Federal or State funds to vocational education programs in the State;

2. Establishment of requirements for admission to or requirements for the administration of vocational education programs;

3. Approval of action by local entities providing vocational education. (For example, a State agency must ensure compliance with Section IV of these Guidelines if and when it reviews a vocational education agency decision to create or change a geographic service area.);

4. Conducting its own programs. (For example, in employing its staff it may not discriminate on the basis of sex or handicap.)

B. STATE AGENCIES PERFORMING OVERSIGHT RESPONSIBILITIES

The State agency responsible for the administration of vocational education programs must adopt a compliance program to prevent, identify and remedy discrimination on the basis of race, color, national origin, sex or handicap by its subrecipients. (A ''subrecipient,'' in this context, is a local agency or vocational education center that receives financial assistance through a State agency.) This compliance program must include:

1. Collecting and analyzing civil rights related data and information that subrecipients compile for their own purposes or that are submitted to State and Federal officials under existing authorities;

2. Conducting periodic compliance reviews of selected subrecipients (i.e., an investigation of a subrecipient to determine whether it engages in unlawful discrimination in any aspect of its program); upon finding unlawful discrimination, notifying the subrecipient of steps it must take to attain compliance and attempting to obtain voluntary compliance;

3. Providing technical assistance upon request to subrecipients. This will include assisting subrecipients to identify unlawful discrimination and instructing them in remedies for and prevention of such discrimination;

4. Periodically reporting its activities and findings under the foregoing paragraphs, including findings of unlawful discrimination under paragraph 2, immediately above, to the Office for Civil Rights.

State agencies are not required to terminate or defer assistance to any subrecipient. Nor are they required to conduct hearings. The responsibilities of the Office for Civil Rights to collect and analyze data, to conduct compliance reviews, to investigate complaints and to provide technical assistance are not diminished or attenuated by the requirements of Section II of the Guidelines.

C. STATEMENT OF PROCEDURES AND PRACTICES

Within one year from the publication of these Guidelines in final form, each State agency recipient performing oversight responsibilities must submit to the Office for Civil Rights the methods of administration and related procedures it will follow to comply with the requirements described in paragraphs A and B immediately above. The Department will review each submission and will promptly either approve it, or return it to State officials for revision.

III. DISTRIBUTION OF FEDERAL FINANCIAL ASSISTANCE AND OTHER FUNDS FOR VOCATIONAL EDUCATION

A. AGENCY RESPONSIBILITIES

Recipients that administer grants for vocational education must distribute Federal, State, or local vocational education funds so that no student or group of students is unlawfully denied an equal opportunity to benefit from vocational education on the basis of race, color, national origin, sex, or handicap.

B. DISTRIBUTION OF FUNDS

Recipients may not adopt a formula or other method for the allocation of Federal, State, or local vocational education funds that has the effect of discriminating on the basis of race, color, national origin, sex, or handicap. However, a recipient may adopt a formula or other method of allocation that uses as a factor race, color, national origin, sex, or handicap [or an index or proxy for race, color, national origin, sex, or handicap e.g., number of persons receiving Aid to Families with Dependent Children or with limited English speaking ability] if the factor is included to compensate for past discrimination or to comply with those provisions of the Vocational Education Amendments of 1976 designed to assist specified protected groups.

C. EXAMPLE OF A PATTERN SUGGESTING UNLAWFUL DISCRIMINATION

In each State it is likely that some local recipients will enroll greater proportions of minority students in vocational education than the State-wide proportion of minority students in vocational education. A funding formula or other method of allocation that results in such local recipients receiving per-pupil allocations of Federal or State vocational education funds lower than the State-wide average per-pupil allocation will be presumed unlawfully discriminatory.

D. DISTRIBUTION THROUGH COMPETITIVE GRANTS OR CONTRACTS

Each State agency that establishes criteria for awarding competitive vocational education grants or contracts must establish and apply the criteria without regard to the race, color, national origin, sex, or handicap of any or all of a recipient's students, except to compensate for past discrimination.

E. APPLICATION PROCESSES FOR COMPETITIVE OR DISCRETIONARY GRANTS

State agencies must disseminate information needed to satisfy the requirements of any application process for competitive or discretionary grants so that all recipients, including those having a high percentage of minority or handicapped students, are informed of and able to seek funds. State agencies that provide technical assistance for the completion of the application process must provide such assistance without discrimination against any one recipient or class of recipients.

F. ALTERATION OF FUND DISTRIBUTION TO PROVIDE EQUAL OPPORTUNITY

If the Office for Civil Rights finds that a recipient's system for distributing vocational education funds unlawfully discriminates on the basis of race, color, national origin, sex, or handicap, it will require the recipient to adopt an alternative nondiscriminatory method of distribution. The Office for Civil Rights may also require the recipient to compensate for the effects of its past unlawful discrimination in the distribution of funds.

IV. ACCESS AND ADMISSION OF STUDENTS TO VOCATIONAL EDUCATION PROGRAMS

A. RECIPIENT RESPONSIBILITIES

Criteria controlling student eligibility for admission to vocational education schools, facilities and programs may not unlawfully discriminate on the basis of race, color, national origin, sex, or handicap. A recipient may not develop, impose, maintain, approve, or implement such discriminatory admissions criteria.

B. SITE SELECTION FOR VOCATIONAL SCHOOLS

State and local recipients may not select or approve a site for a vocational education facility for the purpose or with the effect of excluding, segregating, or otherwise discriminating against students on the basis of race, color, or national origin. Recipients must locate vocational education facilities at sites that are readily accessible to both nonminority and minority communities, and that do not tend to identify the facility or program as intended for nonminority or minority students.

C. ELIGIBILITY FOR ADMISSION TO VOCATIONAL EDUCATION CENTERS BASED ON RESIDENCE

Recipients may not establish, approve or maintain geographic boundaries for a vocational education center service area or attendance zone, (hereinafter ''service area''), that unlawfully exclude students on the basis of race, color, or national origin. The Office for Civil Rights will presume, subject to rebuttal, that any one or combination of the following circumstances indicates that the boundaries of a given service area are unlawfully constituted:

1. A school system or service area contiguous to the given service area, contains minority or nonminority students in substantially greater proportion than the given service area;

2. A substantial number of minority students who reside outside the given vocational education center service area, and who are not eligible for the center reside, nonetheless, as close to the center as a substantial number of non-minority students who are eligible for the center;

3. The over-all vocational education program of the given service area in comparison to the over-all vocational education program of a contiguous school system or service area enrolling a substantially greater proportion of minority students:

(a) Provides its students with a broader range of curricular offerings, facilities and equipment; or (b) provides its graduates greater opportunity for employment in jobs:

(i) For which there is a demonstrated need in the community or region; (ii) that pay higher entry level salaries or wages; or (iii) that are generally acknowledged to offer greater prestige or status.

D. ADDITIONS AND RENOVATIONS TO EXISTING VOCATIONAL EDUCATION FACILITIES

A recipient may not add to, modify, or renovate the physical plant of a vocational education facility in a manner that creates, maintains, or increases student segregation on the basis of race, color, national origin, sex, or handicap.

E. REMEDIES FOR VIOLATIONS OF SITE SELECTION AND GEOGRAPHIC SERVICE AREA REQUIREMENTS

If the conditions specified in paragraphs IV, A, B, C, or D, immediately above, are found and not rebutted by proof of nondiscrimination, the Office for Civil Rights will require the recipient(s) to submit a plan to remedy the discrimination. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination:

(1) Redrawing of the boundaries of the vocational education center's service area to include areas unlawfully excluded and/or to exclude areas unlawfully included; (2) provision of transportation to students residing in areas unlawfully excluded; (3) provision of additional programs and services to students who would have been eligible for attendance at the vocational education center but for the discriminatory service area or site selection; (4) reassignment of students; and (5) construction of new facilities or expansion of existing facilities.

F. ELIGIBILITY FOR ADMISSION TO SECONDARY VOCATIONAL EDUCATION CENTERS BASED ON NUMERICAL LIMITS IMPOSED ON SENDING SCHOOLS

A recipient may not adopt or maintain a system for admission to a secondary vocational education center or program that limits admission to a fixed number of students from each sending school included in the center's service area if such a system disproportionately excludes students from the center on the basis of race, sex, national origin or handicap. (Example: Assume 25 percent of a school district's high school students are black and that most of those black students are enrolled in one high school; the white students, 75 percent of the district's total enrollment, are generally enrolled in the five remaining high schools. This paragraph prohibits a system of admission to the secondary vocational education center that limits eligibility to a fixed and equal number of students from each of the district's six high schools.)

G. REMEDIES FOR VIOLATION OF ELIGIBILITY BASED ON NUMERICAL LIMITS REQUIREMENTS

If the Office for Civil Rights finds a violation of paragraph F, above, the recipient must implement an alternative system of admissions that does not disproportionately exclude students on the basis of race, color, national origin, sex, or handicap.

H. ELIGIBILITY FOR ADMISSION TO VOCATIONAL EDUCATION CENTERS, BRANCHES OR ANNEXES BASED UPON STUDENT OPTION

A vocational education center, branch or annex, open to all students in a service area and predominantly enrolling minority students or students of one race, national origin or sex, will be presumed unlawfully segregated if:

(1) It was established by a recipient for members of one race, national origin or sex; or (2) it has since its construction been attended primarily by members of one race, national origin or sex; or (3) most of its program offerings have traditionally been selected predominantly by members of one race, national origin or sex.

I. REMEDIES FOR FACILITY SEGREGATION UNDER STUDENT OPTION PLANS

If the conditions specified in paragraph IV-H are found and not rebutted by proof of nondiscrimination, the Office for Civil Rights will require the recipient(s) to submit a plan to remedy the segregation. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination:

(1) Elimination of program duplication in the segregated facility and other proximate vocational facilities; (2) relocation or ''clustering'' of programs or courses; (3) adding programs and courses that traditionally have been identified as intended for members of a particular race, national origin or sex to schools that have traditionally served members of the other sex or traditionally served persons of a different race or national origin; (4) merger of programs into one facility through school closings or new construction;

(5) intensive outreach recruitment and counseling; (6) providing free transportation to students whose enrollment would promote desegregation.

J. [RESERVED]

K. ELIGIBILITY BASED ON EVALUATION OF EACH APPLICANT UNDER ADMISSIONS CRITERIA

Recipients may not judge candidates for admission to vocational education programs on the basis of criteria that have the effect of disproportionately excluding persons of a particular race, color, national origin, sex, or handicap. However, if a recipient can demonstrate that such criteria have been validated as essential to participation in a given program and that alternative equally valid criteria that do not have such a disproportionate adverse effect are unavailable, the criteria will be judged nondiscriminatory. Examples of admissions criteria that must meet this test are past academic performance, record of disciplinary infractions, counselors' approval, teachers' recommendations, interest inventories, high school diplomas and standardized tests, such as the Test of Adult Basic Education (TABE).

An introductory, preliminary, or exploratory course may not be established as a prerequisite for admission to a program unless the course has been and is available without regard to race, color, national origin, sex, and handicap. However, a course that was formerly only available on a discriminatory basis may be made a prerequisite for admission to a program if the recipient can demonstrate that:

(a) The course is essential to participation in the program; *and* (b) the course is presently available to those seeking enrollment for the first time and to those formerly excluded.

L. ELIGIBILITY OF NATIONAL ORIGIN MINORITY PERSONS WITH LIMITED ENGLISH LANGUAGE SKILLS

Recipients may not restrict an applicant's admission to vocational education programs because the applicant, as a member of a national origin minority with limited English language skills, cannot participate in and benefit from vocational instruction to the same extent as a student whose primary language is English. It is the responsibility of the recipient to identify such applicants and assess their ability to participate in vocational instruction.

Acceptable methods of identification include: (1) Identification by administrative staff, teachers, or parents of secondary level students; (2) identification by the student in postsecondary or adult programs; and (3) appropriate diagnostic procedures, if necessary.

Recipients must take steps to open all vocational programs to these national origin minority students. A recipient must demonstrate that a concentration of students with limited English language skills in one or a few programs is not the result of discriminatory limitations upon the opportunities available to such students.

M. REMEDIAL ACTION IN BEHALF OF PERSONS WITH LIMITED ENGLISH LANGUAGE SKILLS

If the Office for Civil Rights finds that a recipient has denied national origin minority persons admission to a vocational school or program because of their limited English language skills or has assigned students to vocational programs solely on the basis of their limited English language skills, the recipient will be required to submit a remedial plan that insures national origin minority students equal access to vocational education programs.

N. EQUAL ACCESS FOR HANDICAPPED STUDENTS

Recipients may not deny handicapped students access to vocational education programs or courses because of architectural or equipment barriers, or because of the need for related aids and services or auxiliary aids. If necessary, recipients must:

(1) Modify instructional equipment; (2) modify or adapt the manner in which the courses are offered; (3) house the program in facilities that are readily accessible to mobility impaired students or alter facilities to make them readily accessible to mobility impaired students; and (4) provide auxiliary aids that effectively make lectures and necessary materials available to postsecondary handicapped students; (5) provide related aids or services that assure secondary students an appropriate education.

Academic requirements that the recipient can demonstrate are essential to a program of instruction or to any directly related licensing requirement will not be regarded as discriminatory. However, where possible, a recipient must adjust those requirements to the needs of individual handicapped students.

Access to vocational programs or courses may not be denied handicapped students on the ground that employment opportunities in any occupation or profession may be more limited for handicapped persons than for non-handicapped persons.

O. PUBLIC NOTIFICATION

Prior to the beginning of each school year, recipients must advise students, parents, employees and the general public that all vocational opportunities will be offered without regard to race, color, national origin, sex, or handicap. Announcement of this policy of

non-discrimination may be made, for example, in local newspapers, recipient publications and/or other media that reach the general public, program beneficiaries, minorities (including national origin minorities with limited English language skills), women, and handicapped persons. A brief summary of program offerings and admission criteria should be included in the announcement; also the name, address and telephone number of the person designated to coordinate Title IX and Section 504 compliance activity.

If a recipient's service area contains a community of national origin minority persons with limited English language skills, public notification materials must be disseminated to that community in its language and must state that recipients will take steps to assure that the lack of English language skills will not be a barrier to admission and participation in vocational education programs.

V. Counseling and Prevocational Programs

A. Recipient Responsibilities

Recipients must insure that their counseling materials and activities (including student program selection and career/employment selection), promotional, and recruitment efforts do not discriminate on the basis of race, color, national origin, sex, or handicap.

B. Counseling and Prospects for Success

Recipients that operate vocational education programs must insure that counselors do not direct or urge any student to enroll in a particular career or program, or measure or predict a student's prospects for success in any career or program based upon the student's race, color, national origin, sex, or handicap. Recipients may not counsel handicapped students toward more restrictive career objectives than nonhandicapped students with similar abilities and interests. If a vocational program disproportionately enrolls male or female students, minority or nonminority students, or handicapped students, recipients must take steps to insure that the disproportion does not result from unlawful discrimination in counseling activities.

C. Student Recruitment Activities

Recipients must conduct their student recruitment activities so as not to exclude or limit opportunities on the basis of race, color, national origin, sex, or handicap. Where recruitment activities involve the presentation or portrayal of vocational and career opportunities, the curricula and programs described should cover a broad range of occupational opportunities and not be limited on the basis of the race, color, national origin, sex, or handicap of the students or potential students to whom the presentation is made. Also, to the extent possible, recruiting teams should include persons of different races, national origins, sexes, and handicaps.

D. Counseling of Students With Limited English-Speaking Ability or Hearing Impairments

Recipients must insure that counselors can effectively communicate with national origin minority students with limited English language skills and with students who have hearing impairments. This requirement may be satisfied by having interpreters available.

E. Promotional Activities

Recipients may not undertake promotional efforts (including activities of school officials, counselors, and vocational staff) in a manner that creates or perpetuates stereotypes or limitations based on race, color, national origin, sex or handicap. Examples of promotional efforts are career days, parents' night, shop demonstrations, visitations by groups of prospective students and by representatives from business and industry. Materials that are part of promotional efforts may not create or perpetuate stereotypes through text or illustration. To the extent possible they should portray males or females, minorities or handicapped persons in programs and occupations in which these groups traditionally have not been represented. If a recipient's service area contains a community of national origin minority persons with limited English language skills, promotional literature must be distributed to that community in its language.

VI. Equal Opportunity in the Vocational Education Instructional Setting

A. Accommodations For Handicapped Students

Recipients must place secondary level handicapped students in the regular educational environment of any vocational education program to the maximum extent appropriate to the needs of the student unless it can be demonstrated that the education of the handicapped person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Handicapped students may be placed in a program only after the recipient satisfies the provisions of the Department's Regulation, 34 CFR, part 104, relating to evaluation, placement, and procedural safeguards. If a separate class or facility is identifiable as being for handicapped persons, the facility, the programs, and the services must be comparable to the facilities, programs, and services offered to nonhandicapped students.

B. STUDENT FINANCIAL ASSISTANCE

Recipients may not award financial assistance in the form of loans, grants, scholarships, special funds, subsidies, compensation for work, or prizes to vocational education students on the basis of race, color, national origin, sex, or handicap, except to overcome the effects of past discrimination. Recipients may administer sex restricted financial assistance where the assistance and restriction are established by will, trust, bequest, or any similar legal instrument, if the overall effect of all financial assistance awarded does not discriminate on the basis of sex. Materials and information used to notify students of opportunities for financial assistance may not contain language or examples that would lead applicants to believe the assistance is provided on a discriminatory basis. If a recipient's service area contains a community of national origin minority persons with limited English language skills, such information must be disseminated to that community in its language.

C. HOUSING IN RESIDENTIAL POSTSECONDARY VOCATIONAL EDUCATION CENTERS

Recipients must extend housing opportunities without discrimination based on race, color, national origin, sex, or handicap. This obligation extends to recipients that provide on-campus housing and/or that have agreements with providers of off-campus housing. In particular, a recipient postsecondary vocational education program that provides on-campus or off-campus housing to its nonhandicapped students must provide, at the same cost and under the same conditions, comparable convenient and accessible housing to handicapped students.

D. COMPARABLE FACILITIES

Recipients must provide changing rooms, showers, and other facilities for students of one sex that are comparable to those provided to students of the other sex. This may be accomplished by alternating use of the same facilities or by providing separate, comparable facilities.

Such facilities must be adapted or modified to the extent necessary to make the vocational education program readily accessible to handicapped persons.

VII. WORK STUDY, COOPERATIVE VOCATIONAL EDUCATION, JOB PLACEMENT, AND APPRENTICE TRAINING

A. RESPONSIBILITIES IN COOPERATIVE VOCATIONAL EDUCATION PROGRAMS, WORK-STUDY PROGRAMS, AND JOB PLACEMENT PROGRAMS

A recipient must insure that: (a) It does not discriminate against its students on the basis of race, color, national origin, sex, or handicap in making available opportunities in cooperative education, work study and job placement programs; and (b) students participating in cooperative education, work study and job placement programs are not discriminated against by employers or prospective employers on the basis of race, color, national origin, sex, or handicap in recruitment, hiring, placement, assignment to work tasks, hours of employment, levels of responsibility, and in pay.

If a recipient enters into a written agreement for the referral or assignment of students to an employer, the agreement must contain an assurance from the employer that students will be accepted and assigned to jobs and otherwise treated without regard to race, color, national origin, sex, or handicap.

Recipients may not honor any employer's request for students who are free of handicaps or for students of a particular race, color, national origin, or sex. In the event an employer or prospective employer is or has been subject to court action involving discrimination in employment, school officials should rely on the court's findings if the decision resolves the issue of whether the employer has engaged in unlawful discrimination.

B. APPRENTICE TRAINING PROGRAMS

A recipient may not enter into any agreement for the provision or support of apprentice training for students or union members with any labor union or other sponsor that discriminates against its members or applicants for membership on the basis of race, color, national origin, sex, or handicap. If a recipient enters into a written agreement with a labor union or other sponsor providing for apprentice training, the agreement must contain an assurance from the union or other sponsor:

(1) That it does not engage in such discrimination against its membership or applicants for membership; and (2) that apprentice training will be offered and conducted for its membership free of such discrimination.

VIII. EMPLOYMENT OF FACULTY AND STAFF

A. EMPLOYMENT GENERALLY

Recipients may not engage in any employment practice that discriminates against any employee or applicant for employment on the basis of sex or handicap. Recipients may not engage in any employment practice that discriminates on the basis of race, color, or national origin if such discrimination tends to result in segregation, exclusion or other discrimination against students.

B. RECRUITMENT

Recipients may not limit their recruitment for employees to schools, communities, or companies disproportionately composed of

persons of a particular race, color, national origin, sex, or handicap except for the purpose of overcoming the effects of past discrimination. Every source of faculty must be notified that the recipient does not discriminate in employment on the basis of race, color, national origin, sex, or handicap.

C. PATTERNS OF DISCRIMINATION

Whenever the Office for Civil Rights finds that in light of the representation of protected groups in the relevant labor market there is a significant underrepresentation or overrepresentation of protected group persons on the staff of a vocational education school or program, it will presume that the disproportion results from unlawful discrimination. This presumption can be overcome by proof that qualified persons of the particular race, color, national origin, or sex, or that qualified handicapped persons are not in fact available in the relevant labor market.

D. SALARY POLICIES

Recipients must establish and maintain faculty salary scales and policy based upon the conditions and responsibilities of employment, without regard to race, color, national origin, sex or handicap.

E. EMPLOYMENT OPPORTUNITIES FOR HANDICAPPED APPLICANTS

Recipients must provide equal employment opportunities for teaching and administrative positions to handicapped applicants who can perform the essential functions of the position in question. Recipients must make reasonable accommodation for the physical or mental limitations of handicapped applicants who are otherwise qualified unless recipients can demonstrate that the accommodation would impose an undue hardship.

F. THE EFFECTS OF PAST DISCRIMINATION

Recipients must take steps to overcome the effects of past discrimination in the recruitment, hiring, and assignment of faculty. Such steps may include the recruitment or reassignment of qualified persons of a particular race, national origin, or sex, or who are handicapped.

G. STAFF OF STATE ADVISORY COUNCILS OF VOCATIONAL EDUCATION

State Advisory Councils of Vocational Education are recipients of Federal financial assistance and therefore must comply with Section VIII of the Guidelines.

H. EMPLOYMENT AT STATE OPERATED VOCATIONAL EDUCATION CENTERS THROUGH STATE CIVIL-SERVICE AUTHORITIES

Where recruitment and hiring of staff for State operated vocational education centers is conducted by a State civil service employment authority, the State education agency operating the program must insure that recruitment and hiring of staff for the vocational education center is conducted in accordance with the requirements of these Guidelines.

IX. PROPRIETARY VOCATIONAL EDUCATION SCHOOLS

A. RECIPIENT RESPONSIBILITIES

Proprietary vocational education schools that are recipients of Federal financial assistance through Federal student assistance programs or otherwise are subject to all of the requirements of the Department's regulations and these Guidelines.

B. ENFORCEMENT AUTHORITY

Enforcement of the provisions of Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973 is the responsibility of the Department of Education. However, authority to enforce Title VI of the Civil rights Act of 1964 for proprietary vocational education schools has been delegated to the Veterans Administration.

When the Office for Civil Rights receives a Title VI complaint alleging discrimination by a proprietary vocational education school it will forward the complaint to the Veterans Administration and cite the applicable requirements of the Department's regulations and these Guidelines. The complainant will be notified of such action.

[45 FR 30918, May 9, 1980; 45 FR 37426, June 3, 1980]

PART 101—PRACTICE AND PROCEDURE FOR HEARINGS UNDER PART 100 OF THIS TITLE

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SOURCE: 45 FR 30931, May 9, 1980, unless otherwise noted.

Subpart A—General Information

§ 101.1 Scope of rules.

The rules of procedure in this part supplement §§ 100.9 and 100.10 of this subtitle and govern the practice for hearings, decisions, and administrative review conducted by the Department of Education, pursuant to Title VI of the Civil Rights Act of 1964 (section 602, 78 Stat. 252) and part 100 of this subtitle.

§ 101.2 Records to be public.

All pleadings, correspondence, exhibits, transcripts, of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Department of Education, 400 Maryland Avenue SW., Washington, DC 20202.

§ 101.3 Use of gender and number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§ 101.4 Suspension of rules.

Upon notice to all parties, the reviewing authority or the presiding officer, with respect to matters pending before them, may modify or waive any rule in this part upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

Subpart B—Appearance and Practice

§ 101.11 Appearance.

A party may appear in person or by counsel and participate fully in any proceeding. A State agency or a corporation may appear by any of its officers or by any employee it authorizes to appear on its behalf. Counsel must be members in good standing of the bar of a State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

§ 101.12 Authority for representation.

Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity.

§ 101.13 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at any hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

Subpart C—Parties

§ 101.21 Parties.

(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him a respondent.

(b) The Assistant Secretary for Civil Rights of the Department of Education, shall be deemed a party to all proceedings.

§ 101.22 Amici curiae.

(a) Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae. Such petition shall be filed prior to the prehearing conference, or if none is held, before the commencement of the hearing, unless the petitioner shows good cause for filing the petition later. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof. An amicus curiae is not a party and may not introduce evidence at a hearing.

(b) An amicus curiae may submit a statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. The amicus curiae may submit a brief on each occasion a decision is to be made or a prior decision is subject to review. His brief shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(c) When all parties have completed their initial examination of a witness, any amicus curiae may request the presiding officer to propound specific questions to the witness. The presiding officer, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

§ 101.23 Complainants not parties.

A person submitting a complaint pursuant to § 100.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

Subpart D—Form, Execution, Service and Filing of Documents

§ 101.31 Form of documents to be filed.

Documents to be filed under the rules in this part shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address of the signatory. Copies need not be signed but the name of the person signing the original shall be reproduced. Documents shall be legible and shall not be more than 8½ inches wide and 12 inches long.

§ 101.32 Signature of documents.

The signature of a party, authorized officer, employee or attorney constitutes a certificate that he has read the document, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may proceed as though the document had not been filed. Similar action may be taken if scandalous or indecent matter is inserted.

§ 101.33 Filing and service.

All notices by a Department official, and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing, during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 9 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only on exhibits and transcripts of testimony need be filed. For requirements of service on amici curiae, see § 101.107.

§ 101.34 Service—how made.

Service shall be made by personal delivery of one copy to each person to be served or by mailing by first-class mail, properly addressed with postage prepaid. When a party or amicus has appeared by attorney or other representative, service upon such attorney or representative will be deemed service upon the party or amicus. Documents served by mail preferably should be mailed in sufficient time to reach the addressee by the date on which the original is due to be filed, and should be air mailed if the addressee is more than 300 miles distant.

§ 101.35 Date of service.

The date of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person, except that the date of service of the initial notice of hearing or opportunity for hearing shall be the date of its delivery, or of its attempted delivery if refused.

§ 101.36 Certificate of service.

The original of every document filed and required to be served upon parties to a proceeding shall be endorsed with a certificate of service signed by the party making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service, whether by mail or personal delivery.

Subpart E—Time

§ 101.41 Computation.

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

§ 101.42 Extension of time or postponement.

Requests for extension of time should be served on all parties and should set forth the reasons for the application. Applications may be granted upon a showing of good cause by the applicant. From the designation of a presiding officer until the issuance of his decision such requests should be addressed to him. Answers to such requests are permitted, if made promptly.

§ 101.43 Reduction of time to file documents.

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in part 100 of this chapter.

[45 FR 30931, May 9, 1980, as amended at 79 FR 76095, Dec. 19, 2014]

Subpart F—Proceedings Prior to Hearing

§ 101.51 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to § 100.9 of this title.

§ 101.52 Answer to notice.

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case his answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of all matters of fact recited in the notice.

§ 101.53 Amendment of notice or answer.

The Assistant Secretary for Civil Rights may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer thereto is served, and each respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of his original answer. Otherwise a notice or answer may be amended only by leave of the presiding officer. A respondent shall file his answer to an amended notice within the time remaining for filing the answer to the original notice or within 10 days after service of the amended notice, whichever period may be the longer, unless the presiding officer otherwise orders.

§ 101.54 Request for hearing.

Within 20 days after service of a notice of opportunity for hearing which does not fix a date for hearing the respondent, either in his answer or in a separate document, may request a hearing. Failure of the respondent to request a hearing shall be deemed a waiver of the right to a hearing and to constitute his consent to the making of a decision on the basis of such information as is available.

§ 101.55 Consolidation.

The responsible Department official may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceeding consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§ 101.56 Motions.

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and

served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding officer, if the case is pending before him. A repetitious motion will not be entertained.

§ 101.57 Responses to motions and petitions.

Within 8 days after a written motion or petition is served, or such other period as the reviewing authority or the presiding officer may fix, any party may file a response thereto. An immediate oral response may be made to an oral motion.

§ 101.58 Disposition of motions and petitions.

The reviewing authority or the presiding officer may not sustain or grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences, hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately. Motions and petitions submitted to the reviewing authority or the presiding officer, respectively, and not disposed of in separate rulings or in their respective decisions will be deemed denied. Oral arguments shall not be held or written motions or petitions unless the presiding officer in his discretion expressly so orders.

Subpart G—Responsibilities and Duties of Presiding Officer

§ 101.61 Who presides.

A hearing examiner assigned under 5 U.S.C. 3105 or 3344 (formerly section 11 of the Administrative Procedure Act) shall preside over the taking of evidence in any hearing to which these rules of procedure apply.

§ 101.62 Designation of hearing examiner.

The designation of the hearing examiner as presiding officer shall be in writing, and shall specify whether the examiner is to make an initial decision or to certify the entire record including his recommended findings and proposed decision to the reviewing authority, and may also fix the time and place of hearing. A copy of such order shall be served on all parties. After service of an order designating a hearing examiner to preside, and until such examiner makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification or unavailability of the designated hearing examiner, another hearing examiner may be designated to take his place.

§ 101.63 Authority of presiding officer.

The presiding officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to these ends, including (but not limited to) the power to:

(a) Arrange and issue notice of the date, time, and place of hearings, or, upon due notice to the parties, to change the date, time, and place of hearings previously set.

(b) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(c) Require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(d) Administer oaths and affirmations.

(e) Rule on motions, and other procedural items on matters pending before him.

(f) Regulate the course of the hearing and conduct of counsel therein.

(g) Examine witnesses and direct witnesses to testify.

(h) Receive, rule on, exclude or limit evidence.

(i) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(j) Issue initial or recommended decisions.

(k) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C. 551–559 (the Administrative Procedure Act).

Subpart H—Hearing Procedures

§ 101.71 Statement of position and trial briefs.

The presiding officer may require parties and amici curiae to file written statements of position prior to the beginning of a hearing. The presiding officer may also require the parties to submit trial briefs.

§ 101.72 Evidentiary purpose.

(a) The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what he intends to prove, may be made at hearings.

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of part 100 of this title. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from his failure timely to answer, or from his admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under § 101.101. Thereafter the proceedings shall go to conclusion in accordance with subpart J of this part. The presiding officer may allow an appeal from such order in accordance with § 101.86.

§ 101.73 Testimony.

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in his discretion, may require or permit that the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§ 101.75 and 101.76, witnesses shall be available at the hearing for cross-examination.

§ 101.74 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing if the presiding officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits exchanged prior to hearing will be deemed admitted unless written objection thereto is filed prior to the hearing or unless good cause is shown at the hearing for failure to file such written objection.

§ 101.75 Affidavits.

An affidavit is; not inadmissible as such. Unless the presiding officer fixes other time periods affidavits shall be filed and served on the parties not later than 15 days prior to the hearing; and not less than 7 days prior to hearing a party may file and serve written objection to any affidavit on the ground that he believes it necessary to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the presiding officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions. Notwithstanding any objection, however, affidavits may be considered in the case of any respondent who waives a hearing.

§ 101.76 Depositions.

Upon such terms as may be just, for the convenience of the parties or of the Department, the presiding officer may authorize or direct the testimony of any witness to be taken by deposition.

§ 101.77 Admissions as to facts and documents.

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown, or prior to such earlier date as the presiding officer may order, any party may serve upon

an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute and admission by him for any other purpose or be used against him in any other proceeding or action.

§ 101.78 Evidence.

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded.

§ 101.79 Cross-examination.

A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination.

§ 101.80 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 101.81 Objections.

Objections to evidence shall be timely and briefly state the ground relied upon.

§ 101.82 Exceptions to rulings of presiding officer unnecessary.

Exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is sought, makes known the action which he desires the presiding officer to take, or his objection to an action taken, and his grounds therefor.

§ 101.83 Official notice.

Where official notice is taken or is to be taken of a material fact not appearing in the evidence of record, any party, on timely request, shall be afforded an opportunity to show the contrary.

§ 101.84 Public document items.

Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice, as a public document item by specifying the document or relevant part thereof.

§ 101.85 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall

accompany the record as the offer of proof.

§ 101.86 Appeals from ruling of presiding officer.

Rulings of the presiding officer may not be appealed to the reviewing authority prior to his consideration of the entire proceeding except with the consent of the presiding officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party, or substantial detriment to the public interest. If an appeal is allowed, any party may file a brief with the reviewing authority within such period as the presiding officer directs. No oral argument will be heard unless the reviewing authority directs otherwise. At any time prior to submission of the proceeding to it for decisions, the reviewing authority may direct the presiding officer to certify any question or the entire record to it for decision. Where the entire record is so certified, the presiding officer shall recommend a decision.

Subpart I—The Record

§ 101.91 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§ 101.92 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

Subpart J—Posthearing Procedures, Decisions

§ 101.101 Posthearing briefs: proposed findings and conclusions.

(a) The presiding officer shall fix the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

(b) Briefs should include a summary of the evidence relied upon together with references to exhibit numbers and pages of the transcript, with citations of the authorities relied upon.

§ 101.102 Decisions following hearing.

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including his recommended findings and proposed decision, to the responsible Department official; or if so authorized he shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

§ 101.103 Exceptions to initial or recommended decisions.

Within 20 days after the mailing of an initial or recommended decision, any party may file exceptions to the decision, stating reasons therefor, with the reviewing authority. Any other party may file a response thereto within 30 days after the mailing of the decision. Upon the filing of such exceptions, the reviewing authority shall review the decision and issue its own decision thereon.

§ 101.104 Final decisions.

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in § 101.103, such decision shall become the final decision of the Department, and shall constitute ''final agency action'' within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 101.106.

(b) Where the hearing is conducted by a hearing examiner who makes a recommended decision, or upon the filing of exceptions to a hearing examiner's

initial decision, the reviewing authority shall review the recommended or initial decision and shall issue its own decision thereon, which shall become the final decision of the Department, and shall constitute ''final agency action'' within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 101.106.

(c) All final decisions shall be promptly served on all parties, and amici, if any.

§ 101.105 Oral argument to the reviewing authority.

(a) If any party desires to argue a case orally on exceptions or replies to exceptions to an initial or recommended decision, he shall make such request in writing. The reviewing authority may grant or deny such requests in its discretion. If granted, it will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument. The names of persons who will argue should be filed with the Department hearing clerk not later than 7 days before the date set for oral argument.

(b) The purpose of oral argument is to emphasize and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants should confine their arguments to points of controlling importance and to points upon which exceptions have been filed. Consolidations of appearances at oral argument by parties taking the same side will permit the parties' interests to be presented more effectively in the time allotted.

(c) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the Department hearing clerk at least 7 days before the argument.

§ 101.106 Review by the Secretary.

Within 20 days after an initial decision becomes a final decision pursuant to § 101.104(a) or within 20 days of the mailing of a final decision referred to in § 101.104(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of his intent to review the decision in whole or in part upon his own motion. If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

§ 101.107 Service on amici curiae.

All briefs, exceptions, memoranda, requests, and decisions referred to in this subpart J shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under § 101.71 shall be served on amici.

Subpart K—Judicial Standards of Practice

§ 101.111 Conduct.

Parties and their representatives are expected to conduct themselves with honor and dignity and observe judicial standards of practice and ethics in all proceedings. They should not indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. A representative of any party whether or not a lawyer shall observe the traditional responsibilities of lawyers as officers of the court and use his best efforts to restrain his client from improprieties in connection with a proceeding.

§ 101.112 Improper conduct.

With respect to any proceeding it is improper for any interested person to attempt to sway the judgement of the reviewing authority by undertaking to bring pressure or influence to bear upon any officer having a responsibility for a decision in the proceeding,

or his decisional staff. It is improper that such interested persons or any members of the Department's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgement of any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper for any person to solicit communications to any such officer, or his decisional staff, other than proper communications by parties or amici curiae.

§ 101.113 Ex parte communications.

Only persons employed by or assigned to work with the reviewing authority who perform no investigative or prosecuting function in connection with a proceeding shall communicate ex parte with the reviewing authority, or the presiding officer, or any employee or person involved in the decisional process in such proceedings with respect to the merits of that or a factually related proceeding. The reviewing authority, the presiding officer, or any employee or person involved in the decisional process of a proceeding shall communicate ex parte with respect to the merits of that or a factually related proceeding only with persons employed by or assigned to work with them and who perform no investigative or prosecuting function in connection with the proceeding.

§ 101.114 Expeditious treatment.

Requests for expeditious treatment of matters pending before the responsible Department official or the presiding officer are deemed communications on the merits, and are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications should be in the form of a motion.

§ 101.115 Matters not prohibited.

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication. Such requests should be directed to the Civil Rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by § 101.113. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible Department official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of part 100 of this title are not prohibited.

§ 101.116 Filing of ex parte communications.

A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision. If the prohibited communication is received orally a memorandum setting forth its substance shall be made and filed in the correspondence section of the docket in the case. A person referred to in such memorandum may file a comment for inclusion in the docket if he considers the memorandum to be incorrect.

Subpart L—Posttermination Proceedings

§ 101.121 Posttermination proceedings.

(a) An applicant or recipient adversely affected by the order terminating, discontinuing, or refusing Federal financial assistance in consequence of proceedings pursuant to this title may request the responsible Department official for an order authorizing payment, or permitting resumption, of Federal financial assistance. Such request shall be in writing and shall affirmatively show that since entry of the order, it has brought its program or activity into compliance with the requirements of the Act, and with the Regulation thereunder, and shall set forth specifically, and in detail, the steps which it has taken to achieve such compliance. If the responsible Department official denies such request the applicant or recipient shall be given an expeditious hearing if it so requests in writing and specifies why it

believes the responsible Department official to have been in error. The request for such a hearing shall be addressed to the responsible Department official and shall be made within 30 days after the applicant or recipient is informed that the responsible Department official has refused to authorize payment or permit resumption of Federal financial assistance.

(b) In the event that a hearing shall be requested pursuant to paragraph (a) of this section, the hearing procedures established by this part shall be applicable to the proceedings, except as otherwise provided in this section.

Subpart M—Definitions

§ 101.131 Definitions.

The definitions contained in § 100.13 of this subtitle apply to this part, unless the context otherwise requires, and the term ''reviewing authority'' as used herein includes the Secretary of Education, with respect to action by that official under § 101.106.

Transition provisions: (a) The amendments herein shall become effective upon publication in the FEDERAL REGISTER.

(b) These rules shall apply to any proceeding or part thereof to which part 100 of this title applies. In the case of any proceeding or part thereof governed by the provisions of 34 CFR, part 100 (Title VI regulations of the Department of Education) as that part existed prior to the amendments published in the FEDERAL REGISTER on Oct. 19, 1967 (effective on that date), the rules in this part 101 shall apply as if those amendments were not in effect.

PART 104—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General Provisions

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COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS [NOTE]

AUTHORITY: 20 U.S.C. 1405; 29 U.S.C. 794; Pub. L. 111–256, 124 Stat. 2643.

SOURCE: 45 FR 30936, May 9, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 104.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 104.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Education and to the program or activity that receives such assistance.

[65 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.3 Definitions.

As used in this part, the term:

(a) *The Act* means the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 29 U.S.C. 794.

(b) *Section 504* means section 504 of the Act.

(c) *Education of the Handicapped Act* means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94–142, 20 U.S.C. 1401 *et seq*.

(d) *Department* means the Department of Education.

(e) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department of Education.

(f) *Recipient* means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) *Applicant for assistance* means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) *Handicapped person*—(1) *Handicapped persons* means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) *Physical or mental impairment* means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) *Is regarded as having an impairment* means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) *Program or activity* means all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (k)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 29 U.S.C. 794(b))

(l) *Qualified handicapped person* means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(m) *Handicap* means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000; 82 FR 31912, July 11, 2017]

§ 104.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Aid, benefits, or services limited by Federal law.* The exclusion of nonhandicapped persons from aid, benefits, or services limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from aid, benefits, or services limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance to which this part applies shall submit an assurance, on a form specified by the Assistant

Secretary, that the program or activity will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Assistant Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Assistant Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Assistant Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program or activity when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program or activity had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request:

(i) A list of the interested persons consulted,

(ii) A description of areas examined and any problems identified, and

(iii) A description of any modifications made and of any remedial steps taken.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 104.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity. The notification shall also include an identification of the responsible employee designated pursuant to § 104.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.9 Administrative requirements for small recipients.

The Assistant Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 104.7 and 104.8, in whole or in part, when the Assistant

Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 104.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 104.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs or activities assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeships.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absense, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including those that are social or recreational; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.

(b) Reasonable accommodation may include:

(1) Making facilities used by employees readily accessible to and usable by handicapped persons, and

(2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include:

(1) The overall size of the recipient's program or activity with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

[45 FR 30936, May 9, 2000, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless:

(1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and

(2) Alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 104.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 104.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 104.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That:

(1) All entering employees are subjected to such an examination regardless of handicap, and

(2) The results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

Subpart C—Accessibility

§ 104.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 104.22 Existing facilities.

(a) *Accessibility*. A recipient shall operate its program or activity so that when each part is viewed in its entirety, it is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods*. A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers*. If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period*. A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan*. In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full accessibility in order to comply with paagraph (a) of this section and, if the time period of the transition plan is

longer than one year, identify the steps of that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usuable by handicapped persons.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.23 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3–8 of the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with phusical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[45 FR 30936, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 55 FR 52138, 52141, Dec. 19, 1990]

Subpart D—Preschool, Elementary, and Secondary Education

§ 104.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.32 Location and notification.

A recipient that operates a public elementary or secondary education program or activity shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

[45 FR 30936, May 9, 2000, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision

of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education*—(1) *General*. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation*. If a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the aid, benefits, or services operated by the recipient.

(3) *Residential placement*. If a public or private residential placement is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the placement, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents*. If a recipient has made available, in conformance with the requirements of this section and § 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 104.36.

(d) *Compliance*. A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.34 Educational setting.

(a) *Academic setting*. A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated

by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in §104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§104.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is belived to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with §104.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§104.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons

who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.38 Preschool and adult education.

A recipient to which this subpart applies that provides preschool education or day care or adult education may not, on the basis of handicap, exclude qualified handicapped persons and shall take into account the needs of such persons in determining the aid, benefits or services to be provided.

[65 FR 68055, Nov. 13, 2000]

§ 104.39 Private education.

(a) A recipient that provides private elementary or secondary education may not, on the basis of handicap, exclude a qualified handicapped person if the person can, with minor adjustments, be provided an appropriate education, as defined in § 104.33(b)(1), within that recipient's program or activity.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that provides special education shall do so in accordance with the provisions of §§ 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of §§ 104.34, 104.37, and 104.38.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

Subpart E—Postsecondary Education

§ 104.41 Application of this subpart.

Subpart E applies to postsecondary education programs or activities, including postsecondary vocational education programs or activities, that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.42 Admissions and recruitment.

(a) *General*. Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions*. In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception*. When a recipient is taking remedial action to correct the effects of past discrimination pursuant to §104.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to §104.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies*. For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 104.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training,

housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its program or activity in the most integrated setting appropriate.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations

is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing*. A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 104.46 Financial and employment assistance to students.

(a) *Provision of financial assistance*. (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not,

(i) On the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or

(ii) Assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment*. A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate subpart B if they were provided by the recipient.

(c) *Employment of students by recipients*. A recipient that employs any of its students may not do so in a manner that violates subpart B.

§ 104.47 Nonacademic services.

(a) *Physical education and athletics*. (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services*. A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations*. A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

Subpart F—Health, Welfare, and Social Services

§ 104.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.52 Health, welfare, and other social services.

(a) *General*. In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 104.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice*. A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired*. A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids*. (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Assistant Secretary may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 104.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 104.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity that provides aid, benefits or services for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 104.3(k)(2), in its program or activity is provided an appropriate education, as defined in § 104.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under subpart D.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

Subpart G—Procedures

§ 104.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 100.6–100.10 and part 101 of this title.

APPENDIX A TO PART 104—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. *Recipient.* Section 104.23 contains definitions used throughout the regulation.

One comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of §104.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *Federal financial assistance.* In §104.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts.

3. *Handicapped person.* Section 104.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93–516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase ''substantially limits.'' The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only ''traditional'' handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended.

Paragraph (15) of section 602 uses the term ''specific learning disabilities'' to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of ''record'' in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as having an intellectual disability.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are ''physical or mental impairments'' within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce

rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees.

With respect to other services, the implications of coverage, of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *Qualified handicapped person*. Paragraph (k) of §104.3 defines the term ''qualified handicapped person.'' Throughout the regulation, this term is used instead of the statutory term ''otherwise qualified handicapped person.'' The Department believes that the omission of the word ''otherwise'' is necessary in order to comport with the intent of the statute because, read literally, ''otherwise'' qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be ''otherwise qualified'' for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms ''qualified'' and ''otherwise qualified'' are intended to be interchangeable.

Section 104.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term ''essential functions'' does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of §104.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 104.3(k)(2) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of §104.6(a)(3), however, persons beyond the age limits prescribed in §104.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 104.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which State law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3–18 as of September 1978, and 3–21 as of September 1980 are incorporated by reference in this paragraph.

Section 104.3(k)(3) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term *technical standards* refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination*. Section 104.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1(i) prohibits the exclusion of qualified handicapped persons from aids,

benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term *equally effective,* defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau* v. *Nichols,* 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase ''in the most integrated setting appropriated to the person's needs'' is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to §104.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§104.38 and 104.47 in connection with physical education and athletics programs.

Section 104.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret §104.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of §104.23.

7. *Assurances of compliance.* Section 104.5(a) requires a recipient to submit to the Assistant Secretary an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. *Lloyd* v. *Regional Transportation Authority,* 548 F. 2d 1277 (7th Cir. 1977); *see Hairston* v. *Drosick,* Civil No. 75–0691 (S.D. W. Va., Jan. 14, 1976); *Gurmankin* v. *Castanzo,* 411 F. Supp. 982 (E.D. Pa. 1976); *cf. Lau* v. *Nichols, supra.*

9. *Remedial action.* Where there has been a finding of discrimination, §104.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have

been in the program if discriminatory practices had not existed. Paragraphs (a) (1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In §104.6(b), the term ''voluntary action'' has been substituted for the term ''affirmative action'' because the use of the latter term led to some confusion. We believe the term ''voluntary action'' more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c) (ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 104.7 requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of §104.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 104.8 (formerly §84.9) sets forth requirements for dissemination of statements of nondicrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In §104.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Section 104.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of §104.8(a) has been revised to list possible, rather than required, means of notification. Section 104.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, §104.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested

that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Section 104 which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new §104.9 the Assistant Secretary may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 104.10(a) states that compliance with the regulation is not excused by State or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession, does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind laywers may find it more difficult to find jobs than do nonhandicapped lawyers.

SUBPART B—EMPLOYMENT PRACTICES

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (34 CFR, part 106) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requries certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive Federal procurement contracts in excess of $2,500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 104.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive Federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the words ''positive steps'' instead of ''affirmative action'' advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of §104.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of §104.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirements of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 104.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 104.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other

cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. The reasonable accommodation standard in §104.12 is similar to the obligation imposed upon Federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the Federal Government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the ''business necessity'' standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, colleges and universities. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to an understandable by recipients of ED funds.

17. *Tests and selection criteria.* Revised §104.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Assistant Secretary to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of ''disproportionate, adverse effect'' difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, §104.13(a) has been revised to place the burden on the Assistant Secretary, rather than the recipient, to identify alternate tests.

Section 104.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 104.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might be required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary

qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 104.14(b) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

Finally, the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations, so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis.

19. *Specific acts of Discrimination*. Sections 104.15 (recruitment), 104.16 (compensation), 104.17 (job classification and structure) and 104.18 (fringe benefits) have been deleted from the regulation as unnecessarily duplicative of §104.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

A proposed section, concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 104.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

SUBPART C—PROGRAM ACCESSIBILITY

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20. *Existing facilities*. Section 104.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipients program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under §104.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with §104.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

Nothing in this regulation, however, should be read as prohibiting institutions from forming consortia for the benefit of all students. Thus, if three colleges decide that it would be cost-efficient for one college to offer biology, the second physics, and the third chemistry to all students at the three colleges, the arrangement would not violate section 504. On the other hand, it would violate the regulation if the same institutions set up a consortium under which one college undertook to make its biology lab accessible, another its physics lab, and a third its chemistry lab, and under which mobility-impaired handicapped students (but not other

students) were required to attend the particular college that is accessible for the desired courses.

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

All recipients that provide health, welfare, or other social services may also comply with §104.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised §104.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service.

A recent change in the tax law may assist some recipients in meeting their obligations under this section. Under section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to $25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. See 42 FR 17870 (April 4, 1977), adopting 26 CFR 7.190.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with §104.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but §104.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See §104.4(c)(2)(iv), prohibiting unnecessarily separate treatment; §104.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new §104.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier-free environment—that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction*. Section 104.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 104.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has taken place." Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical

accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the manner in which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase ''to the maximum extent feasible'' has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier-free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

Section 104.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

SUBPART D—PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term ''adult education'' refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§104.32 and 104.33 apply only to public programs and §104.39 applies only to private programs; §§104.35 and 104.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Lebanks* v. *Spears*, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Pub. L. 94–142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguard be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the ''process'' requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 104.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Under §104.33(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word ''in'' encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational

agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 104.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of §104.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new §104.33(b)(2) has been added, which allows this requirement to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of §104.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in §104.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children ''no later than September 1, 1978,'' but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to §104.33. Section 104.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of §104.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 104.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under §104.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by §104.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence

has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under §104.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §§104.34 and 104.36.

New paragraph (b) specified that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Section 104.34(c) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for persons with severe intellectual disabilities), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement*. Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, §104.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§104.35 and 104.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 104.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. ''Any action'' includes denials of placement.

Paragraphs (b) and (c) of §104.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in ''Issues in the Classification of Children,'' a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute. Paragraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, §104.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under §104.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 104.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of §104.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.

Finally, the one-year transition period provided in a proposed section was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 104.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 104.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under §104.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of §104.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for persons with intellectual disabilities is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

SUBPART E—POSTSECONDARY EDUCATION

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in §104.42(a), the regulation delineates, in §104.42(b), specific prohibitions concerning the establishment of limitations on admission of handicapped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 104.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that §104.42(b)(2)(ii) could be interpreted to require a ''global search'' for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. This was not the intent of the provision and, therefore, it has been amended to place the burden on the Assistant Secretary for Civil Rights, rather than on the recipient, to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first-year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that

use of first year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program would be sufficient check on the reliability of first-year grades.

Section 104.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 104.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, ''on the whole'' means that not all of the facilities need be accessible so long as a sufficient number of facilities are available to handicapped persons.

Revised §104.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of §104.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed §104.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 104.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the ''as a whole'' wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of §104.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It shoud be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classrooms and dog

guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§104.42(b)) and will be similarly interpreted.

Under §104.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing.* Section 104.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§106.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with §104.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* A proposed section, providing that recipients may not discriminate on the basis of handicap in the provision of health related services, has been deleted as duplicative of the general provisions of §104.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34. *Financial assistance.* Section 104.46(a), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on §104.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to

those raised under §104.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as §104.43(b) to include the ''as a whole'' concept and will be interpreted in the same manner as §104.43(b).

35. *Nonacademic services.* Section 104.47 establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does §104.38 of subpart D, discussed above, and will be interpreted in a similar fashion.

SUBPART F—HEALTH, WELFARE, AND SOCIAL SERVICES

Subpart F applies to recipients that operate health, welfare, and social service programs. The Department received fewer comments on this subpart than on others.

Although many commented that subpart F lacked specificity, these commenters provided neither concrete suggestions nor additions. Nevertheless, some changes have been made, pursuant to comment, to clarify the obligations of recipients in specific areas. In addition, in an effort to reduce duplication in the regulation, the section governing recipients providing health services has been consolidated with the section regulating providers of welfare and social services. Since the separate provisions that appeared in the proposed regulation were almost identical, no substantive change should be inferred from their consolidation.

Several commenters asked whether subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, §104.4(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state social service agencies to take an active role in the enforcement of section 504 with regard to local social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration.

A number of comments also discussed whether section 504 should be read to require payment of compensation to institutionalized handicapped patients who perform services for the institution in which they reside. The Department of Labor has recently issued a proposed regulation under the Fair Labor Standards Act (FLSA) that covers the question of compensation for institutionalized persons. 42 FR 15224 (March 18, 1977). This Department will seek information and comment from the Department of Labor concerning that agency's experience administering the FLSA regulation.

36. *Health, welfare, and other social service providers.* Section 104.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§104.4(b)(ii) and 104.43(b). New paragraph (a)(3) requires the provision of effective benefits or services, as defined in §104.4(b)(2) (i.e., benefits or services which ''afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit * * *'').

Section 104.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subjection of handicapped persons to different eligibility standards. One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specific section in question has been eliminated. Section 104.4(c) makes clear that special programs for handicapped persons are permitted.

A new paragraph (a)(5) concerning the provision of different or separate services or benefits has been added. This provision prohibits such treatment unless necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 104.52(b) has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualified handicapped persons are not denied effective notice because of their handicap. For example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tacticle devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Section 104.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons

with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 104.52(c), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Assistant Secretary may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or service.

37. *Treatment of Drug Addicts and Alcoholics.* Section 104.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. Section 104.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

38. *Education of institutionalized persons.* The regulation retains §104.54 of the proposed regulation that requires that an appropriate education be provided to qualified handicapped persons who are confined to residential institutions or day care centers.

SUBPART G—PROCEDURES

In §104.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedureal regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

[45 FR 30936, May 9, 1980, as amended at 55 FR 52141, Dec. 19, 1990; 82 FR 31912, July 11, 2017]

APPENDIX B TO PART 104—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

EDITORIAL NOTE: For the text of these guidelines, see 34 CFR part 100, appendix B.

PART 105—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF EDUCATION

Sec.
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105.42 Effective date.

AUTHORITY: 29 U.S.C. 794; Pub. L. 111–256, 124 Stat. 2643; unless otherwise noted.

SOURCE: 55 FR 37168, Sept. 7, 1990, unless otherwise noted.

§105.1 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§105.2 Application.

This part applies to all programs or activities conducted by the Department, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§105.3 Definitions.

For purposes of this part, the following definitions apply:

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking

skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Department. For example, auxiliary aids useful for persons with impaired vision include readers, materials in braille, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDDs), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the Department's alleged discriminatory action in sufficient detail to inform the Department of the nature and date of the alleged violation of section 504. It must be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties must describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Historic preservation programs means programs conducted by the Department that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase—

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, drug addiction, and alcoholism;

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities; and

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Department as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the Department as having such an impairment.

Qualified individual with handicaps means—

(1) With respect to preschool, elementary, or secondary education services provided by the Department, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or Department policy to receive education services from the Department;

(2) With respect to any other Department program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps

who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Department can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other Department program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified handicapped person* as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 105.30

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955); the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810); and the Civil Rights Restoration Act of 1987 (Pub. L. 100–259, 102 Stat. 28). As used in this part, section 504 applies only to programs or activities conducted by the Department and not to federally assisted programs.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

[55 FR 37168, Sept. 7, 1990, as amended at 82 FR 31912, July 11, 2017]

§§ 105.4–105.9 [Reserved]

§ 105.10 Self-evaluation.

(a) The Department shall, within one year of the effective date of this part, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any of those policies and practices is required, the Department shall proceed to make the necessary modifications.

(b) The Department shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The Department shall, for at least 3 years following completion of the self-evaluation, maintain on file, and make available for public inspection—

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

§ 105.11 Notice.

The Department shall make available, to employees, applicants, participants, beneficiaries, and other interested persons, information regarding the provisions of this part and its applicability to the programs or activities conducted by the Department, and make that information available to them in such manner as the Secretary finds necessary to apprise those persons of the protections against discrimination assured them by section 504 and the regulations in this part.

§§ 105.12–105.19 [Reserved]

§ 105.20 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under, any program or activity conducted by the Department.

(b)(1) The Department, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless that action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The Department may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The Department may not, directly or through contractual or other arrangements, use criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The Department may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under, any program or activity conducted by the Department; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The Department, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The Department may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the Department establish requirements for the program or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the Department are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive Order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive Order to a different class of individuals with handicaps is not prohibited by this part.

(d) The Department shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 105.21–105.29 [Reserved]

§ 105.30 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the Department. As provided in § 105.41(b), the definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§ 105.31 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 105.32, no qualified individual with handicaps shall, because the Department's facilities are inaccessible to or

unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Department.

§ 105.32 Program accessibility: Existing facilities.

(a) *General.* The Department shall operate each program or activity so that the program or activity, viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the Department to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the Department to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3)(i) Require the Department to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens.

(ii) The Department has the burden of proving that compliance with § 105.32(a) would result in that alteration or those burdens.

(iii) The decision that compliance would result in that alteration or those burdens must be made by the Secretary after considering all of the Department's resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion.

(iv) If an action would result in that alteration or those burdens, the Department shall take any other action that would not result in the alteration or burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* (i) The Department may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignments of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps.

(ii) The Department is not required to make structural changes in existing facilities if other methods are effective in achieving compliance with this section.

(iii) The Department, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing that Act.

(iv) In choosing among available methods for meeting the requirements of this section, the Department shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 105.32(a) in historic preservation programs, the Department shall give priority to methods that provide physical access to individuals with handicaps. In cases were a physical alteration to an historic property is not required because of § 105.32 (a)(2) or (a)(3), alternative methods of achieving program accessibility include—

(i) Using audiovisual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* The Department shall comply with the obligations established under this section within 60 days of the effective date of this part except that if structural changes in facilities are undertaken, the changes shall be made within 3 years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan.* (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Department shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete those changes.

(2) The Department shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan must be made available for public inspection.

(3) The plan must, at a minimum—

(i) Identify physical obstacles in the Department's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

§ 105.33 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of, the Department must be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 105.34–105.39 [Reserved]

§ 105.40 Communications.

(a) The Department shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public, as follows:

(1)(i) The Department shall furnish appropriate auxiliary aids if necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Department.

(ii) In determining what type of auxiliary aid is necessary, the Department shall give primary consideration to the request of the individual with handicaps.

(iii) The Department need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) If the Department communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDDs) or equally effective telecommunication systems must be used.

(b) The Department shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Department shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility must be used at each primary entrance of an accessible facility.

(d)(1) This section does not require the Department to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens.

(2) The Department has the burden of proving that compliance with § 105.40 would result in that alteration or those burdens.

(3) The decision that compliance would result in that alteration or those burdens must be made by the Secretary after considering all Department resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion.

(4) If an action required to comply with this section would result in that alteration or those burdens, the Department shall take any other action that would not result in the alteration

or burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§ 105.41 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the Department.

(b) As provided in § 105.30, the Department shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Deputy Under Secretary for Management is responsible for coordinating implementation of this section. Complaints may be sent to the U.S. Department of Education, Office of Management, Federal Building No. 6, 400 Maryland Avenue SW., Washington, DC 20202.

(d) The Department shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The Department may extend this time period for good cause.

(e) If the Department receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The Department shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157) is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the Department shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the Department of the letter required by § 105.41(g). The Department may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Secretary.

(j) If the Secretary determines that additional information is needed for the complainant, he or she shall notify the complainant of the additional information needed to make his or her determination on the appeal.

(k) The Secretary shall notify the complainant of the results of the appeal.

(l) The time limit in paragraph (g) of this section may be extended by the Secretary.

(m) The Secretary may delegate the authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated.

§ 105.42 Effective date.

The effective date of this part is October 9, 1990.

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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APPENDIX A TO PART 106—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS [NOTE]

AUTHORITY: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

SOURCE: 45 FR 30955, May 9, 1980, unless otherwise noted.

Subpart A—Introduction

§ 106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93–568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.2 Definitions.

As used in this part, the term:

(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92–318, as amended by section 3 of Pub. L. 93–568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

(e) *Reviewing Authority* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *Administrative law judge* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *Federal financial assistance* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *Program or activity* and *program* means all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or local government; or

(ii) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (h)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 20 U.S.C. 1687)

(i) *Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

(j) *Applicant* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(k) *Educational institution* means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (l), (m), (n), or (o) of this section.

(l) *Institution of graduate higher education* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(m) *Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(n) *Institution of professional education* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(o) *Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(p) *Administratively separate unit* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(q) *Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(r) *Student* means a person who has gained admission.

(s) *Transition plan* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

[45 FR 30955, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§ 106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action*. If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.

(b) *Affirmative action*. In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(iii) of this section.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30572, 30579, May 19, 2020]

§ 106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§ 106.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of subpart B of this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.6 Effect of other requirements and preservation of rights.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b–2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act

(29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Authority: Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives Federal financial assistance.

(d) *Constitutional protections.* Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA).* The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

(g) *Exercise of rights by parents or guardians.* Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a ''complainant,'' ''respondent,'' ''party,'' or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) *Preemptive effect.* To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30573, 30579, May 19, 2020]

§ 106.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19 2020]

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

(a) *Designation of coordinator.* Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the ''Title IX Coordinator.'' The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any

other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(b) *Dissemination of policy*—(1) *Notification of policy*. Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

(2) *Publications*. (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

(c) *Adoption of grievance procedures*. A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) *Application outside the United States*. The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

[85 FR 30573, May 19, 2020]

§ 106.9 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30573, May 19, 2020]

Subpart B—Coverage

§ 106.11 Application.

Except as provided in this subpart, this part 106 applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.

[45 FR 86298, Dec. 30, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§ 106.12 Educational institutions controlled by religious organizations.

(a) *Application*. This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Assurance of exemption*. An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the

institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

(c) *Eligibility*. Any of the following in paragraphs (c)(1) through (6) of this section shall be sufficient to establish that an educational institution is controlled by a religious organization, as contemplated under paragraph (a) of this section, and is therefore eligible to assert a religious exemption to the extent application of this part would not be consistent with its religious tenets:

(1) That the educational institution is a school or department of divinity.

(2) That the educational institution requires its faculty, students, or employees to be members of, or otherwise engage in religious practices of, or espouse a personal belief in, the religion of the organization by which it claims to be controlled.

(3) That the educational institution, in its charter or catalog, or other official publication, contains an explicit statement that it is controlled by a religious organization or an organ thereof, or is committed to the doctrines or practices of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

(4) That the educational institution has a doctrinal statement or a statement of religious practices, along with a statement that members of the institution community must engage in the religious practices of, or espouse a personal belief in, the religion, its practices, or the doctrinal statement or statement of religious practices.

(5) That the educational institution has a published institutional mission that is approved by the governing body of an educational institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings.

(6) Other evidence sufficient to establish that an educational institution is controlled by a religious organization, pursuant to 20 U.S.C. 1681(a)(3).

(d) *Severability*. If any provision of this section or its application to any person, act, or practice is held invalid, the remainder of this section or the application of its provisions to any person, act, or practice shall not be affected thereby.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30573, 30579, May 19, 2020; 85 FR 59980, Sept. 23, 2020]

§ 106.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities*. This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls*. This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations*. This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§ 106.16 and 106.17, and subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of subpart C.* Except as provided in paragraphs (d) and (e) of this section, subpart C applies to each recipient. A recipient to which subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 85 FR 30579, May 19, 2020]

§ 106.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of subpart C unless it is carrying out a transition plan approved by the Secretary as described in § 106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.17 Transition plans.

(a) *Submission of plans.* An institution to which § 106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 106.16 applies shall result in treatment of applicants to or students of such recipient in violation of subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b) (3)

of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b) (4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment which emphasizes the institution's commitment to enrolling students of the sex previously excluded.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§ 106.18 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30573, May 19, 2020]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 106.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is ''Miss'' or ''Mrs.'' A recipient may make pre-admission inquiry as to the sex of an applicant for admision, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of

such preference has the effect of discriminating on the basis of sex in violation of this subpart.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 106.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.24 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30574, May 19, 2020]

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§ 106.30 Definitions.

(a) As used in this part:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. ''Notice'' as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Consent. The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase ''document filed by a complainant'' means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

Respondent means an individual who has been reported to be the perpetrator

of conduct that could constitute sexual harassment.

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) ''Sexual assault'' as defined in 20 U.S.C. 1092(f)(6)(A)(v), ''dating violence'' as defined in 34 U.S.C. 12291(a)(10), ''domestic violence'' as defined in 34 U.S.C. 12291(a)(8), or ''stalking'' as defined in 34 U.S.C. 12291(a)(30).

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

(b) As used in §§ 106.44 and 106.45:

Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

Postsecondary institution means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

[85 FR 30574, May 19, 2020]

§ 106.31 Education programs or activities.

(a) *General*. Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions*. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aid, benefits or services not provided by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

[45 FR 30955, May 9, 1980, as amended at 47 FR 32527, July 28, 1982; 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§ 106.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and

(ii) Comparable in quality and cost to the student.

A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities

provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.34 Access to classes and schools.

(a) *General standard.* Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex.

(1) *Contact sports in physical education classes.* This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(2) *Ability grouping in physical education classes.* This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) *Human sexuality classes.* Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.

(4) *Choruses.* Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

(b) *Classes and extracurricular activities*—(1) *General standard.* Subject to the requirements in this paragraph, a recipient that operates a nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes or extracurricular activities, if—

(i) Each single-sex class or extracurricular activity is based on the recipient's important objective—

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

(ii) The recipient implements its objective in an evenhanded manner;

(iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and

(iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.

(2) *Single-sex class or extracurricular activity for the excluded sex.* A recipient that provides a single-sex class or extracurricular activity, in order to comply with paragraph (b)(1)(ii) of this section, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether classes or extracurricular activities are substantially equal include, but are not limited to, the following: the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.

(4) *Periodic evaluations.* (i) The recipient must conduct periodic evaluations to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to

the achievement of the important objective for the classes or extracurricular activities.

(ii) Evaluations for the purposes of paragraph (b)(4)(i) of this section must be conducted at least every two years.

(5) *Scope of coverage.* The provisions of paragraph (b)(1) through (4) of this section apply to classes and extracurricular activities provided by a recipient directly or through another entity, but the provisions of paragraph (b)(1) through (4) of this section do not apply to interscholastic, club, or intramural athletics, which are subject to the provisions of §§ 106.41 and 106.37(c) of this part.

(c) *Schools*—(1) *General Standard.* Except as provided in paragraph (c)(2) of this section, a recipient that operates a public nonvocational elementary or secondary school that excludes from admission any students, on the basis of sex, must provide students of the excluded sex a substantially equal single-sex school or coeducational school.

(2) *Exception.* A nonvocational public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school without regard to the requirements in paragraph (c)(1) of this section.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether schools are substantially equal include, but are not limited to, the following: The policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the quality and range of extracurricular offerings, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources, and intangible features, such as reputation of faculty.

(4) *Definition.* For the purposes of paragraph (c)(1) through (3) of this section, the term ''school'' includes a ''school within a school,'' which means an administratively separate school located within another school.

[71 FR 62542, Oct. 25, 2006, as amended at 85 FR 30579 May 19, 2020]

§ 106.35 Access to institutions of vocational education.

A recipient shall not, on the basis of sex, exclude any person from admission to any institution of vocational education operated by that recipient.

[71 FR 62543, Oct. 25, 2006, as amended at 85 FR 30579, May 19, 2020]

§ 106.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the

other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period*. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.43 Standards for measuring skill or progress in physical education classes.

If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect.

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62543, Oct. 25, 2006, as amended at 85 FR 30579, May 19, 2020]

§ 106.44 Recipient's response to sexual harassment.

(a) *General response to sexual harassment*. A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, ''education program or activity'' includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a post-secondary institution. A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department

may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) *Response to a formal complaint.* (1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

[85 FR 30574, May 19, 2020]

§ 106.45 Grievance process for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) *Grievance process.* For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

(1) *Basic requirements for grievance process.* A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as ''supportive measures''; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title

IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in §106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) *Notice of allegations*—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in §106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under §106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the

parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) *Dismissal of a formal complaint*—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) *Consolidation of formal complaints.* A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular ''party,'' ''complainant,'' or ''respondent'' include the plural, as applicable.

(5) *Investigation of a formal complaint.* When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an ''eligible student,'' as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a ''parent,'' as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either

the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(6) *Hearings.* (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the

live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) *Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) *Appeals.* (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) *Informal resolution.* A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under §106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not

deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

[85 FR 30575, May 19, 2020]

§ 106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30578, May 19, 2020]

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

§ 106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including those that are social or recreational; and

(10) Any other term, condition, or privilege of employment.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§ 106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for

any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 106.61.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.56 Fringe benefits.

(a) *Fringe benefits defined.* For purposes of this part, *fringe benefits* means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment

which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy*. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability*. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave*. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements*. The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits*. A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.60 Pre-employment inquiries.

(a) *Marital status*. A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is ''Miss or Mrs.''

(b) *Sex*. A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section

shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§ 106.62 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30578, May 19, 2020]

Subpart F–Retaliation

SOURCE: 85 FR 30578, May 19, 2020, unless otherwise noted.

§ 106.71 Retaliation.

(a) *Retaliation prohibited.* No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) *Specific circumstances.* (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

§ 106.72 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subpart G—Procedures

SOURCE: 85 FR 30579, May 19, 2020, unless otherwise noted.

§ 106.81 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6–100.11 and 34 CFR part 101. The definitions in § 106.30 do not apply to 34 CFR 100.6–100.11 and 34 CFR part 101.

§ 106.82 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

APPENDIX A TO PART 106—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

EDITORIAL NOTE: For the text of these guidelines, see 34 CFR part 100, appendix B.

[44 FR 17168, Mar. 21, 1979]

PART 108—EQUAL ACCESS TO PUBLIC SCHOOL FACILITIES FOR THE BOY SCOUTS OF AMERICA AND OTHER DESIGNATED YOUTH GROUPS

Sec.
108.1 Purpose.
108.2 Applicability.
108.3 Definitions.
108.4 Effect of State or local law.
108.5 Compliance obligations.
108.6 Equal access.
108.7 Voluntary sponsorship.
108.8 Assurances.
108.9 Procedures.

AUTHORITY: 20 U.S.C. 7905, unless otherwise noted.

SOURCE: 71 FR 15002, Mar. 24, 2006, unless otherwise noted.

§ 108.1 Purpose.

The purpose of this part is to implement the Boy Scouts of America Equal Access Act, 20 U.S.C. 7905.

(Authority: 20 U.S.C. 7905)

§ 108.2 Applicability.

This part applies to any public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or limited public forum and that receives funds made available through the Department.

(Authority: 20 U.S.C. 7905)

§ 108.3 Definitions.

The following definitions apply to this part:

(a) *Act* means the Boy Scouts of America Equal Access Act, section 9525 of the Elementary and Secondary Education Act of 1965, as amended by section 901 of the No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425, 1981–82 (20 U.S.C. 7905).

(b) *Boy Scouts* means the organization named ''Boy Scouts of America,'' which has a Federal charter and which is listed as an organization in title 36 of the United States Code (Patriotic and National Observances, Ceremonies, and Organizations) in Subtitle II (Patriotic and National Organizations), Part B (Organizations), Chapter 309 (Boy Scouts of America).

(c) *Covered entity* means any public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or limited public forum and that receives funds made available through the Department.

(d) *Department* means the Department of Education.

(e) *Designated open forum* means that an elementary school or secondary school designates a time and place for one or more outside youth or community groups to meet on school premises or in school facilities, including during the hours in which attendance at the school is compulsory, for reasons other than to provide the school's educational program.

(f) *Elementary school* means an elementary school as defined by section 9101(18) of the Elementary and Secondary Education Act of 1965, as amended by section 901 of the No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425, 1958 (20 U.S.C. 7801).

(g) *Group officially affiliated with any other Title 36 youth group* means a youth group resulting from the chartering process or other process used by that Title 36 youth group to establish official affiliation with youth groups.

(h) *Group officially affiliated with the Boy Scouts* means a youth group formed as a result of a community organization charter issued by the Boy Scouts.

(i) *Limited public forum* means that an elementary school or secondary school grants an offering to, or opportunity for, one or more outside youth or community groups to meet on school premises or in school facilities before or after the hours during which attendance at the school is compulsory.

(j) *Local educational agency* means a local educational agency as defined by section 9101(26) of the Elementary and Secondary Education Act of 1965, as amended by section 901 of the No Child

Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425, 1961 (20 U.S.C. 7801).

(k) *Outside youth or community group* means a youth or community group that is not affiliated with the school.

(l) *Premises or facilities* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in that property.

(m) *Secondary school* means a secondary school as defined by section 9101(38) of the Elementary and Secondary Education Act of 1965, as amended by section 901 of the No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425, 1965 (20 U.S.C. 7801).

(n) *State educational agency* means a State educational agency as defined by section 9101(41) of the Elementary and Secondary Education Act of 1965, as amended by section 901 of the No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425, 1965 (20 U.S.C. 7801).

(o) *Title 36 of the United States Code (as a patriotic society)* means title 36 (Patriotic and National Observances, Ceremonies, and Organizations), Subtitle II (Patriotic and National Organizations) of the United States Code.

(p) *Title 36 youth group* means a group or organization listed in title 36 of the United States Code (as a patriotic society) that is intended to serve young people under the age of 21.

(q) *To sponsor any group officially affiliated with the Boy Scouts or with any other Title 36 youth group* means to obtain a community organization charter issued by the Boy Scouts or to take actions required by any other Title 36 youth group to become a sponsor of that group.

(r) *Youth group* means any group or organization intended to serve young people under the age of 21.

(Authority: 20 U.S.C. 7905)

§ 108.4 Effect of State or local law.

The obligation of a covered entity to comply with the Act and this part is not obviated or alleviated by any State or local law or other requirement.

(Authority: 20 U.S.C. 7905)

§ 108.5 Compliance obligations.

(a) The obligation of covered entities to comply with the Act and this part is not limited by the nature or extent of their authority to make decisions about the use of school premises or facilities.

(b) Consistent with the requirements of § 108.6, a covered entity must provide equal access to any group that is officially affiliated with the Boy Scouts or is officially affiliated with any other Title 36 youth group. A covered entity may require that any group seeking equal access inform the covered entity whether the group is officially affiliated with the Boy Scouts or is officially affiliated with any other Title 36 youth group. A covered entity's failure to request this information is not a defense to a covered entity's noncompliance with the Act or this part.

(Authority: 20 U.S.C. 7905)

§ 108.6 Equal access.

(a) *General*. Consistent with the requirements of paragraph (b) of this section, no covered entity shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts or officially affiliated with any other Title 36 youth group that requests to conduct a meeting within that covered entity's designated open forum or limited public forum. No covered entity shall deny that access or opportunity or discriminate for reasons including the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts or of the Title 36 youth group.

(b) *Specific requirements*—(1) *Meetings*. Any group officially affiliated with the Boy Scouts or officially affiliated with any other Title 36 youth group that requests to conduct a meeting in the covered entity's designated open forum or limited public forum must be given equal access to school premises or facilities to conduct meetings.

(2) *Benefits and services*. Any group officially affiliated with the Boy Scouts or officially affiliated with any other Title 36 youth group that requests to conduct a meeting as described in paragraph (b)(1) of this section must be given equal access to any other benefits and services provided to one or more outside youth or community groups that are allowed to meet in that

same forum. These benefits and services may include, but are not necessarily limited to, school-related means of communication, such as bulletin board notices and literature distribution, and recruitment.

(3) *Fees.* Fees may be charged in connection with the access provided under the Act and this part.

(4) *Terms.* Any access provided under the Act and this part to any group officially affiliated with the Boy Scouts or officially affiliated with any other Title 36 youth group, as well as any fees charged for this access, must be on terms that are no less favorable than the most favorable terms provided to one or more outside youth or community groups.

(5) *Nondiscrimination.* Any decisions relevant to the provision of equal access must be made on a nondiscriminatory basis. Any determinations of which youth or community groups are outside groups must be made using objective, nondiscriminatory criteria, and these criteria must be used in a consistent, equal, and nondiscriminatory manner.

(Authority: 20 U.S.C. 7905)

§ 108.7 Voluntary sponsorship.

Nothing in the Act or this part shall be construed to require any school, agency, or school served by an agency to sponsor any group officially affiliated with the Boy Scouts or with any other Title 36 youth group.

(Authority: 20 U.S.C. 7905)

§ 108.8 Assurances.

An applicant for funds made available through the Department to which this part applies must submit an assurance that the applicant will comply with the Act and this part. The assurance shall be in effect for the period during which funds made available through the Department are extended. The Department specifies the form of the assurance, including the extent to which assurances will be required concerning the compliance obligations of subgrantees, contractors and subcontractors, and other participants, and provisions that give the United States a right to seek its judicial enforcement. An applicant may incorporate this assurance by reference in subsequent applications to the Department.

(Approved by the Office of Management and Budget under control number 1870–0503)

(Authority: 20 U.S.C. 7905)

§ 108.9 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964, which are found in 34 CFR 100.6 through 100.11 and 34 CFR part 101, apply to this part, except that, notwithstanding these provisions and any other provision of law, no funds made available through the Department shall be provided to any school, agency, or school served by an agency that fails to comply with the Act or this part.

(Authority: 20 U.S.C. 7905)

PART 110—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General

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Subpart B—Standards for Determining Age Discrimination

110.10 Rules against age discrimination.
110.11 Definitions of ''normal operation'' and ''statutory objective.''
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AUTHORITY: 42 U.S.C. 6101 *et seq.*, unless otherwise noted.

SOURCE: 58 FR 40197, July 27, 1993, unless otherwise noted.

Subpart A—General

§ 110.1 What is the purpose of ED's age discrimination regulations?

The purpose of these regulations is to set out ED's rules for implementing the Age Discrimination Act of 1975. The Act prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act permits federally assisted programs or activities, and recipients of Federal funds, to continue to use age distinctions and factors other than age that meet the requirements of the Act.

(Authority: 42 U.S.C. 6101–6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68056, Nov. 13, 2000]

§ 110.2 To what programs or activities do these regulations apply?

(a) These regulations apply to any program or activity receiving Federal financial assistance from ED.

(b) These regulations do not apply to—

(1) An age distinction contained in that part of a Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body that—

(i) Provides any benefits or assistance to persons based on age;

(ii) Establishes criteria for participation in age-related terms; or

(iii) Describes intended beneficiaries or target groups in age-related terms; or

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program, except any program or activity receiving Federal financial assistance for employment under the Job Training Partnership Act (29 U.S.C. 1501 *et seq.*).

(Authority: 42 U.S.C. 6103)

§ 110.3 What definitions apply?

The following definitions apply to these regulations: *Act* means the Age Discrimination Act of 1975, as amended (Title III of Pub. L. 94–135).

Action means any act, activity, policy, rule, standard, or method of administration, or the use of any policy, rule, standard, or method of administration.

Age means how old a person is, or the number of years from the date of a person's birth.

Age distinction means any action using age or an age-related term.

Age-related term means a word or words that necessarily imply a particular age or range of ages (e.g., ''children,'' ''adult,'' ''older persons,'' but not ''student'' or ''grade'').

Agency means a Federal department or agency that is empowered to extend financial assistance.

Applicant for Federal financial assistance means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient or subrecipient.

Department means the United States Department of Education.

ED means the United States Department of Education.

Federal financial assistance means any grant, entitlement, loan, cooperative agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which ED provides or otherwise makes available assistance in the form of—

(a) Funds;

(b) Services of Federal personnel; or

(c) Real and personal property or any interest in or use of property, including—

(1) Transfers or leases of property for less than fair market value or for reduced consideration; and

(2) Proceeds from a subsequent transfer or lease of property if the Federal share of its fair market value is not returned to the Federal Government.

Program or activity means all of the operations of—

(a)(1) A department, agency, special purpose district, or other instrumentality of a State or local government; or

(2) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(b)(1) A college, university, or other postsecondary institution, or a public system of higher education; or

(2) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(c)(1) An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(i) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(2) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(d) Any other entity that is established by two or more of the entities described in paragraph (a), (b), or (c) of this section; any part of which is extended Federal financial assistance.

(Authority: 42 U.S.C. 6107)

Recipient means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance from ED is extended, directly or through another recipient. ''Recipient'' includes any successor, assignee, or transferee of a recipient, but excludes the ultimate beneficiary of the assistance.

Secretary means the Secretary of Education, or his or her designee.

Subrecipient means any of the entities in the definition of ''recipient'' to which a recipient extends or passes on Federal financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

United States means the fifty States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and the territories and possessions of the United States.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68056, Nov. 13, 2000]

Subpart B—Standards for Determining Age Discrimination

§ 110.10 Rules against age discrimination.

The rules stated in this section are subject to the exceptions contained in §§ 110.12 and 110.13 of these regulations.

(a) *General rule.* No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(b) *Specific rules.* A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual, licensing, or other arrangements, use age distinctions or take any other actions that have the effect, on the basis of age, of—

(1) Excluding individuals from, denying them the benefits of, or subjecting

them to discrimination under a program or activity receiving Federal financial assistance; or

(2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

(c) *Other forms of discrimination*. The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list.

(Authority: 42 U.S.C. 6101–6103)

§ 110.11 Definitions of "normal operation" and "statutory objective."

For purposes of these regulations, the terms *normal operation* and *statutory objective* have the following meanings:

(a) *Normal operation* means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

(b) *Statutory objective* means any purpose of a program or activity expressly stated in any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body.

(Authority: 42 U.S.C. 6103)

§ 110.12 Exceptions to the rules against age discrimination: Normal operation or statutory objective of any program or activity.

A recipient is permitted to take an action otherwise prohibited by § 110.10 if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if—

(a) Age is used as a measure or approximation of one or more other characteristics;

(b) The other characteristic or characteristics must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity;

(c) The other characteristic or characteristics can be reasonably measured or approximated by the use of age; and

(d) The other characteristic or characteristics are impractical to measure directly on an individual basis.

(Authority: 42 U.S.C. 6103)

§ 110.13 Exceptions to the rules against age discrimination: Reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by § 110.10 that is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

(Authority: 42 U.S.C. 6103)

§ 110.14 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 110.12 and 110.13 is on the recipient of Federal financial assistance.

(Authority: 42 U.S.C. 6104)

§ 110.15 Affirmative action by recipients.

Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(Authority: 42 U.S.C. 6103)

§ 110.16 Special benefits for children and the elderly.

If a recipient operating a program or activity provides special benefits to the elderly or to children, the use of age distinctions is presumed to be necessary to the normal operation of the program or activity, notwithstanding the provisions of § 110.12.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.17 Age distinctions contained in ED's regulations.

Any age distinction contained in regulations issued by ED is presumed to be necessary to the achievement of a

statutory objective of the program or activity to which the regulations apply, notwithstanding the provisions of § 110.12.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

Subpart C—Duties of ED Recipients

§ 110.20 General responsibilities.

Each ED recipient has primary responsibility for ensuring that its program or activity is in compliance with the Act and these regulations and shall take steps to eliminate violations of the Act. A recipient also has responsibility to maintain records, provide information, and to afford ED access to its records to the extent required for ED to determine whether the recipient is in compliance with the Act and these regulations.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.21 Notice to subrecipients.

If the recipient initially receiving funds makes the funds available to a subrecipient, the recipient shall notify the subrecipient of its obligations under the Act and these regulations.

(Authority: 42 U.S.C. 6103)

§ 110.22 Information requirements.

Each recipient shall—

(a) Provide ED with information that ED determines is necessary to ascertain whether the recipient is in compliance with the Act and these regulations; and

(b) Permit reasonable access by ED to the books, records, accounts, reports, and other recipient facilities and sources of information to the extent ED determines is necessary to ascertain whether a recipient is in compliance with the Act and these regulations.

(Authority: 42 U.S.C. 6103)

§ 110.23 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance to which these regulations apply shall sign a written assurance, on a form specified by ED, that the program or activity will be operated in compliance with these regulations. An applicant may incorporate this assurance by reference in subsequent applications to ED.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) If Federal financial assistance is provided in the form of real property or interest in the property from ED, the instrument effecting or recording this transfer must contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) If no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) If Federal financial assistance is provided in the form of real property or interest in the property from ED, the covenant must also include a condition coupled with a right to be reserved by ED to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the

real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, ED may, upon request of the transferee and if necessary to accomplish that financing and upon conditions that ED deems appropriate, agree to forbear the exercise of the right to revert title for as long as the lien of the mortgage or other encumbrance remains effective.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.24 Recipient assessment of age distinctions.

(a) As part of a compliance review under § 110.30 or a complaint investigation under § 110.31, ED may require a recipient employing the equivalent of 15 or more full-time employees to complete a written self-evaluation, in a manner specified by ED, of any age distinction imposed in its program or activity receiving Federal financial assistance from ED to assess the recipient's compliance with the Act.

(b) Whenever an assessment indicates a violation of the Act or these regulations, the recipient shall take corrective action.

(Authority: 42 U.S.C. 6103)

§ 110.25 Designation of responsible employee, notice, and grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the Act and these regulations, including investigation of any complaints that the recipient receives alleging any actions that are prohibited by the Act and these regulations.

(b) *Notice.* A recipient shall notify its beneficiaries, in a continuing manner, of information regarding the provisions of the Act and these regulations. The notification must also identify the responsible employee by name or title, address, and telephone number.

(c) *Grievance procedures.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by the Act or these regulations.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

Subpart D—Investigation, Conciliation, and Enforcement Procedures

§ 110.30 Compliance reviews.

(a) ED may conduct compliance reviews, pre-award reviews, and other similar procedures that permit ED to investigate and correct violations of the Act and of these regulations. ED may conduct these reviews in the absence of a complaint against a recipient. The review may be as comprehensive as necessary to determine whether a violation of these regulations occurred.

(b) If a compliance review or pre-award review indicates a violation of the Act or these regulations, ED attempts to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, ED arranges for enforcement as described in § 110.35.

(Authority: 42 U.S.C. 6103)

§ 110.31 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a complaint with ED alleging discrimination prohibited by the Act or by these regulations based on an action occurring on or after July 1, 1979. A complainant shall file a complaint within 180 days from the date the complainant first had knowledge of the alleged discrimination. However, for good cause shown, ED may extend this time limit.

(b) ED attempts to facilitate the filing of complaints, if possible, by—

(1) Accepting as a complete complaint any written statement that identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant;

(2) Freely permitting a complainant to add information to the complaint to

meet the requirements of a complete complaint;

(3) Widely disseminating information regarding the obligations of recipients under the Act and these regulations;

(4) Notifying the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure; and

(5) Notifying the complainant and the recipient (or their representatives) of their right to contact ED for information and assistance regarding the complaint resolution process.

(c) A complaint is considered to be complete on the date that ED receives all the information necessary to process it, as described in paragraph (b)(1) of this section.

(d) ED returns to the complainant any complaint outside the jurisdiction of these regulations and states the reason or reasons why it is outside the jurisdiction of the regulations.

(Authority: 42 U.S.C. 6103)

§ 110.32 Mediation.

(a) ED promptly refers to the Federal Mediation and Conciliation Service or to the mediation agency designated by the Secretary of Health and Human Services, all complaints that—

(1) Fall within the jurisdiction of the Act and these regulations, unless the age distinction complained of is clearly within an exemption under § 110.2(b); and

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or to make an informed judgment that an agreement is not possible. The recipient and the complainant need not meet with the mediator at the same time, and the meeting may be conducted by telephone or other means of effective dialogue if a personal meeting between the party and the mediator is impractical.

(c) If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement and have the complainant and recipient sign it. The mediator shall send a copy of the agreement to ED. ED takes no further action on the complaint unless informed that the complainant or the recipient fails to comply with the agreement, at which time ED reinstates the complaint.

(d) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the mediation agency.

(e) The mediation will proceed for a maximum of 60 days after a complaint is filed with ED. Mediation ends if—

(1) 60 days elapse from the time the complaint is received;

(2) Prior to the end of the 60-day period, an agreement is reached; or

(3) Prior to the end of the 60-day period, the mediator determines that agreement cannot be reached.

(f) The mediator shall return unresolved complaints to ED.

(Authority: 42 U.S.C. 6103)

§ 110.33 Investigation.

(a) *Initial investigation.* ED investigates complaints that are unresolved after mediation or reopened because of a violation of the mediation agreement. ED uses methods during the investigation to encourage voluntary resolution of the complaint, including discussions with the complainant and recipient to establish the facts and, if possible, resolve the complaint to the mutual satisfaction of the parties. ED may seek the assistance of any involved State, local, or other Federal agency.

(b) *Formal investigation, conciliation, and hearing.* If ED cannot resolve the complaint during the early stages of the investigation, ED completes the investigation of the complaint and makes formal findings. If the investigation indicates a violation of the Act or these regulations, ED attempts to achieve voluntary compliance. If ED cannot obtain voluntary compliance,

ED begins enforcement as described in § 110.35.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.34 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who—

(a) Attempts to assert a right protected by the Act or these regulations; or

(b) Cooperates in any mediation, investigation, hearing, or other part of ED's investigation, conciliation, and enforcement process.

(Authority: 42 U.S.C. 6103)

§ 110.35 Compliance procedure.

(a) ED may enforce the Act and these regulations under § 110.35(a) (1) or (2) through—

(1) Termination of, or refusal to grant or continue, a recipient's Federal financial assistance from ED for a program or activity in which the recipient has violated the Act or these regulations. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge.

(2) Any other means authorized by law, including, but not limited to—

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations of the recipient created by the Act or these regulations; or

(ii) Use of any requirement of or referral to any Federal, State, or local government agency that will have the effect of correcting a violation of the Act or of these regulations.

(b) ED limits any termination or refusal under § 110.35(a)(1) to the particular recipient and to the particular program or activity ED finds in violation of the Act or these regulations. ED will not base any part of a termination on a finding with respect to any program or activity that does not receive Federal financial assistance from ED.

(c) ED takes no action under paragraph (a) of this section until—

(1) ED has advised the recipient of its failure to comply with the Act or with these regulations and has determined that voluntary compliance cannot be obtained; and

(2) Thirty days have elapsed after the Secretary has sent a written report of the circumstances and grounds of the action to the committees of the Congress having legislative jurisdiction over the program or activity involved. The Secretary files a report if any action is taken under § 110.35(a)(1).

(d) The Secretary also may defer granting new Federal financial assistance from ED to a recipient if termination proceedings in § 110.35(a)(1) are initiated.

(1) New Federal financial assistance from ED includes all assistance for which ED requires an application or approval, including renewal or continuation of existing activities, or authorization of new activities, during the deferral period. New Federal financial assistance from ED does not include increases in funding as a result of changed computation of formula awards or assistance approved prior to the initiation of termination proceedings.

(2) ED does not begin a deferral until the recipient has received a notice of an opportunity for a hearing under § 110.35(a)(1). A deferral may not continue for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and ED. A deferral may not continue for more than 30 days after the close of the hearing, unless the hearing results in a finding against the recipient.

(Authority: 42 U.S.C. 6104)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.36 Hearings, decisions, and post-termination proceedings.

(a) The following ED procedural provisions applicable to Title VI of the Civil Rights Act of 1964 also apply to ED's enforcement of these regulations: 34 CFR 100.9 and 100.10 and 34 CFR part 101.

(b) Action taken under section 305 of the Act is subject to judicial review as provided by section 306 of the Act.

(Authority: 42 U.S.C. 6104–6105)

§ 110.37 Procedure for disbursal of funds to an alternate recipient.

(a) If the Secretary withholds funds from a recipient under these regulations, the Secretary may disburse the funds withheld directly to an alternate recipient: any public or nonprofit private organization or agency, or State or political subdivision of the State.

(b) The Secretary requires any alternate recipient to demonstrate—

(1) The ability to comply with the Act and these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the Federal financial assistance.

(Authority: 42 U.S.C. 6104)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.38 Remedial action by recipients.

If ED finds that a recipient has discriminated on the basis of age, the recipient shall take any remedial action that ED may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated or if the entity that has discriminated is a subrecipient, both recipients or recipient and subrecipient may be required to take remedial action.

(Authority: 42 U.S.C. 6103)

§ 110.39 Exhaustion of administrative remedies.

(a) A complainant may file a civil action following the exhaustion of administrative remedies under the Act. Administrative remedies are exhausted if—

(1) One hundred eighty days have elapsed since the complainant filed the complaint with ED, and ED has made no finding with regard to the complaint; or

(2) ED issues any finding in favor of the recipient.

(b) If ED fails to make a finding within 180 days or issues a finding in favor of the recipient, ED promptly—

(1) Advises the complainant of this fact;

(2) Advises the complainant of his or her right to bring a civil action for injunctive relief; and

(3) Informs the complainant—

(i) That a civil action can be brought only in a United States district court for the district in which the recipient is found or transacts business;

(ii) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that these costs must be demanded in the complaint filed with the court;

(iii) That before commencing the action, the complainant shall give 30 days notice by registered mail to the Secretary, the Secretary of Health and Human Services, the Attorney General of the United States, and the recipient;

(iv) That the notice shall state the alleged violation of the Act, the relief requested, the court in which the action will be brought, and whether or not attorney's fees are demanded in the event the complainant prevails; and

(v) That the complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

(Authority: 42 U.S.C. 6104)

PARTS 111–199 [RESERVED]

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PART 200—TITLE I—IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

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Section 200.68 also issued under 20 U.S.C. 6320(a)(3)(B).

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Section 200.85 also issued under 20 U.S.C. 6398.

Section 200.87 also issued under 20 U.S.C. 7881(b)(1)(A).

Section 200.88 also issued under 20 U.S.C. 6321(d).

Section 200.89 also issued under 20 U.S.C. 6391–6399, 6571, 18 U.S.C. 1001.

Section 200.90 also issued under 20 U.S.C. 6432, 6454, 6472.

Section 200.100 also issued under 20 U.S.C. 6303, 6303b, 6304.

Section 200.103 also issued under 20 U.S.C. 6315(c)(1)(A)(ii), 6571(a), 8101(4).

SOURCE: 60 FR 34802, July 3, 1995, unless otherwise noted.

Subpart A—Improving Basic Programs Operated by Local Educational Agencies

STANDARDS AND ASSESSMENTS

§ 200.1 State responsibilities for developing challenging academic standards.

(a) *Academic standards in general.* A State must adopt challenging academic content standards and aligned academic achievement standards that will be used by the State, its local educational agencies (LEAs), and its schools to carry out this subpart. These academic standards must—

(1) Be the same academic content standards and aligned academic achievement standards that the State applies to all public schools and public school students in the State, including the public schools and public school students served under this subpart, except as provided in paragraph (d) of this section, which applies only to the State's academic achievement standards;

(2) With respect to the academic achievement standards, include the same knowledge, skills, and levels of achievement expected of all public school students in the State, except as provided in paragraph (d) of this section; and

(3) Include at least mathematics, reading/language arts, and science, and may include other subjects determined by the State.

(b) *Academic content standards.* (1) The challenging academic content standards required under paragraph (a) of this section must—

(i) Specify what all students are expected to know and be able to do;

(ii) Contain coherent and rigorous content; and

(iii) Encourage the teaching of advanced skills.

(2) A State's academic content standards may—

(i) Be grade specific; or,

(ii) Cover more than one grade if grade-level content expectations are provided for each of grades 3 through 8.

(3) At the high school level, the academic content standards must define the knowledge and skills that all high school students are expected to know and be able to do in at least reading/language arts, mathematics, and science, irrespective of course titles or years completed.

(c) *Academic achievement standards.* (1) The challenging academic achievement standards required under paragraph (a) of this section must—

(i) Be aligned with the State's challenging academic content standards and with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards; and

(ii) Include the following components for each content area:

(A) Not less than three achievement levels that describe at least—

(*1*) Two levels of high achievement—proficient and advanced—that determine how well students are mastering the material in the State's academic content standards; and

(*2*) A third level of achievement—basic—to provide complete information about the progress of lower-achieving students toward mastering the proficient and advanced levels of achievement.

(B) Descriptions of the competencies associated with each achievement level.

(C) Assessment scores (''cut scores'') that differentiate among the achievement levels as specified in paragraph (c)(1)(ii)(A) of this section, and a description of the rationale and procedures used to determine each achievement level.

(2) A State must develop academic achievement standards for every grade and subject assessed, even if the State's academic content standards cover more than one grade.

(d) *Alternate academic achievement standards.* For students under section 602(3) of the Individuals with Disabilities Education Act (IDEA) with the most significant cognitive disabilities who take an alternate assessment, a State may, through a documented and validated standards-setting process, define alternate academic achievement standards, provided those standards—

(1) Are aligned with the State's challenging academic content standards;

(2) Promote access to the general curriculum, consistent with the IDEA;

(3) Reflect professional judgment as to the highest possible standards achievable by such students;

(4) Are designated in the individualized education program developed under section 614(d)(3) of the IDEA for each such student as the academic achievement standards that will be used for the student; and

(5) Are aligned to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or employment, consistent with the purposes of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act, as in effect on July 22, 2014, and § 200.2(b)(3)(ii)(B)(*2*).

(e) *Modified academic achievement standards.* A State may not define or implement for use under this subpart any alternate or modified academic achievement standards for children with disabilities under section 602(3) of the IDEA that are not alternate academic achievement standards that meet the requirements of paragraph (d) of this section.

(f) *English language proficiency standards.* A State must adopt English language proficiency standards that—

(1) Are derived from the four recognized domains of speaking, listening, reading, and writing;

(2) Address the different proficiency levels of English learners; and

(3) Are aligned with the State's challenging academic content standards and aligned academic achievement standards.

(g) *Subjects without standards.* If an LEA serves students under subpart A of this part in subjects for which a State has not developed academic standards, the State must describe in its State plan a strategy for ensuring that those students are taught the same knowledge and skills and held to the same

expectations in those subjects as are all other students.

(h) *Other subjects with standards.* If a State has developed standards in other subjects for all students, the State must apply those standards to students participating under subpart A of this part.

(Approved by the Office of Management and Budget under control number 1810–0576)

[67 FR 45039, July 5, 2002, as amended at 68 FR 68702, Dec. 9, 2003; 72 FR 17778, Apr. 9, 2007; 80 FR 50784, Aug. 21, 2015; 84 FR 31671, July 2, 2019]

§ 200.2 State responsibilities for assessment.

(a)(1) Each State, in consultation with its LEAs, must implement a system of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading/language arts, and science.

(2)(i) The State may also measure the achievement of students in other academic subjects in which the State has adopted challenging State academic standards.

(ii) If a State has developed assessments in other subjects for all students, the State must include students participating under this subpart in those assessments.

(b) The assessments required under this section must:

(1)(i) Except as provided in §§ 200.3, 200.5(b), and 200.6(c) and section 1204 of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act (hereinafter ''the Act''), be the same assessments used to measure the achievement of all students; and

(ii) Be administered to all students consistent with § 200.5(a), including the following highly-mobile student populations as defined in paragraph (b)(11) of this section:

(A) Students with status as a migratory child.

(B) Students with status as a homeless child or youth.

(C) Students with status as a child in foster care.

(D) Students with status as a student with a parent who is a member of the armed forces on active duty or serves on full-time National Guard duty;

(2)(i) Be designed to be valid and accessible for use by all students, including students with disabilities and English learners; and

(ii) Be developed, to the extent practicable, using the principles of universal design for learning. For the purposes of this section, ''universal design for learning'' means a scientifically valid framework for guiding educational practice that—

(A) Provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and

(B) Reduces barriers in instruction, provides appropriate accommodations, supports, and challenges, and maintains high achievement expectations for all students, including students with disabilities and English learners;

(3)(i)(A) Be aligned with challenging academic content standards and aligned academic achievement standards (hereinafter ''challenging State academic standards'') as defined in section 1111(b)(1)(A) of the Act; and

(B) Provide coherent and timely information about student attainment of those standards and whether a student is performing at the grade in which the student is enrolled; and

(ii)(A)(*1*) Be aligned with the challenging State academic content standards; and

(*2*) Address the depth and breadth of those standards; and

(B)(*1*) Measure student performance based on challenging State academic achievement standards that are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards consistent with section 1111(b)(1)(D) of the Act; or

(*2*) With respect to alternate assessments for students with the most significant cognitive disabilities, measure student performance based on alternate academic achievement standards defined by the State consistent with section 1111(b)(1)(E) of the Act that reflect professional judgment as to the highest possible standards achievable by such students to ensure that a student who meets the alternate academic achievement standards is on track to

pursue postsecondary education or competitive integrated employment, consistent with the purposes of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act, as in effect on July 22, 2014;

(4)(i) Be valid, reliable, and fair for the purposes for which the assessments are used; and

(ii) Be consistent with relevant, nationally recognized professional and technical testing standards;

(5) Be supported by evidence that—

(i) The assessments are of adequate technical quality—

(A) For each purpose required under the Act; and

(B) Consistent with the requirements of this section; and

(ii) For each assessment administered to meet the requirements of this subpart, is made available to the public, including on the State's Web site;

(6) Be administered in accordance with the frequency described in § 200.5(a);

(7) Involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills—such as critical thinking, reasoning, analysis, complex problem solving, effective communication, and understanding of challenging content—as defined by the State. These measures may—

(i) Include valid and reliable measures of student academic growth at all achievement levels to help ensure that the assessment results could be used to improve student instruction; and

(ii) Be partially delivered in the form of portfolios, projects, or extended performance tasks;

(8) Objectively measure academic achievement, knowledge, and skills without evaluating or assessing personal or family beliefs and attitudes, except that this provision does not preclude the use of—

(i) Constructed-response, short answer, or essay questions; or

(ii) Items that require a student to analyze a passage of text or to express opinions;

(9) Provide for participation in the assessments of all students in the grades assessed consistent with §§ 200.5(a) and 200.6;

(10) At the State's discretion, be administered through—

(i) A single summative assessment; or

(ii) Multiple statewide interim assessments during the course of the academic year that result in a single summative score that provides valid, reliable, and transparent information on student achievement and, at the State's discretion, student growth, consistent with paragraph (b)(4) of this section;

(11)(i) Consistent with sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, enable results to be disaggregated within each State, LEA, and school by—

(A) Gender;

(B) Each major racial and ethnic group;

(C) Status as an English learner as defined in section 8101(20) of the Act;

(D) Status as a migratory child as defined in section 1309(3) of the Act;

(E) Children with disabilities as defined in section 602(3) of the Individuals with Disabilities Education Act (IDEA) as compared to all other students;

(F) Economically disadvantaged students as compared to students who are not economically disadvantaged;

(G) Status as a homeless child or youth as defined in section 725(2) of title VII, subtitle B of the McKinney-Vento Homeless Assistance Act, as amended;

(H) Status as a child in foster care. ''Foster care'' means 24-hour substitute care for children placed away from their parents and for whom the agency under title IV–E of the Social Security Act has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State, tribal, or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made; and

(I) Status as a student with a parent who is a member of the armed forces on active duty or serves on full-time National Guard duty, where ''armed forces,'' ''active duty,'' and ''full-time National Guard duty'' have the same meanings given them in 10 U.S.C. 101(a)(4), 101(d)(1), and 101(d)(5).

(ii) Disaggregation is not required in the case of a State, LEA, or school in which the number of students in a subgroup is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student.

(12) Produce individual student reports consistent with § 200.8(a); and

(13) Enable itemized score analyses to be produced and reported to LEAs and schools consistent with § 200.8(b).

(c)(1) At its discretion, a State may administer the assessments required under this section in the form of computer-adaptive assessments if such assessments meet the requirements of section 1111(b)(2)(J) of the Act and this section. A computer-adaptive assessment—

(i) Must, except as provided in § 200.6(c)(7)(iii), measure a student's academic proficiency based on the challenging State academic standards for the grade in which the student is enrolled and growth toward those standards; and

(ii) May measure a student's academic proficiency and growth using items above or below the student's grade level.

(2) If a State administers a computer-adaptive assessment, the determination under paragraph (b)(3)(i)(B) of this section of a student's academic proficiency for the grade in which the student is enrolled must be reported on all reports required by § 200.8 and section 1111(h) of the Act.

(d) A State must submit evidence for peer review under section 1111(a)(4) of the Act that its assessments under this section and §§ 200.3, 200.4, 200.5(b), 200.6(c), 200.6(f), 200.6(h), and 200.6(j) meet all applicable requirements.

(e) Information provided to parents under section 1111(b)(2) of the Act must—

(1) Be in an understandable and uniform format;

(2) Be, to the extent practicable, written in a language that parents can understand or, if it is not practicable to provide written translations to a parent with limited English proficiency, be orally translated for such parent; and

(3) Be, upon request by a parent who is an individual with a disability as defined by the Americans with Disabilities Act (ADA), as amended, provided in an alternative format accessible to that parent.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 10 U.S.C. 101(a)(4), (d)(1), and (d)(5); 20 U.S.C. 1003(24), 1221e–3, 1401(3), 3474, 6311(a)(4), 6311(b)(1)–(2), 6311(h), 6399(3), 6571, and 7801(20); 29 U.S.C. 701 *et seq.;* 29 U.S.C. 794; 42 U.S.C. 2000d–1, 11434a(2), 12102(1), and 12131 *et seq.;* and 45 CFR 1355.20(a))

[81 FR 88931, Dec. 8, 2016]

§ 200.3 Locally selected, nationally recognized high school academic assessments.

(a) *In general.* (1) A State, at the State's discretion, may permit an LEA to administer a nationally recognized high school academic assessment in each of reading/language arts, mathematics, or science, approved in accordance with paragraph (b) of this section, in lieu of the respective statewide assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C) if such assessment meets all requirements of this section.

(2) An LEA must administer the same locally selected, nationally recognized academic assessment to all high school students in the LEA consistent with the requirements in § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), except for students with the most significant cognitive disabilities who are assessed on an alternate assessment aligned with alternate academic achievement standards, consistent with § 200.6(c).

(b) *State approval.* If a State chooses to allow an LEA to administer a nationally recognized high school academic assessment under paragraph (a) of this section, the State must:

(1) Establish and use technical criteria to determine if the assessment—

(i) Is aligned with the challenging State academic standards;

(ii) Addresses the depth and breadth of those standards;

(iii) Is equivalent to or more rigorous than the statewide assessments under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable, with respect to—

(A) The coverage of academic content;

(B) The difficulty of the assessment;

(C) The overall quality of the assessment; and

(D) Any other aspects of the assessment that the State may establish in its technical criteria;

(iv) Meets all requirements under § 200.2(b), except for § 200.2(b)(1), and ensures that all high school students in the LEA are assessed consistent with §§ 200.5(a) and 200.6; and

(v) Produces valid and reliable data on student academic achievement with respect to all high school students and each subgroup of high school students in the LEA that—

(A) Are comparable to student academic achievement data for all high school students and each subgroup of high school students produced by the statewide assessment at each academic achievement level;

(B) Are expressed in terms consistent with the State's academic achievement standards under section 1111(b)(1)(A) of the Act; and

(C) Provide unbiased, rational, and consistent differentiation among schools within the State for the purpose of the State-determined accountability system under section 1111(c) of the Act, including calculating the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act and annually meaningfully differentiating between schools under section 1111(c)(4)(C) of the Act;

(2) Before approving any nationally recognized high school academic assessment for use by an LEA in the State—

(i) Ensure that the use of appropriate accommodations under § 200.6(b) and (f) does not deny a student with a disability or an English learner—

(A) The opportunity to participate in the assessment; and

(B) Any of the benefits from participation in the assessment that are afforded to students without disabilities or students who are not English learners; and

(ii) Submit evidence to the Secretary in accordance with the requirements for peer review under section 1111(a)(4) of the Act demonstrating that any such assessment meets the requirements of this section; and

(3)(i) Approve an LEA's request to use a locally selected, nationally recognized high school academic assessment that meets the requirements of this section;

(ii) Disapprove an LEA's request if it does not meet the requirements of this section; or

(iii) Revoke approval for good cause.

(c) *LEA applications.* (1) Before an LEA requests approval from the State to use a locally selected, nationally recognized high school academic assessment, the LEA must—

(i) Notify all parents of high school students it serves—

(A) That the LEA intends to request approval from the State to use a locally selected, nationally recognized high school academic assessment in place of the statewide academic assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable;

(B) Of how parents and, as appropriate, students, may provide meaningful input regarding the LEA's request; and

(C) Of any effect of such request on the instructional program in the LEA; and

(ii) Provide an opportunity for meaningful consultation to all public charter schools whose students would be included in such assessments.

(2) As part of requesting approval to use a locally selected, nationally recognized high school academic assessment, an LEA must—

(i) Update its LEA plan under section 1112 or section 8305 of the Act, including to describe how the request was developed consistent with all requirements for consultation under sections 1112 and 8538 of the Act; and

(ii) If the LEA is a charter school under State law, provide an assurance that the use of the assessment is consistent with State charter school law and it has consulted with the authorized public chartering agency.

(3) Upon approval, the LEA must notify all parents of high school students

it serves that the LEA received approval and will use such locally selected, nationally recognized high school academic assessment instead of the statewide academic assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable.

(4) In each subsequent year following approval in which the LEA elects to administer a locally selected, nationally recognized high school academic assessment, the LEA must notify—

(i) The State of its intention to continue administering such assessment; and

(ii) Parents of which assessment the LEA will administer to students to meet the requirements of § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable, at the beginning of the school year.

(5) The notices to parents under this paragraph (c) of this section must be consistent with § 200.2(e).

(d) *Definition.* ''Nationally recognized high school academic assessment'' means an assessment of high school students' knowledge and skills that is administered in multiple States and is recognized by institutions of higher education in those or other States for the purposes of entrance or placement into courses in postsecondary education or training programs.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(b)(2)(H), 6312(a), 6571, 7845, and 7918; 29 U.S.C. 794; 42 U.S.C. 2000d–1)

[81 FR 88932, Dec. 8, 2016]

§ 200.4 State law exception.

(a) If a State provides satisfactory evidence to the Secretary that neither the State educational agency (SEA) nor any other State government official, agency, or entity has sufficient authority under State law to adopt academic content standards, student academic achievement standards, and academic assessments applicable to all students enrolled in the State's public schools, the State may meet the requirements under §§ 200.1 and 200.2 by—

(1) Adopting academic standards and academic assessments that meet the requirements of §§ 200.1 and 200.2 on a Statewide basis and limiting their applicability to students served under subpart A of this part; or

(2) Adopting and implementing policies that ensure that each LEA in the State that receives funds under subpart A of this part will adopt academic standards and academic assessments aligned with those standards that—

(i) Meet the requirements in §§ 200.1 and 200.2; and

(ii) Are applicable to all students served by the LEA.

(b) A State that qualifies under paragraph (a) of this section must—

(1) Establish technical criteria for evaluating whether each LEA's—

(i) Academic content and student academic achievement standards meet the requirements in § 200.1; and

(ii) Academic assessments meet the requirements in § 200.2, particularly regarding validity and reliability, technical quality, alignment with the LEA's academic standards, and inclusion of all students in the grades assessed;

(2) Review and approve each LEA's academic standards and academic assessments to ensure that they—

(i) Meet or exceed the State's technical criteria; and

(ii) For purposes of this section—

(A) Are equivalent to one another in their content coverage, difficulty, and quality;

(B) Have comparable validity and reliability with respect to groups of students described in section 1111(c)(2) of the Act; and

(C) Provide unbiased, rational, and consistent determinations of the annual progress of schools within the State; and

(3) Be able to aggregate, with confidence, data from local assessments to make accountability determinations under section 1111(c) of the Act.

(Authority: 20 U.S.C. 1221e–3, 3474, 6311 (b)(2)(E) and 6571)

[67 FR 45041, July 5, 2002, as amended at 81 FR 88933, Dec. 8, 2016]

§ 200.5 Assessment administration.

(a) *Frequency.* (1) A State must administer the assessments required under § 200.2 annually as follows:

(i) With respect to both the reading/language arts and mathematics assessments—

(A) In each of grades 3 through 8; and

(B) At least once in grades 9 through 12.

(ii) With respect to science assessments, not less than one time during each of—

(A) Grades 3 through 5;

(B) Grades 6 through 9; and

(C) Grades 10 through 12.

(2) A State must administer the English language proficiency assessment required under § 200.6(h) annually to all English learners in schools served by the State in all grades in which there are English learners, kindergarten through grade 12.

(3) With respect to any other subject chosen by a State, the State may administer the assessments at its discretion.

(b) *Middle school mathematics exception*. A State that administers an end-of-course mathematics assessment to meet the requirements under paragraph (a)(1)(i)(B) of this section may exempt an eighth-grade student from the mathematics assessment typically administered in eighth grade under paragraph (a)(1)(i)(A) of this section if—

(1) The student instead takes the end-of-course mathematics assessment the State administers to high school students under paragraph (a)(1)(i)(B) of this section;

(2) The student's performance on the high school assessment is used in the year in which the student takes the assessment for purposes of measuring academic achievement under section 1111(c)(4)(B)(i) of the Act and participation in assessments under section 1111(c)(4)(E) of the Act;

(3) In high school—

(i) The student takes a State-administered end-of-course assessment or nationally recognized high school academic assessment as defined in § 200.3(d) in mathematics that—

(A) Is more advanced than the assessment the State administers under paragraph (a)(1)(i)(B) of this section; and

(B) Provides for appropriate accommodations consistent with § 200.6(b) and (f); and

(ii) The student's performance on the more advanced mathematics assessment is used for purposes of measuring academic achievement under section 1111(c)(4)(B)(i) of the Act and participation in assessments under section 1111(c)(4)(E) of the Act; and

(4) The State describes in its State plan, with regard to this exception, its strategies to provide all students in the State the opportunity to be prepared for and to take advanced mathematics coursework in middle school.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(b)(2)(B)(v), (b)(2)(C), and (b)(2)(G), and 6571)

[81 FR 88933, Dec. 8, 2016]

§ 200.6 Inclusion of all students.

(a) *Students with disabilities in general*. (1) A State must include students with disabilities in all assessments under section 1111(b)(2) of the Act, with appropriate accommodations consistent with paragraphs (b), (f)(1), and (h)(4) of this section. For purposes of this section, students with disabilities, collectively, are—

(i) All children with disabilities as defined under section 602(3) of the IDEA;

(ii) Students with the most significant cognitive disabilities who are identified from among the students in paragraph (a)(1)(i) of this section; and

(iii) Students with disabilities covered under other acts, including—

(A) Section 504 of the Rehabilitation Act of 1973, as amended; and

(B) Title II of the ADA, as amended.

(2)(i) Except as provided in paragraph (a)(2)(ii)(B) of this section, a student with a disability under paragraph (a)(1) of this section must be assessed with an assessment aligned with the challenging State academic standards for the grade in which the student is enrolled.

(ii) A student with the most significant cognitive disabilities under paragraph (a)(1)(ii) of this section may be assessed with—

(A) The general assessment under paragraph (a)(2)(i) of this section; or

(B) If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of

the Act for students with the most significant cognitive disabilities, an alternate assessment under paragraph (c) of this section aligned with the challenging State academic content standards for the grade in which the student is enrolled and the State's alternate academic achievement standards.

(b) *Appropriate accommodations for students with disabilities.* (1) A State's academic assessment system must provide, for each student with a disability under paragraph (a) of this section, the appropriate accommodations, such as interoperability with, and ability to use, assistive technology devices consistent with nationally recognized accessibility standards, that are necessary to measure the academic achievement of the student consistent with paragraph (a)(2) of this section, as determined by—

(i) For each student under paragraph (a)(1)(i) and (ii) of this section, the student's IEP team;

(ii) For each student under paragraph (a)(1)(iii)(A) of this section, the student's placement team; or

(iii) For each student under paragraph (a)(1)(iii)(B) of this section, the individual or team designated by the LEA to make these decisions.

(2) A State must—

(i)(A) Develop appropriate accommodations for students with disabilities;

(B) Disseminate information and resources to, at a minimum, LEAs, schools, and parents; and

(C) Promote the use of such accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments consistent with paragraph (a)(2) of this section and with § 200.2(e); and

(ii) Ensure that general and special education teachers, paraprofessionals, teachers of English learners, specialized instructional support personnel, and other appropriate staff receive necessary training to administer assessments and know how to administer assessments, including, as necessary, alternate assessments under paragraphs (c) and (h)(5) of this section, and know how to make use of appropriate accommodations during assessment for all students with disabilities, consistent with section 1111(b)(2)(B)(vii)(III) of the Act.

(3) A State must ensure that the use of appropriate accommodations under this paragraph (b) of this section does not deny a student with a disability—

(i) The opportunity to participate in the assessment; and

(ii) Any of the benefits from participation in the assessment that are afforded to students without disabilities.

(c) *Alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.* (1) If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of the Act for students with the most significant cognitive disabilities, the State must measure the achievement of those students with an alternate assessment that—

(i) Is aligned with the challenging State academic content standards under section 1111(b)(1) of the Act for the grade in which the student is enrolled;

(ii) Yields results relative to the alternate academic achievement standards; and

(iii) At the State's discretion, provides valid and reliable measures of student growth at all alternate academic achievement levels to help ensure that the assessment results can be used to improve student instruction.

(2) For each subject for which assessments are administered under § 200.2(a)(1), the total number of students assessed in that subject using an alternate assessment aligned with alternate academic achievement standards under paragraph (c)(1) of this section may not exceed 1.0 percent of the total number of students in the State who are assessed in that subject.

(3) A State must—

(i) Not prohibit an LEA from assessing more than 1.0 percent of its assessed students in any subject for which assessments are administered under § 200.2(a)(1) with an alternate assessment aligned with alternate academic achievement standards;

(ii) Require that an LEA submit information justifying the need of the LEA to assess more than 1.0 percent of

its assessed students in any such subject with such an alternate assessment;

(iii) Provide appropriate oversight, as determined by the State, of an LEA that is required to submit information to the State; and

(iv) Make the information submitted by an LEA under paragraph (c)(3)(ii) of this section publicly available, provided that such information does not reveal personally identifiable information about an individual student.

(4) If a State anticipates that it will exceed the cap under paragraph (c)(2) of this section with respect to any subject for which assessments are administered under § 200.2(a)(1) in any school year, the State may request that the Secretary waive the cap for the relevant subject, pursuant to section 8401 of the Act, for one year. Such request must—

(i) Be submitted at least 90 days prior to the start of the State's testing window for the relevant subject;

(ii) Provide State-level data, from the current or previous school year, to show—

(A) The number and percentage of students in each subgroup of students defined in section 1111(c)(2)(A), (B), and (D) of the Act who took the alternate assessment aligned with alternate academic achievement standards; and

(B) The State has measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup under section 1111(c)(2)(C) of the Act who are enrolled in grades for which the assessment is required under § 200.5(a);

(iii) Include assurances from the State that it has verified that each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in any subject for which assessments are administered under § 200.2(a)(1) in that school year using an alternate assessment aligned with alternate academic achievement standards—

(A) Followed each of the State's guidelines under paragraph (d) of this section, except paragraph (d)(6); and

(B) Will address any disproportionality in the percentage of students in any subgroup under section 1111(c)(2)(A), (B), or (D) of the Act taking an alternate assessment aligned with alternate academic achievement standards;

(iv) Include a plan and timeline by which—

(A) The State will improve the implementation of its guidelines under paragraph (d) of this section, including by reviewing and, if necessary, revising its definition under paragraph (d)(1), so that the State meets the cap in paragraph (c)(2) of this section in each subject for which assessments are administered under § 200.2(a)(1) in future school years;

(B) The State will take additional steps to support and provide appropriate oversight to each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in a given subject in a school year using an alternate assessment aligned with alternate academic achievement standards to ensure that only students with the most significant cognitive disabilities take an alternate assessment aligned with alternate academic achievement standards. The State must describe how it will monitor and regularly evaluate each such LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP team or other placement team understand and implement the guidelines established by the State under paragraph (d) of this section so that all students are appropriately assessed; and

(C) The State will address any disproportionality in the percentage of students taking an alternate assessment aligned with alternate academic achievement standards as identified through the data provided in accordance with paragraph (c)(4)(ii)(A) of this section; and

(v) If the State is requesting to extend a waiver for an additional year, meet the requirements in paragraph (c)(4)(i) through (iv) of this section and demonstrate substantial progress towards achieving each component of the prior year's plan and timeline required under paragraph (c)(4)(iv) of this section.

(5) A State must report separately to the Secretary, under section 1111(h)(5) of the Act, the number and percentage of children with disabilities under

paragraph (a)(1)(i) and (ii) of this section taking—

(i) General assessments described in § 200.2;

(ii) General assessments with accommodations; and

(iii) Alternate assessments aligned with alternate academic achievement standards under paragraph (c) of this section.

(6) A State may not develop, or implement for use under this part, any alternate or modified academic achievement standards that are not alternate academic achievement standards for students with the most significant cognitive disabilities that meet the requirements of section 1111(b)(1)(E) of the Act.

(7) For students with the most significant cognitive disabilities, a computer-adaptive alternate assessment aligned with alternate academic achievement standards must—

(i) Assess a student's academic achievement based on the challenging State academic content standards for the grade in which the student is enrolled;

(ii) Meet the requirements for alternate assessments aligned with alternate academic achievement standards under paragraph (c) of this section; and

(iii) Meet the requirements in § 200.2, except that the alternate assessment need not measure a student's academic proficiency based on the challenging State academic achievement standards for the grade in which the student is enrolled and growth toward those standards.

(d) *State guidelines for students with the most significant cognitive disabilities.* If a State adopts alternate academic achievement standards for students with the most significant cognitive disabilities and administers an alternate assessment aligned with those standards, the State must—

(1) Establish, consistent with section 612(a)(16)(C) of the IDEA, and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining, on a case-by-case basis, which students with the most significant cognitive disabilities will be assessed based on alternate academic achievement standards. Such guidelines must include a State definition of ''students with the most significant cognitive disabilities'' that addresses factors related to cognitive functioning and adaptive behavior, such that—

(i) The identification of a student as having a particular disability as defined in the IDEA or as an English learner does not determine whether a student is a student with the most significant cognitive disabilities;

(ii) A student with the most significant cognitive disabilities is not identified solely on the basis of the student's previous low academic achievement, or the student's previous need for accommodations to participate in general State or districtwide assessments; and

(iii) A student is identified as having the most significant cognitive disabilities because the student requires extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled;

(2) Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on alternate academic achievement standards, including any effects of State and local policies on a student's education resulting from taking an alternate assessment aligned with alternate academic achievement standards, such as how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(3) Ensure that parents of students selected to be assessed using an alternate assessment aligned with alternate academic achievement standards under the State's guidelines in paragraph (d) of this section are informed, consistent with § 200.2(e), that their child's achievement will be measured based on alternate academic achievement standards, and how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(4) Not preclude a student with the most significant cognitive disabilities

who takes an alternate assessment aligned with alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma;

(5) Promote, consistent with requirements under the IDEA, the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum that is based on the State's academic content standards for the grade in which the student is enrolled;

(6) Incorporate the principles of universal design for learning, to the extent feasible, in any alternate assessments aligned with alternate academic achievement standards that the State administers consistent with § 200.2(b)(2)(ii); and

(7) Develop, disseminate information on, and promote the use of appropriate accommodations consistent with paragraph (b) of this section to ensure that a student with significant cognitive disabilities who does not meet the criteria in paragraph (a)(1)(ii) of this section—

(i) Participates in academic instruction and assessments for the grade in which the student is enrolled; and

(ii) Is assessed based on challenging State academic standards for the grade in which the student is enrolled.

(e) *Definitions with respect to students with disabilities.* Consistent with 34 CFR 300.5, ''assistive technology device'' means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

(f) *English learners in general.* (1) Consistent with § 200.2 and paragraphs (g) and (i) of this section, a State must assess English learners in its academic assessments required under § 200.2 in a valid and reliable manner that includes—

(i) Appropriate accommodations with respect to a student's status as an English learner and, if applicable, the student's status under paragraph (a) of this section. A State must—

(A) Develop appropriate accommodations for English learners;

(B) Disseminate information and resources to, at a minimum, LEAs, schools, and parents; and

(C) Promote the use of such accommodations to ensure that all English learners are able to participate in academic instruction and assessments; and

(ii) To the extent practicable, assessments in the language and form most likely to yield accurate and reliable information on what those students know and can do to determine the students' mastery of skills in academic content areas until the students have achieved English language proficiency consistent with the standardized, statewide exit procedures in section 3113(b)(2) of the Act.

(2) To meet the requirements under paragraph (f)(1) of this section, the State must—

(i) Ensure that the use of appropriate accommodations under paragraph (f)(1)(i) of this section and, if applicable, under paragraph (b) of this section does not deny an English learner—

(A) The opportunity to participate in the assessment; and

(B) Any of the benefits from participation in the assessment that are afforded to students who are not English learners; and

(ii) In its State plan, consistent with section 1111(a) of the Act—

(A) Provide its definition for ''languages other than English that are present to a significant extent in the participating student population,'' consistent with paragraph (f)(4) of this section, and identify the specific languages that meet that definition;

(B) Identify any existing assessments in languages other than English, and specify for which grades and content areas those assessments are available;

(C) Indicate the languages identified under paragraph (f)(2)(ii)(A) of this section for which yearly student academic assessments are not available and are needed; and

(D) Describe how it will make every effort to develop assessments, at a minimum, in languages other than English that are present to a significant extent in the participating student population including by providing—

(*1*) The State's plan and timeline for developing such assessments, including a description of how it met the requirements of paragraph (f)(4) of this section;

(*2*) A description of the process the State used to gather meaningful input on the need for assessments in languages other than English, collect and respond to public comment, and consult with educators; parents and families of English learners; students, as appropriate; and other stakeholders; and

(*3*) As applicable, an explanation of the reasons the State has not been able to complete the development of such assessments despite making every effort.

(3) A State may request assistance from the Secretary in identifying linguistically accessible academic assessments that are needed.

(4) In determining which languages other than English are present to a significant extent in a State's participating student population, a State must, at a minimum—

(i) Ensure that its definition of ''languages other than English that are present to a significant extent in the participating student population'' encompasses at least the most populous language other than English spoken by the State's participating student population;

(ii) Consider languages other than English that are spoken by distinct populations of English learners, including English learners who are migratory, English learners who were not born in the United States, and English learners who are Native Americans; and

(iii) Consider languages other than English that are spoken by a significant portion of the participating student population in one or more of a State's LEAs as well as languages spoken by a significant portion of the participating student population across grade levels.

(g) *Assessing reading/language arts in English for English learners.* (1) A State must assess, using assessments written in English, the achievement of an English learner in meeting the State's reading/language arts academic standards if the student has attended schools in the United States, excluding Puerto Rico and, if applicable, students in Native American language schools or programs consistent with paragraph (j) of this section, for three or more consecutive years.

(2) An LEA may continue, for no more than two additional consecutive years, to assess an English learner under paragraph (g)(1) of this section if the LEA determines, on a case-by-case individual basis, that the student has not reached a level of English language proficiency sufficient to yield valid and reliable information on what the student knows and can do on reading/language arts assessments written in English.

(3) The requirements in paragraph (g)(1)–(2) of this section do not permit a State or LEA to exempt English learners from participating in the State assessment system.

(h) *Assessing English language proficiency of English learners.* (1) Each State must—

(i) Develop a uniform, valid, and reliable statewide assessment of English language proficiency, including reading, writing, speaking, and listening skills; and

(ii) Require each LEA to use such assessment to assess annually the English language proficiency, including reading, writing, speaking, and listening skills, of all English learners in kindergarten through grade 12 in schools served by the LEA.

(2) The assessment under paragraph (h)(1) of this section must—

(i) Be aligned with the State's English language proficiency standards under section 1111(b)(1)(F) of the Act;

(ii) Be developed and used consistent with the requirements of § 200.2(b)(2), (4), and (5); and

(iii) Provide coherent and timely information about each student's attainment of the State's English language proficiency standards to parents consistent with § 200.2(e) and section 1112(e)(3) of the Act.

(3) If a State develops a computer-adaptive assessment to measure English language proficiency, the State must ensure that the computer-adaptive assessment—

(i) Assesses a student's language proficiency, which may include growth toward proficiency, in order to measure the student's acquisition of English; and

(ii) Meets the requirements for English language proficiency assessments in paragraph (h) of this section.

(4)(i) A State must provide appropriate accommodations that are necessary to measure a student's English language proficiency relative to the State's English language proficiency standards under section 1111(b)(1)(F) of the Act for each English learner covered under paragraph (a)(1)(i) or (iii) of this section.

(ii) If an English learner has a disability that precludes assessment of the student in one or more domains of the English language proficiency assessment required under section 1111(b)(2)(G) of the Act such that there are no appropriate accommodations for the affected domain(s) (e.g., a nonverbal English learner who because of an identified disability cannot take the speaking portion of the assessment), as determined, on an individualized basis, by the student's IEP team, 504 team, or by the individual or team designated by the LEA to make these decisions under title II of the ADA, as specified in paragraph (b)(1) of this section, a State must assess the student's English language proficiency based on the remaining domains in which it is possible to assess the student.

(5) A State must provide for an alternate English language proficiency assessment for each English learner covered under paragraph (a)(1)(ii) of this section who cannot participate in the assessment under paragraph (h)(1) of this section even with appropriate accommodations.

(i) *Recently arrived English learners.* (1)(i) A State may exempt a recently arrived English learner, as defined in paragraph (k)(2) of this section, from one administration of the State's reading/language arts assessment under § 200.2 consistent with section 1111(b)(3)(A)(i)(I) of the Act.

(ii) If a State does not assess a recently arrived English learner on the State's reading/language arts assessment consistent with section 1111(b)(3)(A)(i)(I) of the Act, the State must count the year in which the assessment would have been administered as the first of the three years in which the student may take the State's reading/language arts assessment in a native language consistent with paragraph (g)(1) of this section.

(iii) A State and its LEAs must report on State and local report cards required under section 1111(h) of the Act the number of recently arrived English learners who are not assessed on the State's reading/language arts assessment.

(iv) Nothing in this section relieves an LEA from its responsibility under applicable law to provide recently arrived English learners with appropriate instruction to enable them to attain English language proficiency as well as grade-level content knowledge in reading/language arts, mathematics, and science.

(2) A State must assess the English language proficiency of a recently arrived English learner pursuant to paragraph (h) of this section.

(3) A State must assess the mathematics and science achievement of a recently arrived English learner pursuant to § 200.2 with the frequency described in § 200.5(a).

(j) *Students in Native American language schools or programs.* (1) Except as provided in paragraph (j)(2) of this section, a State is not required to assess, using an assessment written in English, student achievement in meeting the challenging State academic standards in reading/language arts, mathematics, or science for a student who is enrolled in a school or program that provides instruction primarily in a Native American language if—

(i) The State provides such an assessment in the Native American language to all students in the school or program, consistent with the requirements of § 200.2;

(ii) The State submits evidence regarding any such assessment in the Native American language for peer review as part of its State assessment system, consistent with § 200.2(d), and receives approval that the assessment meets all applicable requirements; and

(iii) For an English learner, as defined in section 8101(20)(C)(ii) of the Act, the State continues to assess the

English language proficiency of such English learner, using the annual English language proficiency assessment required under paragraph (h) of this section, and provides appropriate services to enable him or her to attain proficiency in English.

(2) Notwithstanding paragraph (g) of this section, the State must assess under § 200.5(a)(1)(i)(B), using assessments written in English, the achievement of each student enrolled in such a school or program in meeting the challenging State academic standards in reading/language arts, at a minimum, at least once in grades 9 through 12.

(k) *Definitions with respect to English learners and students in Native American language schools or programs.* For the purpose of this section—

(1) ''Native American'' means ''Indian'' as defined in section 6151 of the Act, which includes Alaska Native and members of Federally recognized or State-recognized tribes; Native Hawaiian; and Native American Pacific Islander.

(2) A ''recently arrived English learner'' is an English learner who has been enrolled in schools in the United States for less than twelve months.

(3) The phrase ''schools in the United States'' includes only schools in the 50 States and the District of Columbia.

(Approved by the Office of Management and Budget under control number 1810–0576 and 1810–0581)

(Authority: 20 U.S.C. 1221e-3, 1400 *et seq.*, 3474, 6311(b)(2), 6571, 7491(3), and 7801(20) and (34); 25 U.S.C. 2902; 29 U.S.C. 794; 42 U.S.C. 2000d–1), 12102(1), and 12131; 34 CFR 300.5)

[81 FR 88934, Dec. 8, 2016]

§ 200.7 [Reserved]

§ 200.8 Assessment reports.

(a) *Student reports.* A State's academic assessment system must produce individual student interpretive, descriptive, and diagnostic reports that—

(1)(i) Include information regarding achievement on the academic assessments under § 200.2 measured against the State's student academic achievement standards; and

(ii) Help parents, teachers, and principals to understand and address the specific academic needs of students; and

(2) Are provided to parents, teachers, and principals—

(i) As soon as is practicable after the assessment is given; and

(ii) In an understandable and uniform format, consistent with § 200.2(e).

(b) *Itemized score analyses for LEAs and schools.* (1) A State's academic assessment system must produce and report to LEAs and schools itemized score analyses, consistent with § 200.2(b)(13), so that parents, teachers, principals, and administrators can interpret and address the specific academic needs of students.

(2) The requirement to report itemized score analyses in paragraph (b)(1) of this section does not require the release of test items.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(b)(2)(B)(x) and (xii), and 6571)

[67 FR 45042, July 5, 2002, as amended at 81 FR 88938, Dec. 8, 2016]

§ 200.9 Deferral of assessments.

(a) A State may defer the start or suspend the administration of the assessments required under § 200.2 for one year for each year for which the amount appropriated for State assessment grants under section 1002(b) of the Act is less than $369,100,000.

(b) A State may not cease the development of the assessments referred to in paragraph (a) of this section even if sufficient funds are not appropriated under section 1002(b) of the Act.

(Authority: 20 U.S.C. 1221e–3, 3474, 6302(b), 6311(b)(2)(I), 6363(a), and 6571)

[81 FR 88938, Dec. 8, 2016]

§ 200.10 Applicability of a State's academic assessments to private schools and private school students.

(a) Nothing in § 200.1 or § 200.2 requires a private school, including a private school whose students receive services under subpart A of this part, to participate in a State's academic assessment system.

(b)(1) If an LEA provides services to eligible private school students under subpart A of this part, the LEA must,

through timely consultation with appropriate private school officials, determine how services to eligible private school students will be academically assessed and how the results of that assessment will be used to improve those services.

(2) The assessments referred to in paragraph (b)(1) of this section may be the State's academic assessments under § 200.2 or other appropriate academic assessments.

(Authority: 20 U.S.C. 6320, 7886(a))

[67 FR 45043, July 5, 2002]

PARTICIPATION IN NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (NAEP)

§ 200.11 Participation in NAEP.

(a) *State participation.* Each State that receives funds under this subpart must participate in biennial State academic assessments of fourth and eighth grade reading and mathematics under the State National Assessment of Educational Progress (NAEP), if the Department pays the costs of administering those assessments.

(b) *Local participation.* In accordance with section 1112(c)(3) of the ESEA, and notwithstanding section 303(d)(1) of the National Assessment of Educational Progress Authorization Act, an LEA that receives funds under this subpart must participate, if selected, in the State-NAEP assessments referred to in paragraph (a) of this section.

(c) *Report cards.* Each State and LEA must report on its annual State and LEA report card, respectively, the most recent available academic achievement results in grades four and eight on the State's NAEP reading and mathematics assessments under paragraph (a) of this section, compared to the national average of such results. The report cards must include—

(1) The percentage of students at each achievement level reported on the NAEP in the aggregate and, for State report cards, disaggregated for each subgroup described in section 1111(c)(2) of the ESEA; and

(2) The participation rates for children with disabilities and for English learners.

[84 FR 31672, July 2, 2019]

§§ 200.12–200.24 [Reserved]

SCHOOLWIDE PROGRAMS

§ 200.25 Schoolwide programs in general.

(a) *Purpose.* (1) The purpose of a schoolwide program is to improve academic achievement throughout a school so that all students, particularly the lowest-achieving students, demonstrate proficiency related to the challenging State academic standards under § 200.1.

(2) The improved achievement is to result from improving the entire educational program of the school.

(b) *Eligibility.* (1) A school may operate a schoolwide program if—

(i) The school's LEA determines that the school serves an eligible attendance area or is a participating school under section 1113 of the ESEA; and

(ii) Except as provided under paragraph (b)(1)(iii) of this section, for the initial year of the schoolwide program—

(A) The school serves a school attendance area in which not less than 40 percent of the children are from low-income families; or

(B) Not less than 40 percent of the children enrolled in the school are from low-income families.

(iii) A school that does not meet the poverty percentage in paragraph (b)(1)(ii) of this section may operate a schoolwide program if the school receives a waiver from the State to do so, after taking into account how a schoolwide program will best serve the needs of the students in the school in improving academic achievement and other factors.

(2) In determining the percentage of children from low-income families under paragraph (b)(1) of this section, the LEA may use a measure of poverty that is different from the measure or measures of poverty used by the LEA to identify and rank school attendance areas for eligibility and participation under this subpart.

(c) *Participating students and services.* A school operating a schoolwide program is not required to identify—

(1) Particular children as eligible to participate; or

(2) Individual services as supplementary.

(d) *Supplemental funds.* In accordance with the method of determination described in section 1118(b)(2) of the ESEA, a school participating in a schoolwide program must use funds available under this subpart and under any other Federal program included under paragraph (e) of this section and § 200.29 only to supplement the total amount of funds that would, in the absence of the funds under this subpart, be made available from non-Federal sources for that school, including funds needed to provide services that are required by law for children with disabilities and English learners.

(e) *Consolidation of funds.* An eligible school may, consistent with § 200.29, consolidate and use funds or services under subpart A of this part, together with other Federal, State, and local funds that the school receives, to operate a schoolwide program in accordance with §§ 200.25 through 200.29.

(f) *Prekindergarten program.* A school operating a schoolwide program may use funds made available under this subpart to establish or enhance prekindergarten programs for children below the age of 6.

[67 FR 71718, Dec. 2, 2002, as amended at 84 FR 31672, July 2, 2019]

§ 200.26 Core elements of a schoolwide program.

(a) *Comprehensive needs assessment.* (1) A school operating a schoolwide program must conduct a comprehensive needs assessment of the entire school that—

(i) Takes into account information on the academic achievement of all students in the school, including all subgroups of students under section 1111(c)(2) of the ESEA and migratory children as defined in section 1309(3) of the ESEA, relative to the challenging State academic standards under § 200.1 and any other factors as determined by the LEA to—

(A) Help the school understand the subjects and skills for which teaching and learning need to be improved; and

(B) Identify the specific academic needs of students and subgroups of students who are failing, or are at risk of failing, to meet the challenging State academic standards; and

(ii) Assesses the needs of the school relative to each of the components of the schoolwide program under section 1114(b)(7) of the ESEA.

(2) The comprehensive needs assessment must be developed with the participation of individuals who will carry out the schoolwide program plan.

(3) The school must document how it conducted the needs assessment, the results it obtained, and the conclusions it drew from those results.

(b) *Comprehensive plan.* Using data from the comprehensive needs assessment under paragraph (a) of this section, a school that wishes to operate a schoolwide program must develop a comprehensive plan, in accordance with section 1114(b) of the ESEA, that describes how the school will improve academic achievement for all students in the school, but particularly the needs of those students who are failing, or are at risk of failing, to meet the challenging State academic standards and any other factors as determined by the LEA.

(c) *Evaluation.* A school operating a schoolwide program must—

(1) Regularly monitor the implementation of, and results achieved by, the schoolwide program, using data from the State's annual assessments and other indicators of academic achievement;

(2) Determine whether the schoolwide program has been effective in increasing the achievement of students in meeting the challenging State academic standards, particularly for those students who had been furthest from achieving the standards; and

(3) Revise the plan, as necessary, based on the results of the regular monitoring, to ensure continuous improvement of students in the schoolwide program.

(1) Regularly monitor the implementation of, and results achieved by, the schoolwide program, using data from the State's annual assessments and other indicators of academic achievement;

(2) Determine whether the schoolwide program has been effective in increasing the achievement of students in

meeting the challenging State academic standards, particularly for those students who had been furthest from achieving the standards; and

(3) Revise the plan, as necessary, based on the results of the regular monitoring, to ensure continuous improvement of students in the schoolwide program.

(Approved by the Office of Management and Budget under control number 1810–0581)

[67 FR 71718, Dec. 2, 2002, as amended at 84 FR 31673, July 2, 2019]

§§ 200.27–200.28 [Reserved]

§ 200.29 Consolidation of funds in a schoolwide program.

(a)(1) In addition to funds under subpart A of this part, a school may consolidate and use in its schoolwide program Federal funds from any program administered by the Secretary that is included in the most recent notice published for this purpose in the FEDERAL REGISTER.

(2) For purposes of §§ 200.25 through 200.29, the authority to consolidate funds from other Federal programs also applies to services provided to the school with those funds.

(b)(1) Except as provided in paragraphs (b)(2) and (c) of this section, a school that consolidates and uses in a schoolwide program funds from any other Federal program administered by the Secretary—

(i) Is not required to meet the statutory or regulatory requirements of that program applicable at the school level; but

(ii) Must meet the intent and purposes of that program to ensure that the needs of the intended beneficiaries of that program are addressed.

(2) A school that chooses to consolidate funds from other Federal programs must meet the requirements of those programs relating to—

(i) Health;

(ii) Safety;

(iii) Civil rights;

(iv) Student and parental participation and involvement;

(v) Services to private school children;

(vi) Maintenance of effort;

(vii) Comparability of services;

(viii) Use of Federal funds to supplement, not supplant non-Federal funds in accordance with § 200.25(d); and

(ix) Distribution of funds to SEAs or LEAs.

(c) A school must meet the following requirements if the school consolidates and uses funds from these programs in its schoolwide program:

(1) *Migrant education*. Before the school chooses to consolidate in its schoolwide program funds received under part C of Title I of the ESEA, the school must—

(i) Use these funds, in consultation with parents of migratory children or organizations representing those parents, or both, first to meet the unique educational needs of migratory students that result from the effects of their migratory lifestyle, and those other needs that are necessary to permit these students to participate effectively in school, as identified through the comprehensive Statewide needs assessment under § 200.83; and

(ii) Document that these needs have been met.

(2) *Indian education*. The school may consolidate funds received under subpart 1 of part A of title VI of the ESEA if—

(i) The parent committee established by the LEA under section 6114(c)(4) of the ESEA approves the inclusion of these funds;

(ii) The schoolwide program is consistent with the purpose described in section 6111 of the ESEA; and

(iii) The LEA identifies in its application how the use of such funds in a schoolwide program will produce benefits to Indian students that would not be achieved if the funds are not used in a schoolwide program.

(3) *Special education*. (i) The school may consolidate funds received under part B of the IDEA.

(ii) However, the amount of funds consolidated may not exceed the amount received by the LEA under part B of IDEA for that fiscal year, divided by the number of children with disabilities in the jurisdiction of the LEA, and multiplied by the number of children with disabilities participating in the schoolwide program.

(iii) The school may also consolidate funds received under section 7003(d) of

the ESEA (Impact Aid) for children with disabilities in a schoolwide program.

(iv) A school that consolidates funds under part B of IDEA or section 7003(d) of the ESEA may use those funds for any activities under its schoolwide program plan but must comply with all other requirements of part B of IDEA, to the same extent it would if it did not consolidate funds under part B of IDEA or section 7003(d) of the ESEA in the schoolwide program.

(d) A school that consolidates and uses in a schoolwide program funds under subpart A of this part or from any other Federal program administered by the Secretary—

(1) Is not required to maintain separate fiscal accounting records, by program, that identify the specific activities supported by those particular funds; but

(2) Must maintain records that demonstrate that the schoolwide program, as a whole, addresses the intent and purposes of each of the Federal programs whose funds were consolidated to support the schoolwide program.

(e) Each State must modify or eliminate State fiscal and accounting barriers so that schools can easily consolidate funds from other Federal, State, and local sources in their schoolwide programs to improve educational opportunities and reduce unnecessary fiscal and accounting requirements.

[67 FR 71720, Dec. 2, 2002; 68 FR 1008, Jan. 8, 2003; 84 FR 31673, July 2, 2019]

§§ 200.30–200.54 [Reserved]

QUALIFICATIONS OF PARAPROFESSIONALS

§§ 200.55–200.57 [Reserved]

§ 200.58 Qualifications of paraprofessionals.

(a) *Applicability*. (1) An LEA must ensure that each paraprofessional who is hired by the LEA and who works in a program supported with funds under subpart A of this part meets the requirements in paragraph (b) of this section and, except as provided in paragraph (e) of this section, the requirements in either paragraph (c) or (d) of this section.

(2) For the purpose of this section, the term ''paraprofessional''—

(i) Means an individual who provides instructional support consistent with § 200.59; and

(ii) Does not include individuals who have only non-instructional duties (such as providing technical support for computers, providing personal care services, or performing clerical duties).

(3) For the purpose of paragraph (a) of this section, a paraprofessional working in ''a program supported with funds under subpart A of this part'' is—

(i) A paraprofessional in a targeted assisted school who is paid with funds under subpart A of this part;

(ii) A paraprofessional in a schoolwide program school; or

(iii) A paraprofessional employed by an LEA with funds under subpart A of this part to provide instructional support to a public school teacher covered under § 200.55 who provides equitable services to eligible private school students under § 200.62.

(b) *All paraprofessionals*. A paraprofessional covered under paragraph (a) of this section, regardless of the paraprofessional's hiring date, must have earned a secondary school diploma or its recognized equivalent.

(c) *New paraprofessionals*. A paraprofessional covered under paragraph (a) of this section who is hired after January 8, 2002 must have—

(1) Completed at least two years of study at an institution of higher education;

(2) Obtained an associate's or higher degree; or

(3)(i) Met a rigorous standard of quality, and can demonstrate—through a formal State or local academic assessment—knowledge of, and the ability to assist in instructing, as appropriate—

(A) Reading/language arts, writing, and mathematics; or

(B) Reading readiness, writing readiness, and mathematics readiness.

(ii) A secondary school diploma or its recognized equivalent is necessary, but not sufficient, to meet the requirement in paragraph (c)(3)(i) of this section.

(d) *Existing paraprofessionals*. Each paraprofessional who was hired on or before January 8, 2002 must meet the requirements in paragraph (c) of this section no later than January 8, 2006.

(e) *Exceptions*. A paraprofessional does not need to meet the requirements

in paragraph (c) or (d) of this section if the paraprofessional—

(1)(i) Is proficient in English and a language other than English; and

(ii) Acts as a translator to enhance the participation of limited English proficient children under subpart A of this part; or

(2) Has instructional-support duties that consist solely of conducting parental involvement activities.

(Authority: 20 U.S.C. 6319(c)–(f))

[82 FR 31707, July 7, 2017]

§§ 200.59–200.60 [Reserved]

§ 200.61 Parents' right to know.

(a) *Information for parents.* (1) At the beginning of each school year, an LEA that receives funds under this subpart must notify the parents of each student attending a title I school that the parents may request, and the LEA will provide the parents on request and in a timely manner, information regarding the professional qualifications of the student's classroom teachers, including, at a minimum, the following:

(i) Whether the teacher has met State qualification and licensing criteria for the grade levels and subject areas in which the teacher provides instruction.

(ii) Whether the teacher is teaching under emergency or other provisional status through which State qualification or licensing criteria have been waived.

(iii) Whether the teacher is teaching in the field of discipline of the certification of the teacher.

(iv) Whether the parent's child is provided services by paraprofessionals and, if so, their qualifications.

(2) A school that participates under this subpart must provide to each parent—

(i) Information on the level of achievement and academic growth, if applicable and available, of the parent's child on each of the State academic assessments required under section 1111(b)(2) of the ESEA; and

(ii) Timely notice that the parent's child has been assigned, or has been taught for four or more consecutive weeks by, a teacher who does not meet applicable State certification or licensure requirements at the grade level and subject area in which the teacher has been assigned.

(b) *Testing transparency.* (1) At the beginning of each school year, an LEA that receives funds under this subpart must notify the parents of each student attending a title I school that the parents may request, and the LEA will provide the parents on request in a timely manner, information regarding any State or LEA policy regarding student participation in any assessments mandated by section 1111(b)(2) of the ESEA and by the State or LEA, which must include a policy, procedure, or parental right to opt the child out of such assessment, where applicable.

(2) Each LEA that receives funds under this subpart must make widely available through public means (including by posting in a clear and easily accessible manner on the LEA's website and, where practicable, on the website of each school served by the LEA) for each grade served by the LEA, information on each assessment required by the State to comply with section 1111 of the ESEA, other assessments required by the State, and, where such information is available and feasible to report, assessments required districtwide by the LEA, consistent with section 1112(e)(2)(B)–(C) of the ESEA.

(c) *Language Instruction for English learners*—(1) *Notice.* (i) An LEA using funds under this subpart or title III of the ESEA to provide a language instruction educational program as determined under title III must, not later than 30 days after the beginning of the school year unless paragraph (c)(1)(ii) of this section applies, inform parents of an English learner identified for participation or participating in such a program of the information in section 1112(e)(3)(A) of the ESEA.

(ii) For a child who has not been identified as an English learner prior to the beginning of the school year but is identified as an English learner during such school year, an LEA must notify the child's parents during the first two weeks of the child being placed in a language instruction educational program consistent with paragraph (c)(1)(i) of this section.

(2) *Parental participation.* An LEA receiving funds under this subpart must

implement an effective means of outreach, consistent with paragraph (c)(3) of this section, to parents of English learners to inform parents how the parents can—

(i) Be involved in the education of their children; and

(ii) Be active participants in assisting their children to—

(A) Attain English proficiency;

(B) Achieve at high levels within a well-rounded education; and

(C) Meet the challenging State academic standards expected of all students.

(3) *Parent meetings.* Implementing an effective means of outreach under paragraph (c)(2) of this section must include holding, and sending notice of opportunities for, regular meetings for the purpose of formulating and responding to recommendations from parents of English learners assisted under this subpart or title III.

(4) *Basis for admission or exclusion.* A student may not be admitted to, or excluded from, any federally assisted education program on the basis of a surname or language-minority status.

(d) *Notice and format.* The notice and information provided to parents under this section must meet the requirements in § 200.2(e).

[84 FR 31673, July 2, 2019]

PARTICIPATION OF ELIGIBLE CHILDREN IN PRIVATE SCHOOLS

§ 200.62 Responsibilities for providing services to private school children.

(a) After timely and meaningful consultation with appropriate officials of private schools, an LEA must—

(1) In accordance with §§ 200.62 through 200.67 and section 1117 of the ESEA, provide, individually or in combination, as requested by private school officials to best meet the needs of eligible children, special educational services, instructional services (including evaluations to determine the progress being made in meeting such students' academic needs), counseling, mentoring, one-on-one tutoring, or other benefits under this subpart (such as dual or concurrent enrollment, educational radio and television, computer equipment and materials, other technology, and mobile educational services and equipment) that address their needs, on an equitable basis and in a timely manner, to eligible children who are enrolled in private elementary and secondary schools; and

(2) Ensure that teachers and families of participating private school children participate, on an equitable basis, in accordance with § 200.65 in services and activities developed pursuant to section 1116 of the ESEA.

(b)(1) Eligible private school children are children who—

(i) Reside in participating public school attendance areas of the LEA, regardless of whether the private school they attend is located in the LEA; and

(ii) Meet the criteria in section 1115(c) of the ESEA.

(2) Among the eligible private school children, the LEA must select children to participate, consistent with § 200.64.

(c) The services and other benefits an LEA provides under this section must be secular, neutral and nonideological.

[82 FR 31709, July 7, 2017, as amended at 84 FR 31674, July 2, 2019]

§ 200.63 Consultation.

(a) In order to have timely and meaningful consultation, an LEA must consult with appropriate officials of private schools during the design and development of the LEA's program for eligible private school children, as well as their teachers and families under § 200.65. The goal of consultation is reaching agreement on how to provide equitable and effective programs for eligible private school children, and the results of that agreement must be transmitted to the ombudsman designated under § 200.68.

(b) At a minimum, the LEA must consult on the following:

(1) How the LEA will identify the needs of eligible private school children.

(2) What services the LEA will offer to eligible private school children.

(3) How and when the LEA will make decisions about the delivery of services.

(4) How, where, and by whom the LEA will provide services to eligible private school children.

(5) How the LEA will assess academically the services to eligible private school children in accordance with

§ 200.10, and how the LEA will use the results of that assessment to improve Title I services.

(6) The size and scope of the equitable services that the LEA will provide to eligible private school children, and, consistent with § 200.64(a), the proportion of funds that the LEA will allocate for these services, and how the LEA determines that proportion of funds.

(7) The method or sources of data that the LEA will use under § 200.64(a) to determine the number of private school children from low-income families residing in participating public school attendance areas, including whether the LEA will extrapolate data if a survey is used.

(8) Whether the LEA will provide services directly or through a separate government agency, consortium, entity, or third-party contractor.

(9) Whether to provide equitable services to eligible private school children—

(i) By creating a pool or pools of funds with all of the funds allocated under § 200.64(a)(2) based on all the children from low-income families in a participating school attendance area who attend private schools; or

(ii) In a participating school attendance area who attend private schools with the proportion of funds allocated under § 200.64(a)(2) based on the number of children from low-income families who attend private schools.

(10) When, including the approximate time of day, the LEA will provide services.

(11) Whether the LEA will consolidate and use funds under subpart A of this part with eligible funds available for services to private school children under applicable programs, as defined in section 8501(b)(1) of the ESEA, to provide services to eligible private school children.

(12) The equitable services the LEA will provide to teachers and families of participating private school children.

(c)(1) Consultation by the LEA must—

(i) Include meetings of the LEA and appropriate officials of the private schools; and

(ii) Occur before the LEA makes any decision that affects the opportunity of eligible private school children to participate in Title I programs.

(2) The LEA must meet with officials of the private schools throughout the implementation and assessment of the Title I services.

(d)(1) Consultation must include—

(i) A discussion of service delivery mechanisms the LEA can use to provide equitable services to eligible private school children; and

(ii) A thorough consideration and analysis of the views of the officials of the private schools on the provision of services through a contract with a third-party provider.

(2) If the LEA disagrees with the views of the officials of the private schools on the provision of services through a contract, the LEA must provide in writing to the officials of the private schools the reasons why the LEA chooses not to use a contractor.

(e)(1)(i) The LEA must maintain in its records and provide to the SEA a written affirmation, signed by officials of each private school with participating children or appropriate private school representatives, that the required consultation has occurred.

(ii) The LEA's written affirmation must provide the option for private school officials to indicate their belief that timely and meaningful consultation has not occurred or that the program design is not equitable with respect to eligible private school children.

(2) If the officials of the private schools do not provide the affirmations within a reasonable period of time, the LEA must submit to the SEA documentation that the required consultation occurred.

(f)(1) An official of a private school has the right to complain to the SEA that the LEA did not—

(i) Engage in timely and meaningful consultation;

(ii) Consider the views of the official of the private school; or

(iii) Make a decision that treats the private school students equitably.

(2) If a private school official wishes to file a complaint, the official must provide the basis of the noncompliance by the LEA to the SEA and the LEA must forward the appropriate documentation to the SEA.

(3) An SEA must provide equitable services directly or through contracts with public or private agencies, organizations, or institutions if the appropriate private school officials have—

(i) Requested that the SEA provide such services directly; and

(ii) Demonstrated that the LEA has not met the requirements of §§ 200.62 through 200.67 in accordance with the SEA's procedures for making such a request.

[82 FR 31709, July 7, 2017, as amended at 84 FR 31674, July 2, 2019]

§ 200.64 Factors for determining equitable participation of private school children.

(a) *Equal expenditures.* (1) Funds expended by an LEA under this subpart for services for eligible private school children in the aggregate must be equal to the proportion of funds generated by private school children from low-income families who reside in participating public school attendance areas under paragraph (a)(2) of this section.

(2) An LEA must determine the proportional share of funds available for services for eligible private school children based on the total amount of funds received by the LEA under subpart 2 of part A of title I of the ESEA prior to any allowable expenditures or transfers by the LEA.

(3)(i) To obtain a count of private school children from low-income families who reside in participating public school attendance areas, the LEA may—

(A) Use the same poverty data the LEA uses to count public school children;

(B)(*1*) Use comparable poverty data from a survey of families of private school students that, to the extent possible, protects the families' identity; and

(*2*) Extrapolate data from the survey based on a representative sample if complete actual data are unavailable;

(C) Use comparable poverty data from a different source, such as scholarship applications;

(D) Apply the low-income percentage of each participating public school attendance area to the number of private school children who reside in that school attendance area; or

(E) Use an equated measure of low income correlated with the measure of low income used to count public school children.

(ii) An LEA may count private school children from low-income families every year or every two years.

(iii) After timely and meaningful consultation in accordance with § 200.63, the LEA shall have the final authority in determining the method used to calculate the number of private school children from low-income families.

(4) An SEA must provide notice in a timely manner to appropriate private school officials in the State of the allocation of funds for educational services and other benefits that LEAs have determined are available for eligible private school children.

(5) An LEA must obligate funds generated to provide equitable services for eligible private school children in the fiscal year for which the funds are received by the LEA.

(b) *Services on an equitable basis.* (1) The services that an LEA provides to eligible private school children must be equitable in comparison to the services and other benefits that the LEA provides to public school children participating under subpart A of this part.

(2) Services are equitable if the LEA—

(i) Addresses and assesses the specific needs and educational progress of eligible private school children on a comparable basis as public school children;

(ii) Meets the equal expenditure requirements under paragraph (a) of this section; and

(iii) Provides private school children with an opportunity to participate that—

(A) Is equitable to the opportunity provided to public school children; and

(B) Provides reasonable promise of the private school children achieving the high levels called for by the State's student academic achievement standards or equivalent standards applicable to the private school children.

(3)(i) The LEA may provide services to eligible private school children either directly or through arrangements

with another LEA or a third-party provider.

(ii) If the LEA contracts with a third-party provider—

(A) The provider must be independent of the private school; and

(B) The contract must be under the control and supervision of the LEA.

(4) After timely and meaningful consultation under § 200.63, the LEA must make the final decisions with respect to the services it will provide to eligible private school children.

[82 FR 31709, July 7, 2017, as amended at 84 FR 31675, July 2, 2019]

§ 200.65 Determining equitable participation of teachers and families of participating private school children.

(a) From the proportional share reserved for equitable services under § 200.77(d), an LEA shall ensure that teachers and families of participating private school children participate on an equitable basis in services and activities under this subpart.

(b) After consultation with appropriate private school officials, the LEA must provide services and activities under paragraph (a) of this section either—

(1) In conjunction with the LEA's services and activities for teachers and families; or

(2) Independently.

[84 FR 31675, July 2, 2019]

§ 200.66 Requirements to ensure that funds do not benefit a private school.

(a) An LEA must use funds under subpart A of this part to provide services that supplement, and in no case supplant, the services that would, in the absence of Title I services, be available to participating private school children.

(b)(1) The LEA must use funds under subpart A of this part to meet the special educational needs of participating private school children.

(2) The LEA may not use funds under subpart A of this part for—

(i) The needs of the private school; or

(ii) The general needs of children in the private school.

(Authority: 20 U.S.C. 6320(a), 6321(b))

[82 FR 31710, July 7, 2017]

§ 200.67 Requirements concerning property, equipment, and supplies for the benefit of private school children.

(a) The LEA must keep title to and exercise continuing administrative control of all property, equipment, and supplies that the LEA acquires with funds under subpart A of this part for the benefit of eligible private school children.

(b) The LEA may place equipment and supplies in a private school for the period of time needed for the program.

(c) The LEA must ensure that the equipment and supplies placed in a private school—

(1) Are used only for Title I purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The LEA must remove equipment and supplies from a private school if—

(1) The LEA no longer needs the equipment and supplies to provide Title I services; or

(2) Removal is necessary to avoid unauthorized use of the equipment or supplies for other than Title I purposes.

(e) The LEA may not use funds under subpart A of this part for repairs, minor remodeling, or construction of private school facilities.

[82 FR 31710, July 7, 2017]

§ 200.68 Ombudsman.

To help ensure equity for eligible private school children, teachers, and other educational personnel, an SEA must designate an ombudsman to monitor and enforce the requirements in §§ 200.62 through 200.67.

[84 FR 31675, July 2, 2019]

§ 200.69 [Reserved]

ALLOCATIONS TO LEAS

§ 200.70 Allocation of funds to LEAs in general.

(a) The Secretary allocates basic grants, concentration grants, targeted

grants, and education finance incentive grants, through SEAs, to each eligible LEA for which the Bureau of the Census has provided data on the number of children from low-income families residing in the school attendance areas of the LEA (hereinafter referred to as the ''Census list'').

(b) In establishing eligibility and allocating funds under paragraph (a) of this section, the Secretary counts children ages 5 to 17, inclusive (hereinafter referred to as ''formula children'')—

(1) From families below the poverty level based on the most recent satisfactory data available from the Bureau of the Census;

(2) From families above the poverty level receiving assistance under the Temporary Assistance for Needy Families program under Title IV of the Social Security Act;

(3) Being supported in foster homes with public funds; and

(4) Residing in local institutions for neglected children.

(c) Except as provided in §§ 200.72, 200.75, and 200.100, an SEA may not change the Secretary's allocation to any LEA that serves an area with a total census population of at least 20,000 persons.

(d) In accordance with § 200.74, an SEA may use an alternative method, approved by the Secretary, to distribute the State's share of basic grants, concentration grants, targeted grants, and education finance incentive grants to LEAs that serve an area with a total census population of less than 20,000 persons.

(Authority: 20 U.S.C. 6333–6337)

[82 FR 31710, July 7, 2017]

§ 200.71 LEA eligibility.

(a) *Basic grants.* An LEA is eligible for a basic grant if the number of formula children is—

(1) At least 10; and

(2) Greater than two percent of the LEA's total population ages 5 to 17 years, inclusive.

(b) *Concentration grants.* An LEA is eligible for a concentration grant if—

(1) The LEA is eligible for a basic grant under paragraph (a) of this section; and

(2) The number of formula children exceeds—

(i) 6,500; or

(ii) 15 percent of the LEA's total population ages 5 to 17 years, inclusive.

(c) *Targeted grants.* An LEA is eligible for a targeted grant if the number of formula children is—

(1) At least 10; and

(2) At least five percent of the LEA's total population ages 5 to 17 years, inclusive.

(d) *Education finance incentive grants.* An LEA is eligible for an education finance incentive grant if the number of formula children is—

(1) At least 10; and

(2) At least five percent of the LEA's total population ages 5 to 17 years, inclusive.

(Authority: 20 U.S.C. 6333–6337)

[82 FR 31710, July 7, 2017]

§ 200.72 Procedures for adjusting allocations determined by the Secretary to account for eligible LEAs not on the Census list.

(a) *General.* For each LEA not on the Census list (hereinafter referred to as a ''new'' LEA), an SEA must determine the number of formula children and the number of children ages 5 to 17, inclusive, in that LEA.

(b) *Determining LEA eligibility.* An SEA must determine basic grant, concentration grant, targeted grant, and education finance incentive grant eligibility for each new LEA and re-determine eligibility for the LEAs on the Census list, as appropriate, based on the number of formula children and children ages 5 to 17, inclusive, determined in paragraph (a) of this section.

(c) *Adjusting LEA allocations.* An SEA must adjust the LEA allocations calculated by the Secretary to determine allocations for eligible new LEAs based on the number of formula children determined in paragraph (a) of this section.

(Authority: 20 U.S.C. 6333–6337)

[82 FR 31711, July 7, 2017]

§ 200.73 Applicable hold-harmless provisions.

(a) *General.* (1) Except as authorized under paragraph (c) of this section and § 200.100(d)(2), an SEA may not reduce

the allocation of an eligible LEA below the hold-harmless amounts established under paragraph (a)(4) of this section.

(2) The hold-harmless protection limits the maximum reduction of an LEA's allocation compared to the LEA's allocation for the preceding year.

(3) Except as provided in § 200.100(d), an SEA must apply the hold-harmless requirement separately for basic grants, concentration grants, targeted grants, and education finance incentive grants as described in paragraph (a)(4) of this section.

(4) Under sections 1122(c) and 1125A(f)(3) of the ESEA, the hold-harmless percentage varies based on the LEA's proportion of formula children, as shown in the following table:

LEA's number of formula children ages 5 to 17, inclusive, as a percentage of its total population of children ages 5 to 17, inclusive	Hold-harmless percentage	Applicable grant formulas
(i) 30% or more	95	Basic Grants, Concentration Grants, Targeted Grants, and Education Finance Incentive Grants.
(ii) 15% or more but less than 30%	90	
(iii) Less than 15%	85	

(b) *Targeted grants and education finance incentive grants.* The number of formula children used to determine the hold-harmless percentage is the number before applying the weights described in section 1125 and section 1125A of the ESEA.

(c) *Adjustment for insufficient funds.* If the amounts made available to the State are insufficient to pay the full amount that each LEA is eligible to receive under paragraph (a)(4) of this section, the SEA must ratably reduce the allocations for all LEAs in the State to the amount available.

(d) *Eligibility for hold-harmless protection.* (1) An LEA must meet the eligibility requirements for a basic grant, targeted grant, or education finance incentive grant under § 200.71 in order for the applicable hold-harmless provision to apply.

(2) An LEA not meeting the eligibility requirements for a concentration grant under § 200.71 must be paid its hold-harmless amount for four consecutive years.

(e) *Hold-harmless protection for a newly opened or significantly expanded charter school LEA.* An SEA must calculate a hold-harmless base for the prior year for a newly opened or significantly expanded charter school LEA that, as applicable, reflects the new or significantly expanded enrollment of the charter school LEA.

[82 FR 31711, July 7, 2017, as amended at 84 FR 31675, July 2, 2019]

§ 200.74 Use of an alternative method to distribute grants to LEAs with fewer than 20,000 residents.

(a) For eligible LEAs serving an area with a total census population of less than 20,000 persons (hereinafter referred to as ''small LEAs''), an SEA may apply to the Secretary to use an alternative method to distribute basic grant, concentration grant, targeted grant, and education finance incentive grant funds.

(b) In its application, the SEA must—

(1) Identify the alternative data it proposes to use; and

(2) Assure that it has established a procedure through which a small LEA that is dissatisfied with the determination of its grant may appeal directly to the Secretary.

(c) The SEA must base its alternative method on population data that best reflect the current distribution of children from low-income families among the State's small LEAs and use the same poverty measure consistently for small LEAs across the State for all Title I, part A programs.

(d) Based on the alternative poverty data selected, the SEA must—

(1) Re-determine eligibility of its small LEAs for basic grants, concentration grants, targeted grants, and education finance incentive grants in accordance with § 200.71;

(2) Calculate allocations for small LEAs in accordance with the provisions of sections 1124, 1124A, 1125, and 1125A of the ESEA, as applicable; and

(3) Ensure that each LEA receives the hold-harmless amount to which it is entitled under § 200.73.

(e) The amount of funds available for redistribution under each formula is the separate amount determined by the Secretary under sections 1124, 1124A, 1125, and 1125A of the ESEA for eligible small LEAs after the SEA has made the adjustments required under § 200.72(c).

(f) If the amount available for redistribution to small LEAs under an alternative method is not sufficient to satisfy applicable hold-harmless requirements, the SEA must ratably reduce all eligible small LEAs to the amount available.

(Authority: 20 U.S.C. 6333–6337)

[82 FR 31711, July 7, 2017]

§ 200.75 Special procedures for allocating concentration grant funds in small States.

(a) In a State in which the number of formula children is less than 0.25 percent of the national total on January 8, 2002 (hereinafter referred to as a ''small State''), an SEA may either—

(1) Allocate concentration grants among eligible LEAs in the State in accordance with §§ 200.72 through 200.74, as applicable; or

(2) Without regard to the allocations determined by the Secretary—

(i) Identify those LEAs in which the number or percentage of formula children exceeds the statewide average number or percentage of those children; and

(ii) Allocate concentration grant funds, consistent with § 200.73, among the LEAs identified in paragraph (a)(2)(i) of this section based on the number of formula children in each of those LEAs.

(b) If the SEA in a small State uses an alternative method under § 200.74, the SEA must use the poverty data approved under the alternative method to identify those LEAs with numbers or percentages of formula children that exceed the statewide average number or percentage of those children for the State as a whole.

(Authority: 20 U.S.C. 6334(b))

[82 FR 31711, July 7, 2017]

§ 200.76 [Reserved]

§ 200.77 Reservation of funds by an LEA.

Before allocating funds in accordance with § 200.78, an LEA must reserve funds as are reasonable and necessary to—

(a) Provide services comparable to those provided to children in participating school attendance areas and schools to serve—

(1)(i) Homeless children and youths, including providing educationally related support services to children in shelters and other locations where homeless children may live.

(ii) Funds reserved under paragraph (a)(1)(i) of this section may be—

(A) Determined based on a needs assessment of homeless children and youths in the LEA, taking into consideration the number and needs of those children, which may be the same needs assessment as conducted under section 723(b)(1) of the McKinney-Vento Homeless Assistance Act; and

(B) Used to provide homeless children and youths with services not ordinarily provided to other students under this subpart, including providing—

(*1*) Funding for the liaison designated under section 722(g)(1)(J)(ii) of the McKinney-Vento Homeless Assistance Act; and

(*2*) Transportation pursuant to section 722(g)(1)(J)(iii) of that Act;

(2) Children in local institutions for neglected children; and

(3) If appropriate—

(i) Children in local institutions for delinquent children; and

(ii) Neglected and delinquent children in community-day school programs;

(4) An LEA must determine the amount of funds reserved under paragraphs (a)(1)(i) and (a)(2) and (3) of this section based on the total allocation received by the LEA under subpart 2 of part A of title I of the ESEA prior to any allowable expenditures or transfers by the LEA;

(b) Provide, where appropriate under section 1113(c)(4) of the ESEA, financial incentives and rewards to teachers who serve students in title I schools identified for comprehensive support and improvement activities or targeted

support and improvement activities under section 1111(d) of the ESEA for the purpose of attracting and retaining qualified and effective teachers;

(c) Meet the requirements for parental involvement in section 1116(a)(3) of the ESEA;

(d) Provide and administer equitable services in accordance with § 200.64(a);

(e) Administer programs for public school children under this subpart; and

(f) Conduct other authorized activities, such as early childhood education, school improvement and coordinated services.

[82 FR 31712, July 7, 2017, as amended at 84 FR 31675, July 2, 2019]

§ 200.78 Allocation of funds to school attendance areas and schools.

(a)(1) After reserving funds, as applicable, under § 200.77, including funds for equitable services for private school students, their teachers, and their families, an LEA must allocate funds under this subpart to school attendance areas and schools, identified as eligible and selected to participate under section 1113(a) or (b) of the ESEA, in rank order on the basis of the total number of public school children from low-income families in each area or school.

(2) To determine the number of children from low-income families in a secondary school, an LEA must use—

(i) The same measure of poverty it uses for elementary schools; or

(ii) An accurate estimate of the number of students from low-income families by applying the average percentage of students from low-income families in the elementary school attendance areas that feed into the secondary school to the number of students enrolled in the secondary school if—

(A) The LEA conducts outreach to secondary schools within the LEA to inform the schools of the option to use this measure; and

(B) A majority of the secondary schools approve the use of this measure.

(3) If an LEA ranks its school attendance areas and schools by grade span groupings, the LEA may determine the percentage of children from low-income families in the LEA as a whole or for each grade span grouping.

(b)(1) Except as provided in paragraphs (b)(2) and (d) of this section, an LEA must allocate to each participating school attendance area or school an amount for each low-income child that is at least 125 percent of the per-pupil amount of funds the LEA received for that year under part A, subpart 2 of Title I. The LEA must calculate this per-pupil amount before it reserves funds under § 200.77, using the poverty measure selected by the LEA under section 1113(a)(5) of the ESEA.

(2) If an LEA is serving only school attendance areas or schools in which the percentage of children from low-income families is 35 percent or more, the LEA is not required to allocate a per-pupil amount of at least 125 percent.

(c) An LEA is not required to allocate the same per-pupil amount to each participating school attendance area or school provided the LEA allocates higher per-pupil amounts to areas or schools with higher concentrations of poverty than to areas or schools with lower concentrations of poverty.

(d) An LEA may reduce the amount of funds allocated under this section to a school attendance area or school if the area or school is spending supplemental State or local funds for programs that meet the requirements in § 200.79(b).

(e) If an LEA contains two or more counties in their entirety, the LEA must distribute to schools within each county a share of the LEA's total grant that is no less than the county's share of the child count used to calculate the LEA's grant.

[82 FR 31712, July 7, 2017, as amended at 84 FR 31676, July 2, 2019]

FISCAL REQUIREMENTS

§ 200.79 Exclusion of supplemental State and local funds from supplement, not supplant and comparability determinations.

(a) For the purpose of determining compliance with the supplement not supplant requirement in section 1118(b) and the comparability requirement in section 1118(c) of the ESEA, a grantee or subgrantee under this subpart may exclude supplemental State and local funds spent in any school attendance

area or school for programs that meet the intent and purposes of title I of the ESEA.

(b) A program meets the intent and purposes of Title I if the program either—

(1)(i) Is implemented in a school in which the percentage of children from low-income families is at least 40 percent;

(ii) Is designed to promote schoolwide reform and upgrade the entire educational operation of the school to support students in their achievement toward meeting the challenging State academic standards that all students are expected to meet;

(iii) Is designed to meet the educational needs of all students in the school, particularly the needs of students who are failing, or are most at risk of failing, to meet the challenging State academic standards; and

(iv) Uses the State's assessment system under § 200.2 to review the effectiveness of the program; or

(2)(i) Serves only students who are failing, or are most at risk of failing, to meet the challenging State academic standards;

(ii) Provides supplementary services designed to meet the special educational needs of the students who are participating in the program to support their achievement toward meeting the State's student academic achievement standards; and

(iii) Uses the State's assessment system under § 200.2 to review the effectiveness of the program.

(c) The conditions in paragraph (b) of this section also apply to supplemental State and local funds expended under section 1113(b)(1)(D) and 1113(c)(2)(B) of the ESEA.

[82 FR 31713, July 7, 2017, as amended at 84 FR 31676, July 2, 2019]

Subpart B—Even Start Family Literacy Program

§ 200.80 [Reserved]

Subpart C—Migrant Education Program

SOURCE: 67 FR 71736, Dec. 2, 2002, unless otherwise noted.

§ 200.81 Program definitions.

The following definitions apply to programs and projects operated under this subpart:

(a) *Agricultural work or employment* means the production or initial processing of raw agricultural products such as crops, trees, dairy products, poultry, or livestock. It consists of work performed for wages or personal subsistence.

(b) *Consolidated Student Record* means the MDEs for a migratory child that have been submitted by one or more SEAs and consolidated into a single, uniquely identified record available through MSIX.

(c) *Fishing work or employment* means the catching or initial processing of fish or shellfish or the raising or harvesting of fish or shellfish at fish farms. It consists of work performed for wages or personal subsistence.

(d) [Reserved]

(e) *Migrant Student Information Exchange (MSIX)* means the nationwide system administered by the Department for linking and exchanging specified educational and health information for all migratory children.

(f) *Migratory agricultural worker* means an individual who made a qualifying move in the preceding 36 months and, after doing so, engaged in new temporary or seasonal employment or personal subsistence in agriculture, which may be dairy work or the initial processing of raw agricultural products. If an individual did not engage in such new employment soon after a qualifying move, such individual may be considered a migratory agricultural worker if the individual actively sought such new employment and has a recent history of moves for temporary or seasonal agricultural employment.

(g) *Migratory child* means a child or youth who made a qualifying move in the preceding 36 months as a migratory agricultural worker or a migratory fisher; or with, or to join, a parent or spouse who is a migratory agricultural worker or a migratory fisher.

(h) *Migratory fisher* means an individual who made a qualifying move in the preceding 36 months and, after doing so, engaged in new temporary or seasonal employment or personal subsistence in fishing. If the individual did

not engage in such new employment soon after a qualifying move, the individual may be considered a migratory fisher if the individual actively sought such new employment and has a recent history of moves for temporary or seasonal fishing employment.

(i) *Minimum Data Elements (MDEs)* means the educational and health information for migratory children that the Secretary requires each SEA that receives a grant of MEP funds to collect, maintain, and submit to MSIX, and use under this part. MDEs may include—

(1) Immunization records and other health information;

(2) Academic history (including partial credit), credit accrual, and results from State assessments required under the ESEA;

(3) Other academic information essential to ensuring that migratory children achieve to high academic standards; and

(4) Information regarding eligibility for services under the Individuals with Disabilities Education Act.

(j) *Move* or *Moved* means a change from one residence to another residence that occurs due to economic necessity.

(k) *MSIX Memorandum of Understanding (MOU)* means the agreement between the Department and an SEA that governs the interconnection of the State migrant student records system(s) and MSIX, including the terms under which the agency will abide by the agreement based upon its review of all relevant technical, security, and administrative issues.

(l) *MSIX Interconnection Security Agreement* means the agreement between the Department and an SEA that specifies the technical and security requirements for establishing, maintaining, and operating the interconnection between the State migrant student records system and MSIX. The MSIX Interconnection Security Agreement supports the MSIX MOU and documents the requirements for connecting the two information technology systems, describes the security controls to be used to protect the systems and data, and contains a topological drawing of the interconnection.

(m) *Personal subsistence* means that the worker and the worker's family, as a matter of economic necessity, consume, as a substantial portion of their food intake, the crops, dairy products, or livestock they produce or the fish they catch.

(n) *Qualifying work* means temporary employment or seasonal employment in agricultural work or fishing work.

(o) *Seasonal employment* means employment that occurs only during a certain period of the year because of the cycles of nature and that, by its nature, may not be continuous or carried on throughout the year.

(p) *Temporary employment* means employment that lasts for a limited period of time, usually a few months, but no longer than 12 months. It typically includes employment where the employer states that the worker was hired for a limited time frame; the worker states that the worker does not intend to remain in that employment indefinitely; or the SEA has determined on some other reasonable basis that the employment is temporary. The definition includes employment that is constant and available year-round only if, within 18 months after the effective date of this regulation and at least once every three years thereafter, the SEA documents that, given the nature of the work, of those workers whose children were previously determined to be eligible based on the State's prior determination of the temporary nature of such employment (or the children themselves if they are the workers), virtually no workers remained employed by the same employer more than 12 months.

[73 FR 44123, July 29, 2008, as amended at 81 FR 28970, May 10, 2016; 83 FR 42440, Aug. 22, 2018; 84 FR 31676, July 2, 2019]

§ 200.82 Use of program funds for unique program function costs.

An SEA may use the funds available from its State Migrant Education Program (MEP) to carry out other administrative activities, beyond those allowable under § 200.100(b)(4), that are unique to the MEP, including those that are the same or similar to administrative activities performed by LEAs in the State under subpart A of this

part. These activities include but are not limited to—

(a) Statewide identification and recruitment of eligible migratory children;

(b) Interstate and intrastate coordination of the State MEP and its local projects with other relevant programs and local projects in the State and in other States;

(c) Procedures for providing for educational continuity for migratory children through the timely transfer of educational and health records, beyond that required generally by State and local agencies;

(d) Collecting and using information for accurate distribution of subgrant funds;

(e) Development of a statewide needs assessment and a comprehensive State plan for MEP service delivery;

(f) Supervision of instructional and support staff;

(g) Establishment and implementation of a State parent advisory council; and

(h) Conducting an evaluation of the effectiveness of the State MEP.

(Authority: 20 U.S.C. 6392, 6571)

[67 FR 71736, Dec. 2, 2002; 68 FR 19152, Apr. 18, 2003]

§ 200.83 Responsibilities of SEAs to implement projects through a comprehensive needs assessment and a comprehensive State plan for service delivery.

(a) An SEA that receives a grant of MEP funds must develop and update a written comprehensive State plan for service delivery based on a current statewide needs assessment that, at a minimum, has the following components:

(1) *Performance targets.* The plan must specify—

(i) Performance targets that the State has adopted for all children in reading and mathematics achievement, high school graduation, and the number of school dropouts, as well as the State's performance targets, if any, for school readiness; and

(ii) Any other performance targets that the State has identified for migratory children.

(2) *Needs assessment.* The plan must include an identification and assessment of—

(i) The unique educational needs of migratory children that result from the children's migratory lifestyle; and

(ii) Other needs of migratory students that must be met in order for migratory children to participate effectively in school.

(3) *Measurable program outcomes.* The plan must include the measurable program outcomes (i.e., objectives) that a State's migrant education program will produce to meet the identified unique needs of migratory children and help migratory children achieve the State's performance targets identified in paragraph (a)(1) of this section.

(4) *Service delivery.* The plan must describe the strategies that the SEA will pursue on a statewide basis to achieve the measurable program outcomes in paragraph (a)(3) of this section by addressing—

(i) The unique educational needs of migratory children consistent with paragraph (a)(2)(i) of this section; and

(ii) Other needs of migratory children consistent with paragraph (a)(2)(ii) of this section.

(5) *Evaluation.* The plan must describe how the State will evaluate the effectiveness of its program.

(b) The SEA must develop its comprehensive State plan for service delivery in consultation with the State parent advisory council or, for SEAs not operating programs for one school year in duration, in consultation with the parents of migratory children. This consultation must be in a format and language that the parents understand.

(c) Each SEA receiving MEP funds must ensure that its local operating agencies comply with the comprehensive State plan for service delivery.

(Approved by the Office of Management and Budget under control number 1810–0662)

[67 FR 71736, Dec. 2, 2002, as amended at 68 FR 19152, Apr. 18, 2003; 73 FR 44124, July 29, 2008; 84 FR 31677, July 2, 2019]

§ 200.84 Responsibilities for evaluating the effectiveness of the MEP and using evaluations to improve services to migratory children.

(a) Each SEA must determine the effectiveness of its MEP through a written evaluation that measures the implementation and results achieved by the program against the State's performance targets in § 200.83(a)(1), particularly for those students who have priority for service as defined in section 1304(d) of the ESEA.

(b) SEAs and local operating agencies receiving MEP funds must use the results of the evaluation carried out by an SEA under paragraph (a) of this section to improve the services provided to migratory children.

(Authority: 20 U.S.C. 6394)

[81 FR 28970, May 10, 2016]

§ 200.85 Responsibilities of SEAs for the electronic exchange through MSIX of specified educational and health information of migratory children.

(a) *MSIX State record system and data exchange requirements.* In order to receive a grant of MEP funds, an SEA must collect, maintain, and submit to MSIX MDEs and otherwise exchange and use information on migratory children in accordance with the requirements of this section. Failure of an SEA to do so constitutes a failure under section 454 of the General Education Provisions Act, 20 U.S.C. 1234c, to comply substantially with a requirement of law applicable to the funds made available under the MEP.

(b) *MSIX data submission requirements*—(1) *General.* (i) In order to satisfy the requirements of paragraphs (b)(2) and (3) of this section, an SEA that receives a grant of MEP funds must submit electronically to MSIX the MDEs applicable to the child's age and grade level. An SEA must collect and submit the MDEs applicable to the child's age and grade level, regardless of the type of school in which the child is enrolled (*e.g.*, public, private, or home school), or whether a child is enrolled in any school.

(ii) For migratory children who are or were enrolled in private schools, the SEA meets its responsibility under paragraph (b)(1)(i) of this section for collecting MDEs applicable to the child's age and grade level by advising the parent of the migratory child, or the migratory child if the child is emancipated, of the necessity of requesting the child's records from the private school, and by facilitating the parent or emancipated child's request to the private school that it provide all necessary information from the child's school records—

(A) Directly to the parent or emancipated child, in which case the SEA must follow up directly with the parent or child; or

(B) To the SEA, or a specific local operating agency, for forwarding to MSIX, in which case the SEA must follow up with the parent, emancipated child, or the private school to make sure that the records requested by the parent or emancipated child have been forwarded.

(iii) For migratory children who are or were enrolled in home schools, the SEA meets its responsibility under paragraph (b)(1)(i) of this section for collecting MDEs applicable to the child's age and grade level by requesting these records, either directly or through a local operating agency, directly from the parent or emancipated child.

(2) *Start-up data submissions.* No later than 90 calendar days after the effective date of these regulations, an SEA must collect and submit to MSIX each of the MDEs described in paragraph (b)(1)(i) of this section applicable to the child's age and grade level for every migratory child who is eligible to receive MEP services in the State on the effective date of these regulations, other than through continuation of services provided under section 1304(e) of the ESEA.

(3) *Subsequent data submissions.* An SEA must comply with the following timelines for subsequent data submissions throughout the entire calendar year whether or not local operating agencies or LEAs in the State are closed for summer or intersession periods.

(i) *Migratory children for whom an SEA has approved a new Certificate of Eligibility.* For every migratory child for whom an SEA approves a new Certificate of Eligibility under § 200.89(c) after

the effective date of these regulations—

(A) An SEA must collect and submit to MSIX the MDEs described in paragraph (b)(1)(i) of this section within 10 working days of approving a new Certificate of Eligibility for the migratory child. The SEA is not required to collect and submit MDEs in existence before its approval of a new Certificate of Eligibility for the child except as provided in paragraph (b)(3)(i)(B) of this section; and

(B) An SEA that approves a new Certificate of Eligibility for a secondary school-aged migratory child must also—

(*1*) Collect and submit to MSIX within 10 working days of approving a new Certificate of Eligibility for the child MDEs from the most recent secondary school in that State attended previously by the migratory child; and

(*2*) Notify MSIX within 30 calendar days if one of its local operating agencies obtains records from a secondary school attended previously in another State by the migratory child.

(ii) *End of term submissions.* (A) Within 30 calendar days of the end of an LEA's or local operating agency's fall, spring, summer, or intersession terms, an SEA must collect and submit to MSIX all MDE updates and newly available MDEs for migratory children who were eligible for the MEP during the term and for whom the SEA submitted data previously under paragraph (b)(2) or (b)(3)(i) of this section.

(B) When a migratory child's MEP eligibility expires before the end of a school year, an SEA must submit all MDE updates and newly available MDEs for the child through the end of the school year.

(iii) *Change of residence submissions.* (A) Within four working days of receiving notification from MSIX that a migratory child in its State has changed residence to a new local operating agency within the State or another SEA has approved a new Certificate of Eligibility for a migratory child, an SEA must collect and submit to MSIX all new MDEs and MDE updates that have become available to the SEA or one of its local operating agencies since the SEA's last submission of MDEs to MSIX for the child.

(B) An SEA or local operating agency that does not yet have a new MDE or MDE update for a migratory child when it receives a change of residence notification from MSIX must submit the MDE to MSIX within four working days of the date that the SEA or one of its local operating agencies obtains the MDE.

(c) *Use of Consolidated Student Records.* In order to facilitate school enrollment, grade and course placement, accrual of high school credits, and participation in the MEP, each SEA that receives a grant of MEP funds must—

(1) Use, and require each of its local operating agencies to use, the Consolidated Student Record for all migratory children who have changed residence to a new school district within the State or in another State;

(2) Encourage LEAs that are not local operating agencies receiving MEP funds to use the Consolidated Student Record for all migratory children described in paragraph (c)(1) of this section; and

(3) Establish procedures, develop and disseminate guidance, and provide training in the use of Consolidated Student Records to SEA, local operating agency, and LEA personnel who have been designated by the SEA as authorized MSIX users under paragraph (f)(2) of this section.

(d) *MSIX data quality.* Each SEA that receives a grant of MEP funds must—

(1) Use, and require each of its local operating agencies to use, reasonable and appropriate methods to ensure that all data submitted to MSIX are accurate and complete; and

(2) Respond promptly, and ensure that each of its local operating agencies responds promptly, to any request by the Department for information needed to meet the Department's responsibility for the accuracy and completeness of data in MSIX in accordance with the Privacy Act of 1974, as amended, 5 U.S.C. 552a(e)(6) and (g)(1)(C) or (D).

(e) *Procedures for MSIX data correction by parents, guardians, and migratory children.* Each SEA that receives a grant of MEP funds must establish and implement written procedures that

allow a parent or guardian of a migratory child, or a migratory child, to ask the SEA to correct or determine the correctness of MSIX data. An SEA's written procedures must meet the following minimum requirements:

(1) *Response to parents, guardians, and migratory children.* (i) Within 30 calendar days of receipt of a data correction request from a parent, guardian, or migratory child, an SEA must—

(A) Send a written or electronic acknowledgement to the requester;

(B) Investigate the request;

(C) Decide whether to revise the data as requested; and

(D) Send the requester a written or electronic notice of the SEA's decision.

(ii) If an SEA determines that data it submitted previously to MSIX should be corrected, the SEA must submit the revised data to MSIX within four working days of its decision to correct the data. An SEA is not required to notify MSIX if it decides not to revise the data as requested.

(iii)(A) If a parent, guardian, or migratory child requests that an SEA correct or determine the correctness of data that was submitted to MSIX by another SEA, within four working days of receipt of the request, the SEA must send the data correction request to the SEA that submitted the data to MSIX.

(B) An SEA that receives an MSIX data correction request from another SEA under this paragraph must respond as if it received the data correction request directly from the parent, guardian, or migratory child.

(2) *Response to SEAs.* An SEA or local operating agency that receives a request for information from an SEA that is responding to a parent's, guardian's, or migratory child's data correction request under paragraph (e)(1) of this section must respond in writing within ten working days of receipt of the request.

(3) *Response to the Department.* An SEA must respond in writing within ten working days to a request from the Department for information needed by the Department to respond to an individual's request to correct or amend a Consolidated Student Record under the Privacy Act of 1974, as amended, 5 U.S.C. 552a(d)(2) and 34 CFR 5b.7.

(f) *MSIX data protection.* Each SEA that receives a grant of MEP funds must—

(1) Enter into and carry out its responsibilities in accordance with an MSIX MOU, an MSIX Interconnection Security Agreement, and other information technology agreements required by the Secretary in accordance with applicable Federal requirements;

(2) Establish and implement written procedures to protect the integrity, security, and confidentiality of Consolidated Student Records, whether in electronic or print format, through appropriate administrative, technical, and physical safeguards established in accordance with the MSIX MOU and MSIX Interconnection Security Agreement. An SEA's written procedures must include, at a minimum, reasonable methods to ensure that—

(3) Require all authorized users to complete the User Application Form approved by the Secretary before providing them access to MSIX. An SEA may also develop its own documentation for approving user access to MSIX provided that it contains the same information as the User Application Form approved by the Secretary; and

(4) Retain the documentation required for approving user access to MSIX for three years after the date the SEA terminates the user's access.

[81 FR 28970, May 10, 2016, as amended at 84 FR 31677, July 2, 2019]

EFFECTIVE DATE NOTE: At 81 FR 28970, May 10, 2016, § 200.85 was revised. This section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 200.86 Use of MEP funds in schoolwide projects.

Funds available under part C of Title I of the ESEA may be used in a schoolwide program subject to the requirements of § 200.29(c)(1).

(Authority: 20 U.S.C. 6396)

[67 FR 71736, Dec. 2, 2002; 68 FR 19152, Apr. 18, 2003]

§ 200.87 Responsibilities for participation of children in private schools.

An SEA and its operating agencies must conduct programs and projects

under this subpart in a manner consistent with the basic requirements of section 8501 of the ESEA.

[67 FR 71736, Dec. 2, 2002, as amended at 84 FR 31677, July 2, 2019]

§ 200.88 Exclusion of supplemental State and local funds from supplement, not supplant and comparability determinations.

(a) For purposes of determining compliance with the comparability requirement in section 1118(c) and the supplement, not supplant requirement in section 1118(b) of the ESEA, a grantee or subgrantee under part C of title I of the ESEA may exclude supplemental State and local funds expended in any school attendance area or school for carrying out special programs that meet the intent and purposes of part C of title I.

(b) Before funds for a State and local program may be excluded for purposes of these requirements, the SEA must make an advance written determination that the program meets the intent and purposes of part C of Title I.

(c) A program meets the intent and purposes of part C of Title I if it meets the following requirements:

(1) The program is specifically designed to meet the unique educational needs of migratory children, as defined in section 1309(3) of the ESEA.

(2) The program is based on performance targets related to educational achievement that are similar to those used in programs funded under part C of Title I of the ESEA, and is evaluated in a manner consistent with those program targets.

(3) The grantee or subgrantee keeps, and provides access to, records that ensure the correctness and verification of these requirements.

(4) The grantee monitors program performance to ensure that these requirements are met.

(Approved by the Office of Management and Budget under control number 1810–0662)

[67 FR 71736, Dec. 2, 2002; 68 FR 19152, Apr. 18, 2003; 84 FR 31677, July 2, 2019]

§ 200.89 Re-interviewing; eligibility documentation; and quality control.

(a) [Reserved]

(b) *Responsibilities of SEAs for re-interviewing to ensure the eligibility of children under the MEP*—(1) *Retrospective re-interviewing.* (i) As a condition for the continued receipt of MEP funds in FY 2006 and subsequent years, an SEA under a corrective action issued by the Secretary under paragraph (b)(2)(vii) or (d)(7) of this section must, as required by the Secretary—

(A) Conduct a statewide re-interviewing process consistent with paragraph (b)(1)(ii) of this section; and

(B) Consistent with paragraph (b)(1)(iii) of this section, report to the Secretary on the procedures it has employed, its findings, its defect rate, and corrective actions it has taken or will take to avoid a recurrence of any problems found.

(ii) At a minimum, the re-interviewing process must include—

(A) Selection of a sample of identified migratory children (from the child counts of a particular year as directed by the Secretary) randomly selected on a statewide basis to allow the State to estimate the statewide proportion of eligible migratory children at a 95 percent confidence level with a confidence interval of plus or minus 5 percent.

(B) Use of independent re-interviewers (i.e., interviewers who are neither SEA or local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested) trained to conduct personal interviews and to understand and apply program eligibility requirements; and

(C) Calculation of a defect rate based on the number of sampled children determined ineligible as a percentage of those sampled children whose parent/guardian was actually re-interviewed.

(iii) At a minimum, the report must include—

(A) An explanation of the sample and procedures used in the SEA's re-interviewing process;

(B) The findings of the re-interviewing process, including the determined defect rate;

(C) An acknowledgement that the Secretary may adjust the child counts for 2000–2001 and subsequent years downward based on the defect rate that the Secretary accepts;

(D) A summary of the types of defective eligibility determinations that the

SEA identified through the re-interviewing process;

(E) A summary of the reasons why each type of defective eligibility determination occurred; and

(F) A summary of the corrective actions the SEA will take to address the identified problems.

(2) *Prospective re-interviewing*. As part of the system of quality controls identified in paragraph (d) of this section, an SEA that receives MEP funds must annually validate child eligibility determinations from the current performance reporting period (September 1 to August 31) through re-interviews for a randomly selected sample of children identified as migratory during the same performance reporting period. In conducting these re-interviews, an SEA must—

(i) Except as specified in paragraphs (b)(2)(i)(A) and (B) of this section, use one or more re-interviewers who may be SEA or local operating agency staff members working to administer or operate the State MEP, or any other person trained to conduct personal interviews and to understand and apply program eligibility requirements, but who did not work on the initial eligibility determinations being tested;

(A) At least once every three years until September 1, 2020, SEAs must use one or more independent re-interviewers (*i.e.*, interviewers who are neither SEA nor local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested and who are trained to conduct personal interviews and to understand and apply program eligibility requirements).

(B) Beginning September 1, 2020, an SEA must use one or more independent re-interviewers to validate child eligibility determinations made during one of the first three full performance reporting periods (September 1 through August 31) following the effective date of a major statutory or regulatory change that directly impacts child eligibility (as determined by the Secretary). Therefore, the entire sample of eligibility determinations to be tested by independent re-interviewers must be drawn from children determined to be eligible in a single performance period, based on eligibility requirements that include the major statutory or regulatory change.

(ii) Select a random sample of identified migratory children so that a sufficient number of eligibility determinations in the current performance reporting period are tested on a statewide basis or within categories associated with identified risk factors (*e.g.*, experience of recruiters, size or growth in local migratory child population, effectiveness of local quality control procedures) in order to help identify possible problems with the State's child eligibility determinations;

(iii) Conduct re-interviews with the parents or guardians of the children in the sample. States must use a face-to-face approach to conduct these re-interviews unless circumstances make face-to-face re-interviews impractical and necessitate the use of an alternative method such as telephone re-interviewing;

(iv) Determine and document in writing whether the child eligibility determination and the information on which the determination was based were true and correct;

(v) Stop serving any children found not to be eligible and remove them from the data base used to compile counts of eligible children;

(vi) Certify and report to the Department the results of re-interviewing in the SEA's annual report of the number of migratory children in the State required by the Secretary; and

(vii) Implement corrective actions or improvements to address the problems identified by the State (including the identification and removal of other ineligible children in the total population), and any corrective actions, including retrospective re-interviewing, required by the Secretary.

(c) *Responsibilities of SEAs to document the eligibility of migratory children*. (1) An SEA and its operating agencies must use the Certificate of Eligibility (COE) form established by the Secretary to document the State's determination of the eligibility of migratory children.

(2) In addition to the form required under paragraph (c)(1) of this section, the SEA and its operating agencies

must maintain any additional documentation the SEA requires to confirm that each child found eligible for this program meets all of the eligibility definitions in section 1309 of the ESEA and § 200.81.

(3) An SEA is responsible for the accuracy of all the determinations of the eligibility of migratory children identified in the State.

(d) *Responsibilities of an SEA to establish and implement a system of quality controls for the proper identification and recruitment of eligible migratory children.* An SEA must establish and implement a system of quality controls for the proper identification and recruitment of eligible migratory children on a statewide basis. At a minimum, this system of quality controls must include the following components:

(1) Training to ensure that recruiters and all other staff involved in determining eligibility and in conducting quality control procedures know the requirements for accurately determining and documenting child eligibility under the MEP.

(2) Supervision and annual review and evaluation of the identification and recruitment practices of individual recruiters.

(3) A formal process for resolving eligibility questions raised by recruiters and their supervisors and for ensuring that this information is communicated to all local operating agencies.

(4) An examination by qualified individuals at the SEA or local operating agency level of each COE to verify that the written documentation is sufficient and that, based on the recorded data, the child is eligible for MEP services.

(5) A process for the SEA to validate that eligibility determinations were properly made, including conducting prospective re-interviewing as described in paragraph (b)(2).

(6) Documentation that supports the SEA's implementation of this quality-control system and of a record of actions taken to improve the system where periodic reviews and evaluations indicate a need to do so.

(7) A process for implementing corrective action if the SEA finds COEs that do not sufficiently document a child's eligibility for the MEP, or in response to internal State audit findings and recommendations, or monitoring or audit findings of the Secretary.

[73 FR 44124, July 29, 2008, as amended at 83 FR 42440, Aug. 22, 2018; 84 FR 31677, July 2, 2019; 84 FR 64423, Nov. 22, 2019]

Subpart D—Prevention and Intervention Programs for Children and Youth Who are Neglected, Delinquent, or At-Risk of Dropping Out

SOURCE: 67 FR 71736, Dec. 2, 2002, unless otherwise noted.

§ 200.90 Program definitions.

(a) The following definition applies to the programs authorized in part D, subparts 1 and 2 of Title I of the ESEA:

Children and youth means the same as ''children'' as that term is defined in § 200.103(a).

(b) The following definitions apply to the programs authorized in part D, subpart 1 of Title I of the ESEA:

Institution for delinquent children and youth means, as determined by the SEA, a public or private residential facility that is operated primarily for the care of children and youth who—

(i) Have been adjudicated to be delinquent or in need of supervision; and

(ii) Have had an average length of stay in the institution of at least 30 days.

Institution for neglected children and youth means, as determined by the SEA, a public or private residential facility, other than a foster home, that is operated primarily for the care of children and youth who—

(i) Have been committed to the institution or voluntarily placed in the institution under applicable State law due to abandonment, neglect, or death of their parents or guardians; and

(ii) Have had an average length of stay in the institution of at least 30 days.

Regular program of instruction means an educational program (not beyond grade 12) in an institution or a community day program for neglected or delinquent children that consists of classroom instruction in basic school subjects such as reading, mathematics, and career and technical education, and that is supported by non-Federal

funds. Neither the manufacture of goods within the institution nor activities related to institutional maintenance are considered classroom instruction.

(c) The following definition applies to the local agency program authorized in part D, subpart 2 of title I of the ESEA:

Locally operated correctional facility means a facility in which persons are confined as a result of a conviction for a criminal offense, including persons under 21 years of age. The term also includes a local public or private institution and community day program or school not operated by the State that serves delinquent children and youth.

[67 FR 71736, Dec. 2, 2002, as amended at 84 FR 31677, July 2, 2019]

§ 200.91 SEA counts of eligible children.

To receive an allocation under part D, subpart 1 of Title I of the ESEA, an SEA must provide the Secretary with a count of children and youth under the age of 21 enrolled in a regular program of instruction operated or supported by State agencies in institutions or community day programs for neglected or delinquent children and youth and adult correctional institutions as specified in paragraphs (a) and (b) of this section.

(a) *Enrollment.* (1) To be counted, a child or youth must be enrolled in a regular program of instruction for at least—

(i) 20 hours per week if in an institution or community day program for neglected or delinquent children; or

(ii) 15 hours per week if in an adult correctional institution.

(2) The State agency must specify the date on which the enrollment of neglected or delinquent children is determined under paragraph (a)(1) of this section, except that the date specified must be—

(i) Consistent for all institutions or community day programs operated by the State agency; and

(ii) Represent a school day in the calendar year preceding the year in which funds become available.

(b) *Adjustment of enrollment.* The SEA must adjust the enrollment for each institution or community day program served by a State agency by—

(1) Multiplying the number determined in paragraph (a) of this section by the number of days per year the regular program of instruction operates; and

(2) Dividing the result of paragraph (b)(1) of this section by 180.

(c) *Date of submission.* The SEA must annually submit the data in paragraph (b) of this section no later than January 31.

(Approved by the Office of Management and Budget under control number 1810–0060)

(Authority: 20 U.S.C. 6432)

§§ 200.92–200.99 [Reserved]

Subpart E—General Provisions

SOURCE: 67 FR 71738, Dec. 2, 2002, unless otherwise noted.

§ 200.100 Reservation of funds for school improvement, State administration, and direct student services.

A State must reserve funds for school improvement, and may reserve funds for State administration and direct student services as follows:

(a) *School improvement.* (1) To carry out school improvement activities and the State's statewide system of technical assistance and support for LEAs authorized under sections 1003 and 1111(d) of the ESEA, an SEA must reserve the greater of—

(i) Seven percent from the sum of the amounts allocated to the State under section 1002(a) of the ESEA; or

(ii) The sum of the total amount that the State—

(A) Reserved for fiscal year 2016 under section 1003(a) of the ESEA as in effect on December 9, 2015; and

(B) Received for fiscal year 2016 under section 1003(g) of the ESEA as in effect on December 9, 2015.

(2) For fiscal year 2018 and subsequent years, in reserving funds under paragraph (a)(1) of this section, a State may not reduce the sum of the allocations an LEA receives under subpart 2 of part A of title I of the ESEA below the sum of the allocations the LEA received under subpart 2 for the preceding fiscal year.

(3) If funds under section 1002(a) are insufficient in a given fiscal year to implement both paragraphs (a)(1) and

(2) of this section, a State is not required to reserve the full amount required under paragraph (a)(1) of this section.

(b) *State administration.*(1) An SEA may reserve for State administrative activities authorized in sections 1004 and 1603 of the ESEA no more than the greater of—

(i) One percent from each of the amounts allocated to the State or Outlying Area under section 1002(a), (c), and (d) of the ESEA; or

(ii) $400,000 ($50,000 for the Outlying Areas).

(2)(i) An SEA reserving $400,000 under paragraph (b)(1)(ii) of this section must reserve proportionate amounts from each of the amounts allocated to the State or Outlying Area under section 1002(a), but is not required to reserve proportionate amounts from section 1002(a), (c), and (d) of the ESEA.

(ii) If an SEA reserves funds from the amounts allocated to the State or Outlying Area under section 1002(c) or (d) of the ESEA, the SEA may not reserve from those allocations more than the amount the SEA would have reserved if it had reserved proportionate amounts from section 1002(a), (c), and (d) of the ESEA.

(3) If the sum of the amounts allocated to all the States under section 1002(a), (c), and (d) of the ESEA is greater than $14,000,000,000, an SEA may not reserve more than one percent of the amount the State would receive if $14,000,000,000 had been allocated among the States under section 1002(a), (c), and (d) of the ESEA.

(4) An SEA may use the funds it has reserved under paragraph (b) of this section to perform general administrative activities necessary to carry out, at the State level, any of the programs authorized under Title I, parts A, C, and D of the ESEA.

(c) *Direct student services.* To carry out direct student services authorized under section 1003A of the ESEA, an SEA may, after meaningful consultation with geographically diverse LEAs, reserve not more than three percent of the amounts allocated to the State under subpart 2 of part A of title I of the ESEA for each fiscal year.

(d) *Reservations and hold-harmless.* In reserving funds under paragraphs (b) and (c) of this section, an SEA may—

(1) Proportionately reduce each LEA's total allocation received under section 1002(a) of the ESEA while ensuring that no LEA receives in total less than the hold-harmless percentage under § 200.73(a)(4), except that, when the amount remaining is insufficient to pay all LEAs the hold-harmless amount provided in § 200.73, the SEA shall ratably reduce each LEA's hold-harmless allocation to the amount available; or

(2) Proportionately reduce each LEA's total allocation received under subpart 2 of part A of title I of the ESEA even if an LEA's total allocation falls below its hold-harmless percentage under § 200.73(a)(4).

(Approved by the Office of Management and Budget under control number 1810–0622)

[67 FR 71736, Dec. 2, 2002, as amended at 84 FR 31677, July 2, 2019]

§§ 200.101–200.102 [Reserved]

§ 200.103 Definitions.

The following definitions apply to programs operated under this part:

(a) *Child with a disability* means child with a disability, as defined in section 602(3) of the IDEA.

(b) *Children* means—

(1) Persons up through age 21 who are entitled to a free public education through grade 12; and

(2) Preschool children below the age and grade level at which the agency provides free public education.

(c) *Fiscal year* means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30—or another 12-month period normally used by the SEA for recordkeeping.

[67 FR 71738, Dec. 2, 2002, as amended at 72 FR 17781, Apr. 9, 2007; 84 FR 31678, July 2, 2019]

INNOVATIVE ASSESSMENT DEMONSTRATION AUTHORITY

§ 200.104 Innovative assessment demonstration authority.

(a) *In general.* (1) The Secretary may provide a State educational agency

(SEA), or consortium of SEAs, with authority to establish and operate an innovative assessment system in its public schools (hereinafter referred to as ''innovative assessment demonstration authority'').

(2) An SEA or consortium of SEAs may implement the innovative assessment demonstration authority during its demonstration authority period and, if applicable, extension or waiver period described in § 200.108(a) and (c), after which the Secretary will either approve the system for statewide use consistent with § 200.107 or withdraw the authority consistent with § 200.108(b).

(b) *Definitions.* For purposes of §§ 200.104 through 200.108—

(1) *Affiliate member of a consortium* means an SEA that is formally associated with a consortium of SEAs that is implementing the innovative assessment demonstration authority, but is not yet a full member of the consortium because it is not proposing to use the consortium's innovative assessment system under the demonstration authority, instead of, or in addition to, its statewide assessment under section 1111(b)(2) of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (hereinafter ''the Act'') for purposes of accountability and reporting under sections 1111(c) and 1111(h) of the Act.

(2) *Demonstration authority period* refers to the period of time over which an SEA, or consortium of SEAs, is authorized to implement the innovative assessment demonstration authority, which may not exceed five years and does not include the extension or waiver period under § 200.108. An SEA must use its innovative assessment system in all participating schools instead of, or in addition to, the statewide assessment under section 1111(b)(2) of the Act for purposes of accountability and reporting under section 1111(c) and 1111(h) of the Act in each year of the demonstration authority period.

(3) *Innovative assessment system* means a system of assessments, which may include any combination of general assessments or alternate assessments aligned with alternate academic achievement standards, in reading/language arts, mathematics, or science administered in at least one required grade under § 200.5(a)(1) and section 1111(b)(2)(B)(v) of the Act that—

(i) Produces—

(A) An annual summative determination of each student's mastery of grade-level content standards aligned to the challenging State academic standards under section 1111(b)(1) of the Act; or

(B) In the case of a student with the most significant cognitive disabilities assessed with an alternate assessment aligned with alternate academic achievement standards under section 1111(b)(1)(E) of the Act and aligned with the State's academic content standards for the grade in which the student is enrolled, an annual summative determination relative to such alternate academic achievement standards for each such student; and

(ii) May, in any required grade or subject, include one or more of the following types of assessments:

(A) Cumulative year-end assessments.

(B) Competency-based assessments.

(C) Instructionally embedded assessments.

(D) Interim assessments.

(E) Performance-based assessments.

(F) Another innovative assessment design that meets the requirements under § 200.105(b).

(4) *Participating LEA* means a local educational agency (LEA) in the State with at least one school participating in the innovative assessment demonstration authority.

(5) *Participating school* means a public school in the State in which the innovative assessment system is administered under the innovative assessment demonstration authority instead of, or in addition to, the statewide assessment under section 1111(b)(2) of the Act and where the results of the school's students on the innovative assessment system are used by its State and LEA for purposes of accountability and reporting under section 1111(c) and 1111(h) of the Act.

(c) *Peer review of applications.* (1) An SEA or consortium of SEAs seeking innovative assessment demonstration authority under paragraph (a) of this section must submit an application to the

Secretary that demonstrates how the applicant meets all application requirements under § 200.105 and that addresses all selection criteria under § 200.106.

(2) The Secretary uses a peer review process, including a review of the SEA's application to determine that it meets or will meet each of the requirements under § 200.105 and sufficiently addresses each of the selection criteria under § 200.106, to inform the Secretary's decision of whether to award the innovative assessment demonstration authority to an SEA or consortium of SEAs. Peer review teams consist of experts and State and local practitioners who are knowledgeable about innovative assessment systems, including—

(i) Individuals with past experience developing innovative assessment and accountability systems that support all students and subgroups of students described in section 1111(c)(2) of the Act (e.g., psychometricians, measurement experts, researchers); and

(ii) Individuals with experience implementing such innovative assessment and accountability systems (e.g., State and local assessment directors, educators).

(3)(i) If points or weights are assigned to the selection criteria under § 200.106, the Secretary will inform applicants in the application package or a notice published in the FEDERAL REGISTER of—

(A) The total possible score for all of the selection criteria under § 200.106; and

(B) The assigned weight or the maximum possible score for each criterion or factor under that criterion.

(ii) If no points or weights are assigned to the selection criteria and selected factors under § 200.106, the Secretary will evaluate each criterion equally and, within each criterion, each factor equally.

(d) *Initial demonstration period.* (1) The initial demonstration period is the first three years in which the Secretary awards at least one SEA, or consortium of SEAs, innovative assessment demonstration authority, concluding with publication of the progress report described in section 1204(c) of the Act. During the initial demonstration period, the Secretary may provide innovative assessment demonstration authority to—

(i) No more than seven SEAs in total, including those SEAs participating in consortia; and

(ii) Consortia that include no more than four SEAs.

(2) An SEA that is an affiliate member of a consortium is not included in the application under paragraph (c) of this section or counted toward the limitation in consortia size under paragraph (d)(1)(ii) of this section.

(Authority: 20 U.S.C. 1221e–3, 3474, 6364, 6571)

[81 FR 88966, Dec. 8, 2016]

§ 200.105 Demonstration authority application requirements.

An SEA or consortium of SEAs seeking the innovative assessment demonstration authority must submit to the Secretary, at such time and in such manner as the Secretary may reasonably require, an application that includes the following:

(a) *Consultation.* Evidence that the SEA or consortium has developed an innovative assessment system in collaboration with—

(1) Experts in the planning, development, implementation, and evaluation of innovative assessment systems, which may include external partners; and

(2) Affected stakeholders in the State, or in each State in the consortium, including—

(i) Those representing the interests of children with disabilities, English learners, and other subgroups of students described in section 1111(c)(2) of the Act;

(ii) Teachers, principals, and other school leaders;

(iii) LEAs;

(iv) Representatives of Indian tribes located in the State;

(v) Students and parents, including parents of children described in paragraph (a)(2)(i) of this section; and

(vi) Civil rights organizations.

(b) *Innovative assessment system.* A demonstration that the innovative assessment system does or will—

(1) Meet the requirements of section 1111(b)(2)(B) of the Act, except that an innovative assessment—

(i) Need not be the same assessment administered to all public elementary and secondary school students in the State during the demonstration authority period described in § 200.104(b)(2) or extension period described in § 200.108 and prior to statewide use consistent with § 200.107, if the innovative assessment system will be administered initially to all students in participating schools within a participating LEA, provided that the statewide academic assessments under § 200.2(a)(1) and section 1111(b)(2) of the Act are administered to all students in any non-participating LEA or any non-participating school within a participating LEA; and

(ii) Need not be administered annually in each of grades 3–8 and at least once in grades 9–12 in the case of reading/language arts and mathematics assessments, and at least once in grades 3–5, 6–9, and 10–12 in the case of science assessments, so long as the statewide academic assessments under § 200.2(a)(1) and section 1111(b)(2) of the Act are administered in any required grade and subject under § 200.5(a)(1) in which the SEA does not choose to implement an innovative assessment;

(2)(i) Align with the challenging State academic content standards under section 1111(b)(1) of the Act, including the depth and breadth of such standards, for the grade in which a student is enrolled; and

(ii) May measure a student's academic proficiency and growth using items above or below the student's grade level so long as, for purposes of meeting the requirements for reporting and school accountability under sections 1111(c) and 1111(h) of the Act and paragraphs (b)(3) and (b)(7)–(9) of this section, the State measures each student's academic proficiency based on the challenging State academic standards for the grade in which the student is enrolled;

(3) Express student results or competencies consistent with the challenging State academic achievement standards under section 1111(b)(1) of the Act and identify which students are not making sufficient progress toward, and attaining, grade-level proficiency on such standards;

(4)(i) Generate results, including annual summative determinations as defined in paragraph (b)(7) of this section, that are valid, reliable, and comparable for all students and for each subgroup of students described in § 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, to the results generated by the State academic assessments described in § 200.2(a)(1) and section 1111(b)(2) of the Act for such students. Consistent with the SEA's or consortium's evaluation plan under § 200.106(e), the SEA must plan to annually determine comparability during each year of its demonstration authority period in one of the following ways:

(A) Administering full assessments from both the innovative and statewide assessment systems to all students enrolled in participating schools, such that at least once in any grade span (*i.e.*, 3–5, 6–8, or 9–12) and subject for which there is an innovative assessment, a statewide assessment in the same subject would also be administered to all such students. As part of this determination, the innovative assessment and statewide assessment need not be administered to an individual student in the same school year.

(B) Administering full assessments from both the innovative and statewide assessment systems to a demographically representative sample of all students and subgroups of students described in section 1111(c)(2) of the Act, from among those students enrolled in participating schools, such that at least once in any grade span (*i.e.*, 3–5, 6–8, or 9–12) and subject for which there is an innovative assessment, a statewide assessment in the same subject would also be administered in the same school year to all students included in the sample.

(C) Including, as a significant portion of the innovative assessment system in each required grade and subject in which both an innovative and statewide assessment are administered, items or performance tasks from the statewide assessment system that, at a minimum, have been previously pilot tested or field tested for use in the statewide assessment system.

(D) Including, as a significant portion of the statewide assessment system in

each required grade and subject in which both an innovative and statewide assessment are administered, items or performance tasks from the innovative assessment system that, at a minimum, have been previously pilot tested or field tested for use in the innovative assessment system.

(E) An alternative method for demonstrating comparability that an SEA can demonstrate will provide for an equally rigorous and statistically valid comparison between student performance on the innovative assessment and the statewide assessment, including for each subgroup of students described in § 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act; and

(ii) Generate results, including annual summative determinations as defined in paragraph (b)(7) of this section, that are valid, reliable, and comparable, for all students and for each subgroup of students described in § 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, among participating schools and LEAs in the innovative assessment demonstration authority. Consistent with the SEA's or consortium's evaluation plan under § 200.106(e), the SEA must plan to annually determine comparability during each year of its demonstration authority period;

(5)(i) Provide for the participation of all students, including children with disabilities and English learners;

(ii) Be accessible to all students by incorporating the principles of universal design for learning, to the extent practicable, consistent with § 200.2(b)(2)(ii); and

(iii) Provide appropriate accommodations consistent with § 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act;

(6) For purposes of the State accountability system consistent with section 1111(c)(4)(E) of the Act, annually measure in each participating school progress on the Academic Achievement indicator under section 1111(c)(4)(B) of the Act of at least 95 percent of all students, and 95 percent of students in each subgroup of students described in section 1111(c)(2) of the Act, who are required to take such assessments consistent with paragraph (b)(1)(ii) of this section;

(7) Generate an annual summative determination of achievement, using the annual data from the innovative assessment, for each student in a participating school in the demonstration authority that describes—

(i) The student's mastery of the challenging State academic standards under section 1111(b)(1) of the Act for the grade in which the student is enrolled; or

(ii) In the case of a student with the most significant cognitive disabilities assessed with an alternate assessment aligned with alternate academic achievement standards under section 1111(b)(1)(E) of the Act, the student's mastery of those standards;

(8) Provide disaggregated results by each subgroup of students described in § 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, including timely data for teachers, principals and other school leaders, students, and parents consistent with § 200.8 and section 1111(b)(2)(B)(x) and (xii) and section 1111(h) of the Act, and provide results to parents in a manner consistent with paragraph (b)(4)(i) of this section and § 200.2(e); and

(9) Provide an unbiased, rational, and consistent determination of progress toward the State's long-term goals for academic achievement under section 1111(c)(4)(A) of the Act for all students and each subgroup of students described in section 1111(c)(2) of the Act and a comparable measure of student performance on the Academic Achievement indicator under section 1111(c)(4)(B) of the Act for participating schools relative to non-participating schools so that the SEA may validly and reliably aggregate data from the system for purposes of meeting requirements for—

(i) Accountability under sections 1003 and 1111(c) and (d) of the Act, including how the SEA will identify participating and non-participating schools in a consistent manner for comprehensive and targeted support and improvement under section 1111(c)(4)(D) of the Act; and

(ii) Reporting on State and LEA report cards under section 1111(h) of the Act.

(c) *Selection criteria*. Information that addresses each of the selection criteria under § 200.106.

(d) *Assurances*. Assurances that the SEA, or each SEA in a consortium, will—

(1) Continue use of the statewide academic assessments in reading/language arts, mathematics, and science required under § 200.2(a)(1) and section 1111(b)(2) of the Act—

(i) In all non-participating schools; and

(ii) In all participating schools for which such assessments will be used in addition to innovative assessments for accountability purposes under section 1111(c) of the Act consistent with paragraph (b)(1)(ii) of this section or for evaluation purposes consistent with § 200.106(e) during the demonstration authority period;

(2) Ensure that all students and each subgroup of students described in section 1111(c)(2) of the Act in participating schools are held to the same challenging State academic standards under section 1111(b)(1) of the Act as all other students, except that students with the most significant cognitive disabilities may be assessed with alternate assessments aligned with alternate academic achievement standards consistent with § 200.6 and section 1111(b)(1)(E) and (b)(2)(D) of the Act, and receive the instructional support needed to meet such standards;

(3) Report the following annually to the Secretary, at such time and in such manner as the Secretary may reasonably require:

(i) An update on implementation of the innovative assessment demonstration authority, including—

(A) The SEA's progress against its timeline under § 200.106(c) and any outcomes or results from its evaluation and continuous improvement process under § 200.106(e); and

(B) If the innovative assessment system is not yet implemented statewide consistent with § 200.104(a)(2), a description of the SEA's progress in scaling up the system to additional LEAs or schools consistent with its strategies under § 200.106(a)(3)(i), including updated assurances from participating LEAs consistent with paragraph (e)(2) of this section.

(ii) The performance of students in participating schools at the State, LEA, and school level, for all students and disaggregated for each subgroup of students described in section 1111(c)(2) of the Act, on the innovative assessment, including academic achievement and participation data required to be reported consistent with section 1111(h) of the Act, except that such data may not reveal any personally identifiable information.

(iii) If the innovative assessment system is not yet implemented statewide, school demographic information, including enrollment and student achievement information, for the subgroups of students described in section 1111(c)(2) of the Act, among participating schools and LEAs and for any schools or LEAs that will participate for the first time in the following year, and a description of how the participation of any additional schools or LEAs in that year contributed to progress toward achieving high-quality and consistent implementation across demographically diverse LEAs in the State consistent with the SEA's benchmarks described in § 200.106(a)(3)(iii).

(iv) Feedback from teachers, principals and other school leaders, and other stakeholders consulted under paragraph (a)(2) of this section, including parents and students, from participating schools and LEAs about their satisfaction with the innovative assessment system;

(4) Ensure that each participating LEA informs parents of all students in participating schools about the innovative assessment, including the grades and subjects in which the innovative assessment will be administered, and, consistent with section 1112(e)(2)(B) of the Act, at the beginning of each school year during which an innovative assessment will be implemented. Such information must be—

(i) In an understandable and uniform format;

(ii) To the extent practicable, written in a language that parents can understand or, if it is not practicable to provide written translations to a parent

with limited English proficiency, be orally translated for such parent; and

(iii) Upon request by a parent who is an individual with a disability as defined by the Americans with Disabilities Act, provided in an alternative format accessible to that parent; and

(5) Coordinate with and provide information to, as applicable, the Institute of Education Sciences for purposes of the progress report described in section 1204(c) of the Act and ongoing dissemination of information under section 1204(m) of the Act.

(e) *Initial implementation in a subset of LEAs or schools.* If the innovative assessment system will initially be administered in a subset of LEAs or schools in a State—

(1) A description of each LEA, and each of its participating schools, that will initially participate, including demographic information and its most recent LEA report card under section 1111(h)(2) of the Act; and

(2) An assurance from each participating LEA, for each year that the LEA is participating, that the LEA will comply with all requirements of this section.

(f) *Application from a consortium of SEAs.* If an application for the innovative assessment demonstration authority is submitted by a consortium of SEAs—

(1) A description of the governance structure of the consortium, including—

(i) The roles and responsibilities of each member SEA, which may include a description of affiliate members, if applicable, and must include a description of financial responsibilities of member SEAs;

(ii) How the member SEAs will manage and, at their discretion, share intellectual property developed by the consortium as a group; and

(iii) How the member SEAs will consider requests from SEAs to join or leave the consortium and ensure that changes in membership do not affect the consortium's ability to implement the innovative assessment demonstration authority consistent with the requirements and selection criteria in this section and § 200.106.

(2) While the terms of the association with affiliate members are defined by each consortium, consistent with § 200.104(b)(1) and paragraph (f)(1)(i) of this section, for an affiliate member to become a full member of the consortium and to use the consortium's innovative assessment system under the demonstration authority, the consortium must submit a revised application to the Secretary for approval, consistent with the requirements of this section and § 200.106 and subject to the limitation under § 200.104(d).

(Authority: 20 U.S.C. 1221e–3, 3474, 6364, 6571; 29 U.S.C. 794; 42 U.S.C. 2000d–1; 42 U.S.C. 12101; 42 U.S.C. 12102)

]81 FR 88967, Dec. 8, 2016]

§ 200.106 Demonstration authority selection criteria.

The Secretary reviews an application by an SEA or consortium of SEAs seeking innovative assessment demonstration authority consistent with § 200.104(c) based on the following selection criteria:

(a) *Project narrative.* The quality of the SEA's or consortium's plan for implementing the innovative assessment demonstration authority. In determining the quality of the plan, the Secretary considers—

(1) The rationale for developing or selecting the particular innovative assessment system to be implemented under the demonstration authority, including—

(i) The distinct purpose of each assessment that is part of the innovative assessment system and how the system will advance the design and delivery of large-scale, statewide academic assessments in innovative ways; and

(ii) The extent to which the innovative assessment system as a whole will promote high-quality instruction, mastery of challenging State academic standards, and improved student outcomes, including for each subgroup of students described in section 1111(c)(2) of the Act;

(2) The plan the SEA or consortium, in consultation with any external partners, if applicable, has to—

(i) Develop and use standardized and calibrated tools, rubrics, methods, or other strategies for scoring innovative assessments throughout the demonstration authority period, consistent with relevant nationally recognized

professional and technical standards, to ensure inter-rater reliability and comparability of innovative assessment results consistent with § 200.105(b)(4)(ii), which may include evidence of inter-rater reliability; and

(ii) Train evaluators to use such strategies, if applicable; and

(3) If the system will initially be administered in a subset of schools or LEAs in a State—

(i) The strategies the SEA, including each SEA in a consortium, will use to scale the innovative assessment to all schools statewide, with a rationale for selecting those strategies;

(ii) The strength of the SEA's or consortium's criteria that will be used to determine LEAs and schools that will initially participate and when to approve additional LEAs and schools, if applicable, to participate during the requested demonstration authority period; and

(iii) The SEA's plan, including each SEA in a consortium, for how it will ensure that, during the demonstration authority period, the inclusion of additional LEAs and schools continues to reflect high-quality and consistent implementation across demographically diverse LEAs and schools, or contributes to progress toward achieving such implementation across demographically diverse LEAs and schools, including diversity based on enrollment of subgroups of students described in section 1111(c)(2) of the Act and student achievement. The plan must also include annual benchmarks toward achieving high-quality and consistent implementation across participating schools that are, as a group, demographically similar to the State as a whole during the demonstration authority period, using the demographics of initially participating schools as a baseline.

(b) *Prior experience, capacity, and stakeholder support.* (1) The extent and depth of prior experience that the SEA, including each SEA in a consortium, and its LEAs have in developing and implementing the components of the innovative assessment system. An SEA may also describe the prior experience of any external partners that will be participating in or supporting its demonstration authority in implementing those components. In evaluating the extent and depth of prior experience, the Secretary considers—

(i) The success and track record of efforts to implement innovative assessments or innovative assessment items aligned to the challenging State academic standards under section 1111(b)(1) of the Act in LEAs planning to participate; and

(ii) The SEA's or LEA's development or use of—

(A) Effective supports and appropriate accommodations consistent with § 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act for administering innovative assessments to all students, including English learners and children with disabilities, which must include professional development for school staff on providing such accommodations;

(B) Effective and high-quality supports for school staff to implement innovative assessments and innovative assessment items, including professional development; and

(C) Standardized and calibrated tools, rubrics, methods, or other strategies for scoring innovative assessments, with documented evidence of the validity, reliability, and comparability of annual summative determinations of achievement, consistent with § 200.105(b)(4) and (7).

(2) The extent and depth of SEA, including each SEA in a consortium, and LEA capacity to implement the innovative assessment system considering the availability of technological infrastructure; State and local laws; dedicated and sufficient staff, expertise, and resources; and other relevant factors. An SEA or consortium may also describe how it plans to enhance its capacity by collaborating with external partners that will be participating in or supporting its demonstration authority. In evaluating the extent and depth of capacity, the Secretary considers—

(i) The SEA's analysis of how capacity influenced the success of prior efforts to develop and implement innovative assessments or innovative assessment items; and

(ii) The strategies the SEA is using, or will use, to mitigate risks, including those identified in its analysis, and

support successful implementation of the innovative assessment.

(3) The extent and depth of State and local support for the application for demonstration authority in each SEA, including each SEA in a consortium, as demonstrated by signatures from the following:

(i) Superintendents (or equivalent) of LEAs, including participating LEAs in the first year of the demonstration authority period.

(ii) Presidents of local school boards (or equivalent, where applicable), including within participating LEAs in the first year of the demonstration authority.

(iii) Local teacher organizations (including labor organizations, where applicable), including within participating LEAs in the first year of the demonstration authority.

(iv) Other affected stakeholders, such as parent organizations, civil rights organizations, and business organizations.

(c) *Timeline and budget*. The quality of the SEA's or consortium's timeline and budget for implementing the innovative assessment demonstration authority. In determining the quality of the timeline and budget, the Secretary considers—

(1) The extent to which the timeline reasonably demonstrates that each SEA will implement the system statewide by the end of the requested demonstration authority period, including a description of—

(i) The activities to occur in each year of the requested demonstration authority period;

(ii) The parties responsible for each activity; and

(iii) If applicable, how a consortium's member SEAs will implement activities at different paces and how the consortium will implement interdependent activities, so long as each non-affiliate member SEA begins using the innovative assessment in the same school year consistent with § 200.104(b)(2); and

(2) The adequacy of the project budget for the duration of the requested demonstration authority period, including Federal, State, local, and non-public sources of funds to support and sustain, as applicable, the activities in the timeline under paragraph (c)(1) of this section, including—

(i) How the budget will be sufficient to meet the expected costs at each phase of the SEA's planned expansion of its innovative assessment system; and

(ii) The degree to which funding in the project budget is contingent upon future appropriations at the State or local level or additional commitments from non-public sources of funds.

(d) *Supports for educators, students, and parents*. The quality of the SEA or consortium's plan to provide supports that can be delivered consistently at scale to educators, students, and parents to enable successful implementation of the innovative assessment system and improve instruction and student outcomes. In determining the quality of supports, the Secretary considers—

(1) The extent to which the SEA or consortium has developed, provided, and will continue to provide training to LEA and school staff, including teachers, principals, and other school leaders, that will familiarize them with the innovative assessment system and develop teacher capacity to implement instruction that is informed by the innovative assessment system and its results;

(2) The strategies the SEA or consortium has developed and will use to familiarize students and parents with the innovative assessment system;

(3) The strategies the SEA will use to ensure that all students and each subgroup of students under section 1111(c)(2) of the Act in participating schools receive the support, including appropriate accommodations consistent with § 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act, needed to meet the challenging State academic standards under section 1111(b)(1) of the Act; and

(4) If the system includes assessment items that are locally developed or locally scored, the strategies and safeguards (e.g., test blueprints, item and task specifications, rubrics, scoring tools, documentation of quality control procedures, inter-rater reliability checks, audit plans) the SEA or consortium has developed, or plans to develop, to validly and reliably score

such items, including how the strategies engage and support teachers and other staff in designing, developing, implementing, and validly and reliably scoring high-quality assessments; how the safeguards are sufficient to ensure unbiased, objective scoring of assessment items; and how the SEA will use effective professional development to aid in these efforts.

(e) *Evaluation and continuous improvement.* The quality of the SEA's or consortium's plan to annually evaluate its implementation of innovative assessment demonstration authority. In determining the quality of the evaluation, the Secretary considers—

(1) The strength of the proposed evaluation of the innovative assessment system included in the application, including whether the evaluation will be conducted by an independent, experienced third party, and the likelihood that the evaluation will sufficiently determine the system's validity, reliability, and comparability to the statewide assessment system consistent with the requirements of § 200.105(b)(4) and (9); and

(2) The SEA's or consortium's plan for continuous improvement of the innovative assessment system, including its process for—

(i) Using data, feedback, evaluation results, and other information from participating LEAs and schools to make changes to improve the quality of the innovative assessment; and

(ii) Evaluating and monitoring implementation of the innovative assessment system in participating LEAs and schools annually.

(Authority: 20 U.S.C. 1221e–3, 3474, 6364, 6571)

[81 FR 88969, Dec. 8, 2016]

§ 200.107 Transition to statewide use.

(a)(1) After an SEA has scaled its innovative assessment system to operate statewide in all schools and LEAs in the State, the SEA must submit evidence for peer review under section 1111(a)(4) of the Act and § 200.2(d) to determine whether the system may be used for purposes of both academic assessments and the State accountability system under sections 1111(b)(2), (c), and (d) and 1003 of the Act.

(2) An SEA may only use the innovative assessment system for the purposes described in paragraph (a)(1) of this section if the Secretary determines that the system is of high quality consistent with paragraph (b) of this section.

(b) Through the peer review process of State assessments and accountability systems under section 1111(a)(4) of the Act and § 200.2(d), the Secretary determines that the innovative assessment system is of high quality if—

(1) An innovative assessment developed in any grade or subject under § 200.5(a)(1) and section 1111(b)(2)(B)(v) of the Act—

(i) Meets all of the requirements under section 1111(b)(2) of the Act and § 200.105(b) and (c);

(ii) Provides coherent and timely information about student achievement based on the challenging State academic standards under section 1111(b)(1) of the Act;

(iii) Includes objective measurements of academic achievement, knowledge, and skills; and

(iv) Is valid, reliable, and consistent with relevant, nationally recognized professional and technical standards;

(2) The SEA provides satisfactory evidence that it has examined the statistical relationship between student performance on the innovative assessment in each subject area and student performance on other measures of success, including the measures used for each relevant grade-span within the remaining indicators (*i.e.,* indicators besides Academic Achievement) in the statewide accountability system under section 1111(c)(4)(B)(ii)–(v) of the Act, and how the inclusion of the innovative assessment in its Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act affects the annual meaningful differentiation of schools under section 1111(c)(4)(C) of the Act;

(3) The SEA has solicited information, consistent with the requirements under § 200.105(d)(3)(iv), and taken into account feedback from teachers, principals, other school leaders, parents, and other stakeholders under § 200.105(a)(2) about their satisfaction with the innovative assessment system; and

(4) The SEA has demonstrated that the same innovative assessment system was used to measure—

(i) The achievement of all students and each subgroup of students described in section 1111(c)(2) of the Act, and that appropriate accommodations were provided consistent with § 200.6(b) and (f)(1)(i) under section 1111(b)(2)(B)(vii) of the Act; and

(ii) For purposes of the State accountability system consistent with section 1111(c)(4)(E) of the Act, progress on the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act of at least 95 percent of all students, and 95 percent of students in each subgroup of students described in section 1111(c)(2) of the Act.

(c) With respect to the evidence submitted to the Secretary to make the determination described in paragraph (b)(2) of this section, the baseline year for any evaluation is the first year that a participating LEA in the State administered the innovative assessment system under the demonstration authority.

(d) In the case of a consortium of SEAs, evidence may be submitted for the consortium as a whole so long as the evidence demonstrates how each member SEA meets each requirement of paragraph (b) of this section applicable to an SEA.

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(a), 6364, 6571)

[81 FR 88971, Dec. 8, 2016]

§ 200.108 Extension, waivers, and withdrawal of authority.

(a) *Extension.* (1) The Secretary may extend an SEA's demonstration authority period for no more than two years if the SEA submits to the Secretary—

(i) Evidence that its innovative assessment system continues to meet the requirements under § 200.105 and the SEA continues to implement the plan described in its application in response to the selection criteria in § 200.106 in all participating schools and LEAs;

(ii) A high-quality plan, including input from stakeholders under § 200.105(a)(2), for transitioning to statewide use of the innovative assessment system by the end of the extension period; and

(iii) A demonstration that the SEA and all LEAs that are not yet fully implementing the innovative assessment system have sufficient capacity to support use of the system statewide by the end of the extension period.

(2) In the case of a consortium of SEAs, the Secretary may extend the demonstration authority period for the consortium as a whole or for an individual member SEA.

(b) *Withdrawal of demonstration authority.* (1) The Secretary may withdraw the innovative assessment demonstration authority provided to an SEA, including an individual SEA member of a consortium, if at any time during the approved demonstration authority period or extension period, the Secretary requests, and the SEA does not present in a timely manner—

(i) A high-quality plan, including input from stakeholders under § 200.105(a)(2), to transition to full statewide use of the innovative assessment system by the end of its approved demonstration authority period or extension period, as applicable; or

(ii) Evidence that—

(A) The innovative assessment system meets all requirements under § 200.105, including a demonstration that the innovative assessment system has met the requirements under § 200.105(b);

(B) The SEA continues to implement the plan described in its application in response to the selection criteria in § 200.106;

(C) The innovative assessment system includes and is used to assess all students attending participating schools in the demonstration authority, consistent with the requirements under section 1111(b)(2) of the Act to provide for participation in State assessments, including among each subgroup of students described in section 1111(c)(2) of the Act, and for appropriate accommodations consistent with § 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act;

(D) The innovative assessment system provides an unbiased, rational, and consistent determination of progress toward the State's long-term goals and measurements of interim progress for academic achievement under section 1111(c)(4)(A) of the Act for all students

and subgroups of students described in section 1111(c)(2) of the Act and a comparable measure of student performance on the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act for participating schools relative to non-participating schools; or

(E) The innovative assessment system demonstrates comparability to the statewide assessments under section 1111(b)(2) of the Act in content coverage, difficulty, and quality.

(2)(i) In the case of a consortium of SEAs, the Secretary may withdraw innovative assessment demonstration authority for the consortium as a whole at any time during its demonstration authority period or extension period if the Secretary requests, and no member of the consortium provides, the information under paragraph (b)(1)(i) or (ii) of this section.

(ii) If innovative assessment demonstration authority for one or more SEAs in a consortium is withdrawn, the consortium may continue to implement the authority if it can demonstrate, in an amended application to the Secretary that, as a group, the remaining SEAs continue to meet all requirements and selection criteria in §§ 200.105 and 200.106.

(c) *Waiver authority*. (1) At the end of the extension period, an SEA that is not yet approved consistent with § 200.107 to implement its innovative assessment system statewide may request a waiver from the Secretary consistent with section 8401 of the Act to delay the withdrawal of authority under paragraph (b) of this section for the purpose of providing the SEA with the time necessary to receive approval to transition to use of the innovative assessment system statewide under § 200.107(b).

(2) The Secretary may grant an SEA a one-year waiver to continue the innovative assessment demonstration authority, if the SEA submits, in its request under paragraph (c)(1) of this section, evidence satisfactory to the Secretary that it—

(i) Has met all of the requirements under paragraph (b)(1) of this section and of §§ 200.105 and 200.106; and

(ii) Has a high-quality plan, including input from stakeholders under § 200.105(a)(2), for transition to statewide use of the innovative assessment system, including peer review consistent with § 200.107, in a reasonable period of time.

(3) In the case of a consortium of SEAs, the Secretary may grant a one-year waiver consistent with paragraph (c)(1) of this section for the consortium as a whole or for individual member SEAs, as necessary.

(d) *Return to the statewide assessment system*. If the Secretary withdraws innovative assessment demonstration authority consistent with paragraph (b) of this section, or if an SEA voluntarily terminates use of its innovative assessment system prior to the end of its demonstration authority, extension, or waiver period under paragraph (c) of this section, as applicable, the SEA must—

(1) Return to using, in all LEAs and schools in the State, a statewide assessment that meets the requirements of section 1111(b)(2) of the Act; and

(2) Provide timely notice to all participating LEAs and schools of the withdrawal of authority and the SEA's plan for transition back to use of a statewide assessment.

(Authority: 20 U.S.C. 1221e–3, 3474, 6364, 6571)

[81 FR 88971, Dec. 8, 2016]

§ 200.109 [Reserved]

PART 206—SPECIAL EDUCATIONAL PROGRAMS FOR STUDENTS WHOSE FAMILIES ARE ENGAGED IN MIGRANT AND OTHER SEASONAL FARMWORK—HIGH SCHOOL EQUIVALENCY PROGRAM AND COLLEGE ASSISTANCE MIGRANT PROGRAM

Subpart A—General

Sec.

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Subpart D—How Does the Secretary Make a Grant to an Applicant?

206.30 How does the Secretary evaluate an application?
206.31 How does the Secretary evaluate points for prior experience for HEP and CAMP service delivery?

Subpart E—What Conditions Must Be Met by a Grantee?

206.40 What restrictions are there on expenditures?

AUTHORITY: 20 U.S.C. 1070d–2, unless otherwise noted.

SOURCE: 46 FR 35075, July 6, 1981, unless otherwise noted.

Subpart A—General

§ 206.1 What are the special educational programs for students whose families are engaged in migrant and other seasonal farmwork?

(a) *High School Equivalency Program.* The High School Equivalency Program (HEP) is designed to assist persons who are eligible under § 206.3—to obtain the equivalent of a secondary school diploma and subsequently to gain employment or be placed in an institution of higher education (IHE) or other postsecondary education or training.

(b) *College Assistance Migrant Program.* The College Assistance Migrant Program (CAMP) is designed to assist persons who are eligible under § 206.3—who are enrolled or are admitted for enrollment on a full-time basis in the first academic year at an IHE.

(Authority: 20 U.S.C. 1070d–2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992]

§ 206.2 Who is eligible to participate as a grantee?

(a) *Eligibility.* An IHE or a private nonprofit organization may apply for a grant to operate a HEP or CAMP project.

(b) *Cooperative planning.* If a private nonprofit organization other than an IHE applies for a HEP or a CAMP grant, that agency must plan the project in cooperation with an IHE and must propose to operate the project, or in the case of a HEP grant, some aspects of the project, with the facilities of that IHE.

(Authority: 20 U.S.C. 1070d–2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987]

§ 206.3 Who is eligible to participate in a project?

(a) *General.* To be eligible to participate in a HEP or a CAMP project—

(1) A person, or his or her immediate family member, must have spent a minimum of 75 days during the past 24 months as a migrant or seasonal farmworker; or

(2) The person must have participated (with respect to HEP within the last 24 months), or be eligible to participate, in programs under 34 CFR part 200, subpart C (Title I—Migrant Education Program) or 20 CFR part 633 (Employment and Training Administration, Department of Labor—Migrant and Seasonal Farmworker Programs).

(b) *Special HEP qualifications.* To be eligible to participate in a HEP project, a person also must—

(1) Not have earned a secondary school diploma or its equivalent;

(2) Not be currently enrolled in an elementary or secondary school;

(3) Be 16 years of age or over, or beyond the age of compulsory school attendance in the State in which he or she resides; and

(4) Be determined by the grantee to need the academic and supporting services and financial assistance provided

by the project in order to attain the equivalent of a secondary school diploma and to gain employment or be placed in an IHE or other postsecondary education or training.

(c) *Special CAMP qualifications*. To be eligible to participate in a CAMP project, a person also must—

(1) Be enrolled or be admitted for enrollment as a full-time student at the participating IHE;

(2) Not be beyond the first academic year of a program of study at the IHE, as determined under the standards of the IHE; and

(3) Be determined by the grantee to need the academic and supporting services and financial assistance provided by the project in order to complete an academic program of study at the IHE.

(Authority: 20 U.S.C. 1070d–2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992; 75 FR 65769, Oct. 26, 2010]

§ 206.4 What regulations apply to these programs?

The following regulations apply to HEP and CAMP:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) [Reserved]

(2) 34 CFR part 75 (Direct Grant Programs).

(3) 34 CFR part 77 (Definitions That Apply to Department Regulations).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR part 82 (New Restrictions on Lobbying).

(6) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(7) [Reserved]

(8) 34 CFR part 86 (Drug-Free Schools and Campuses).

(9) 34 CFR part 97 (Protection of Human Subjects).

(10) 34 CFR part 98 (Student Rights in Research, Experimental Programs, and Testing).

(11) 34 CFR part 99 (Family Educational Rights and Privacy).

(b) The regulations in this part 206.

(c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted in 2 CFR part 3474, and the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted in 2 CFR part 3485.

(Authority: 20 U.S.C. 1070d–2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992; 58 FR 11539, Feb. 26, 1993; 75 FR 65770, Oct. 26, 2010; 79 FR 76095, Dec. 19, 2014]

§ 206.5 What definitions apply to these programs?

(a) *Definitions in EDGAR*. The following terms used in this part are defined in 34 CFR 77.1(c) (EDGAR, Definitions):

Applicant
Application
Award
Elementary school
EDGAR
Facilities
Grant
Grantee
Minor remodeling
Nonprofit
Private
Project
Public
Secondary school
Secretary
State

(b) *Definitions in the grants administration regulations*. The following terms used in this part are defined in 2 CFR part 200, as adopted in 2 CFR part 3474:

Budget
Equipment
Supplies

(c) *Program definitions*. The following additional definitions apply specifically to HEP and CAMP:

(1) *Act* means the Higher Education Act of 1965, as amended.

(2) *Agricultural activity* means:

(i) Any activity directly related to the production of crops, dairy products, poultry, or livestock;

(ii) Any activity directly related to the cultivation or harvesting of trees; or

(iii) Any activity directly related to fish farms.

(3) *Farmwork* means any agricultural activity, performed for either wages or

personal subsistence, on a farm, ranch, or similar establishment.

(4) *Full-time*, with respect to an individual, means a student who is carrying a full-time academic workload, as defined in 34 CFR part 690 (regulations for the Pell Grant Program).

(5) *Immediate family member* means one or more of the following:

(i) A spouse.

(ii) A parent, step-parent, adoptive parent, foster parent, or anyone with guardianship.

(iii) Any person who—

(A) Claims the individual as a dependent on a Federal income tax return for either of the previous two years, or

(B) Resides in the same household as the individual, supports that individual financially, and is a relative of that individual.

(6) *Institution of higher education* means an educational institution that:

(i) Is in a State;

(ii) Is authorized by that State to provide a program of education beyond secondary school;

(iii) Is a public or nonprofit institution;

(iv) Admits as a regular student only a person who:

(A) Has a secondary school diploma;

(B) Has the recognized equivalent of a secondary school diploma; or

(C) Is beyond the age of compulsory school attendance in that State and has the ability to benefit from the training offered by the institution;

(v) Provides:

(A) An educational program for which it awards a bachelor's degree; or

(B) At least a two-year program that is acceptable for full credit toward a bachelor's degree;

(vi)(A) Is accredited by a nationally recognized accrediting agency or association;

(B) Has satisfactorily assured the Secretary that it will meet the accreditation standards of a nationally recognized accrediting agency or association within a reasonable time considering the resources available to the institution, the period of time, if any, it has operated, and its effort to meet accreditation standards; or

(C) Has its credits accepted on transfer by at least three accredited institutions on the same basis as those institutions accept transfer credits from fully accredited institutions.

(7) *Migrant farmworker* means a seasonal farmworker—as defined in paragraph (c)(8) of this section—whose employment required travel that precluded the farmworker from returning to his or her domicile (permanent place of residence) within the same day.

(8) *Seasonal farmworker* means a person whose primary employment was in farmwork on a temporary or seasonal basis (that is, not a constant year-round activity) for a period of at least 75 days within the past 24 months.

(d) *Other definitions.* For purposes of determining program eligibility under § 206.3(a)(2), the definitions in 34 CFR 200.81 (Title I—Migrant Education Program) and 20 CFR 633.104 (Employment and Training Administration, Department of Labor—Migrant and Seasonal Farmworker Programs) apply.

(Authority: 20 U.S.C. 1070d–2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992; 75 FR 65770, Oct. 26, 2010; 79 FR 76095, Dec. 19, 2014]

Subpart B—What Kinds of Activities Does the Secretary Assist Under These Programs?

§ 206.10 What types of services may be provided?

(a) *General.* A grantee may use funds under HEP or CAMP to support approved projects designed to provide academic and supporting services and financial assistance to eligible participants as described in § 206.3.

(b) *Types of services*—(1) *HEP projects.* A HEP project may provide the following types of services to assist participants in obtaining the equivalent of a secondary school diploma, and as needed, to assure the success of the participants in meeting the project's objectives and in succeeding at the secondary school level and beyond:

(i) Recruitment services to reach persons who are eligible under § 206.3 (a) and (b).

(ii) Educational services that provide instruction designed to help students pass an examination and obtain a certificate that meets the guidelines for

high school equivalency established by the State in which the project is located.

(iii) Supportive services that include the following:

(A) Personal, vocational, and academic counseling;

(B) Placement services designed to place students in a university, college, or junior college program (including preparation for college entrance examinations), or in military services or career positions; and

(C) Health services.

(iv) Information concerning and assistance in obtaining available student financial aid.

(v) Stipends for high school equivalency program participants.

(vi) Housing for those enrolled in residential programs.

(vii) Exposure to cultural events, academic programs, and other educational and cultural activities usually not available to migrant youth.

(viii) Other essential supportive services, (such as transportation and child care) as needed, to ensure the success of eligible students.

(ix) Other activities to improve persistence and retention in postsecondary education.

(2) *CAMP projects.* A CAMP project may provide the following types of services to assist the participants in meeting the project's objectives and in succeeding in an academic program of study at the IHE:

(i) Outreach and recruitment services to reach persons who are eligible under § 206.3 (a) and (c).

(ii) Supportive and instructional services to improve placement, persistence, and retention in postsecondary education, including:

(A) Personal, academic, career economic education, or personal finance counseling as an ongoing part of the program;

(B) Tutoring and academic-skillbuilding instruction and assistance;

(C) Assistance with special admissions;

(D) Health services; and

(E) Other services as necessary to assist students in completing program requirements.

(iii) Assistance in obtaining student financial aid that includes, but is not limited to, the following:

(A) Stipends.

(B) Scholarships.

(C) Student travel.

(D) Career-oriented work-study.

(E) Books and supplies.

(F) Tuition and fees.

(G) Room and board.

(H) Other assistance necessary to assist students in completing their first year of college or university.

(iv) Housing support for students living in institutional facilities and commuting students.

(v) Exposure to cultural events, academic programs, and other activities not usually available to migrant youth.

(vi) Internships.

(vii) Other essential supportive services (such as transportation and child care) as necessary to ensure the success of eligible students.

(c) The health services, and other financial support services provided to participating students must:

(1) Be necessary to ensure their participation in the HEP or CAMP; and

(2) Not detract, because of the amount, from the basic educational services provided under those programs.

(Authority: 20 U.S.C. 1070d–2(b) and (c))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992; 75 FR 65770, Oct. 26, 2010]

§ 206.11 What types of CAMP services must be provided?

(a) In addition to the services provided in § 206.10(b)(2), CAMP projects must provide follow-up services for project participants after they have completed their first year of college.

(b) Follow-up services may include—

(1) Monitoring and reporting the academic progress of students who participated in the project during their first year of college and their subsequent years in college;

(2) Referring these students to on- or off-campus providers of counseling services, academic assistance, or financial aid, and coordinating those services, assistance, and aid with other non-program services, assistance, and aid, including services, assistance, and

aid provided by community-based organizations, which may include mentoring and guidance; and

(3) For students attending two-year institutions of higher education, encouraging the students to transfer to four-year institutions of higher education, where appropriate, and monitoring the rate of transfer of those students.

(c) Grantees may not use more than 10 percent of funds awarded to them for follow-up services.

(Authority: 20 U.S.C. 1070d-2(c))

[57 FR 60407, Dec. 18, 1992, as amended at 75 FR 65770, Oct. 26, 2010]

Subpart C—How Does One Apply for a Grant?

§ 206.20 What must be included in an application?

In applying for a grant, an applicant shall:

(a) Follow the procedures and meet the requirements stated in subpart C of 34 CFR part 75 (EDGAR-Direct Grant Programs);

(b) Submit a grant application that:

(1) Covers a period of five years unless extraordinary circumstances warrant a shorter period; and

(2) Includes an annual budget of not less than $180,000;

(c) Include a management plan that contains:

(1) Assurances that the staff has a demonstrated knowledge of and will be sensitive to the unique characteristics and needs of the migrant and seasonal farmworker population; and

(2) Provisions for:

(i) Staff inservice training;

(ii) Training and technical assistance;

(iii) Staff travel;

(iv) Student travel;

(v) Interagency coordination; and

(vi) Project evaluation; and

(d) Provide the following assurances:

(1) The grantee will develop and implement a plan for identifying, informing, and recruiting eligible participants who are most in need of the academic and supporting services and financial assistance provided by the project.

(2) The grantee will develop and implement a plan for identifying and using the resources of the participating IHE and the community to supplement and enhance the services provided by the project.

(Authority: 20 U.S.C. 1070d–2(a) and (d)-(f))

(Approved by the Office of Management and Budget under control number 1810–0055)

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992; 75 FR 65770, Oct. 26, 2010]

Subpart D—How Does the Secretary Make a Grant to an Applicant?

§ 206.30 How does the Secretary evaluate an application?

The Secretary evaluates an application under the procedures in 34 CFR part 75.

(Authority: 20 U.S.C. 1070d–2(a) and (e))

[62 FR 10403, Mar. 6, 1997]

§ 206.31 How does the Secretary evaluate points for prior experience for HEP and CAMP service delivery?

(a) In the case of an applicant for a HEP award, the Secretary considers the applicant's experience in implementing an expiring HEP project with respect to—

(1) Whether the applicant served the number of participants described in its approved application;

(2) The extent to which the applicant met or exceeded its funded objectives with regard to project participants, including the targeted number and percentage of—

(i) Participants who received a general educational development (GED) credential; and

(ii) GED credential recipients who were reported as entering postsecondary education programs, career positions, or the military; and

(3) The extent to which the applicant met the administrative requirements, including recordkeeping, reporting, and financial accountability under the terms of the previously funded award.

(b) In the case of an applicant for a CAMP award, the Secretary considers

the applicant's experience in implementing an expiring CAMP project with respect to—

(1) Whether the applicant served the number of participants described in its approved application;

(2) The extent to which the applicant met or exceeded its funded objectives with regard to project participants, including the targeted number and percentage of participants who—

(i) Successfully completed the first year of college; and

(ii) Continued to be enrolled in postsecondary education after completing their first year of college; and

(3) The extent to which the applicant met the administrative requirements, including recordkeeping, reporting, and financial accountability under the terms of the previously funded award.

(Authority: 20 U.S.C. 1070d–2(e))

[75 FR 65770, Oct. 26, 2010]

Subpart E—What Conditions Must Be Met by a Grantee?

§ 206.40 What restrictions are there on expenditures?

Funds provided under HEP or CAMP may not be used for construction activities, other than minor construction-related activities such as the repair or minor remodeling or alteration of facilities.

(Authority: Sec. 418A(a); 20 U.S.C. 1070d–2)

PART 222—IMPACT AID PROGRAMS

Subpart A—General

Sec.

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AUTHORITY: 20 U.S.C. 7701–7714; Pub. L. 111–256, 124 Stat. 2643; unless otherwise noted.

SOURCE: 60 FR 50778, Sept. 29, 1995, unless otherwise noted.

Subpart A—General

§ 222.1 What is the scope of this part?

The regulations in this part govern the provision of financial assistance under title VIII of the Elementary and Secondary Education Act of 1965 (ESEA) to local educational agencies (LEAs) in areas affected by Federal activities.

(Authority: 20 U.S.C. 7701–7714)

§ 222.2 What definitions apply to this part?

(a)(1) The following terms defined in section 8013 of the Act apply to this part:

Armed forces
Average per-pupil expenditure
Construction
Current expenditures
Indian lands
Local contribution percentage
Low-rent housing
Modernization
School facilities

(2) The following term defined in § 222.30 applies to this part:

Free public education

(b) The following terms defined in section 9101 of the ESEA (General Provisions) also apply to this part:

Average daily attendance (ADA)
Child
County
Department
Outlying area
Parent
Secretary
State
State educational agency (SEA)

(c) In addition, the following definitions apply to this part:

Act means title VIII of the Elementary and Secondary Education Act of 1965 (ESEA), as amended.

Applicant means any LEA that files an application for financial assistance under section 8002 or section 8003 of the Act and the regulations in this part implementing those provisions. Except as provided in section 8005(d)(4) of the Act, an SEA may be an applicant for assistance under section 8003 only if the SEA directly operates and maintains facilities for providing free public education for the children it claims in its application.

(Authority: 20 U.S.C. 7705 and 7713(9))

Application means a complete and signed application in the form approved by the Secretary, filed by an applicant.

(Authority: 20 U.S.C. 7705)

Federally connected children means children described in section 8003 or section 8010(c)(2) of the Act.

(Authority: 20 U.S.C. 7703(a)(1) and 7710(c); 37 U.S.C. 101)

Federal property. (1) The term means—

(i) Federal property described in section 8013; and

(ii) Ships that are owned by the United States and whose home ports are located upon Federal property described in this definition.

(2) Notwithstanding paragraph (1) of this definition, for the purpose of section 8002 the term does not include—

(i) Any real property that the United States does not own in fee simple, except for Indian lands described in section 8013(7), and transferred property described in section 8002(d); and

(ii) Real property described in section 8002(c) (real property with respect to which payments are being made under section 13 of the Tennessee Valley Authority Act of 1933).

(Authority: 20 U.S.C. 7702(c) and (d), and 7713(5) and (7))

Fiscally dependent LEA means an LEA that does not have the final authority to determine the amount of revenue to be raised from local sources for current expenditure purposes.

(Authority: 20 U.S.C. 7702(b)(2) and 7703(f))

Fiscally independent LEA means an LEA that has the final authority to determine the amount of revenue to be raised from local sources for current expenditure purposes within the limits established by State law.

(Authority: 20 U.S.C. 7702(b)(2) and 7703(f))

Local educational agency (LEA) is defined in section 8013(9). Except for an SEA qualifying under section 8005(d)(4), the term includes an SEA only so long as—

(1) The SEA directly operates and maintains the facilities for providing free public education for the children it claims in its application;

(2) The children claimed by the SEA actually are attending those State-operated facilities; and

(3) The SEA does not, through a tuition arrangement, contract, or by any other means, pay another entity to operate and maintain facilities for those children.

(Authority: 20 U.S.C. 7705(d)(4) and 7713(9))

Local real property tax rate for current expenditure purposes. (1) For a fiscally independent LEA, the term means the entire tax levied on real property within the LEA, if all but a *de minimis* amount of the total proceeds from the tax levy are available to that LEA for current expenditures (as defined in section 8013).

(2) For a fiscally dependent LEA, the term means the following:

(i) The entire tax levied by the general government on real property if all but a *de minimis* amount of the total proceeds from that tax levy are available to the LEA for current expenditures (as defined in section 8013);

(ii) That portion of a local real property tax rate designated by the general government for current expenditure purposes (as defined in section 8013); or

(iii) If no real property tax levied by the general government meets the criteria in paragraphs (2)(i) or (ii) of this definition, an imputed tax rate that the Secretary determines by—

(A) Dividing the total local real property tax revenue available for current expenditures of the general government by the total revenue from all local sources available for current expenditures of the general government;

(B) Multiplying the figure obtained in paragraph (2)(iii)(A) of this definition by the revenue received by the LEA for current expenditures (as defined in section 8013) from the general government; and

(C) Dividing the figure obtained in paragraph (2)(iii)(B) of this definition by the total current actual assessed value of all real property in the district.

(3) The term does not include any portion of a tax or revenue that is restricted to or dedicated for any specific purpose other than current expenditures (as defined in section 8013).

(Authority: 20 U.S.C. 7702(b)(2) and 7703(f))

Membership means the following:

(1)(i) The definition given to the term by State law; or

(ii) If State law does not define the term, the number of children listed on an LEA's current enrollment records on its survey date(s).

(2) The term includes children for whom the applicant is responsible for providing a free public education, but who are attending schools other than those operated by the applicant under a tuition arrangement described in paragraph (4) of the definition of ''free public education'' in § 222.30.

(3) The term does not include children who—

(i) Have never attended classes in schools of the LEA or of another educational entity with which the LEA has a tuition arrangement;

(ii) Have permanently left the LEA;

(iii) Otherwise have become ineligible to attend classes there; or

(iv) Attend the schools of the applicant LEA under a tuition arrangement with another LEA that is responsible for providing them a free public education; or

(v) Reside in a State other than the State in which the LEA is located, unless the student is covered by the provisions of—

(A) Section 7010(c) of the Act; or

(B) A formal State tuition or enrollment agreement.

(Authority: 20 U.S.C. 7703 and 8801(1))

Parent employed on Federal property. (1) The term means:

(i) An employee of the Federal government who reports to work on, or whose place of work is located on, Federal property, including a Federal employee who reports to an alternative duty station on the survey date, but whose regular duty station is on Federal property.

Example 1: Lauren, a Virginia resident, is an employee of the U.S. Department of Defense. Her physical duty station is in the Pentagon in Arlington, Virginia, and her children attend LEA A in Virginia. Lauren meets the definition of a ''parent employed on Federal property'' as she is both a Federal employee and her duty station is on eligible Federal property in the same State as LEA A. Thus LEA A may claim Lauren's children on its Impact Aid application.

Example 2: Alex, a Virginia resident, is an employee of the U.S. Department of Defense. His physical duty station is in the Pentagon in Arlington, Virginia, and his children attend LEA B in Virginia. On the survey date, Alex was teleworking from his home. For purposes of LEA B's Impact Aid application, Alex meets the definition of a ''parent employed on Federal property,'' as he is both a Federal employee and his duty station is on eligible Federal property in the same State as LEA B, even though Alex was at an alternative duty station on the survey date because he teleworked. LEA B may claim Alex's children on its Impact Aid application.

Example 3: Elroy is an employee of the U.S. Department of Education. His normal duty station is on eligible Federal property located in Washington, DC. Elroy's place of

residence is in Virginia, and his children attend LEA C in Virginia. Elroy, a Federal employee, does not meet the definition of a ''parent employed on Federal property.'' The statute requires that the Federal property on which a parent is employed be in the same State as the LEA (ESEA section 7003(a)(1)(G)), and because the Federal property where Elroy works is not in the same State as LEA C, LEA C may not claim Elroy's children.

(ii) A person not employed by the Federal government but who spends more than 50 percent of his or her working time on Federal property (whether as an employee or self-employed) when engaged in farming, grazing, lumbering, mining, or other operations that are authorized by the Federal government, through a lease or other arrangement, to be carried out entirely or partly on Federal property.

Example 1: Xavier, a dealer at a casino on eligible Indian lands in Utah, reports to work at the casino as his normal duty station and works his eight hour shift at the casino. Xavier's child attends school in LEA D in Utah. For purposes of Impact Aid, Xavier meets the definition of a ''parent employed on Federal property'' because, although Xavier is not a Federal employee, his duty station is the casino, which is located on an eligible Federal property within the same State as LEA D. LEA D may claim Xavier's children on its Impact Aid application.

Example 2: Becca works at a privately owned convenience store on leased property on a military installation in Maine. Becca's children attend school at a LEA E, a Maine public school district. On a daily basis, including on the survey date, Becca reports to work at the convenience store where she works her entire shift. Becca meets the definition of a ''parent employed on Federal property'' for LEA E because, although Becca is not a Federal employee, her duty station is the convenience store, which is located on an eligible Federal property within the same State as LEA E. LEA E may claim Becca's children on its Impact Aid application.

Example 3: Zoe leases Federal property in Massachusetts to grow lima beans. Zoe's daughter attends LEA F, a Massachusetts public school. On the survey date, Zoe has a valid lease agreement to carry out farming operations that are authorized by the Federal government. Zoe also has a crop of corn on an adjacent field that is not on Federal property. On the survey date, Zoe spent 75 percent of her day harvesting lima beans and 25 percent of her day harvesting corn. Because Zoe spent more than 50 percent of her day working on farming operations that are authorized by the Federal government on leased Federal property in the same State her daughter attends school, Zoe meets the definition of a ''parent employed on Federal property,'' and LEA F can claim her daughter on its Impact Aid application.

Example 4: Frank is a private contractor with an office on a military installation and an office on private property, both of which are located in Maryland. His time is split between the two offices. Frank's children attend public school in Maryland in LEA G. On the survey date, Frank reported to his office on the military installation. He spent 4 of his 8 hours at the office on the military installation and 4 hours at the privately owned office facility. Frank's children attend LEA G, a Maryland public school. Frank meets the definition of a ''parent employed on Federal property'' because he reported to work on the military installation and he spent at least 50 percent of his time on Federal property conducting operations that are authorized by the Federal government on eligible Federal property in the same State as LEA G. LEA G may claim Frank's children on its Impact Aid application.

(2) Except as provided in paragraph (1)(ii) of this definition, the term does not include a person who is not employed by the Federal government and reports to work at a location not on Federal property, even though the individual provides services to operations or activities authorized to be carried out on Federal property.

Example 1: Maria delivers bread to the convenience store and the commissary, which are both eligible Federal properties located on a military installation in Florida. Maria's son attends school in LEA H, a Florida public school district. On a daily basis, including the survey date, Maria reports to a privately owned warehouse on private property to get her inventory for delivery. Maria is not a Federal employee and her duty station is the warehouse located on private property. She therefore does not meet the definition of a ''parent employed on Federal property'' for purposes of Impact Aid. LEA H may not claim Maria's children on its Impact Aid application.

Example 2: Lorenzo is a construction worker who is working on an eligible Federal property in Arizona, but each day he reports to his construction office located on private property to get his daily assignments and meet with the crew before going to the jobsite. Lorenzo's twins attend LEA I, in Arizona. Lorenzo is not a Federal employee and his duty station is the construction office and not the Federal property. Lorenzo therefore does not meet the definition of a ''parent employed on Federal property.'' LEA I

may not claim Lorenzo's children on its Impact Aid application.

Example 3: Aubrey, a defense contractor, routinely reports to work at her duty station on private property in California. Aubrey's children attend LEA J in California. On the survey date, Aubrey attends an all-day meeting on a military installation. Aubrey is not a Federal employee and she does not normally report to work on eligible Federal property; as a result, Aubrey is not an eligible parent employed on Federal property, and LEA J cannot claim her children on its Impact Aid application.

(Authority: 20 U.S.C. 7703)

Real property. (1) The term means—

(i) Land; and

(ii) Improvements (such as buildings and appurtenances to those buildings, railroad lines, utility lines, pipelines, and other permanent fixtures), except as provided in paragraph (2).

(2) The term does not include—

(i) Improvements that are classified as personal property under State law; or

(ii) Equipment and movable machinery, such as motor vehicles, movable house trailers, farm machinery, rolling railroad stock, and floating dry docks, unless that equipment or movable machinery is classified as real property or subject to local real property taxation under State law.

(Authority: 20 U.S.C. 7702 and 7713(5))

Revenues derived from local sources. (1) The term means—

(i) Tax funds derived from real estate; and

(ii) Other taxes or receipts that are received from the county, and any other local tax or miscellaneous receipts.

(2)(i) For the purpose of paragraph (1)(i) of this definition, the term *tax funds derived from real estate* means—

(A) Locally received funds that are derived from local taxation of real property;

(B) Tax funds that are received on account of Wherry-Spence housing projects (12 U.S.C. 1702 *et seq.*) located on private property; and

(C) All local real property tax funds that are received from either the county or the State, serving as a collecting agency, and that are returned to the LEA for expenditure by that agency.

(ii) The term does not include—

(A) Any payments under this Act or the Johnson-O'Malley Act (25 U.S.C. 452);

(B) Tax payments that are received on account of Wherry-Spence housing projects located on federally owned property; or

(C) Local real property tax funds that are received by the State and distributed to LEAs on a per-pupil or formula basis.

(Authority: 20 U.S.C. 7713(11))

State aid means any contribution, no repayment of which is expected, made by a State to or on behalf of an LEA within the State for the support of free public education.

(Authority: 20 U.S.C. 7703)

Uniformed services means the United States Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration, and Public Health Service.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703(a)(1); 37 U.S.C. 101)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33161, June 11, 2015; 81 FR 64740, Sept. 20, 2016]

§ 222.3 How does a local educational agency apply for assistance under section 8002 or 8003 of the Act?

An LEA must meet the following application requirements to be considered for a payment under section 8002 or 8003:

(a) Except as provided in paragraphs (b) and (d) of this section, on or before January 31 of the fiscal year preceding the fiscal year for which the LEA seeks assistance under section 8002 or section 8003, the LEA must—

(1) File with the Secretary a complete and signed application for payment under section 8002 or section 8003; and

(2) Certify to the Secretary that it will file, and file, a copy of the application referred to in paragraph (a) of this section with its SEA.

(b)(1) If any of the following events that give rise to eligibility for payment occur after the filing deadline in paragraph (a)(1) of this section, an LEA

must file a complete and signed application within the time limits required by paragraph (b)(2) of this section:

(i) The United States Government initiates or reactivates a Federal activity, or acquires real property.

(ii) The United States Congress enacts new legislation.

(iii) A reorganization of school districts takes place.

(iv) Property, previously determined by the Secretary not to be Federal property, is determined in writing by the Secretary to be Federal property.

(2) Except as provided in paragraph (d) of this section, within 60 days after the applicable event occurs but not later than June 30 of the fiscal year preceding the fiscal year for which the LEA seeks assistance under section 8002 or section 8003, the LEA must—

(i) File an application with the Secretary as permitted by paragraph (b)(1) of this section; and

(ii) File a copy of that application with its SEA.

(c)(1) If the SEA wishes to notify the Secretary of any inconsistencies or other concerns with an LEA's application, the SEA must do so—

(i) For an application subject to the filing deadlines in paragraph (a)(1) of this section, on or before February 15 of the fiscal year preceding the fiscal year for which the LEA seeks assistance under section 8002 or section 8003; and

(ii) On or before fifteen days following the date by which an application subject to the filing deadlines in paragraph (b) of this section must be filed.

(2) The Secretary does not process for payment a timely filed application until any concerns timely raised by the SEA are resolved. If the Secretary does not receive comments or notification from the SEA by the applicable deadline set forth in paragraph (c)(1) of this section, the Secretary assumes that the data and statements in the application are, to the best of the SEA's knowledge, true, complete, and correct.

(d) If a filing date in this section falls on a Saturday, Sunday, or Federal holiday, the deadline for filing is the next succeeding business day.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33162, June 11, 2015; 81 FR 64741, Sept. 20, 2016]

§ 222.4 How does the Secretary determine when an application is timely filed?

To be timely filed under § 222.3, an application must be received by the Secretary on or before the applicable filing date.

[62 FR 35412, July 1, 1997, as amended at 80 FR 33162, June 11, 2015]

§ 222.5 When may a local educational agency amend its application?

(a) An LEA may amend its application following any of the events described in § 222.3(b)(1) by submitting a written request to the Secretary and a copy to its SEA no later than the earlier of the following events:

(1) The 60th day following the applicable event.

(2) By June 30 of the Federal fiscal year preceding the fiscal year for which the LEA seeks assistance.

(b) The LEA also may amend its application based on actual data regarding eligible Federal properties or federally connected children if—

(1) Those data were not available at the time the LEA filed its application (*e.g.*, due to a second membership count of students) and are acceptable to the Secretary; and

(2) The LEA submits a written request to the Secretary with a copy to its SEA no later than the end of the Federal fiscal year preceding the fiscal year for which the LEA seeks assistance.

(Authority: 20 U.S.C. 7705)

[80 FR 33162, June 11, 2015, as amended at 81 FR 64741, Sept. 20, 2016]

§ 222.6 Which applications does the Secretary accept?

(a) The Secretary accepts or approves for payment any otherwise approvable application under section 8002 or section 8003 that is timely filed with the

Secretary in accordance with §§ 222.3, 222.4, and 222.5, as applicable.

(b) The Secretary does not accept or approve for payment any section 8002 or section 8003 application that is not timely filed with the Secretary as described in paragraph (a) of this section, except as follows:

(1) The Secretary accepts and approves for payment any otherwise approvable application filed within—

(i) 60 days from the application deadline established in § 222.3; or

(ii) 60 days from the date of the Secretary's written notice of an LEA's failure to comply with the applicable filing date.

(2) The Secretary reduces the payment for applications described in paragraph (b)(1) of this section by 10 percent of the amount that would have been paid if the LEA had timely filed the application.

(Authority: 20 U.S.C. 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33162, June 11, 2015]

§ 222.7 What information may a local educational agency submit after the application deadline?

(a) *General*. Except as indicated in paragraph (b) of this section, the Secretary does not consider information submitted by an applicant after the deadlines prescribed in this subpart for submission of applications and amendments to applications.

(b) *Information solicited by the Secretary*. The Secretary may solicit from an applicant at any time additional information to process an application.

(Authority: 20 U.S.C. 7702, 7703, 7705, 7706)

§ 222.8 What action must an applicant take upon a change in its boundary, classification, control, governing authority, or identity?

(a) Any applicant that is a party to an annexation, consolidation, deconsolidation, merger, or other similar action affecting its boundaries, classification, control, governing authority, or identity must provide the following information to the Secretary as soon as practicable:

(1) A description of the character and extent of the change.

(2) The effective date of the change.

(3) Full identification of all predecessor and successor LEAs.

(4) Full information regarding the disposition of the assets and liabilities of all predecessor LEAs.

(5) Identification of the governing body of all successor LEAs.

(6) The name and address of each authorized representative officially designated by the governing body of each successor LEA for purposes of the Act.

(b) If a payment is made under section 8002 or 8003 to an LEA that has ceased to be a legally constituted entity during the regular school term due to an action described in paragraph (a) of this section, the LEA may retain that payment if—

(1) An adjustment is made in the payment of a successor LEA to account for the payment to the predecessor LEA; or

(2)(i) The payment amount does not exceed the amount the predecessor LEA would have been eligible to receive if the change in boundaries or organization had not taken place; and

(ii) A successor LEA is not an eligible applicant.

(c) A predecessor LEA receiving any portion of a payment under section 8002 or 8003 that exceeds the amount allowed by paragraph (b)(2)(i) of this section must return the excessive portion to the Secretary, unless the Secretary determines otherwise under section 8012 of the Act.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7702 and 7703)

§ 222.9 What records must a local educational agency maintain?

Except as otherwise provided in § 222.10—

(a) An LEA must maintain adequate written records to support the amount of payment it received under the Act for any fiscal year;

(b) On request, the LEA must make its records available to the Secretary for the purpose of examination or audit; and

(c) Each applicant must submit such reports and information as the Secretary may require to determine the

amount that the applicant may be paid under the Act.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 1232f, 7702, 7703, 7704, 7706)

§ 222.10 How long must a local educational agency retain records?

An LEA must retain the records described in § 222.9 until the later of—

(a) Three years after the last payment for a fiscal year; or

(b) If the records have been questioned on Federal audit or review, until the question is finally resolved and any necessary adjustments to payments have been made.

(Authority: 20 U.S.C. 1232f, 7702, 7703, 7704, 7706)

§ 222.11 How does the Secretary recover overpayments?

Except as otherwise provided in §§ 222.12–222.18, the Secretary adjusts for and recovers overpayments as follows:

(a) If the Secretary determines that an LEA has received a payment in excess of what it should have received under the Act and this part, the Secretary deducts the amount of the overpayment from subsequent payments for which the LEA is eligible under the Act.

(b)(1) If the LEA is not eligible for subsequent payments under the Act, the LEA must promptly refund the amount of the overpayment to the Secretary.

(2) If the LEA does not promptly repay the amount of the overpayment or promptly enter into a repayment agreement with the Secretary, the Secretary may use the procedures in 34 CFR part 30 to offset that amount against payments from other Department programs or, under the circumstances permitted in part 30, to request that another agency offset the debt.

(Authority: 20 U.S.C. 1226a–1, 7702, 7703, 7706, 7712)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35412, July 1, 1997]

§ 222.12 What overpayments are eligible for forgiveness under section 8012 of the Act?

(a) The Secretary considers as eligible for forgiveness under section 8012 of the Act (''eligible overpayment'') any amount that is more than an LEA was eligible to receive for a particular fiscal year under the Act, except for the types of overpayments listed in § 222.13.

(b) The Secretary applies §§ 222.14–222.18 in forgiving, in whole or part, an LEA's obligation to repay an eligible overpayment that resulted from error either by the LEA or the Secretary.

(Authority: 20 U.S.C. 7712)

[62 FR 35412, July 1, 1997]

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33162, June 11, 2015]

§ 222.13 What overpayments are not eligible for forgiveness under section 8012 of the Act?

The Secretary does not consider as eligible for forgiveness under section 8012 of the Act any overpayment caused by an LEA's failure to expend or account for funds properly under the following laws and regulations:

(a) Section 8003(d) of the Act (implemented in subpart D of this part) for certain federally connected children with disabilities.

(b) Section 8007 of the Act for construction.

(Authority: 20 U.S.C. 7712)

[80 FR 33162, June 11, 2015]

§ 222.14 What requirements must a local educational agency meet for an eligible overpayment to be forgiven in whole or part?

The Secretary forgives an eligible overpayment, in whole or part as described in § 222.18, if—

(a) An LEA submits to the Department's Impact Aid Program office a written request for forgiveness by the later of—

(1) Thirty days from the LEA's initial receipt of a written notice of the overpayment; or

(2) September 2, 1997;

(b) The LEA submits to the Department's Impact Aid Program office the information and documentation described in § 222.16 by the deadlines described in paragraph (a) of this section,

or other time limit established in writing by the Secretary due to lack of availability of the information and documentation; and

(c) The Secretary determines under § 222.17 that—

(1) In the case either of an LEA's or the Department's error, repayment of the LEA's total eligible overpayments will result in an undue financial hardship on the LEA and seriously harm the LEA's educational program; or

(2) In the case of the Department's error, determined on a case-by-case basis, repayment would be manifestly unjust (''manifestly unjust repayment exception'').

[62 FR 35413, July 1, 1997]

§ 222.15 How are the filing deadlines affected by requests for other forms of relief?

Unless the Secretary (or the Secretary's delegatee) extends the applicable time limit in writing—

(a) A request for forgiveness of an overpayment under § 222.14 does not extend the time within which an applicant must file a request for an administrative hearing under § 222.151; and

(b) A request for an administrative hearing under § 222.151, or for reconsideration under § 222.152, does not extend the time within which an applicant must file a request for forgiveness under § 222.14.

(Authority: 20 U.S.C. 7712)

[62 FR 35413, July 1, 1997]

§ 222.16 What information and documentation must a local educational agency submit for an eligible overpayment to be considered for forgiveness?

(a) Every LEA requesting forgiveness must submit, within the time limits established under § 222.14(b), the following information and documentation for the fiscal year immediately preceding the date of the forgiveness request (''preceding fiscal year''):

(1) A copy of the LEA's annual financial report to the State.

(2) The LEA's local real property tax rate for current expenditure purposes, as described in § 222.17(b).

(3) The average local real property tax rate of all LEAs in the State.

(4) The average per pupil expenditure (APPE) of the LEA, calculated by dividing the LEA's aggregate current expenditures by the total number of children in average daily attendance for whom the LEA provided a free public education.

(5) The APPE of the State, as defined in section 8013 of the ESEA.

(b) An LEA requesting forgiveness under § 222.14(c)(2) (manifestly unjust repayment exception), or § 222.17(a)(3) (no present or prospective ability to repay), also must submit written information and documentation in specific support of its forgiveness request under those provisions within the time limits established under § 222.14(b).

(Authority: 20 U.S.C. 7712)

[62 FR 35413, July 1, 1997]

§ 222.17 How does the Secretary determine undue financial hardship and serious harm to a local educational agency's educational program?

(a) The Secretary determines that repayment of an eligible overpayment will result in undue financial hardship on an LEA and seriously harm its educational program if the LEA meets the requirements in paragraph (a)(1), (2), or (3) of this section.

(1) An LEA other than an LEA described in paragraphs (a)(2) and (3) of this section meets the requirements of paragraph (a) of this section if—

(i) The LEA's eligible overpayments on the date of its request total at least $10,000;

(ii) The LEA's local real property tax rate for current expenditure purposes, for the preceding fiscal year, is equal to or higher than the State average local real property tax rate for that preceding fiscal year; and

(iii) The LEA's average per pupil expenditure (APPE) (as described in § 222.16(a)(4)) for the preceding fiscal year is lower than the State APPE (as described in § 222.16(a)(5)) for that preceding fiscal year.

(2) The following LEAs qualify under paragraph (a) of this section if they meet the requirements in paragraph (a)(1)(i) of this section and their APPE (as described in § 222.16(a)(4)) for the preceding fiscal year does not exceed

125 percent of the State APPE (as described in § 222.16(a)(5)) for that preceding fiscal year:

(i) An LEA with boundaries that are the same as a Federal military installation.

(ii) Other LEAs with no local real property tax revenues, or with minimal local real property tax revenues per pupil due to substantial amounts of Federal property in the LEA as compared with the average amount of those revenues per pupil for all LEAs in the State.

(3) An LEA qualifies under paragraph (a) of this section if neither the successor nor the predecessor LEA has the present or prospective ability to repay the eligible overpayment.

(b) The Secretary uses the following methods to determine a tax rate for the purposes of paragraph (a)(1)(ii) of this section:

(1) If an LEA is fiscally independent, the Secretary uses actual tax rates if all the real property in the taxing jurisdiction of the LEA is assessed at the same percentage of true value. In the alternative, the Secretary computes a tax rate for fiscally independent LEAs by using the methods described in §§ 222.67–222.69.

(2) If an LEA is fiscally dependent, the Secretary imputes a tax rate using the method described in § 222.70(b).

(Authority: 20 U.S.C. 7712)

[62 FR 35413, July 1, 1997]

§ 222.18 What amount does the Secretary forgive?

For an LEA that meets the requirements of § 222.14(a) (timely filed forgiveness request) and § 222.14(b) (timely filed information and documentation), the Secretary forgives an eligible overpayment as follows:

(a) *Forgiveness in whole.* The Secretary forgives the eligible overpayment in whole if the Secretary determines that the LEA meets—

(1) The requirements of § 222.17 (undue financial hardship), and the LEA's current expenditure closing balance for the LEA's fiscal year immediately preceding the date of its forgiveness request (''preceding fiscal year'') is ten percent or less of its total current expenditures (TCE) for that year; or

(2) The manifestly unjust repayment exception in § 222.14(c)(2).

(b) *Forgiveness in part.* (1) The Secretary forgives the eligible overpayment in part if the Secretary determines that the LEA meets the requirements of § 222.17 (undue financial hardship), and the LEA's preceding fiscal year's current expenditure closing balance is more than ten percent of its TCE for that year.

(2) For an eligible overpayment that is forgiven in part, the Secretary—

(i) Requires the LEA to repay the amount by which the LEA's preceding fiscal year's current expenditure closing balance exceeded ten percent of its preceding fiscal year's TCE (''calculated repayment amount''); and

(ii) Forgives the difference between the calculated repayment amount and the LEA's total overpayments.

(3) For the purposes of this section, ''current expenditure closing balance'' means an LEA's closing balance before any revocable transfers to non-current expenditure accounts, such as capital outlay or debt service accounts.

Example: An LEA that timely requests forgiveness has two overpayments of which portions remain owing on the date of its request—one of $200,000 and one of $300,000. Its preceding fiscal year's closing balance is $250,000 (before a revocable transfer to a capital outlay or debt service account); and 10 percent of its TCE for the preceding fiscal year is $150,000.

The Secretary calculates the amount that the LEA must repay by determining the amount by which the preceding fiscal year's closing balance exceeds 10 percent of the preceding year's TCE. This calculation is made by subtracting 10 percent of the LEA's TCE ($150,000) from the closing balance ($250,000), resulting in a difference of $100,000 that the LEA must repay. The Secretary then totals the eligible overpayment amounts ($200,000 + $300,000), resulting in a total amount of $500,000. The Secretary subtracts the calculated repayment amount ($100,000) from the total of the two overpayment balances ($500,000), resulting in $400,000 that the Secretary forgives.

(Authority: 20 U.S.C. 7712)

[62 FR 35414, July 1, 1997]

§ 222.19 What other statutes and regulations apply to this part?

(a) The following Federal statutes and regulations on nondiscrimination apply to assistance under this part:

(1) The provisions of title VI of the Civil Rights Act of 1964 (Pub. L. 88–352) (prohibition of discrimination on the basis of race, color or national origin), and the implementing regulations (34 CFR part 100).

(Authority: 42 U.S.C. 2000d—2000d–4)

(2) The provisions of title IX of the Education Amendments of 1972 (Pub. L. 92–318) (prohibition of discrimination on the basis of sex), and the implementing regulations (34 CFR part 106).

(Authority: 20 U.S.C. 1681–1683)

(3) The provisions of section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112) (prohibition of discrimination on the basis of disability), and the implementing regulations (34 CFR part 104).

(Authority: 29 U.S.C. 794)

(4) The provisions of title II of the Americans with Disabilities Act of 1990 (Pub. L. 101–336) (prohibition of discrimination on basis of disability), and any implementing regulations.

(Authority: 42 U.S.C. 12101–12213)

(5) The provisions of the Age Discrimination Act of 1975 (Pub. L. 94–135) (prohibition of age discrimination), and any implementing regulations.

(Authority: 42 U.S.C. 6101)

(b) The following Education Department General Administrative Regulations (EDGAR):

(1) Subparts A, E, F, and §§ 75.900 and 75.910 of 34 CFR part 75 (Direct Grant Programs) for payments under sections 8003(d) (payments for federally connected children with disabilities), 8007 (construction), and 8008 (school facilities), except for the following:

(i) Section 75.603 does not apply to payments under section 8007 (construction) or section 8008 (school facilities).

(ii) Section 75.605 does not apply to payments under section 8007 (construction).

(iii) Sections 75.600–602, 75.604, and 75.606–617 apply to payments under section 8007 (construction) only to the extent that funds received under that section are used for major renovations or to construct new school facilities.

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 82 (New Restrictions on Lobbying).

(4) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(c) 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485 (OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)).

(d) 2 CFR part 200, as adopted in 2 CFR part 3474 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards), for payments under sections 8003(d) (payments for federally connected children with disabilities), 8007 (construction), and 8008 (school facilities).

(Authority: 20 U.S.C. 1221e–3)

[60 FR 50778, Sept. 29, 1995. Redesignated at 62 FR 35412, July 1, 1997;79 FR 76095, Dec. 19, 2014; 80 FR 33162, June 11, 2015]

Subpart B—Payments for Federal Property Under Section 8002 of the Act

§ 222.20 What definitions apply to this subpart?

In addition to the terms referenced or defined in § 222.2, the following definitions apply to this subpart:

Acquisition or *acquired by the United States*. (1) The term means—

(i) The receipt or taking by the United States of ownership in fee simple of real property by condemnation, exchange, gift, purchase, transfer, or other arrangement;

(ii) The receipt by the United States of real property as trustee for the benefit of individual Indians or Indian tribes; or

(iii) The imposition by the United States of restrictions on sale, transfer, or exchange of real property held by individual Indians or Indian tribes.

(2) The definition of ''acquisition'' in 34 CFR 77.1(c) (Definitions that Apply

to Department Regulations) of this title does not apply to this subpart.

(Authority: 20 U.S.C. 7702)

Assessed value. For the purpose of determining eligibility under section 8002(a)(1) and § 222.21, the following definition applies:

(1) The term means the value that is assigned to real property, for the purpose of generating local real property tax revenues for current expenditures (as defined in section 8013 of the Act), by a State or local official who is legally authorized to determine that assessed value.

(2) The term does not include—

(i) A value assigned to tax-exempt real property;

(ii) A value assigned to real property for the purpose of generating other types of revenues, such as payments in lieu of taxes (PILOTs);

(iii) Fair market value, or a percentage of fair market value, of real property unless that value was actually used to generate local real property tax revenues for current expenditures (as defined in section 8013); or

(iv) A value assigned to real property in a condemnation or other court proceeding, or a percentage of that value, unless that value was actually used to generate local real property tax revenues for current expenditures (as defined in section 8013).

(Authority: 20 U.S.C. 7702(a)(1))

Eligible Federal property. (1) The term means ''Federal property'' as defined in § 222.2(c) for section 8002, which meets the following additional requirements:

(i) The United States has acquired the Federal property since 1938; and

(ii) The Federal property was not acquired by exchange for other Federal property that the United States owned within the school district before 1939.

(2) In addition, for local educational agencies (LEAs) that are eligible under § 222.21(a)(2), the term also means land acquired by the United States Forest Service between 1915 and 1990.

(Authority: 20 U.S.C. 7702)

§ 222.21 What requirements must a local educational agency meet concerning Federal acquisition of real property within the local educational agency?

(a) For an LEA with an otherwise approvable application to be eligible to receive financial assistance under section 8002 of the Act, the LEA must meet the requirements in subpart A of this part and § 222.22. In addition, unless otherwise provided by statute as meeting the requirements in section 8002(a)(1)(C), the LEA must document—

(1) That the United States owns or has acquired ''eligible Federal property'' within the LEA, that has an aggregate assessed value of 10 percent or more of the assessed value of—

(i) All real property in that LEA, based upon the assessed values of the eligible Federal property and of all real property (including that Federal property) on the date or dates of acquisition of the eligible Federal property; or

(ii) All real property in the LEA as assessed in the first year preceding or succeeding acquisition, whichever is greater, only if—

(A) The assessment of all real property in the LEA is not made at the same time or times that the Federal property was so acquired and assessed; and

(B) State law requires an assessment be made of property so acquired; or

(2)(i) That, as demonstrated by written evidence from the United States Forest Service satisfactory to the Secretary, the LEA contains between 20,000 and 60,000 acres of land that has been acquired by the United States Forest Service between 1915 and 1990; and

(ii) That the LEA serves a county chartered by State law in 1875 or 1890.

(b) ''Federal property'' described in section 8002(d) (certain transferred property) is considered to be owned by the United States for the purpose of paragraph (a) of this section.

(c) If, during any fiscal year, the United States sells, transfers, is otherwise divested of ownership of, or relinquishes an interest in or restriction on, eligible Federal property, the Secretary redetermines the LEA's eligibility for the following fiscal year,

based upon the remaining eligible Federal property, in accordance with paragraph (a) of this section. This paragraph does not apply to a transfer of real property by the United States described in section 8002(d).

(d) Except as provided under paragraph (a)(2) of this section, the Secretary's determinations and redeterminations of eligibility under this section are based on the following documents:

(1) For a new section 8002 applicant or newly acquired eligible Federal property, only upon—

(i) Original records as of the time(s) of Federal acquisition of real property, prepared by a legally authorized official, documenting the assessed value of that real property;

(ii) Facsimiles, such as microfilm, or other reproductions of those records; or

(iii) If the documents specified in paragraphs (d)(1)(i) and (ii) are unavailable, other records that the Secretary determines to be appropriate and reliable for establishing eligibility under section 8002(a)(1) of the Act, such as Federal agency records or local historical records.

(2) For a redetermination of an LEA's eligibility under section 8002(a)(1), only upon—

(i) Records described in paragraph (d)(1) of this section; or

(ii) Department records.

(e) The Secretary does not base the determination or redetermination of an LEA's eligibility under this section upon secondary documentation that is in the nature of an opinion, such as estimates, certifications, or appraisals.

(Authority: 20 U.S.C. 7702(a)(1))

[60 FR 50778, Sept. 29, 1995, as amended at 73 FR 70575, Nov. 20, 2008]

§ 222.22 How does the Secretary treat compensation from Federal activities for purposes of determining eligibility and payments?

(a) An LEA with an otherwise approvable application is eligible to receive assistance under section 8002 for a fiscal year only if the LEA meets the requirements in subpart A of these regulations and § 222.21, and is not substantially compensated, for the loss in revenue resulting from Federal ownership of real property by increases in revenue accruing to the LEA during the previous fiscal year from Federal activities with respect to the eligible Federal property in the LEA.

(b) The Secretary considers that an LEA is substantially compensated by increases in revenue from Federal activities with respect to the eligible Federal property if—

(1) The LEA received revenue during the preceding fiscal year that is generated from activities in or on the eligible Federal property; and

(2) The revenue described in paragraph (b)(1) of this section equals or exceeds the maximum payment amount under section 8002(b) for the fiscal year for which the LEA seeks assistance.

(c) If an LEA described in paragraph (a) of this section received revenue described in paragraph (b)(1) of this section during the preceding fiscal year that, when added to the LEA's projected total section 8002 payment for the fiscal year for which the LEA seeks assistance, exceeds the maximum payment amount under section 8002(b) for the fiscal year for which the LEA seeks assistance, the Secretary reduces the LEA's projected section 8002 payment by an amount equal to that excess amount.

(d) For purposes of this section, the amount of revenue that an LEA receives during the previous fiscal year from activities conducted on Federal property includes payments received by any Federal agency due to activities on Federal property, including forestry, mining, and grazing, but does not include revenue from:

(1) Payments received by the LEA from the Secretary of Defense to support—

(i) The operation of a domestic dependent elementary or secondary school; or

(ii) The provision of a free public education to dependents of members of the Armed Forces residing on or near a military installation;

(2) Payments from the Department; or

(3) Payments in Lieu of Taxes from the Department of Interior under 31 U.S.C. 6901 *et seq*.

(Authority: 20 U.S.C. 7702(a)(2) and (b)(1)(A))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35414, July 1, 1997; 80 FR 33162, June 11, 2015; 81 FR 64741, Sept. 20, 2016]

§ 222.23 How are consolidated LEAs treated for the purposes of eligibility and payment under section 7002?

(a) *Eligibility*. An LEA formed by the consolidation of one or more LEAs is eligible for section 7002 funds, notwithstanding section 222.21(a)(1), if—

(1) The consolidation occurred prior to fiscal year 1995 or after fiscal year 2005; and

(2) At least one of the former LEAs included in the consolidation:

(i) Was eligible for section 7002 funds in the fiscal year prior to the consolidation; and

(ii) Currently contains Federal property that meets the requirements of § 222.21(a) within the boundaries of the former LEA or LEAs.

(b) *Documentation required*. In the first year of application following the consolidation, an LEA that meets the requirements of paragraph (a) of this section must submit evidence that it meets the requirements of paragraphs (a)(1) and (a)(2)(ii) of this section.

(c) *Basis for foundation payment*. (1) The foundation payment for a consolidated district is based on the total section 7002 payment for the last fiscal year for which the former LEA received payment. When more than one former LEA qualifies under paragraph (a)(2) of this section, the payments for the last fiscal year for which the former LEAs received payment are added together to calculate the foundation basis.

(2) Consolidated LEAs receive only a foundation payment and do not receive a payment from any remaining funds.

(Authority: 20 U.S.C. 7702(g))

[81 FR 64741, Sept. 20, 2016]

§ 222.24 How does a local educational agency that has multiple tax rates for real property classifications derive a single real property tax rate?

An LEA that has multiple tax rates for real property classifications derives a single tax rate for the purposes of determining its Section 7002 maximum payment by dividing the total revenues for current expenditures it received from local real property taxes by the total taxable value of real property located within the boundaries of the LEA. These data are from the fiscal year prior to the fiscal year in which the applicant seeks assistance.

(Authority: 20 U.S.C. 7702)

[81 FR 64741, Sept. 20, 2016]

§§ 222.25–222.29 [Reserved]

Subpart C—Payments for Federally Connected Children Under Section 8003(b) of the Act

§ 222.30 What is "free public education"?

In addition to the terms defined in § 222.2, the following definition applies to this part:

Free public education. (1) The term means education that is provided—

(i) At public expense;

(ii)(A) As the complete elementary or secondary educational program as determined under State law through grade 12; and

(B) Preschool education, whether or not included as elementary education by State law;

(iii) In a school of the local educational agency (LEA) or under a tuition arrangement with another LEA or other educational entity; and

(iv) Under public supervision and direction, except with respect to children with disabilities.

(2) For the purpose of paragraph (1)(i) of this definition, education is provided at public expense if—

(i) There is no tuition charge to the child or the child's parents; and

(ii) Federal funds, other than Impact Aid funds and charter school startup

funds, do not provide a substantial portion of the educational program, in relation to other LEAs in the State, as determined by the Secretary.

(3) For the purpose of paragraph (1)(ii) of this definition, the complete elementary or secondary educational program is the program recognized by the State as meeting all requirements for elementary or secondary education for the children claimed and, except for preschool education, does not include a program that provides only—

(i) Supplementary services or instruction; or

(ii) A portion of the required educational program.

(4) For the purpose of paragraph (1)(iii) of this definition, a tuition arrangement must—

(i) Satisfy all applicable legal requirements in the State; and

(ii) Genuinely reflect the applicant LEA's responsibility to provide a free public education to the children claimed under section 8003.

(5) For the purpose of paragraph (1)(iv) of this definition, education provided under public supervision and direction means education that is provided—

(i) In a school of the applicant LEA or another LEA; or

(ii) By another educational entity, over which the applicant LEA, or other public agency, exercises authority with respect to the significant aspects of the educational program for the children claimed. The Secretary considers significant aspects of the educational program to include administrative decisions relating to teachers, instruction, and curriculum.

(Authority: 20 U.S.C. 7703, 7709, 7713(6))

[60 FR 50778, Sept. 29, 1995, as amended at 81 FR 64741, Sept. 20, 2016]

§ 222.31 To which local educational agencies does the Secretary make basic support payments under section 8003(b) of the Act?

The Secretary makes payments to an LEA with an otherwise approvable application for children claimed under section 8003(b) of the Act if—

(a) The LEA meets the requirements in subpart A of these regulations and this subpart; and

(b)(1) The LEA is responsible under applicable State or Federal law for providing a free public education to those children;

(2) The LEA is providing a free public education to those children; and

(3) The State provides funds for the education of those children on the same basis as all other public school children in the State, unless permitted otherwise under section 8009 of the Act.

(Authority: 20 U.S.C. 7703 and 7709)

§ 222.32 What information does the Secretary use to determine a local educational agency's basic support payment?

(a) The Secretary determines an LEA's payment under section 8003(b) on the basis of information in the LEA's application, including information regarding the membership of federally connected children.

(b) The LEA must supply information in its timely and complete application regarding its federally connected membership on the basis of any count described in §§ 222.33 through 222.35.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703 and 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 81 FR 64741, Sept. 20, 2016]

§ 222.33 When must an applicant make its first or only membership count?

(a)(1) An applicant must select a day in the current school year as the survey date for making the first membership count, which must be no earlier than the fourth day of the regular school year and before January 31.

(2) The applicant must use the same survey date for all schools in the LEA.

(b) As of the survey date, the applicant must—

(1) Count the membership of its federally connected children; and

(2) Count the total membership of its children—both federally connected and non-federally connected.

(c) The data on the application resulting from the count in paragraph (b)

of this section must be accurate and verifiable by the application deadline.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703, 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33163, June 11, 2015; 81 FR 64741, Sept. 20, 2016]

§ 222.34 If an applicant makes a second membership count, when must that count be made?

(a)(1) The applicant may, but is not required to, make a second count of membership.

(2) If the applicant chooses to make a second count of membership, the applicant must select a day after January 31, but no later than May 14, as the survey date for making the second membership count, and make that count in accordance with § 222.33(b).

(3) The applicant must use the same survey date for the second membership count for all schools in the LEA.

(b) The applicant may use the information obtained from a second membership count to amend its application for assistance as described in § 222.5(b).

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703 and 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33163, June 11, 2015]

§ 222.35 How does a local educational agency count the membership of its federally connected children?

An applicant counts the membership of its federally connected children using one of the following methods:

(a) Parent-pupil survey. An applicant may conduct a parent-pupil survey to count the membership of its federally connected children, which must be counted as of the survey date.

(1) The applicant shall conduct a parent-pupil survey by providing a form to a parent of each pupil enrolled in the LEA to substantiate the pupil's place of residence and the parent's place of employment.

(2) A parent-pupil survey form must include the following:

(i) Pupil enrollment information (this information may also be obtained from school records), including—

(A) Name of pupil;

(B) Date of birth of the pupil; and

(C) Name of public school and grade of the pupil.

(ii) Pupil residence information, including:

(A) The complete address of the pupil's residence, or other acceptable location information for that residence, such as a complete legal description, a complete U.S. Geological Survey number, or complete property tract or parcel number, or acceptable certification by a Federal agency official with access to data or records to verify the location of the Federal property; and

(B) If the pupil's residence is on Federal property, the name of the Federal facility.

(3) If any of the following circumstances apply, the parent-pupil survey form must also include the following:

(i) If the parent is employed on Federal property, except for a parent who is a member of the uniformed services on active duty, parent employment information, including—

(A) Name (as it appears on the employer's payroll record) of the parent (mother, father, legal guardian or other person standing *in loco parentis*) who is employed on Federal property and with whom the pupil resides; and

(B) Name of employer, name and complete address of the Federal property on which the parent is employed (or other acceptable location information, such as a complete legal description or acceptable certification by a Federal agency).

(ii) If the parent is a member of the uniformed services on active duty, the name, rank, and branch of service of that parent.

(iii) If the parent is both an official of, and accredited by a foreign government, and a foreign military officer, the name, rank, and country of service.

(iv) If the parent is a civilian employed on a Federal vessel, the name of the vessel, hull number, homeport, and name of the controlling agency.

(4)(i) Every parent-pupil survey form must include the signature of the parent supplying the information, except as provided in paragraph (a)(4)(ii) of this section, and the date of such signature, which must be on or after the survey date.

(ii) An LEA may accept an unsigned parent-pupil survey form, or a parent-pupil survey form that is signed by a person other than a parent, only under unusual circumstances. In those instances, the parent-pupil survey form must show why the parent did not sign the survey form, and when, how, and from whom the residence and employment information was obtained. Unusual circumstances may include, but are not limited to:

(A) A pupil who, on the survey date, resided with a person without full legal guardianship of the child while the pupil's parent or parents were deployed for military duty. In this case, the person with whom the child is residing may sign the parent-pupil survey form.

(B) A pupil who, on the survey date, was a ward of the juvenile justice system. In this case, an administrator of the institution where the pupil was held on the survey date may sign the parent-pupil survey form.

(C) A pupil who, on the survey date, was an emancipated youth may sign his or her own parent-pupil survey form.

(D) A pupil who, on the survey date, was at least 18 years old but who was not past the 12th grade may sign his or her own parent-pupil survey form.

(iii) The Department does not accept a parent-pupil survey form signed by an employee of the school district who is not the student's mother, father, legal guardian or other person standing *in loco parentis*.

(b) Source check. A source check is a type of survey tool that groups children being claimed on the Impact Aid application by Federal property. This form is used in lieu of the parent-pupil survey form to substantiate a pupil's place of residence or parent's place of employment on the survey date.

(1) The source check must include sufficient information to determine the eligibility of the Federal property and the individual children claimed on the form.

(2) A source check may also include:

(i) Certification by a parent's employer regarding the parent's place of employment;

(ii) Certification by a military or other Federal housing official as to the residence of each pupil claimed;

(iii) Certification by a military personnel official regarding the military active duty status of the parent of each pupil claimed as active duty uniformed services; or

(iv) Certification by the Bureau of Indian Affairs (BIA) or authorized tribal official regarding the eligibility of Indian lands.

(c) Another method approved by the Secretary.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703)

[81 FR 64741, Sept. 20, 2016]

§ 222.36 How many federally connected children must a local educational agency have to receive a payment under section 8003?

(a) An LEA is eligible to receive a payment under section 8003 for a fiscal year only if the total number of eligible federally connected children for whom it provided a free public education for the preceding fiscal year was—

(1) At least 400 who were in average daily attendance (ADA); or

(2) At least 3 percent of the total number of children in ADA.

(b) An LEA is eligible to receive a payment under section 8003 for a fiscal year on behalf of federally connected children described in section 8003(a)(1)(F) or (G) only if the total number of those children for whom it provided a free public education for the preceding fiscal year was—

(1) At least 1,000 in ADA; or

(2) At least 10 percent of the total number of children in ADA.

(c) Children described in paragraph (b) of this section are counted for the purposes of paragraph (a) of this section only if the applicant LEA is eligible to receive a payment on behalf of those children under section 8003.

(Authority: 20 U.S.C. 7703(a)(3) and (b)(1)(B))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35415, July 1, 1997; 80 FR 33163, June 11, 2015]

§ 222.37 How does the Secretary calculate the average daily attendance of federally connected children?

(a) This section describes how the Secretary computes the ADA of federally connected children for each category in section 8003 to determine an applicant's payment.

(b)(1) For purposes of this section, actual ADA means raw ADA data that have not been weighted or adjusted to reflect higher costs for specific types of students for purposes of distributing State aid for education.

(2) If an LEA provides a program of free public summer school, attendance data for the summer session are included in the LEA's ADA figure in accordance with State law or practice.

(3) An LEA's ADA count includes attendance data for children who do not attend the LEA's schools, but for whom it makes tuition arrangements with other educational entities.

(4) Data are not counted for any child—

(i) Who is not physically present at school for the daily minimum time period required by the State, unless the child is—

(A) Participating via telecommunication or correspondence course programs that meet State standards; or

(B) Being served by a State-approved homebound instruction program for the daily minimum time period appropriate for the child; or

(ii) Attending the applicant's schools under a tuition arrangement with another LEA.

(c) An LEA may determine its average daily attendance calculation in one of the following ways:

(1) If an LEA is in a State that collects actual ADA data for purposes of distributing State aid for education, the Secretary calculates the ADA of that LEA's federally connected children for the current fiscal year payment as follows:

(i) By dividing the ADA of all the LEA's children for the second preceding fiscal year by the LEA's total membership on its survey date for the second preceding fiscal year (or, in the case of an LEA that conducted two membership counts in the second preceding fiscal year, by the average of the LEA's total membership on the two survey dates); and

(ii) By multiplying the figure determined in paragraph (c)(1)(i) of this section by the LEA's total membership of federally connected children in each subcategory described in section 7003 and claimed in the LEA's application for the current fiscal year payment.

(2) An LEA may submit its total preceding year ADA data. The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

(i) Dividing the LEA's preceding year's total ADA data by the preceding year's total membership data; and

(ii) Multiplying the figure determined in paragraph (c)(2)(i) of this section by the LEA's total membership of federally connected children as described in paragraph (c)(1)(i) of this section.

(3) An LEA may submit attendance data based on sampling conducted during the previous fiscal year.

(i) The sampling must include attendance data for all children for at least 30 school days.

(ii) The data must be collected during at least three periods evenly distributed throughout the school year.

(iii) Each collection period must consist of at least five consecutive school days.

(iv) The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

(A) Determining the ADA of all children in the sample;

(B) Dividing the figure obtained in paragraph (c)(3)(iv)(A) of this section by the LEA's total membership for the previous fiscal year; and

(C) Multiplying the figure determined in paragraph (c)(3)(iv)(B) of this section by the LEA's total membership of federally connected children for the current fiscal year, as described in paragraph (c)(1)(i) of this section.

(d) An SEA may submit data to calculate the average daily attendance calculation for the LEAs in that State in one of the following ways:

(1) If the SEA distributes State aid for education based on data similar to attendance data, the SEA may request that the Secretary use those data to

calculate the ADA of each LEA's federally connected children. If the Secretary determines that those data are, in effect, equivalent to attendance data, the Secretary allows use of the requested data and determines the method by which the ADA for all of the LEA's federally connected children will be calculated.

(2) An SEA may submit data necessary for the Secretary to calculate a State average attendance ratio for all LEAs in the State by submitting the total ADA and total membership data for the State for each of the last three most recent fiscal years that ADA data were collected. The Secretary uses these data to calculate the ADA of the federally connected children for each LEA in the State by—

(i)(A) Dividing the total ADA data by the total membership data for each of the three fiscal years and averaging the results; and

(B) Multiplying the average determined in paragraph (d)(2)(i)(A) of this section by the LEA's total membership of federally connected children as described in paragraph (c)(1)(i) of this section.

(e) The Secretary may calculate a State average attendance ratio in States with LEAs that would benefit from such calculation by using the methodology in paragraph (d)(2)(i) of this section.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703, 7706, 7713)

[81 FR 64742, Sept. 20, 2016]

§ 222.38 What is the maximum basic support payment that a local educational agency may receive under section 8003(b)(1)?

(a) The maximum basic support payment that an LEA may receive under section 8003(b)(1) for any fiscal year is the sum of its total weighted student units under section 8003(a)(2) for the federally connected children eligible to be counted as the basis for payment, multiplied by the greater of the following:

(1) One-half of the State average per pupil expenditure for the third fiscal year preceding the fiscal year for which the LEA seeks assistance.

(2) One-half of the national average per pupil expenditure for the third fiscal year preceding the fiscal year for which the LEA seeks assistance.

(3) The local contribution rate (LCR) based on generally comparable LEAs determined in accordance with §§ 222.39–222.41.

(4) The State average per pupil expenditure for the third preceding fiscal year multiplied by the local contribution percentage as defined in section 8013(8) of the Act for that same year.

(b) If satisfactory data from the third preceding fiscal year are not available for the expenditures described in paragraphs (a)(1) or (2), the Secretary uses data from the most recent fiscal year for which data that are satisfactory to the Secretary are available.

(Authority: 20 U.S.C. 7703(a) and (b))

[80 FR 33163, June 11, 2015]

§ 222.39 How does a State educational agency identify generally comparable local educational agencies for local contribution rate purposes?

(a) To identify generally comparable LEAs within its State for LCR purposes, the State educational agency (SEA) for that State, after appropriate consultation with the applicant LEAs in the State, shall use data from the third fiscal year preceding the fiscal year for which the LCR is being computed to group all of its LEAs, including all applicant LEAs, as follows:

(1) *Grouping by grade span/legal classification alone.* Divide all LEAs into groups that serve the same grade span and then subdivide the grade span groups by legal classification, if the Secretary considers this classification relevant and sufficiently different from grade span within the State. As an alternative grade-span division, divide all LEAs into elementary, secondary, or unified grade-span groups, as appropriate, within the State.

(2) *Grouping by grade span/legal classification and size.* (i) Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and legal classification, if relevant and sufficiently different from grade span and size.

(ii) List all LEAs within each group in descending order by size as measured by ADA, placing the LEA with the *largest* ADA at the top of the list. A State that does not tabulate actual annual ADA shall use the same formula for establishing ADA for the purpose of ranking LEAs by size as the Department has approved for the purpose of calculating payments under section 8003 for applicant LEAs in the State.

(iii) Divide each group into either two subgroups or three subgroups.

(iv) To determine the subgroups, divide each list at the point(s) that will result in as nearly equal numbers of LEAs in each subgroup as possible, so that no group is more than one LEA larger than any other group.

(3) *Grouping by grade span/legal classification and location.* Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and, if relevant and sufficiently different from grade span and location, legal classification; then subdivide these groups by location, as determined by placement inside or outside a metropolitan statistical area (MSA) as defined by the U.S. Bureau of the Census. The Department will supply SEAs with lists of MSA classifications for their LEAs, and only the classifications on those lists will be recognized by the Department for the purposes of these regulations.

(4) *Grouping by grade span/legal classification, size, and location.* (i) Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and, if relevant and sufficiently different from grade span, size, and location, legal classification; then subdivide these groups by size (into two or three subgroups for each grade span, as described in paragraph (a)(2) of this section); and further subdivide these groups by location (inside or outside an MSA).

(ii) In using both the size and location factors, the SEA shall subdivide according to the size factor before the location factor.

(b) After applying the following restrictions, the SEA shall compute an LCR according to the provisions of § 222.41 for each group of generally comparable LEAs identified under paragraph (a) of this section, as follows:

(1) The SEA shall not, when computing an LCR, include the following ''significantly impacted'' LEAs in any group of generally comparable LEAs:

(i) Any LEA having—in the third fiscal year preceding the fiscal year for which the LCR is being computed—20 percent or more of its ADA composed of children identified under section 8003(a)(1)(A)–(C).

(ii) Any LEA having—in the third fiscal year preceding the fiscal year for which the LCR is being computed—50 percent or more of its ADA composed of children identified under section 8003(a)(1)(A)–(G) who were eligible under § 222.36 to be counted as the basis for payment under section 8003.

(2) The SEA may not compute an LCR for any group that contains fewer than 10 LEAs.

(c) The LCR for a ''significantly impacted'' LEA described in paragraph (b)(1) of this section is the LCR of any group in which that LEA would be included based on grade span/legal classification, size, location, or a combination of these factors, if the LEA were not excluded as significantly impacted.

(d) This section does not apply to applicant LEAs located in—

(1) Puerto Rico;

(2) Wake Island;

(3) Guam;

(4) American Samoa;

(5) Any outlying area; and

(6) Any State in which there is only one LEA.

Example. An LEA applies for assistance under section 8003 and wishes to recommend to the Secretary an LCR based on generally comparable LEAs within its State.

1. *Characteristics of Applicant LEA.* The grade span of an applicant LEA is kindergarten through grade 8 (K–8). In the applicant's State, legal classification of LEAs is based on grade span, and thus does not act to further subdivide groups of LEAs.

The ADA of the applicant LEA is above the median ADA of LEAs serving only K–8 in the State.

The applicant LEA is located outside an MSA.

2. *Characteristics of Other LEAs Serving Same Grade Span.* The SEA of the applicant's State groups all LEAs in its State according to the factors in § 222.39.

a. The SEA identifies the following groups:

(i) One hundred and one LEAs serve only K–8. The SEA has identified a group of 50

LEAs having an ADA above the median ADA for the group of 101, one LEA having an ADA at the median, and a group of 50 LEAs having an ADA below the median ADA; and according to § 222.39(a)(2), the SEA considers 51 LEAs to have an ADA below the median ADA.

(ii) Of the 101 LEAs in the group, the SEA has identified a group of 64 LEAs as being inside an MSA and a group of 37 LEAs as being outside an MSA.

(iii) Among the group of 50 LEAs having an ADA above the median, the SEA has identified a group of 35 LEAs as being inside an MSA and a group of 15 LEAs as being outside an MSA.

(iv) Among the group of 51 LEAs having an ADA at or below the median, the SEA has identified a group of 29 LEAs as being inside an MSA and 22 LEAs as being outside an MSA.

(v) One LEA has 20 percent of its ADA composed of children identified under section 8003(a)(1)(A)–(C) and, therefore, must be excluded from any group it falls within before the SEA computes an LCR for the group. The LEA has an ADA below the median ADA and is located outside an MSA.

b. On the basis of § 222.41, the SEA computes the LCR for each group of generally comparable LEAs that the SEA has identified.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703(b)(1)(C)(iii))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33163, June 11, 2015]

§ 222.40 What procedures does a State educational agency use for certain local educational agencies to determine generally comparable local educational agencies using additional factors, for local contribution rate purposes?

(a) To use the procedures in this section, the applicant LEA, for the year of application, must either—

(1)(i) Be located entirely on Federal land; and

(ii) Be raising either no local revenues or an amount of local revenues the Secretary determines to be minimal; or

(2)(i) Be located in a State where State aid makes up no more than 40 percent of the State average per pupil expenditure in the third fiscal year preceding the fiscal year for which the LCR is being computed;

(ii) In its application, have federally connected children identified under section 8003(a)(1)(A)–(C) equal to at least 20 percent of its total ADA; and

(iii) In its application, have federally connected children identified under section 8003(a)(1)(A)–(G) who were eligible to be counted as the basis for payment under section 8003 equal to at least 50 percent of its total ADA.

(b) If requested by an applicant LEA described in paragraph (a) of this section, the SEA follows the procedures in this section, in consultation with the LEA, to determine generally comparable LEAs using additional factors for the purpose of calculating and certifying an LCR for that LEA.

(c) The SEA identifies—

(1) The subgroup of generally comparable LEAs from the group identified under § 222.39(a)(2) (grouping by grade span/legal classification and size) that includes the applicant LEA; or

(2) For an LEA described in paragraph (a) of this section that serves a different span of grades from all other LEAs in its State (and therefore cannot match any group of generally comparable LEAs under § 222.39(a)(2)), for purposes of this section only, a group using only legal classification and size as measured by ADA.

(d) From the subgroup described in paragraph (c) of this section, the SEA then identifies 10 or more generally comparable LEAs that share one or more additional common factors of general comparability with the applicant LEA described in paragraph (a) of this section, as follows:

(1)(i) The SEA must consider one or more generally accepted, objectively defined factors that affect the applicant's cost of educating its children. Examples of such cost-related factors include location inside or outside an MSA, an unusually large geographical area or an economically depressed area, sparsity or density of population, and the percentage of its students who are from low-income families or who are children with disabilities, neglected or delinquent children, low-achieving children, or children with limited English proficiency.

(ii) The SEA may not consider cost-related factors that can be varied at the discretion of the applicant LEA or

its generally comparable LEAs or factors dependent on the wealth of the applicant LEA or its generally comparable LEAs. Examples of factors that may not be considered include special alternative curricular programs, pupil-teacher ratio, and per pupil expenditures.

(iii) If an SEA proposes to use one or more special additional factors to determine generally comparable LEAs, the SEA must submit, with its annual submission of generally comparable data to the Department, its rationale for selecting the additional factor or factors and describe how they affect the cost of education in the LEA.

(2) The SEA applies the factor or factors of general comparability identified under paragraph (d)(1)(i) of this section in one of the following ways in order to identify 10 or more generally comparable LEAs for the eligible applicant LEA, none of which may be significantly impacted LEAs:

(i) The SEA identifies all of the LEAs in the group to which the eligible applicant LEA belongs under § 222.39(a)(2) that share the factor or factors. If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding significantly impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The SEA computes the LCR for the eligible applicant LEA using the data for all of the LEAs in the subgroup except the eligible applicant LEA.

Example 1. An eligible applicant LEA contains a designated economically depressed area, and the SEA, in consultation with the LEA, identifies ''economically depressed area'' as an additional factor of general comparability. From the group of LEAs under § 222.39(a)(2) that includes the eligible applicant LEA, the SEA identifies two subgroups, those LEAs that contain a designated economically depressed area and those that do not. The entire subgroup identified by the SEA that includes the eligible applicant LEA is that LEA's new group of generally comparable LEAs if it contains at least 10 LEAs.

(ii) After the SEA identifies all of the LEAs in the group to which the eligible applicant LEA belongs under § 222.39(a)(2) that share the factor or factors, the SEA then systematically orders by ADA all of the LEAs in the group that includes the eligible applicant LEA. The SEA may further divide the ordered LEAs into subgroups by using logical division points (*e.g.*, the median, quartiles, or standard deviations) or a continuous interval of the ordered LEAs (*e.g.*, a percentage or a numerical range). If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding significantly impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The SEA computes the LCR for the eligible applicant LEA using the data for all of the LEAs in the subgroup except the eligible applicant LEA.

Example 2. An eligible applicant LEA serves an unusually high percentage of children with disabilities, and the SEA, in consultation with the LEA, identifies ''proportion of children with disabilities'' as an additional comparability factor. From the group of LEAs under § 222.39(a)(2) that includes the eligible applicant LEA, the SEA lists the LEAs in descending order according to the percentage of children with disabilities enrolled in each of the LEAs. The SEA divides the list of LEAs into four groups containing equal numbers of LEAs. The group containing the eligible applicant LEA is that LEA's new group of generally comparable LEAs if it contains at least 10 LEAs.

(iii) The SEA may apply more than one factor of general comparability in identifying a new group of 10 or more generally comparable LEAs for the eligible applicant LEA. If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding significantly impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The SEA computes the LCR for the eligible applicant LEA using the data from all of the LEAs in the subgroup except the eligible applicant LEA.

Example 3. An eligible applicant LEA is very sparsely populated and serves an unusually high percentage of children with limited English proficiency. The SEA, in consultation with the LEA, identifies ''sparsity of population'' and ''proportion of children with limited English proficiency'' as additional comparability factors. From the group of LEAs under § 222.39(a)(2) that includes the eligible applicant LEA, the SEA identifies all LEAs that are sparsely populated. The SEA further subdivides the sparsely populated

LEAs into two groups, those that serve an unusually high percentage of children with limited English proficiency and those that do not. The subgroup of at least 10 sparsely populated LEAs that serve a high percentage of children with limited English proficiency is the eligible applicant LEA's new group of generally comparable LEAs.

(e)(1) Using the new group of generally comparable LEAs selected under paragraph (d) of this section, the SEA computes the LCR for the eligible applicant LEA according to the provisions of § 222.41.

(2) The SEA certifies the resulting LCR by submitting that LCR to the Secretary and providing the Secretary a description of the additional factor or factors of general comparability and the data used to identify the new group of generally comparable LEAs.

(3) The Secretary reviews the data submitted by the SEA, and accepts the LCR for the purpose of use under section 8003(b)(1)(C)(iii) in determining the LEA's maximum payment under section 8003 if the Secretary determines that it meets the purposes and requirements of the Act and this part.

(Authority: 20 U.S.C. 7703(b)(1)(C)(iii))

[80 FR 33164, June 11, 2015, as amended at 81 FR 64743, Sept. 20, 2016]

§ 222.41 How does a State educational agency compute and certify local contribution rates based upon generally comparable local educational agencies?

Except as otherwise specified in the Act, the SEA, subject to the Secretary's review and approval, computes and certifies an LCR for each group of generally comparable LEAs within its State that was identified using the factors in § 222.39, and § 222.40 if appropriate, as follows:

(a)(1) The SEA shall compile the aggregate local current expenditures of the comparable LEAs in each group for the third fiscal year preceding the fiscal year for which the LCR is being computed.

(2) For purposes of this section, the SEA shall consider only those aggregate current expenditures made by the generally comparable LEAs from revenues derived from local sources. No State or Federal funds may be included.

(b) The SEA shall compile the aggregate number of children in ADA to whom the generally comparable LEAs in each group provided a free public education during the third fiscal year preceding the fiscal year for which the LCR is being computed.

(c) The SEA shall divide—

(1) The aggregate current expenditures determined under paragraph (a) of this section by;

(2) The aggregate number of children determined under paragraph (b) of this section.

(d) The SEA certifies the resulting figure for each group as the LCR for that group of generally comparable LEAs to be used by the Secretary under section 8003(b)(1)(C)(iii) in determining the LEA's maximum payment amount under section 8003.

(Authority: 20 U.S.C. 7703(b)(1)(C)(iii))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33165, June 11, 2015]

§ 222.42 [Reserved]

§ 222.43 What requirements must a local educational agency meet in order to be eligible for financial assistance under section 8003(b)(1)(F) due to unusual geographic features?

An LEA is eligible for financial assistance under section 8003(b)(1)(F) if the Secretary determines that the LEA meets all of the following requirements—

(a)(1) The LEA is eligible for a basic support payment under section 8003(b), including meeting the maintenance of effort requirements in section 8003(g) of the Act;

(2) The LEA timely applies for assistance under section 8003(b)(1)(F) and meets all other requirements of subparts A and C;

(3) The LEA is meeting the tax rate requirement in § 222.68(c) and the other applicable requirements of §§ 222.68 through 222.72; and

(4) The LEA is not in a State that takes the LEA's payment under section 8003(b)(1)(F) into account in an equalization program that qualifies under section 8009 of the Act.

(b)(1) As part of its section 8003 application, the LEA indicates in writing that it wishes to apply for an ''unusual

geographic'' payment and it will provide the Secretary with documentation upon request that demonstrates that the LEA is unable to provide a level of education equivalent to that provided by its generally comparable LEAs because—

(i) The applicant's current expenditures are affected by unusual geographic factors; and

(ii) As a result, those current expenditures are not reasonably comparable to the current expenditures of its generally comparable LEAs.

(2) The LEA's documentation must include—

(i) A specific description of the unusual geographic factors on which the applicant is basing its request for compensation under this section and objective data demonstrating that the applicant is more severely affected by the factors than any other LEA in its State;

(ii) Objective data demonstrating the specific ways in which the unusual geographic factors affect the applicant's current expenditures so that they are not reasonably comparable to the current expenditures of its generally comparable LEAs;

(iii) Objective data demonstrating the specific ways in which the unusual geographic factors prevent the applicant from providing a level of education equivalent to that provided by its generally comparable LEAs; and

(iv) Any other information that the Secretary may require to make an eligibility determination under this section.

(Authority: 20 U.S.C. 7703(b)(1)(F))

[80 FR 33165, June 11, 2015]

§ 222.44 How does the Secretary determine a maximum payment for local educational agencies that are eligible for financial assistance under section 8003(b)(1)(F) and § 222.43?

The Secretary determines a maximum payment under section 8003(b)(1)(F) for an eligible LEA, using data from the third preceding fiscal year, as follows:

(a) Subject to paragraph (b) of this section, the Secretary increases the eligible LEA's local contribution rate (LCR) for section 8003(b) payment purposes to the amount the Secretary determines will compensate the applicant for the increase in its current expenditures necessitated by the unusual geographic factors identified under § 222.43(b)(2).

(b) The Secretary does not increase the LCR under this section to an amount that is more than—

(1) Is necessary to allow the applicant to provide a level of education equivalent to that provided by its generally comparable LEAs; or

(2) The per pupil share for all children in ADA of the increased current expenditures necessitated by the unusual geographic factors identified under § 222.43, as determined by the Secretary.

(Authority: 20 U.S.C. 7703(b)(1)(F))

[80 FR 33165, June 11, 2015]

§§ 222.45–222.49 [Reserved]

Subpart D—Payments Under Section 8003(d) of the Act for Local Educational Agencies That Serve Children With Disabilities

§ 222.50 What definitions apply to this subpart?

In addition to the terms referenced or defined in § 222.2, the following definitions apply to this subpart:

Child with a disability as defined in 34 CFR 300.8.

Early intervention services as defined in 34 CFR 303.13.

Free appropriate public education or *FAPE* as defined in 34 CFR 300.17.

Individualized education program or *IEP* as defined in 34 CFR 300.22.

Individualized family service plan or *IFSP* as defined in 34 CFR 303.20.

Infant or toddler with a disability as defined in 34 CFR 303.21.

Infants, toddlers, and children with disabilities, for these regulations, means both a ''child with a disability'' as defined in 34 CFR 300.8 and an ''infant or toddler with a disability'' as defined in 34 CFR 303.21.

Related services as defined in 34 CFR 300.34.

Special education as defined in 34 CFR 300.39.

[80 FR 33166, June 11, 2015, as amended at 82 FR 31912, July 11, 2017]

§ 222.51 Which children may a local educational agency count for payment under section 8003(d) of the Act?

(a) An LEA may count children described in sections 8003(a)(1)(A)(ii), (a)(1)(B), (a)(1)(C), and (a)(1)(D) of the Act who are eligible for services under the provisions of Part B or Part C of the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*) (IDEA), for the purpose of computing a payment under section 8003(d) in accordance with the provisions of this section.

(b)(1) An LEA may count a child with a disability described in paragraph (a) of this section who attends a private school or residential program if the LEA has placed or referred the child in accordance with the provisions of section 613 of the IDEA and 34 CFR part 300, subparts C and D.

(2) An LEA may not count a child with a disability described in paragraph (a) of this section who is placed in a private school by his or her parents, but that child may participate in public school programs that use section 8003(d) funds.

(c) An LEA may count infants and toddlers with disabilities described in paragraph (a) of this section if—

(1) The LEA provides early intervention services or FAPE to each of those children—

(i) Either directly or through an arrangement with another entity; and

(ii) The State does not charge a fee or other out-of-pocket cost to the child's parents under the State's system of payments on file with the Secretary required under 34 CFR 303.203(b)(1), 303.520, and 303.521, and there is no other cost to the child's parents (the costs of premiums do not count as out-of-pocket costs); and

(2) Each of those children has an IFSP or IEP (as appropriate).

(Authority: 20 U.S.C. 1400 *et seq.* and 7703(d))

[80 FR 33166, June 11, 2015]

§ 222.52 What requirements must a local educational agency meet to receive a payment under section 8003(d)?

To receive a payment under section 8003(d), an eligible LEA shall—

(a) State in its application the number of federally connected children with disabilities it claims for a payment under section 8003(d);

(b) Have in effect written IEPs or IFSPs for all federally connected children with disabilities it claims under section 8003(d); and

(c) Meet the requirements of subparts A and C of the regulations in this part.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 1400 *et seq.* and 7703)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

§ 222.53 What restrictions and requirements apply to the use of funds provided under section 8003(d)?

(a) An LEA shall use funds provided under section 8003(d) in accordance with the provisions of section 8003(d)(2) and 34 CFR parts 300 and 303.

(b) Obligations and expenditures of section 8003(d) funds may be incurred in either of the two following ways:

(1) An LEA may obligate or expend section 8003(d) funds for the fiscal year for which the funds were appropriated.

(2) An LEA may reimburse itself for obligations or expenditures of local and general State aid funds for the fiscal year for which the section 8003(d) funds were appropriated.

(c) An LEA shall use its section 8003(d) funds for the following types of expenditures:

(1) Expenditures that are reasonably related to the conduct of programs or projects for the free appropriate public education of, or early intervention services for, federally connected children with disabilities, which may include—

(i) Program planning and evaluation; and

(ii) Construction of or alteration to existing school facilities, but only when in accordance with section 605 of the IDEA and when the Secretary authorizes in writing those uses of funds.

(2) Acquisition cost (net invoice price) of equipment required for the free appropriate public education of, and early intervention services for, federally connected children with disabilities.

(i) If section 8003(d) funds are used for the acquisition of any equipment described in this paragraph (c)(2) of this section, the fair market value of any financial advantage realized through rebates, discounts, bonuses, free pieces of equipment used in a program or project for the free appropriate public education of, or early intervention services for, federally connected children with disabilities, or other circumstances, is not an allowable expenditure and may not be credited as an expenditure of those funds.

(ii) Funds awarded under the provisions of section 8003(d) may be used to acquire equipment for the free appropriate public education of, or early intervention services for, the federally connected children with disabilities only if title to the equipment would be in the applicant agency.

(d) An LEA shall account for the use of section 8003(d) funds as follows:

(1) By recording, for each fiscal year, the receipt (or credit) of section 8003(d) funds separately from other funds received under the Act, *i.e.*, on a line item basis in the general fund account or in a separate account; and

(2) By demonstrating that, for each fiscal year, the amount of expenditures for special education and related services and for early intervention services provided to the federally connected children with disabilities is at least equal to the amount of section 8003(d) funds received or credited for that fiscal year. This is done as follows:

(i) For each fiscal year determine the amount of an LEA's expenditures for special education and related services and for early intervention services provided to all children with disabilities.

(ii) The amount determined in paragraph (d)(2)(i) of this section is divided by the average daily attendance (ADA) of the total number of children with disabilities the LEA served during that fiscal year.

(iii) The amount determined in paragraph (d)(2)(ii) of this section is then multiplied by the total ADA of the LEA's federally connected children with disabilities claimed by the LEA for that fiscal year.

(3) If the amount of section 8003(d) funds the LEA received (or was credited) for the fiscal year exceeds the amount obtained in paragraph (d)(2)(iii) of this section, an overpayment equal to the excess section 8003(d) funds is established. This overpayment may be reduced or eliminated to the extent that the LEA can demonstrate that the average per pupil expenditure for special education and related services and for early intervention services provided to federally connected children with disabilities exceeded its average per pupil expenditure for serving non-federally connected children with disabilities.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703(d))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

§ 222.54 What supplement-not-supplant requirement applies to this subpart?

Funds provided under section 8003(d) may not supplant any State funds that were or would have been available to the LEA for the free appropriate public education of children counted under section 8003(d).

(a) No section 8003(d) funds may be paid to an LEA whose per pupil State aid for federally connected children with disabilities, either general State aid or special education State aid, has been or would be reduced as a result of eligibility for or receipt of section 8003(d) funds, whether or not a State has a program of State aid that meets the requirements of section 8009 of the Act and subpart K of the regulations in this part.

(1) A reduction in the per pupil amount of State aid for children with disabilities, including children counted under section 8003(d), from that received in a previous year raises a presumption that supplanting has occurred.

(2) The LEA may rebut this presumption by demonstrating that the reduction was unrelated to the receipt of section 8003(d) funds.

(b) In any State in which there is only one LEA, all funds for programs, and for early intervention services, for children with disabilities other than

funds from Federal sources are considered by the Secretary to be local funds.

(Authority: 20 U.S.C. 7703(d))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

§ 222.55 What other statutes and regulations are applicable to this subpart?

Local educational agencies receiving funds under section 8003(d) are subject to the requirements of the Individuals with Disabilities Education Act, and related regulations (20 U.S.C. 1401 *et seq.* and 34 CFR parts 300 and 303).

(Authority: 20 U.S.C. 1401 *et seq.*, 6314, and 7703(d))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

§§ 222.56–222.59 [Reserved]

Subpart E—Payments for Heavily Impacted Local Educational Agencies Under Section 8003(b)(2) of the Act

SOURCE: 80 FR 33166, June 11, 2015, unless otherwise noted.

§ 222.60 What are the scope and purpose of this subpart?

The regulations in this subpart implement section 8003(b)(2) of the Act, which provides financial assistance to certain heavily impacted local educational agencies (LEAs). The specific eligibility requirements are detailed in §§ 222.62 through 222.66.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.61 What data are used to determine a local educational agency's eligibility under section 8003(b)(2) of the Act?

(a) Computations and determinations made with regard to an LEA's eligibility under section 8003(b)(2) in §§ 222.61 through 222.66 of these regulations are based on the LEA's final student, revenue, expenditure, and tax data from the third fiscal year preceding the fiscal year for which it seeks assistance.

(b) Except for an LEA described in § 222.64(a)(3)(ii), the LEAs used for meeting the applicable tax rate requirement are the comparable LEAs that are identified in § 222.74 or all LEAs in the applicant's State.

(c) As used in this subpart, the phrase ''tax rate for general fund purposes'' means ''local real property tax rates for current expenditures purposes'' as defined in § 222.2. ''Current expenditures'' is defined in section 8013(4) of the ESEA.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.62 How are local educational agencies determined eligible under section 8003(b)(2)?

(a) An applicant that wishes to be considered to receive a heavily impacted payment must submit the required information indicating tax rate eligibility under §§ 222.63 or 222.64 with the annual section 7003 Impact Aid application. Final LEA tax rate eligibility must be verified by the SEA under the process described in § 222.73.

(b) An LEA that is eligible to apply for a ''continuing'' heavily impacted payment under section 8003(b)(2)(B) is one that received a heavily impacted LEA payment for fiscal year 2000 and that meets eligibility requirements specified in § 222.63.

(c) An LEA that is eligible to apply for a ''new'' heavily impacted payment under section 8003(b)(2)(C) is one that did not receive see above and throughout the section for fiscal year 2000 and that meets eligibility requirements specified in § 222.64 for two consecutive application years.

(Authority: 20 U.S.C. 7703(b)(2))

[80 FR 33166, June 11, 2015, as amended at 81 FR 64743, Sept. 20, 2016]

§ 222.63 When is a local educational agency eligible as a continuing applicant for payment under section 8003(b)(2)(B)?

A continuing heavily impacted LEA must have—

(a) The same boundaries as those of a Federal military installation;

(b)(1) An enrollment of federally connected children described in section 8003(a)(1) equal to at least 35 percent of the total number of children in average daily attendance (ADA) in the LEA;

(2) A per pupil expenditure (PPE) that is less than the average PPE of

the State in which the LEA is located or of all the States, whichever PPE is greater (except that an LEA with a total student enrollment of less than 350 students shall be determined to have met the PPE requirement); and

(3) A tax rate for general fund purposes of at least 95 percent of the average tax rate of comparable LEAs identified under § 222.74 or all LEAs in the applicant's State;

(c)(1) An enrollment of federally connected children described in section 8003(a)(1) equal to at least 30 percent of the total number of children in ADA in the LEA; and

(2) A tax rate for general fund purposes of at least 125 percent of the average tax rate of comparable LEAs identified under §§ 222.39–40 or of all LEAs in the applicant's State; or

(d) A total enrollment of at least 25,000 students, of which at least 50 percent are children described in section 8003(a)(1) and at least 6,000 of such children are children described in section 8003(a)(1)(A) and (B).

(Authority: 20 U.S.C. 7703(b)(2)(B))

§ 222.64 When is a local educational agency eligible as a new applicant for payment under section 8003(b)(2)(C)?

A new heavily impacted LEA must have—

(a)(1)(i) Federally connected children equal to at least 50 percent of the total number of children in average daily attendance (ADA) in the LEA if children described in section 8003(a)(1)(F)–(G) are eligible to be counted for a section 8003(b)(1) payment; or

(ii) Federally connected children equal to at least 40 percent of the total number of children in ADA if children described in section 8003(a)(1)(F)–(G) are not eligible to be counted for a section 8003(b)(1) payment; and

(2)(i) If the LEA has a total ADA of more than 350 children,

(A) A per pupil expenditure (PPE) that is less than the average of the State in which the LEA is located; and

(B) A tax rate for general fund purposes equal to at least 95 percent of the average tax rate of comparable LEAs identified in § 222.74 or of all LEAs in the applicant's State; or

(ii) If the LEA has a total ADA of less than 350 children,

(A) A PPE that is less than the average PPE of one or three generally comparable LEAs identified in § 222.74(b); and

(B) A tax rate equal to at least 95 percent of the average tax rate of one or three generally comparable LEAs identified in § 222.74(b);

(b) The same boundaries as those of a Federal military installation; or

(c)(1) The same boundaries as island property held in trust by the Federal government;

(2) No taxing authority; and

(3) Received a payment under section 8003(b)(1) for fiscal year 2001.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.65 What other requirements must a local educational agency meet to be eligible for financial assistance under section 8003(b)(2)?

Subject to § 222.66, an LEA described in § 222.63 or § 222.64 is eligible for financial assistance under section 8003(b)(2) if the Secretary determines that the LEA meets the following requirements:

(a) The LEA timely applies for assistance under section 8003(b)(2) and meets all of the other application and eligibility requirements of subparts A and C of these regulations.

(b) Except for an LEA described in § 222.63(a) or (d), or § 222.64(b) or (c), the LEA meets the applicable tax rate requirement in accordance with the procedures and requirements of §§ 222.68 through 222.74.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.66 How does a local educational agency lose and resume eligibility under section 8003(b)(2)?

(a) A continuing heavily impacted LEA that fails to meet the eligibility requirements in § 222.63 in any fiscal year or a new heavily impacted LEA that received a section 8003(b)(2) payment but then fails to meet the eligibility requirements in § 222.64 will still receive a heavily impacted payment in the first year of ineligibility, based on the number of children in ADA that would be counted for that application if the LEA were eligible.

(b)(1) A continuing heavily impacted LEA may resume eligibility for a heavily impacted payment if it applies in the fiscal year preceding the year for which it seeks eligibility and it meets the eligibility requirements in § 222.63 for both fiscal years.

(2) In the first fiscal year that a continuing heavily impacted LEA qualifies to resume eligibility, it cannot receive a heavily impacted payment but instead will receive a basic support payment under section 8003(b)(1) for that year.

Example:

CONTINUING LEA

In Federal Fiscal Years (FFYs) 1 and 2, a continuing LEA is eligible for a section 8003(b)(2) payment. In FFY 3, the LEA applies but is ineligible for section 8003(b)(2). However, it will still receive a payment under section 8003(b)(2) for FFY 3 (a ''hold harmless'' payment under § 222.66(a)). For FFY 4, the LEA applies and meets the requirements. The LEA is not eligible to receive a section 8003(b)(2) payment in FFY 4 but is instead eligible for a section 8003(b)(1) payment (see § 222.66(b)). In FFY 5, the LEA applies, meets the requirements, and receives a section 8003(b)(2) payment. The LEA not only must apply one year in advance and meet the section 8003(b)(2) requirements (FFY 4) but it must apply and meet the requirements for the subsequent FFY (year 5). The effects of these requirements on a continuing applicant's status and payments are summarized in the table below.

CONTINUING LEAS

	FFY 1	FFY 2	FFY 3	FFY 4	FFY 5
8003(b)(2) Eligibility	*Yes*	*Yes*	*No*	*Yes*	*Yes*
Payment Type	(b)(2)	(b)(2)	(b)(2) Hold Harmless.	(b)(1)	(b)(2)

(c) A new heavily impacted LEA may resume eligibility for a heavily impacted payment if it meets the eligibility requirements in § 222.64 for the fiscal year for which it seeks a payment.

Example:

NEW LEA

A new LEA applies for a section 8003(b)(2) payment and meets the applicable eligibility criteria. The LEA does not receive a section 8003(b)(2) payment in FFY 1 and it must apply and meet the requirements again in FFY 2 before it can receive a (b)(2) payment (see § 222.62(b)). If that new district is then ineligible for a year, it can regain eligibility only if it meets the applicable criteria in a subsequent year. For example, if a new LEA loses its section 8003(b)(2) eligibility in FFY 3 because its tax rate dropped to 94 percent of the average tax rate of comparable districts in the State, that LEA is still entitled to receive a payment under section 8003(b)(2) in FFY 3 if it applies for such payment (a ''hold harmless'' payment under § 222.66(a)). Then if the LEA applies in FFY 4 and meets the eligibility requirement under section 8003(b)(2), it is once again eligible to receive a section 8003(b)(2) payment (see § 222.66(c)). The effects of these requirements on a new applicant's status and payments are summarized in the table below.

NEW LEAS

	FFY 1	FFY 2	FFY 3	FFY 4	FFY 5
8003(b)(2) Eligibility	*Yes*	*Yes*	*No*	*Yes*	*Yes*
Payment Type	(b)(1)	(b)(2)	(b)(2) Hold Harmless.	(b)(2)	(b)(2)

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.67 How may a State aid program affect a local educational agency's eligibility for assistance under section 8003(b)(2)?

The Secretary determines that an LEA is not eligible for financial assistance under section 8003(b)(2) if—

(a) The LEA is in a State that has an equalized program of State aid that meets the requirements of section 8009; and

(b) The State, in determining the LEA's eligibility for or amount of State aid, takes into consideration the portion of the LEA's payment under section 8003(b)(2) that exceeds what the LEA would receive under section 8003(b)(1).

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.68 How does the Secretary determine whether a fiscally independent local educational agency meets the applicable tax rate requirement?

(a) To determine whether a fiscally independent LEA, as defined in § 222.2(c), meets the applicable tax rate requirement in §§ 222.63(b)(3), 222.63(c)(2), and 222.64(a)(3), the Secretary compares the LEA's local real property tax rate for current expenditure purposes, as defined in § 222.2(c) (referred to in this part as ''tax rate'' or ''tax rates''), with the tax rates of its generally comparable LEAs.

(b) For purposes of this section, the Secretary uses—

(1) The actual tax rate if all the real property in the LEA and its generally comparable LEAs is assessed at the same percentage of true value; or

(2) Tax rates computed under §§ 222.69–222.71.

(c) The Secretary determines that an LEA described in §§ 222.63(b), 222.63(c), or 222.64(a) meets the applicable tax rate requirement if—

(1) The LEA's tax rate is equal to at least 95 percent (or 125 percent under 222.63(c)) of the average tax rate of its generally comparable LEAs;

(2) Each of the LEA's tax rates for each classification of real property is equal to at least 95 percent (or 125 percent under 222.63(c)) of each of the average tax rates of its generally comparable LEAs for the same classification of property;

(3) The LEA taxes all of its real property at the maximum rates allowed by the State, if those maximum rates apply uniformly to all LEAs in the State and the State does not permit any rates higher than the maximum; or

(4) The LEA has no taxable real property.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.69 What tax rates does the Secretary use if real property is assessed at different percentages of true value?

If the real property of an LEA and its generally comparable LEAs consists of one classification of property but the property is assessed at different percentages of true value in the different LEAs, the Secretary determines whether the LEA meets the applicable tax rate requirement under § 222.68(c)(1) by using tax rates computed by—

(a) Multiplying the LEA's actual tax rate for real property by the percentage of true value assigned to that property for tax purposes; and

(b) Performing the computation in paragraph (a) of this section for each of its generally comparable LEAs and determining the average of those computed tax rates.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.70 What tax rates does the Secretary use if two or more different classifications of real property are taxed at different rates?

If the real property of an LEA and its generally comparable LEAs consists of two or more classifications of real property taxed at different rates, the Secretary determines whether the LEA meets the applicable tax rate requirement under § 222.68(c)(1) or (2) by using one of the following:

(a) Actual tax rates for each of the classifications of real property.

(b) Tax rates computed in accordance with § 222.69 for each of the classifications of real property.

(c) Tax rates computed by—

(1) Determining the total true value of all real property in the LEA by dividing the assessed value of each classification of real property in the LEA by the percentage of true value assigned to that property for tax purposes and aggregating the results;

(2) Determining the LEA's total revenues derived from local real property taxes for current expenditures (as defined in section 8013);

(3) Dividing the amount determined in paragraph (c)(2) of this section by

the amount determined in paragraph (c)(1) of this section; and

(4) Performing the computations in paragraphs (c)(1), (2), and (3) of this section for each of the generally comparable LEAs and then determining the average of their computed tax rates.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.71 What tax rates may the Secretary use if substantial local revenues are derived from local tax sources other than real property taxes?

(a) In a State in which a substantial portion of revenues for current expenditures for educational purposes is derived from local tax sources other than real property taxes, the State educational agency (SEA) may request that the Secretary take those revenues into account in determining whether an LEA in that State meets the applicable tax rate requirement under § 222.68.

(b) If, based upon the request of an SEA, the Secretary determines that it is appropriate to take the revenues described in paragraph (a) of this section into account in determining whether an LEA in that State meets the applicable tax rate requirement under § 222.68, the Secretary uses tax rates computed by—

(1) Dividing the assessed value of each classification of real property in the LEA by the percentage of true value assigned to that property for tax purposes and aggregating the results;

(2) Determining the LEA's total revenues derived from local tax sources for current expenditures (as defined in section 8013);

(3) Dividing the amount determined in paragraph (b)(2) of this section by the amount determined in paragraph (b)(1) of this section; and

(4) Performing the computations in paragraphs (b)(1), (2), and (3) of this section for each of the generally comparable LEAs and then determining the average of those computed tax rates.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.72 How does the Secretary determine whether a fiscally dependent local educational agency meets the applicable tax rate requirement?

(a) If an LEA is fiscally dependent, as defined in § 222.2(c), the Secretary compares the LEA's imputed local tax rate, calculated under paragraph (b) of this section, with the average tax rate of its generally comparable LEAs, calculated under paragraph (c) of this section, to determine whether the LEA meets the applicable tax rate requirement.

(b) The Secretary imputes a local tax rate for a fiscally dependent LEA by—

(1) Dividing the assessed value of each classification of real property within the boundaries of the general government by the percentage of true value assigned to that property for tax purposes and aggregating the results;

(2) Determining the amount of locally derived revenues made available by the general government for the LEA's current expenditures (as defined in section 8013); and

(3) Dividing the amount determined in paragraph (b)(2) of this section by the amount determined in paragraph (b)(1) of this section.

(c) The Secretary performs the computations in paragraph (b) of this section for each of the fiscally dependent generally comparable LEAs and the computations in §§ 222.68 through 222.71, whichever is applicable, for each of the fiscally independent generally comparable LEAs and determines the average of all those tax rates.

(d) The Secretary determines that a fiscally dependent LEA described in § 222.63(b) or § 222.64(a) meets the applicable tax rate requirement if its imputed local tax rate is equal to at least 95 percent of the average tax rate of its generally comparable LEAs.

(e) The Secretary determines that a fiscally dependent LEA described in § 222.63(c) meets the applicable tax rate requirement if its imputed local tax rate is equal to at least 125 percent of the average tax rate of its generally comparable LEAs.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.73 What information must the State educational agency provide?

The SEA of any State with an LEA applying for assistance under section

8003(b)(2) shall provide the Secretary with relevant information necessary to determine the PPE for all LEAs in the State and whether the LEA meets the applicable tax rate requirement under this subpart.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.74 How does the Secretary identify generally comparable local educational agencies for purposes of section 8003(b)(2)?

(a) Except as otherwise provided in paragraph (b) of this section, the Secretary identifies generally comparable LEAs for purposes of this subpart in accordance with the local contribution rate procedures described in §§ 222.39 through 222.40.

(b) For applicant LEAs described in § 222.64(a)(2)(ii) and (a)(3)(ii), to identify the one or three generally comparable LEAs, the Secretary uses the following procedures:

(1) The Secretary asks the SEA of the applicant LEA to identify generally comparable LEAs in the State by first following the directions in § 222.39(a)(4), using data from the preceding fiscal year. The SEA then removes from the resulting list any LEAs that are significantly impacted, as described in § 222.39(b)(1), except the applicant LEA.

(2) If the remaining LEAs are not in rank order by total ADA, the SEA lists them in that order.

(3) The LEA may then select as its generally comparable LEAs, for purposes of section 8003(b)(2) only, one or three LEAs from the list that are closest to it in size as determined by total ADA (*i.e.*, the next one larger or the next one smaller, or the next three larger LEAs, the next three smaller, the next two larger and the next one smaller, or the next one larger and the next two smaller).

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.75 How does the Secretary compute the average per pupil expenditure of generally comparable local educational agencies under this subpart?

For applicant LEAs described in § 222.64(a)(2)(ii), the Secretary computes average per pupil expenditures (APPE) by dividing the sum of the total current expenditures for the third preceding fiscal year for the identified generally comparable LEAs by the sum of the total ADA of those LEAs for the same fiscal year.

(Authority: 20 U.S.C. 7703(b)(2))

§§ 222.76–222.79 [Reserved]

Subpart F [Reserved]

Subpart G—Special Provisions for Local Educational Agencies That Claim Children Residing on Indian Lands

GENERAL

§ 222.90 What definitions apply to this subpart?

In addition to the definitions in § 222.2, the following definitions apply to this subpart:

Indian children means children residing on Indian lands who are recognized by an Indian tribe as being affiliated with that tribe.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established under the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(Authority: 20 U.S.C. 7713, 7881, 7938, 8801)

§ 222.91 What requirements must a local educational agency meet to receive a payment under section 7003 of the Act for children residing on Indian lands?

(a) To receive a payment under section 7003 of the Act for children residing on Indian lands, an LEA must—

(1) Meet the application and eligibility requirements in section 7003 and subparts A and C of these regulations;

(2) Except as provided in paragraph (b) of this section, develop and implement policies and procedures in accordance with § 222.94; and

(3) Include in its application for payments under section 7003—

(i) An assurance that the LEA established these policies and procedures in

consultation with and based on information from tribal officials and parents of those children residing on Indian lands who are Indian children, except as provided in paragraph (b) of this section;

(ii) An assurance that the LEA has provided a written response to the comments, concerns and recommendations received through the Indian policies and procedures consultation process, except as provided in paragraph (b) of this section; and

(iii) Either a copy of the policies and procedures, or documentation that the LEA has received a waiver in accordance with the provisions of paragraph (b) of this section.

(b) An LEA is not required to comply with § 222.94 with respect to students from a tribe that has provided the LEA with a waiver that meets the requirements of this paragraph.

(1) A waiver must contain a voluntary written statement from an appropriate tribal official or tribal governing body that—

(i) The LEA need not comply with § 222.94 because the tribe is satisfied with the LEA's provision of educational services to the tribe's students; and

(ii) The tribe was provided a copy of the requirements in § 222.91 and § 222.94, and understands the requirements that are being waived.

(2) The LEA must submit the waiver at the time of application.

(3) The LEA must obtain a waiver from each tribe that has Indian children living on Indian lands claimed by the LEA on its application under section 7003 of the Act. If the LEA only obtains waivers from some, but not all, applicable tribes, the LEA must comply with the requirements of § 222.94 with respect to those tribes that did not agree to waive these requirements.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703(a), 7704)

[81 FR 64743, Sept. 20, 2016]

§ 222.92 What additional statutes and regulations apply to this subpart?

(a) The following statutes and regulations apply to LEAs that claim children residing on Indian lands for payments under section 8003:

(1) The General Education Provisions Act (GEPA) in 20 U.S.C. 1221 *et seq.*, unless otherwise noted.

(2) Other relevant regulations in this part.

(b) The following statutes, rules, and regulations do not apply to any hearing proceedings under this subpart:

(1) Administrative Procedure Act.

(2) Federal Rules of Civil Procedure.

(3) Federal Rules of Evidence.

(4) GEPA, part E.

(5) 34 CFR part 81.

(Authority: 20 U.S.C. 1221 *et seq.* unless otherwise noted, 7703, and 7704)

§ 222.93 [Reserved]

INDIAN POLICIES AND PROCEDURES

§ 222.94 What are the responsibilities of the LEA with regard to Indian policies and procedures?

(a) An LEA that is subject to the requirements of § 222.91(a) must consult with and involve local tribal officials and parents of Indian children in the planning and development of:

(1) Its Indian policies and procedures (IPPs), and

(2) The LEA's general educational program and activities.

(b) An LEA's IPPs must include a description of the specific procedures for how the LEA will:

(1) Disseminate relevant applications, evaluations, program plans and information related to the LEA's education program and activities with sufficient advance notice to allow tribes and parents of Indian children the opportunity to review and make recommendations.

(2) Provide an opportunity for tribes and parents of Indian children to provide their views on the LEA's educational program and activities, including recommendations on the needs of their children and on how the LEA may help those children realize the benefits of the LEA's education programs and activities. As part of this requirement, the LEA will—

(i) Notify tribes and the parents of Indian children of the opportunity to

submit comments and recommendations, considering the tribe's preference for method of communication, and

(ii) Modify the method of and time for soliciting Indian views, if necessary, to ensure the maximum participation of tribes and parents of Indian children.

(3) At least annually, assess the extent to which Indian children participate on an equal basis with non-Indian children in the LEA's education program and activities. As part of this requirement, the LEA will:

(i) Share relevant information related to Indian children's participation in the LEA's education program and activities with tribes and parents of Indian children; and

(ii) Allow tribes and parents of Indian children the opportunity and time to review and comment on whether Indian children participate on an equal basis with non-Indian children.

(4) Modify the IPPs if necessary, based upon the results of any assessment or input described in paragraph (b) of this section.

(5) Respond at least annually in writing to comments and recommendations made by tribes or parents of Indian children, and disseminate the responses to the tribe and parents of Indian children prior to the submission of the IPPs by the LEA.

(6) Provide a copy of the IPPs annually to the affected tribe or tribes.

(c)(1) An LEA that is subject to the requirements of § 222.91(a) must implement the IPPs described in paragraph (b) of this section.

(2) Each LEA that has developed IPPs shall review those IPPs annually to ensure that they comply with the provisions of this section, and are implemented by the LEA in accordance with this section.

(3) If an LEA determines, after input from the tribe and parents of Indian children, that its IPPs do not meet the requirements of this section, the LEA shall amend its IPPs to conform to those requirements within 90 days of its determination.

(4) An LEA that amends its IPPs shall, within 30 days, send a copy of the amended IPPs to—

(i) The Impact Aid Program Director for approval; and

(ii) The affected tribe or tribes.

(Authority: 20 U.S.C. 7704)

[81 FR 64744, Sept. 20, 2016]

§ 222.95 How are Indian policies and procedures reviewed to ensure compliance with the requirements in section 8004(a) of the Act?

(a) The Director of the Impact Aid Program (Director) periodically reviews applicant LEAs' IPPs to ensure that they comply with the provisions of section 8004(a) and § 222.94.

(b) If the Director determines either that the LEA's IPPs do not comply with the minimum standards of section 8004(a), or that the IPPs have not been implemented in accordance with § 222.94, the Director provides the LEA with written notification of the deficiencies related to its IPPs and requires that the LEA take appropriate action.

(c) An LEA shall make the necessary changes within 90 days of receipt of written notification from the Director.

(d) If the LEA fails to make the necessary adjustments or changes within the prescribed period of time, the Director may withhold all or part of the payments that the LEA is eligible to receive under section 8003.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7704 (a) and (d)(2))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35416, July 1, 1997; 81 FR 64744, Sept. 20, 2016]

§§ 222.96–222.101 [Reserved]

INDIAN POLICIES AND PROCEDURES COMPLAINT AND HEARING PROCEDURES

§ 222.102 Who may file a complaint about a local educational agency's Indian policies and procedures?

(a) Only a tribal chairman or an authorized designee for a tribe that has students attending an LEA's schools may file a written complaint with the Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) regarding any action of the LEA pursuant to, or relevant to, section 8004(a) and § 222.94.

(b) If a tribe files a complaint through a designee, the tribe shall acknowledge in writing in the complaint that the designee is authorized to act on its behalf.

(Authority: 20 U.S.C. 7704(e)(1))

§ 222.103 What must be included in a complaint?

For purposes of this subpart, a complaint is a signed statement that includes—

(a) An allegation that an LEA has failed to develop and implement IPPs in accordance with section 8004(a);

(b) Information that supports the allegation;

(c) A specific request for relief; and

(d) A statement describing what steps the tribe has taken to resolve with the LEA the matters on which the complaint is based.

(Authority: 20 U.S.C. 7704(e)(1))

§ 222.104 When does the Assistant Secretary consider a complaint received?

(a) The Assistant Secretary considers a complaint to have been received only after the Assistant Secretary determines that the complaint—

(1) Satisfies the requirements in §§ 222.102 and 222.103; and

(2) Is in writing and signed by the tribal chairman or the tribe's authorized designee.

(b) If the Assistant Secretary determines that a complaint fails to meet the requirements in §§ 222.102–222.103, the Assistant Secretary notifies the tribe or its designee in writing that the complaint has been dismissed for purposes of invoking the hearing procedures in §§ 222.102–222.113.

(c) Any notification that a complaint has been dismissed includes the reasons why the Assistant Secretary determined that the complaint did not meet the requirements in §§ 222.102 and 222.103.

(d) Notification that a complaint has been dismissed does not preclude other efforts to investigate or resolve the issues raised in the complaint, including the filing of an amended complaint.

(Authority: 20 U.S.C. 7704(e)(1))

§§ 222.105–222.107 [Reserved]

§ 222.108 What actions must be taken upon receipt of a complaint?

Within 10 working days of receipt of a complaint, the Secretary or his designee—

(a) Designates a hearing examiner to conduct a hearing;

(b) Designates a time for the hearing that is no more than 30 days after the designation of a hearing examiner;

(c) Designates a place for the hearing that, to the extent possible, is—

(1) Near the LEA; or

(2) At another location convenient to the tribe and the LEA, if it is determined that there is good cause to designate another location;

(d) Notifies the tribe and the LEA of the time, place, and nature of the hearing; and

(e) Transmits copies of the complaint to the LEA and the affected tribe or tribes.

(Authority: 20 U.S.C. 7704(e))

§ 222.109 When may a local educational agency reply to a complaint?

An LEA's reply to the charges in the complaint must be filed with the hearing examiner within 15 days of the date the LEA receives a copy of the notice and complaint described in § 222.108 (d) and (e) from the hearing examiner.

(Authority: 20 U.S.C. 7704(e))

§ 222.110 What are the procedures for conducting a hearing on a local educational agency's Indian policies and procedures?

Hearings on IPP complaints filed by an Indian tribe or tribes against an LEA are conducted as follows:

(a) The hearing must be open to the public.

(b) Parties may be represented by counsel.

(c)(1) Each party may submit oral and written testimony that is relevant to the issues in the proceeding and make recommendations concerning appropriate remedial actions.

(2) A party may object to evidence it considers to be irrelevant or unduly repetitious.

(d) No party shall communicate orally or in writing with the hearing examiner or the Assistant Secretary on matters under review, except minor procedural matters, unless all parties to the complaint are given—

(1) Timely and adequate notice of the communication; and

(2) Reasonable opportunity to respond.

(e) For each document that a party submits, the party shall—

(1) File one copy for inclusion in the record of the proceeding; and

(2) Provide a copy to each of the other parties to the proceeding.

(f) Each party shall bear only its own costs in the proceeding.

(Authority: 20 U.S.C. 7704(e))

§ 222.111 What is the authority of the hearing examiner in conducting a hearing?

The hearing examiner is authorized to conduct a hearing under section 8004(e) and §§ 222.109–222.113 as follows:

(a) The hearing examiner may—

(1) Clarify, simplify, or define the issues or consider other matters that may aid in the disposition of the complaint;

(2) Direct the parties to exchange relevant documents or information; and

(3) Examine witnesses.

(b) The hearing examiner—

(1) Regulates the course of proceedings and conduct of the parties;

(2) Arranges for the preparation of a transcript of each hearing and provides one copy to each party;

(3) Schedules the submission of oral and documentary evidence;

(4) Receives, rules on, excludes, or limits evidence;

(5) Establishes and maintains a record of the proceeding, including any transcripts referenced above;

(6) Establishes reasonable rules governing public attendance at the proceeding; and

(7) Is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(Authority: 20 U.S.C. 7704(e))

§ 222.112 What procedures are followed after the hearing?

(a) Each party may submit to the hearing examiner additional evidence that is relevant to the issues raised at the hearing, within the time period and in the manner specified by the hearing examiner.

(b) Within 30 days after the hearing, the hearing examiner—

(1) Makes, on the basis of the record, written findings of fact and recommendations concerning any appropriate remedial action that should be taken;

(2) Submits those findings and recommendations, along with the hearing record, to the Assistant Secretary; and

(3) Sends a copy of those findings and recommendations to each party.

(c)(1) Each party may file with the Assistant Secretary comments on the hearing examiner's findings and recommendations.

(2) The comments must be received by the Assistant Secretary within 10 days after the party receives a copy of the hearing examiner's findings and recommendations.

(Authority: 20 U.S.C. 7704(e))

§ 222.113 What are the responsibilities of the Assistant Secretary after the hearing?

(a) Within 30 days after receiving the entire hearing record and the hearing examiner's findings and recommendations, the Assistant Secretary makes, on the basis of the record, a written determination that includes—

(1) Any appropriate remedial action that the LEA must take;

(2) A schedule for completing any remedial action; and

(3) The reasons for the Assistant Secretary's decision.

(b) After completing the final determination required by paragraph (a) of this section, the Assistant Secretary sends the parties a copy of that determination.

(c) The Assistant Secretary's final determination under paragraph (a) of this section is the final action of the Department concerning the complaint and is subject to judicial review.

(Authority: 20 U.S.C. 7704(e))

WITHHOLDING AND RELATED PROCEDURES FOR INDIAN POLICIES AND PROCEDURES

SOURCE: 62 FR 35416, July 1, 1997, unless otherwise noted.

§ 222.114 How does the Assistant Secretary implement the provisions of this subpart?

The Assistant Secretary implements section 8004 of the Act and this subpart through such actions as the Assistant Secretary determines to be appropriate, including the withholding of funds in accordance with §§ 222.115–222.122, after affording the affected LEA, parents, and Indian tribe or tribes an opportunity to present their views.

(Authority: 20 U.S.C. 7704 (d)(2), (e) (8)–(9))

§ 222.115 When does the Assistant Secretary withhold payments from a local educational agency under this subpart?

Except as provided in § 222.120, the Assistant Secretary withholds payments to an LEA if—

(a) The Assistant Secretary determines it is necessary to enforce the requirements of section 8004 of the Act or this subpart; or

(b) After a hearing has been conducted under section 8004(e) of the Act and §§ 222.102–222.113 (IPP hearing)—

(1) The LEA rejects the final determination of the Assistant Secretary; or

(2) The LEA fails to implement the required remedy within the time established and the Assistant Secretary determines that the required remedy will not be undertaken by the LEA even if the LEA is granted a reasonable extension of time.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), (e)(8)–(9))

§ 222.116 How are withholding procedures initiated under this subpart?

(a) If the Assistant Secretary decides to withhold an LEA's funds, the Assistant Secretary issues a written notice of intent to withhold the LEA's payments.

(b) In the written notice, the Assistant Secretary—

(1) Describes how the LEA failed to comply with the requirements at issue; and

(2)(i) Advises an LEA that has participated in an IPP hearing that it may request, in accordance with § 222.117(c), that its payments not be withheld; or

(ii) Advises an LEA that has not participated in an IPP hearing that it may request a withholding hearing in accordance with § 222.117(d).

(c) The Assistant Secretary sends a copy of the written notice of intent to withhold payments to the LEA and the affected Indian tribe or tribes by certified mail with return receipt requested.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), and (e) (8)–(9))

§ 222.117 What procedures are followed after the Assistant Secretary issues a notice of intent to withhold payments?

(a) The withholding of payments authorized by section 8004 of the Act is conducted in accordance with section 8004 (d)(2) or (e)(8)–(9) of the Act and the regulations in this subpart.

(b) An LEA that receives a notice of intent to withhold payments from the Assistant Secretary is not entitled to an Impact Aid hearing under the provisions of section 8011 of the Act and subpart J of this part.

(c) *After an IPP hearing.* (1) An LEA that rejects or fails to implement the final determination of the Assistant Secretary after an IPP hearing has 10 days from the date of the LEA's receipt of the written notice of intent to withhold funds to provide the Assistant Secretary with a written explanation and documentation in support of the reasons why its payments should not be withheld. The Assistant Secretary provides the affected Indian tribe or tribes with an opportunity to respond to the LEA's submission.

(2) If after reviewing an LEA's written explanation and supporting documentation, and any response from the Indian tribe or tribes, the Assistant Secretary determines to withhold an LEA's payments, the Assistant Secretary notifies the LEA and the affected Indian tribe or tribes of the withholding determination in writing by certified mail with return receipt

requested prior to withholding the payments.

(3) In the withholding determination, the Assistant Secretary states the facts supporting the determination that the LEA failed to comply with the legal requirements at issue, and why the provisions of § 222.120 (provisions governing circumstances when an LEA is exempt from the withholding of payments) are inapplicable. This determination is the final decision of the Department.

(d) *An LEA that has not participated in an IPP hearing.* (1) An LEA that has not participated in an IPP hearing has 30 days from the date of its receipt of the Assistant Secretary's notice of intent to withhold funds to file a written request for a withholding hearing with the Assistant Secretary. The written request for a withholding hearing must—

(i) Identify the issues of law and facts in dispute; and

(ii) State the LEA's position, together with the pertinent facts and reasons supporting that position.

(2) If the LEA's request for a withholding hearing is accepted, the Assistant Secretary sends written notification of acceptance to the LEA and the affected Indian tribe or tribes and forwards to the hearing examiner a copy of the Assistant Secretary's written notice, the LEA's request for a withholding hearing, and any other relevant documents.

(3) If the LEA's request for a withholding hearing is rejected, the Assistant Secretary notifies the LEA in writing that its request for a hearing has been rejected and provides the LEA with the reasons for the rejection.

(4) The Assistant Secretary rejects requests for withholding hearings that are not filed in accordance with the time for filing requirements described in paragraph (d)(1) of this section. An LEA that files a timely request for a withholding hearing, but fails to meet the other filing requirements set forth in paragraph (d)(1) of this section, has 30 days from the date of receipt of the Assistant Secretary's notification of rejection to submit an acceptable amended request for a withholding hearing.

(e) If an LEA fails to file a written explanation in accordance with paragraph (c) of this section, or a request for a withholding hearing or an amended request for a withholding hearing in accordance with paragraph (d) of this section, the Secretary proceeds to take appropriate administrative action to withhold funds without further notification to the LEA.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), and (e) (8)–(9))

§ 222.118 How are withholding hearings conducted in this subpart?

(a) *Appointment of hearing examiner.* Upon receipt of a request for a withholding hearing that meets the requirements of § 222.117(d), the Assistant Secretary requests the appointment of a hearing examiner.

(b) *Time and place of the hearing.* Withholding hearings under this subpart are held at the offices of the Department in Washington, DC, at a time fixed by the hearing examiner, unless the hearing examiner selects another place based upon the convenience of the parties.

(c) *Proceeding.* (1) The parties to the withholding hearing are the Assistant Secretary and the affected LEA. An affected Indian tribe is not a party, but, at the discretion of the hearing examiner, may participate in the hearing and present its views on the issues relevant to the withholding determination.

(2) The parties may introduce all relevant evidence on the issues stated in the LEA's request for withholding hearing or other issues determined by the hearing examiner during the proceeding. The Assistant Secretary's notice of intent to withhold, the LEA's request for a withholding hearing, and all amendments and exhibits to those documents, must be made part of the hearing record.

(3) Technical rules of evidence, including the Federal Rules of Evidence, do not apply to hearings conducted under this subpart, but the hearing examiner may apply rules designed to assure production of the most credible evidence available, including allowing the cross-examination of witnesses.

(4) Each party may examine all documents and other evidence offered or accepted for the record, and may have the opportunity to refute facts and arguments advanced on either side of the issues.

(5) A transcript must be made of the oral evidence unless the parties agree otherwise.

(6) Each party may be represented by counsel.

(7) The hearing examiner is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(d) *Filing requirements*. (1) All written submissions must be filed with the hearing examiner by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, a party may serve a document upon the other party by facsimile transmission.

(3) The filing date for a written submission under this subpart is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was timely received by the hearing examiner.

(5) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

(e) *Procedural rules*. (1) If the hearing examiner determines that no dispute exists as to a material fact or that the resolution of any disputes as to material facts would not be materially assisted by oral testimony, the hearing examiner shall afford each party an opportunity to present its case—

(i) In whole or in part in writing; or

(ii) In an informal conference after affording each party sufficient notice of the issues to be considered.

(2) With respect to withholding hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the hearing examiner shall afford to each party—

(i) Sufficient notice of the issues to be considered at the hearing;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(f) *Decision of the hearing examiner*. (1) The hearing examiner—

(i) Makes written findings and an initial withholding decision based upon the hearing record; and

(ii) Forwards to the Secretary, and mails to each party and to the affected Indian tribe or tribes, a copy of the written findings and initial withholding decision.

(2) A hearing examiner's initial withholding decision constitutes the Secretary's final withholding decision without any further proceedings unless—

(i) Either party to the withholding hearing, within 30 days of the date of its receipt of the initial withholding decision, requests the Secretary to review the decision and that request is granted; or

(ii) The Secretary otherwise determines, within the time limits stated in paragraph (g)(2)(ii) of this section, to review the initial withholding decision.

(3) When an initial withholding decision becomes the Secretary's final decision without any further proceedings, the Department notifies the parties and the affected Indian tribe or tribes of the finality of the decision.

(g) *Administrative appeal of an initial decision*. (1)(i) Any party may request the Secretary to review an initial withholding decision.

(ii) A party must file this request for review within 30 days of the party's receipt of the initial withholding decision.

(2) The Secretary may—

(i) Grant or deny a timely request for review of an initial withholding decision; or

(ii) Otherwise determine to review the decision, so long as that determination is made within 45 days of the date of receipt of the initial decision by the Secretary.

(3) The Secretary mails to each party and the affected Indian tribe or tribes, by certified mail with return receipt requested, written notice of—

(i) The Secretary's action granting or denying a request for review of an initial decision; or

(ii) The Secretary's determination to review an initial decision.

(h) *Secretary's review of an initial withholding decision.* (1) When the Secretary reviews an initial withholding decision, the Secretary notifies each party and the affected Indian tribe or tribes in writing, by certified mail with return receipt requested, that it may file a written statement or comments; and

(2) Mails to each party and to the affected Indian tribe or tribes, by certified mail with return receipt requested, written notice of the Secretary's final withholding decision.

(Authority: 20 U.S.C. 7704)

§ 222.119 What is the effect of withholding under this subpart?

(a) The withholding provisions in this subpart apply to all payments that an LEA is otherwise eligible to receive under section 8003 of the Act for any fiscal year.

(b) The Assistant Secretary withholds funds after completion of any administrative proceedings under §§ 222.116–222.118 until the LEA documents either compliance or exemption from compliance with the requirements in section 8004 of the Act and this subpart.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), (e)(8)–(9))

§ 222.120 When is a local educational agency exempt from withholding of payments?

Except as provided in paragraph (d)(2) of this section, the Assistant Secretary does not withhold payments to an LEA under the following circumstances:

(a) The LEA documents that it has received a written statement from the affected Indian tribe or tribes that the LEA need not comply with section 8004 (a) and (b) of the Act, because the affected Indian tribe or tribes is satisfied with the provision of educational services by the LEA to the children claimed on the LEA's application for assistance under section 8003 of the Act.

(b) The Assistant Secretary receives from the affected Indian tribe or tribes a written request that meets the requirements of § 222.121 not to withhold payments from an LEA.

(c) The Assistant Secretary, on the basis of documentation provided by the LEA, determines that withholding payments during the course of the school year would substantially disrupt the educational programs of the LEA.

(d)(1) The affected Indian tribe or tribes elects to have educational services provided by the Bureau of Indian Affairs under section 1101(d) of the Education Amendments of 1978.

(2) For an LEA described in paragraph (d)(1) of this section, the Secretary recalculates the section 8003 payment that the LEA is otherwise eligible to receive to reflect the number of students who remain in attendance at the LEA.

(Authority: 20 U.S.C. 7703(a), 7704(c), (d)(2) and (e)(8))

§ 222.121 How does the affected Indian tribe or tribes request that payments to a local educational agency not be withheld?

(a) The affected Indian tribe or tribes may submit to the Assistant Secretary a formal request not to withhold payments from an LEA.

(b) The formal request must be in writing and signed by the tribal chairman or authorized designee.

(Authority: 20 U.S.C. 7704 (d)(2) and (e)(8))

§ 222.122 What procedures are followed if it is determined that the local educational agency's funds will not be withheld under this subpart?

If the Secretary determines that an LEA's payments will not be withheld under this subpart, the Assistant Secretary notifies the LEA and the affected Indian tribe or tribes, in writing, by certified mail with return receipt requested, of the reasons why the payments will not be withheld.

(Authority: 20 U.S.C. 7704 (d)–(e))

§§ 222.123–222.129 [Reserved]

Subpart H [Reserved]

Subpart I—Facilities Assistance and Transfers Under Section 8008 of the Act

§ 222.140 What definitions apply to this subpart?

In addition to the terms referenced or defined in § 222.2, the following definitions apply to this subpart:

Minimum school facilities means those school facilities for which the Secretary may provide assistance under this part as follows:

(1) The Secretary, after consultation with the State educational agency and the local educational agency (LEA), considers these facilities necessary to support an educational program—

(i) For the membership of students residing on Federal property to be served at normal capacity; and

(ii) In accordance with applicable Federal and State laws and, if necessary or appropriate, common practice in the State.

(2) The term includes, but is not restricted to—

(i) Classrooms and related facilities; and

(ii) Machinery, utilities, and initial equipment, to the extent that these are necessary or appropriate for school purposes.

Providing assistance means constructing, leasing, renovating, remodeling, rehabilitating, or otherwise providing minimum school facilities.

(Authority: 20 U.S.C. 7708)

§ 222.141 For what types of projects may the Secretary provide assistance under section 8008 of the Act?

The types of projects for which the Secretary may provide assistance under section 8008 of the Act during any given year include, but are not restricted to, one or more of the following:

(a)(1) Emergency repairs to existing facilities for which the Secretary is responsible under section 8008.

(2) As used in this section, the term *emergency repairs* means those repairs necessary—

(i) For the health and safety of persons using the facilities;

(ii) For the removal of architectural barriers to the disabled; or

(iii) For the prevention of further deterioration of the facilities.

(b) Renovation of facilities for which the Secretary is responsible under section 8008 to meet the standards of minimum school facilities in exchange for an LEA or another appropriate entity accepting transfer of the Secretary's interest in them under § 222.143.

(c) Provision of temporary facilities on Federal property pending emergency repairs.

(d) Construction of replacement minimum school facilities when more cost-effective than renovation and when the replacement facilities are to be transferred to local ownership under § 222.143.

(Authority: 20 U.S.C. 7708)

§ 222.142 What terms and conditions apply to minimum school facilities operated under section 8008 by another agency?

When minimum school facilities are provided under section 8008, the Secretary may—

(a) Arrange for the operation of the facilities by an agency other than the Department;

(b) Establish terms and conditions for the operation of the facilities; and

(c) Require the operating agency to submit assurances and enter into other arrangements that the Secretary specifies.

(Authority: 20 U.S.C. 7708)

§ 222.143 What terms and conditions apply to the transfer of minimum school facilities?

When the Secretary transfers to an LEA or other appropriate entity (transferee) facilities that have been used to carry out the purposes of section 10 of Pub. L. 81–815 or section 8008, the Secretary establishes appropriate terms and conditions for the transfer including that it be—

(a) Without charge; and

(b) Consented to by the transferee.

(Authority: 20 U.S.C. 7708)

§§ 222.144–222.149 [Reserved]

Subpart J—Impact Aid Administrative Hearings and Judicial Review Under Section 8011 of the Act

§ 222.150 What is the scope of this subpart?

(a) Except as provided in paragraph (b) of this section, the regulations in this subpart govern all Impact Aid administrative hearings under section 8011(a) of the Act and requests for reconsideration.

(b) Except as otherwise indicated in this part, the regulations in this subpart do not govern the following administrative hearings:

(1) Subpart G, §§ 222.90–222.122 (Indian policies and procedures tribal complaint and withholding hearings.

(2) Subpart K, § 222.165 (hearings concerning determinations under section 8009 of the Act).

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35418, July 1, 1997]

§ 222.151 When is an administrative hearing provided to a local educational agency?

(a) Any local educational agency (LEA) that is adversely affected by the Secretary's (or the Secretary's delegatee's) action or failure to act upon the LEA's application under the Act is entitled to an administrative hearing in accordance with this subpart.

(b) An applicant is entitled to an administrative hearing under this subpart only if—

(1) The applicant files a written request for an administrative hearing within 60 days of its receipt of written notice of the adverse action; and

(2) The issues of fact or law specified in the hearing request are material to the determination of the applicant's rights and are not committed wholly to the discretion of the Secretary.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35418, July 1, 1997; 80 FR 33170, June 11, 2015]

§ 222.152 When may a local educational agency request reconsideration of a determination?

(a)(1) An LEA may request reconsideration of any determination made by the Secretary (or the Secretary's delegatee) under the Act, either in addition to or instead of requesting an administrative hearing under § 222.151.

(2) A request for reconsideration, or actual reconsideration by the Secretary (or the Secretary's delegatee), does not extend the time within which an applicant must file a request for an administrative hearing under § 222.151, unless the Secretary (or the Secretary's delegatee) extends that time limit in writing.

(b) The Secretary's (or the Secretary's delegatee's) consideration of a request for reconsideration is not prejudiced by a pending request for an administrative hearing on the same matter, or the fact that a matter has been scheduled for a hearing. The Secretary (or the Secretary's delegatee) may, but is not required to, postpone the administrative hearing due to a request for reconsideration.

(c) The Secretary (or the Secretary's delegatee) may reconsider any determination under the Act concerning a particular party unless the determination has been the subject of an administrative hearing under this part with respect to that party.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35418, July 1, 1997;80 FR 33170, June 11, 2015]

§ 222.153 How must a local educational agency request an administrative hearing?

An applicant requesting a hearing in accordance with this subpart must—

(a)(1) If it mails the hearing request, address it to the Secretary, c/o Director, Impact Aid Program, Room 3E105, U.S. Department of Education, 400 Maryland Avenue SW., Washington, DC 20202–6244;

(2) If it hand-delivers the hearing request, deliver it to the Director, Impact Aid Program, Room 3E105, U.S. Department of Education, 400 Maryland Avenue SW., Washington, DC 20202–6244; or

(3) If it emails the hearing request, send it to *Impact.Aid@ed.gov*.

Note to paragraph (a): The Secretary encourages applicants requesting an Impact Aid hearing to mail or email their requests. Because of enhanced security procedures, building access for non-official staff may be limited. Applicants should be prepared to mail their hearing requests if they or their courier are unable to obtain access to the building.

(b) Clearly specify in its written hearing request the issues of fact and law to be considered; and

(c) Furnish a copy of its hearing request to its State educational agency (SEA) (unless the applicant is an SEA).

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

§ 222.154 How must written submissions under this subpart be filed?

(a) All written submissions under this subpart must be filed by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) If agreed upon by the parties, a party may serve a document upon the other party or parties by facsimile transmission.

(c) The filing date for a written submission under this subpart is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(d) A party other than the Department filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department, including by the administrative law judge (ALJ).

(e) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.155 When and where is an administrative hearing held?

Administrative hearings under this subpart are held at the offices of the Department in Washington, DC, at a time fixed by the ALJ, unless the ALJ selects another place based upon the convenience of the parties.

(Authority: 20 U.S.C. 7711(a))

§ 222.156 How is an administrative hearing conducted?

Administrative hearings under this subpart are conducted as follows:

(a) The administrative hearing is conducted by an ALJ appointed under 5 U.S.C. 3105, who issues rules of procedure that are proper and not inconsistent with this subpart.

(b) The parties may introduce all relevant evidence on the issues stated in the applicant's request for hearing or on other issues determined by the ALJ during the proceeding. The application in question and all amendments and exhibits must be made part of the hearing record.

(c) Technical rules of evidence, including the Federal Rules of Evidence, do not apply to hearings conducted under this subpart, but the ALJ may apply rules designed to assure production of the most credible evidence available, including allowing the cross-examination of witnesses.

(d) Each party may examine all documents and other evidence offered or accepted for the record, and may have the opportunity to refute facts and arguments advanced on either side of the issues.

(e) A transcript must be made of the oral evidence unless the parties agree otherwise.

(f) Each party may be represented by counsel.

(g) The ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(Authority: 5 U.S.C. 556 and 3105; 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.157 What procedures apply for issuing or appealing an administrative law judge's decision?

(a) *Decision*. (1) The ALJ—

(i) Makes written findings and an initial decision based upon the hearing record; and

(ii) Forwards to the Secretary, and mails to each party, a copy of the written findings and initial decision.

(2) An ALJ's initial decision constitutes the Secretary's final decision without any further proceedings unless—

(i) A party, within the time limits stated in paragraph (b)(1)(ii) of this section, requests the Secretary to review the decision and that request is granted; or

(ii) The Secretary otherwise determines, within the time limits stated in paragraph (b)(2)(ii) of this section, to review the initial decision.

(3) When an initial decision becomes the Secretary's final decision without any further proceedings, the Department's Office of Hearings and Appeals notifies the parties of the finality of the decision.

(b) *Administrative appeal of an initial decision*. (1)(i) Any party may request the Secretary to review an initial decision.

(ii) A party must file such a request for review within 30 days of the party's receipt of the initial decision.

(2) The Secretary may—

(i) Grant or deny a timely request for review of an initial decision; or

(ii) Otherwise determine to review the decision, so long as that determination is made within 45 days of the date of receipt of the initial decision.

(3) The Secretary mails to each party written notice of—

(i) The Secretary's action granting or denying a request for review of an initial decision; or

(ii) The Secretary's determination to review an initial decision.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.158 What procedures apply to the Secretary's review of an initial decision?

When the Secretary reviews an initial decision, the Secretary—

(a) Notifies the applicant in writing that it may file a written statement or comments; and

(b) Mails to each party written notice of the Secretary's final decision.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.159 When and where does a party seek judicial review?

If an LEA or a State that is aggrieved by the Secretary's final decision following an administrative hearing proceeding under this subpart wishes to seek judicial review, the LEA or State must, within 30 working days (as determined by the LEAs or State) after receiving notice of the Secretary's final decision, file with the United States Court of Appeals for the circuit in which that LEA or State is located a petition for review of the final agency action, in accordance with section 8011(b) of the Act.

(Authority: 20 U.S.C. 7711(b))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

Subpart K—Determinations Under Section 8009 of the Act

§ 222.160 What are the scope and purpose of this subpart?

(a) *Scope*. This subpart applies to determinations made by the Secretary under section 8009 of the Act.

(b) *Purpose*. The sole purpose of the regulations in this subpart is to implement the provisions of section 8009. The definitions and standards contained in this subpart apply only with respect to section 8009 and do not establish definitions and standards for any other purpose.

(Authority: 20 U.S.C. 7709)

§ 222.161 How is State aid treated under section 7009 of the Act?

(a) *General rules*. (1) A State may take into consideration payments under sections 8002 and 8003(b) of the Act (including hold harmless payments calculated under section 8003(e)) in allocating State aid if that State has a State aid program that qualifies under § 222.162, except as follows:

(i) Those payments may be taken into consideration for each affected local educational agency (LEA) only in the proportion described in § 222.163.

(ii) A State may not take into consideration—

(A) That portion of an LEA's payment that is generated by the portion of a weight in excess of one under section 8003(a)(2)(B) of the Act (children residing on Indian lands);

(B) Payments under section 8003(d) of the Act (children with disabilities); or

(C) The amount that an LEA receives under section 8003(b)(2) that exceeds the amount the LEA would receive if eligible under section 8003(b)(1) and not section 8003(b)(2) (heavily impacted LEAs).

(2) No State aid program may qualify under this subpart if a court of that State has determined by final order, not under appeal, that the program fails to equalize expenditures for free public education among LEAs within the State or otherwise violates law, and if the court's order provides that the program is no longer in effect.

(3) No State, whether or not it has an equalization program that qualifies under § 222.162, may, in allocating State aid, take into consideration an LEA's eligibility for payments under the Act if that LEA does not apply for and receive those payments.

(4) Any State that takes into consideration payments under the Act in accordance with the provisions of section 8009 in allocating State aid to LEAs must reimburse any LEA for any amounts taken into consideration for any fiscal year to the extent that the LEA did not in fact receive payments in those amounts during that fiscal year.

(5) Except as provided in paragraph (a)(6), a State may not take into consideration payments under the Act in making estimated or final State aid payments before its State aid program has been certified by the Secretary.

(6)(i) If the Secretary has not made a determination under section 7009 of the Act for a fiscal year, the State may request permission from the Secretary to make estimated or preliminary State aid payments for that fiscal year, that consider a portion of Impact Aid payments as local resources in accordance with this section.

(ii) The State must include with its request an assurance that if the Secretary determines that the State does not meet the requirements of section 222.162 for that State fiscal year, the State must pay to each affected LEA, within 60 days of the Secretary's determination, the amount by which the State reduced State aid to the LEA.

(iii) In determining whether to grant permission, the Secretary may consider factors including whether—

(A) The Secretary certified the State under § 222.162 in the prior State fiscal year; and

(B) Substantially the same State aid program is in effect since the date of the last certification.

(b) *Data for determinations.* (1) Except as provided in paragraph (b)(2) of this section, determinations under this subpart requiring the submission of financial or school population data must be made on the basis of final data for the second fiscal year preceding the fiscal year for which the determination is made if substantially the same program was then in effect.

(2)(i) If the Secretary determines that the State has substantially revised its State aid program, the Secretary may certify that program for any fiscal year only if—

(A) The Secretary determines, on the basis of projected data, that the State's program will meet the disparity standard described in § 222.162 for the fiscal year for which the determination is made; and

(B) The State provides an assurance to the Secretary that, if final data do not demonstrate that the State's program met that standard for the fiscal year for which the determination is made, the State will pay to each affected LEA the amount by which the State reduced State aid to the LEA.

(ii) Data projections submitted by a State must set forth the assumptions upon which the data projections are founded, be accompanied by an assurance as to their accuracy, and be adjusted by actual data for the fiscal year of determination that must be submitted to the Secretary as soon as these data are available.

(3) For a State that has not previously been certified by the Secretary under § 222.162, or if the last certification was more than two years prior, the State submits projected data showing whether it meets the disparity standard in § 222.162. The projected data must show the resulting amounts of State aid as if the State were certified to consider Impact Aid in making State aid payments.

(c) *Definitions*. The following definitions apply to this subpart:

Current expenditures is defined in section 7013(4) of the Act. Additionally, for the purposes of this section it does not include expenditures of funds received by the agency under sections 7002 and 7003(b) (including hold harmless payments calculated under section 7003(e)) that are not taken into consideration under the State aid program and exceed the proportion of those funds that the State would be allowed to take into consideration under § 222.162.

Equalize expenditures means to meet the standard set forth in § 222.162.

Local tax revenues means compulsory charges levied by an LEA or by an intermediate school district or other local governmental entity on behalf of an LEA for current expenditures for educational services. ''Local tax revenues'' include the proceeds of ad valorem taxes, sales and use taxes, income taxes and other taxes. Where a State funding formula requires a local contribution equivalent to a specified mill tax levy on taxable real or personal property or both, ''local tax revenues'' include any revenues recognized by the State as satisfying that local contribution requirement.

Local tax revenues covered under a State equalization program means ''local tax revenues'' as defined in paragraph (c) of this section contributed to or taken into consideration in a State aid program subject to a determination under this subpart, but excluding all revenues from State and Federal sources.

Revenue means an addition to assets that does not increase any liability, does not represent the recovery of an expenditure, does not represent the cancellation of certain liabilities without a corresponding increase in other liabilities or a decrease in assets, and does not represent a contribution of fund capital in food service or pupil activity funds. Furthermore, the term ''revenue'' includes only revenue for current expenditures.

State aid means any contribution, no repayment for which is expected, made by a State to or on behalf of LEAs within the State for current expenditures for the provision of free public education.

Total local tax revenues means all ''local tax revenues'' as defined in paragraph (c) of this section, including tax revenues for education programs for children needing special services, vocational education, transportation, and the like during the period in question but excluding all revenues from State and Federal sources.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997; 80 FR 33170, June 11, 2015; 81 FR 64744, Sept. 20, 2016; 83 FR 47070, Sept. 18, 2018]

§ 222.162 What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?

(a) *Percentage disparity limitation*. The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

(b)(1) *Weighted average disparity for different grade level groups*. If a State requests it, the Secretary will make separate disparity computations for different groups of LEAs in the State that have similar grade levels of instruction.

(2) In those cases, the weighted average disparity for all groups, based on the proportionate number of pupils in each group, may not be more than the percentage provided in paragraph (a) of

this section. The method for calculating the weighted average disparity percentage is set out in the appendix to this subpart.

(c) *Per pupil figure computations.* In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on one of the following bases:

(1) The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of the total number of pupils receiving free public education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses ''weighted pupil,'' ''classroom,'' ''instructional unit,'' or another designated measure of need in determining allocations of State aid to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made using one of the methods in paragraph (d) of this section. The two allowable categories of special cost differentials are—

(i) Those associated with pupils having special educational needs, such as children with disabilities, economically disadvantaged children, non-English speaking children, and gifted and talented children; and

(ii) Those associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

(d) *Accounting for special cost differentials.* In computing per-pupil figures under paragraph (c) of this section, the State accounts for special cost differentials that meet the requirements of paragraph (c)(2) of this section in one of four ways:

(1) *The inclusion method on a revenue basis.* The State divides total revenues by a weighted pupil count that includes only those weights associated with the special cost differentials.

(2) *The inclusion method on an expenditure basis.* The State divides total current expenditures by a weighted pupil count that includes only those weights associated with the special cost differentials.

(3) *The exclusion method on a revenue basis.* The State subtracts revenues associated with the special cost differentials from total revenues, and divides this net amount by an unweighted pupil count.

(4) *The exclusion method on an expenditure basis.* The State subtracts current expenditures from revenues associated with the special cost differentials from total current expenditures, and divides this net amount by an unweighted pupil count.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997; 81 FR 64744, Sept. 20, 2016]

§ 222.163 What proportion of Impact Aid funds may a State take into consideration upon certification?

(a) *Provision of law.* Section 8009(d)(1)(B) provides that, upon certification by the Secretary, in allocating State aid a State may consider as local resources funds received under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues. Determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State.

(Authority: 20 U.S.C. 7709)

(b) *Computation of proportion.* (1) In computing the share that local tax revenues covered under a State equalization program are of total local tax revenues for an LEA with respect to a program qualifying under § 222.162, the proportion is obtained by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA.

(2) In cases where there are no local tax revenues for current expenditures and the State provides all of those revenues on behalf of the LEA, the State may consider up to 100 percent of the

funds received under the Act by that LEA in allocating State aid.

(Authority: 20 U.S.C. 7709(d)(1)(B))

(c) *Application of proportion to Impact Aid payments.* Except as provided in § 222.161(a)(1)(ii) and (iii), the proportion established under this section (or a lesser proportion) for any LEA receiving payments under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) may be applied by a State to actual receipts of those payments.

(Authority: 20 U.S.C. 7709(d)(1)(B))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

§ 222.164 What procedures does the Secretary follow in making a determination under section 7009?

(a) *Initiation.* (1) A proceeding under this subpart leading to a determination by the Secretary under section 8009 may be initiated—

(i) By the State educational agency (SEA) or other appropriate agency of the State;

(ii) By an LEA; or

(iii) By the Secretary, if the Secretary has reason to believe that the State's action is in violation of section 8009.

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall provide either the State or all LEAs with a complete copy of the submission required in paragraph (b) of this section. Following receipt of the submission, the Secretary shall notify the State and all LEAs in the State of their right to request from the Secretary, within 30 days of the initiation of a proceeding, the opportunity to present their views to the Secretary before the Secretary makes a determination.

(b) *Submission.* (1) A submission by a State or LEA under this section must be made in the manner requested by the Secretary and must contain the information and assurances as may be required by the Secretary in order to reach a determination under section 8009 and this subpart.

(2)(i) A State in a submission shall—

(A) Demonstrate how its State aid program comports with § 222.162; and

(B) Demonstrate for each LEA receiving funds under the Act that the proportion of those funds that will be taken into consideration comports with § 222.163.

(ii) The submission must be received by the Secretary no later than 120 calendar days before the beginning of the State's fiscal year for the year of the determination, and must include (except as provided in § 222.161(c)(2)) final second preceding fiscal year disparity data enabling the Secretary to determine whether the standard in § 222.162 has been met. The submission is considered timely if received by the Secretary on or before the filing deadline or if it bears a U.S. Postal Service postmark dated on or before the filing deadline.

(3) An LEA in a submission must demonstrate whether the State aid program comports with section 8009.

(4) Whenever a proceeding is initiated under this subpart, the Secretary may request from a State the data deemed necessary to make a determination. A failure on the part of a State to comply with that request within a reasonable period of time results in a summary determination by the Secretary that the State aid program of that State does not comport with the regulations in this subpart.

(5) Before making a determination under section 8009, the Secretary affords the State, and all LEAs in the State, an opportunity to present their views as follows:

(i) Upon receipt of a timely request for a predetermination hearing, the Secretary notifies all LEAs and the State of the time and place of the predetermination hearing.

(ii) Predetermination hearings are informal and any LEA and the State may participate whether or not they requested the predetermination hearing.

(iii) At the conclusion of the predetermination hearing, the Secretary holds the record open for 15 days for the submission of post-hearing comments. The Secretary may extend the period for post-hearing comments for good cause for up to an additional 15 days.

(iv) Instead of a predetermination hearing, if the party or parties requesting the predetermination hearing agree, they may present their views to the Secretary exclusively in writing. In such a case, the Secretary notifies all LEAs and the State that this alternative procedure is being followed and that they have up to 30 days from the date of the notice in which to submit their views in writing. Any LEA or the State may submit its views in writing within the specified time, regardless of whether it requested the opportunity to present its views.

(c) *Determinations.* The Secretary reviews the participants' submissions and any views presented at a predetermination hearing under paragraph (b)(5) of this section, including views submitted during the post-hearing comment period. Based upon this review, the Secretary issues a written determination setting forth the reasons for the determination in sufficient detail to enable the State or LEAs to respond. The Secretary affords reasonable notice of a determination under this subpart and the opportunity for a hearing to the State or any LEA adversely affected by the determination.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7709)

NOTE TO PARAGRAPH (b)(2) OF THIS SECTION: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997; 81 FR 64745, Sept. 20, 2016]

§ 222.165 What procedures does the Secretary follow after making a determination under section 8009?

(a) *Request for hearing.* (1) A State or LEA that is adversely affected by a determination under section 8009 and this subpart and that desires a hearing regarding that determination must submit a written request for a hearing within 60 days of receipt of the determination. The time within which a request must be filed may not be extended unless the Secretary, or the Secretary's delegatee, extends the time in writing at the time notice of the determination is given.

(2) A request for a hearing in accordance with this section must specify the issues of fact and law to be considered.

(3) If an LEA requests a hearing, it must furnish a copy of the request to the State. If a State requests a hearing, it must furnish a copy of the request to all LEAs in the State.

(b) *Right to intervene.* Any LEA or State that is adversely affected by a determination shall have the right of intervention in the hearing.

(c) *Time and place of hearing.* The hearing is held at a time and place fixed by the Secretary or the Secretary's delegatee (with due regard to the mutual convenience of the parties).

(d) *Counsel.* In all proceedings under this section, all parties may be represented by counsel.

(e) *Proceedings.* (1) The Secretary refers the matter in controversy to an administrative law judge (ALJ) appointed under 5 U.S.C. 3105.

(2) The ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(f) *Filing requirements.* (1) Any written submission under this section must be filed by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(3) The filing date for a written submission under this section is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(5) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

(g) *Procedural rules.* (1) If, in the opinion of the ALJ, no dispute exists as to a material fact the resolution of which would be materially assisted by oral

testimony, the ALJ shall afford each party to the proceeding an opportunity to present its case—

(i) In whole or in part in writing; or

(ii) In an informal conference after affording each party sufficient notice of the issues to be considered.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford the following procedures to each party:

(i) Sufficient notice of the issues to be considered at the hearing.

(ii) An opportunity to make a record of the proceedings.

(iii) An opportunity to present witnesses on the party's behalf.

(iv) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(h) *Decisions*. (1) The ALJ—

(i) Makes written findings and an initial decision based upon the hearing record; and

(ii) Forwards to the Secretary, and mails to each party, a copy of the written findings and initial decision.

(2) Appeals to the Secretary and the finality of initial decisions under section 8009 are governed by §§ 222.157(b), 222.158, and 222.159 of subpart J of this part.

(Authority: 20 U.S.C. 7709)

(i) *Corrective action*. (1) Within 30 days after a determination by the Secretary that a State has been in violation of section 8009 unless the determination is timely appealed by the State, the State shall provide satisfactory written assurances that it will undertake appropriate corrective action if necessary.

(2) A State found by the Secretary to have been in violation of section 8009 following a hearing shall provide, within 30 days after disposal of the hearing request (such as by a final decision issued under this subpart or withdrawal of the hearing request), satisfactory assurances that it is taking corrective action, if necessary.

(3) At any time during a hearing under this subpart, a State may provide the Secretary appropriate assurances that it will undertake corrective action if necessary. The Secretary or the ALJ, as applicable, may stay the proceedings pending completion of corrective action.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35420, July 1, 1997; 80 FR 33170, June 11, 2015]

§§ 222.166–222.169 [Reserved]

APPENDIX TO SUBPART K OF PART 222—DETERMINATIONS UNDER SECTION 8009 OF THE ACT—METHODS OF CALCULATIONS FOR TREATMENT OF IMPACT AID PAYMENTS UNDER STATE EQUALIZATION PROGRAMS

The following paragraphs describe the methods for making certain calculations in conjunction with determinations made under the regulations in this subpart. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these calculations.

1. *Determinations of disparity standard compliance under § 222.162(b)(1).*

(a) The determinations of disparity in current expenditures or revenue per pupil are made by—

(i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second preceding fiscal year before the year of determination;

(ii) Identifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and

(iii) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (ii) and dividing the difference by the lower figure.

Example: In State X, after ranking all LEAs organized on a grade 9–12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($1,000–$820 = $180/$820). The program would meet the disparity standard for fiscal years before fiscal year 1998 but would not for subsequent years.

(b) In cases under § 222.162(b), where separate computations are made for different groups of LEAs, the disparity percentage for each group is obtained in the manner described in paragraph (a) above. Then the

weighted average disparity percentage for the State as a whole is determined by—

(i) Multiplying the disparity percentage for each group by the total number of pupils receiving free public education in the schools in that group;

(ii) Summing the figures obtained in paragraph (b)(i); and

(iii) Dividing the sum obtained in paragraph (b)(ii) by the total number of pupils for all the groups.

EXAMPLE

Group 1 (grades 1–6), 80,000 pupils × 18.00%=	14,400
Group 2 (grades 7–12), 100,000 pupils × 22.00%=	22,000
Group 3 (grades 1–12), 20,000 pupils × 35.00%=	7,000
Total 200,000 pupils	43,400
43,400/200,000 = 21.70% Disparity	

2. *Determinations under § 222.163(b) as to maximum proportion of payments under the Act that may be taken into consideration by a State under an equalization program.* The proportion that local tax revenues covered under a State equalization program are of total local tax revenues for a particular LEA shall be obtained by dividing: (a) The amount of local tax revenues covered under the equalization program by (b) the total local tax revenues attributable to current expenditures within the LEA. Local revenues that can be excluded from the proportion computation are those received from local non-tax sources such as interest, bake sales, gifts, donations, and in-kind contributions.

Examples

Example 1. State A has an equalization program under which each LEA is guaranteed $900 per pupil less the LEA contribution based on a uniform tax levy. The LEA contribution from the uniform tax levy is considered under the equalization program. LEA X contributes the proceeds of the uniform tax levy, $700 per pupil, and the State contributes the $200 difference. No other local tax revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent ($700/$700). If LEA X receives $100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

Example 2. The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional $100 per pupil not covered under the equalization program. The permissible levy is not included in local tax revenues covered under the equalization program but it is included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 87.5 percent ($700/$800). If LEA X receives $100 per pupil in payments under the Act, $87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing $787.50 per pupil under the program and State A would now contribute $112.50 per pupil as the difference.

Example 3. State B has an equalization program under which each LEA is guaranteed $900 per pupil for contributing the equivalent of a two mill tax levy. LEA X contributes $700 per pupil from a two mill tax levy and an additional $500 per pupil from local interest, bake sales, in-kind contributions, and other non-tax local sources. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent ($700/$700). The local revenue received from interest, bake sales, in-kind contributions and other non-tax local revenues are excluded from the computation since they are from non-tax sources. If LEA X receives $100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

Example 4. State C has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels of tax rates. For an eight mill rate the guarantee is $500, for nine mills $550, for 10 mills $600. LEA X levies a 10 mill rate and realizes $300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option realizing another $300 per pupil. The $300 proceeds of the local leeway option are not included in local tax revenues covered under the equalization program, but they are included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 50 percent ($300/$600). If LEA X receives $100 per pupil in payments under the Act, $50 per pupil may be taken into consideration. LEA X may be regarded as contributing $350 per pupil under the program and State B would now contribute $250 as the difference.

Example 5. The initial facts are the same as in Example 4, except that LEA Y in State C, while taxing at the same 10 mill rate for both the equalization program and leeway allowance as LEA X, realizes $550 per pupil for each tax. As with LEA X, the percentage of payments under the Act that may be taken into consideration for LEA Y is 50 percent (550/1100). If LEA Y receives $150 per

pupil in payments under the Act, then up to $75 per pupil normally could be taken into consideration. However, since LEA Y would have received only $50 per pupil in State aid, only $50 of the allowable $75 could be taken into consideration. Thus, LEA Z may be regarded as contributing $600 per pupil under the program and State B would not contribute any State aid.

Subpart L—Impact Aid Discretionary Construction Grant Program Under Section 8007(b) of the Act

SOURCE: 69 FR 12235, Mar. 15, 2004, unless otherwise noted.

GENERAL

§ 222.170 What is the purpose of the Impact Aid Discretionary Construction grant program (Section 8007(b) of the Act)?

The Impact Aid Discretionary Construction grant program provides competitive grants for emergency repairs and modernization of school facilities to certain eligible local educational agencies (LEAs) that receive formula Impact Aid funds.

(Authority: 20 U.S.C. 7707(b))

§ 222.171 What LEAs may be eligible for Discretionary Construction grants?

(a) Applications for these grants are considered in four funding priority categories. The specific requirements for each priority are detailed in §§ 222.177 through 222.182.

(b)(1) Generally, to be eligible for an emergency construction grant, an LEA must—

(i) Enroll a high proportion (at least 40 percent) of federally connected children in average daily attendance (ADA) who reside on Indian lands or who have a parent on active duty in the U.S. uniformed services;

(ii) Have a school that enrolls a high proportion of one of these types of students;

(iii) Be eligible for funding for heavily impacted LEAs under section 8003(b)(2) of the Act; or

(iv) Meet the specific numeric requirements regarding bonding capacity.

(2) The Secretary must also consider such factors as an LEA's total assessed value of real property that may be taxed for school purposes, its availability and use of bonding capacity, and the nature and severity of the emergency.

(c)(1) Generally, to be eligible for a modernization construction grant, an LEA must—

(i) Be eligible for Impact Aid funding under either section 8002 or 8003 of the Act;

(ii) Be eligible for funding for heavily impacted LEAs under section 8003(b)(2) of the Act;

(iii) Enroll a high proportion (at least 40 percent) of federally connected children in ADA who reside on Indian lands or who have a parent on active duty in the U.S. uniformed services;

(iv) Have a school that enrolls a high proportion of one of these types of students; or

(v) Meet the specific numeric requirements regarding bonding capacity.

(2) The Secretary must also consider such factors as an LEA's total assessed value of real property that may be taxed for school purposes, its availability and use of bonding capacity, and the nature and severity of its need for modernization funds.

(Authority: 20 U.S.C. 7707(b))

§ 222.172 What activities may an LEA conduct with funds received under this program?

(a) An LEA may use emergency grant funds received under this program only to repair, renovate, alter, and, in the limited circumstances described in paragraph (c) of this section, replace a public elementary or secondary school facility used for free public education to ensure the health and safety of students and personnel, including providing accessibility for the disabled as part of a larger project.

(b) An LEA may use modernization grant funds received under this program only to renovate, alter, retrofit, extend, and, in the limited circumstances described in paragraph (c) of this section, replace a public elementary or secondary school facility used for free public education to provide school facilities that support a contemporary educational program for

the LEA's students at normal capacity, and in accordance with the laws, standards, or common practices in the LEA's State.

(c)(1) An emergency or modernization grant under this program may be used for the construction of a new school facility but only if the Secretary determines—

(i) That the LEA holds title to the existing facility for which funding is requested; and

(ii) In consultation with the grantee, that partial or complete replacement of the facility would be less expensive or more cost-effective than improving the existing facility.

(2) When construction of a new school facility is permitted, emergency and modernization funds may be used only for a new school facility that is used for free public education. These funds may be used for the—

(i) Construction of instructional, resource, food service, and general or administrative support areas, so long as they are a part of the instructional facility; and

(ii) Purchase of initial equipment or machinery, and initial utility connections.

(Authority: 20 U.S.C. 7707(b))

§ 222.173 What activities will not receive funding under a Discretionary Construction grant?

The Secretary does not fund the following activities under a Discretionary Construction grant:

(a) Improvements to facilities for which the LEA does not have full title or other interest, such as a lease-hold interest.

(b) Improvements to or repairs of school grounds, such as environmental remediation, traffic remediation, and landscaping, that do not directly involve instructional facilities.

(c) Repair, renovation, alteration, or construction for stadiums or other facilities that are primarily used for athletic contests, exhibitions, and other events for which admission is charged to the general public.

(d) Improvements to or repairs of teacher housing.

(e) Except in the limited circumstances as provided in § 222.172(c), when new construction is permissible, acquisition of any interest in real property.

(f) Maintenance costs associated with any of an LEA's school facilities.

(Authority: 20 U.S.C. 7707(b))

§ 222.174 What prohibitions apply to these funds?

Grant funds under this program may not be used to supplant or replace other available non-Federal construction money. These grant funds may be used for emergency or modernization activities only to the extent that they supplement the amount of construction funds that would, in the absence of these grant funds, be available to a grantee from non-Federal funds for these purposes.

Example 1. ''Supplanting.'' An LEA signs a contract for a $300,000 roof replacement and plans to use its capital expenditure fund to pay for the renovation. Since the LEA already has non-Federal funds available for the roof project, it may not now use a grant from this program to pay for the project or replace its own funds in order to conserve its capital fund.

Example 2. ''Non-supplanting.'' The LEA from the example of supplanting that has the $300,000 roof commitment has also received a $400,000 estimate for the replacement of its facility's heating, ventilation, and air conditioning (HVAC) system. The LEA has not made any commitments for the HVAC system because it has no remaining funds available to pay for that work. Since other funds are not available, it would not be supplanting if the LEA received an emergency grant under this program to pay for the HVAC system.

(Authority: 20 U.S.C. 7707(b))

§ 222.175 What regulations apply to recipients of funds under this program?

The following regulations apply to the Impact Aid Discretionary Construction program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 75 (Direct Grant Programs) except for 34 CFR §§ 75.600 through 75.617.

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(4) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(5) 34 CFR part 82 (New Restrictions on Lobbying).

(6) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(b) The OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended in 2 CFR part 3474.

(c) The regulations in 34 CFR part 222.

(Authority: 20 U.S.C. 1221e–3)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

§ 222.176 What definitions apply to this program?

(a) In addition to the terms referenced in 34 CFR 222.2, the following definitions apply to this program:

Bond limit means the cap or limit that a State may impose on an LEA's capacity for bonded indebtedness. For applicants in States that place no limit on an LEA's capacity for bonded indebtedness, the Secretary shall consider the LEA's bond limit to be 10 percent of its total assessed valuation.

Construction means

(1) Preparing drawings and specifications for school facilities;

(2) Repairing, renovating, or altering school facilities;

(3) Extending school facilities as described in § 222.172(b);

(4) Erecting or building school facilities, as described in § 222.172(c); and

(5) Inspections or supervision related to school facilities projects.

Emergency means a school facility condition that is so injurious or hazardous that it either poses an immediate threat to the health and safety of the facility's students and staff or can be reasonably expected to pose such a threat in the near future. These conditions can include deficiencies in the following building features: a roof; electrical wiring; a plumbing or sewage system; heating, ventilation, or air conditioning; the need to bring a school facility into compliance with fire and safety codes, or providing accessibility for the disabled as part of a larger project.

Level of bonded indebtedness means the amount of long-term debt issued by an LEA divided by the LEA's bonding capacity.

Minimal capacity to issue bonds means that the total assessed value of real property in an LEA that may be taxed for school purposes is at least $25,000,000 but not more than $50,000,000.

Modernization means the repair, renovation, alteration, or extension of a public elementary or secondary school facility in order to support a contemporary educational program for an LEA's students in normal capacity, and in accordance with the laws, standards, or common practices in the LEA's State.

No practical capacity to issue bonds means that the total assessed value of real property in an LEA that may be taxed for school purposes is less than $25,000,000.

School facility means a building used to provide free public education, including instructional, resource, food service, and general or administrative support areas, so long as they are a part of the facility.

Total assessed value per student means the assessed valuation of real property per pupil (AVPP), unless otherwise defined by an LEA's State.

(b) The following terms used in this subpart are defined or referenced in 34 CFR 77.1:

Applicant
Application
Award
Contract
Department
EDGAR
Equipment
Fiscal year
Grant
Grantee
Project
Public
Real property
Recipient

(Authority: 20 U.S.C. 7707(b) and 1221e–3)

ELIGIBILITY

§ 222.177 What eligibility requirements must an LEA meet to apply for an emergency grant under the first priority?

An LEA is eligible to apply for an emergency grant under the first priority of section 8007(b) of the Act if it—

(a) Is eligible to receive formula construction funds for the fiscal year under section 8007(a) of the Act;

(b)(1) Has no practical capacity to issue bonds;

(2) Has minimal capacity to issue bonds and has used at least 75 percent of its bond limit; or

(3) Is eligible to receive funds for the fiscal year for heavily impacted districts under section 8003(b)(2) of the Act; and

(c) Has a school facility emergency that the Secretary has determined poses a health or safety hazard to students and school personnel.

(Authority: 20 U.S.C. 7707(b))

§ 222.178 What eligibility requirements must an LEA meet to apply for an emergency grant under the second priority?

Except as provided in § 222.179, an LEA is eligible to apply for an emergency grant under the second priority of section 8007(b) of the Act if it—

(a) Is eligible to receive funds for the fiscal year under section 8003(b) of the Act;

(b)(1) Enrolls federally connected children living on Indian lands equal to at least 40 percent of the total number of children in average daily attendance (ADA) in its schools; or

(2) Enrolls federally connected children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA in its schools;

(c) Has used at least 75 percent of its bond limit;

(d) Has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and

(e) Has a school facility emergency that the Secretary has determined poses a health or safety hazard to students and school personnel.

(Authority: 20 U.S.C. 7707(b))

§ 222.179 Under what circumstances may an ineligible LEA apply on behalf of a school for an emergency grant under the second priority?

An LEA that is eligible to receive section 8003(b) assistance for the fiscal year but that does not meet the other eligibility criteria described in § 222.178(a) or (b) may apply on behalf of a school located within its geographic boundaries for an emergency grant under the second priority of section 8007(b) of the Act if—

(a) The school—

(1) Enrolls children living on Indian lands equal to at least 40 percent of the total number of children in ADA; or

(2) Enrolls children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA;

(b) The school has a school facility emergency that the Secretary has determined poses a health or safety hazard to students and school personnel;

(c) The LEA has used at least 75 percent of its bond limit; and

(d) The LEA has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average.

(Authority: 20 U.S.C. 7707(b))

§ 222.180 What eligibility requirements must an LEA meet to apply for a modernization grant under the third priority?

An LEA is eligible to apply for a modernization grant under the third priority of section 8007(b) of the Act if it—

(a) Is eligible to receive funds for the fiscal year under section 8002 or 8003(b) of the Act;

(b)(1) Has no practical capacity to issue bonds;

(2) Has minimal capacity to issue bonds and has used at least 75 percent of its bond limit; or

(3) Is eligible to receive funds for the fiscal year for heavily impacted districts under section 8003(b)(2) of the Act; and

(c) Has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in

enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

§ 222.181 What eligibility requirements must an LEA meet to apply for a modernization grant under the fourth priority?

An LEA is eligible to apply for a modernization grant under the fourth priority of section 8007(b) of the Act if it—

(a)(1) Is eligible to receive funds for the fiscal year under section 8003(b) of the Act; and

(i) Enrolls children living on Indian lands equal to at least 40 percent of the total number of children in ADA in its schools; or

(ii) Enrolls children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA in its schools; or

(2) Is eligible to receive assistance for the fiscal year under section 8002 of the Act;

(b) Has used at least 75 percent of its bond limit;

(c) Has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and

(d) Has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

§ 222.182 Under what circumstances may an ineligible LEA apply on behalf of a school for a modernization grant under the fourth priority?

An LEA that is eligible to receive a payment under Title VIII for the fiscal year but that does not meet the other eligibility criteria described in § 222.181 may apply on behalf of a school located within its geographic boundaries for a modernization grant under the fourth priority of section 8007(b) of the Act if—

(a) The school—

(1) Enrolls children living on Indian lands equal to at least 40 percent of the total number of children in ADA; or

(2) Enrolls children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA;

(b) The LEA has used at least 75 percent of its bond limit;

(c) The LEA has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and

(d) The school has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

HOW TO APPLY FOR A GRANT

§ 222.183 How does an LEA apply for a grant?

(a) To apply for funds under this program, an LEA may submit only one application for one educational facility for each competition.

(b) An application must—

(1) Contain the information required in §§ 222.184 through 222.186, as applicable, and in any application notice that the Secretary may publish in the FEDERAL REGISTER; and

(2) Be timely filed in accordance with the provisions of the Secretary's application notice.

(Approved by the Office of Management and Budget under control number 1810–0657)

(Authority: 20 U.S.C. 7707(b))

[60 FR 50778, Sept. 29, 1995, as amended at 76 FR 23713, Apr. 28, 2011]

§ 222.184 What information must an application contain?

An application for an emergency or modernization grant must contain the following information:

(a) The name of the school facility the LEA is proposing to repair, construct, or modernize.

(b)(1) For an applicant under section 8003(b) of the Act, the number of federally connected children described in section 8003(a)(1) enrolled in the school facility, as well as the total enrollment in the facility, for which the LEA is seeking a grant; or

(2) For an applicant under section 8002 of the Act, the total enrollment, for the preceding year, in the LEA and in the school facility for which the LEA is seeking a grant, based on the fall State count date.

(c) The identification of the LEA's interest in, or authority over, the school facility involved, such as an ownership interest or a lease arrangement.

(d) The original construction date of the school facility that the LEA proposes to renovate or modernize.

(e) The dates of any major renovations of that school facility and the areas of the school covered by the renovations.

(f) The proportion of Federal acreage within the geographic boundaries of the LEA.

(g) Fiscal data including the LEA's—

(1) Maximum bonding capacity;

(2) Amount of bonded debt;

(3) Total assessed value of real property available to be taxed for school purposes;

(4) State average assessed value per pupil of real property available to be taxed for school purposes;

(5) Local real property tax levy, in mills or dollars, used to generate funds for capital expenditures; and

(6) Sources and amounts of funds available for the proposed project.

(h) A description of the need for funds and the proposed project for which a grant under this subpart L would be used, including a cost estimate for the project.

(i) Applicable assurances and certifications identified in the approved grant application package.

(Approved by the Office of Management and Budget under control number 1810–0657)

(Authority: 20 U.S.C. 7707(b))

§ 222.185 What additional information must be included in an emergency grant application?

In addition to the information specified in § 222.184, an application for an emergency grant must contain the following:

(a) A description of the deficiency that poses a health or safety hazard to occupants of the facility.

(b) A description of how the deficiency adversely affects the occupants and how it will be repaired.

(c) A statement signed by an appropriate local official, as defined below, that the deficiency threatens the health and safety of occupants of the facility or prevents the use of the facility. An appropriate local official may include a local building inspector, a licensed architect, or a licensed structural engineer. An appropriate local official may not include a member of the applicant LEA's staff.

(Approved by the Office of Management and Budget under control number 1810–0657)

(Authority: 20 U.S.C. 7707(b))

§ 222.186 What additional information must be included in a modernization grant application?

In addition to the information specified in § 222.184, an application for a modernization grant must contain a description of—

(a) The need for modernization; and

(b) How the applicant will use funds received under this program to address the need referenced in paragraph (a) of this section.

(Approved by the Office of Management and Budget under control number 1810–0657)

(Authority: 20 U.S.C. 7707(b))

§ 222.187 Which year's data must an SEA or LEA provide?

(a) Except as provided in paragraph (b) of this section, the Secretary will determine eligibility under this discretionary program based on student and fiscal data for each LEA from the fiscal year preceding the fiscal year for which the applicant is applying for funds.

(b) If satisfactory fiscal data are not available from the preceding fiscal year, the Secretary will use data from the most recent fiscal year for which data that are satisfactory to the Secretary are available.

(Authority: 20 U.S.C. 7707(b))

HOW GRANTS ARE MADE

§ 222.188 What priorities may the Secretary establish?

In any given year, the Secretary may assign extra weight for certain facilities systems or emergency and modernization conditions by identifying the systems or conditions and their assigned weights in a notice published in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 7707(b))

§ 222.189 What funding priority does the Secretary give to applications?

(a) Except as provided in paragraph (b) of this section, the Secretary gives funding priority to applications in the following order:

(1) First priority is given to applications described under § 222.177 and, among those applicants for emergency grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the emergency.

(2) After all eligible first-priority applications are funded, second priority is given to applications described under §§ 222.178 and 222.179 and, among those applicants for emergency grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the emergency.

(3) Third priority is given to applications described under § 222.180 and, among those applicants for modernization grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the need for modernization.

(4) Fourth priority is given to applications described under §§ 222.181 and 222.182 and, among those applicants for modernization grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the need for modernization.

(b)(1) The Secretary makes awards in each priority described above until the Secretary is unable to make an approvable award in that priority.

(2) If the Secretary is unable to fund a full project or a viable portion of a project, the Secretary may continue to fund down the list of high-ranking applicants within a priority.

(3) The Secretary applies any remaining funds to awards in the next priority.

(4) If an applicant does not receive an emergency or modernization grant in a fiscal year, the Secretary will, subject to the availability of funds and to the priority and award criteria, consider that application in the following year along with the next fiscal year's pool of applications.

Example: The first five applicants in priority one have been funded. Three hundred thousand dollars remain available. Three unfunded applications remain in that priority. Application #6 requires a minimum of $500,000, application #7 requires $400,000, and application #8 requires $300,000 for a new roof and $150,000 for related wall and ceiling repairs. Applicant #8 agrees to accept the remaining $300,000 since the roof upgrade can be separated into a viable portion of applicant #8's total project. Applications #6 and #7 will be retained for consideration in the next fiscal year and will compete again with that fiscal year's pool of applicants. Applicant #8 will have to submit a new application in the next fiscal year if it wishes to be considered for the unfunded portion of the current year's application.

(Authority: 20 U.S.C. 7707(b))

§ 222.190 How does the Secretary rank and select applicants?

(a) To the extent that they are consistent with these regulations and section 8007(b) of the Act, the Secretary will follow grant selection procedures that are specified in 34 CFR 75.215 through 75.222. In general these procedures are based on the authorizing statute, the selection criteria, and any priorities or other applicable requirements that have been published in the FEDERAL REGISTER.

(b) In the event of ties in numeric ranking, the Secretary may consider as tie-breaking factors: the severity of the emergency or the need for modernization; for applicants under section 8003 of the Act, the numbers of federally connected children who will benefit from the project; or for applicants under section 8002 of the Act, the numbers of children who will benefit from the project; the AVPP compared to the

LEA's State average; and available resources or non-Federal funds available for the grant project.

(Authority: 20 U.S.C. 7707(b))

§ 222.191 What is the maximum award amount?

(a) Subject to any applicable contribution requirements as described in §§ 222.192 and 222.193, the procedures in 34 CFR 75.231 through 75.236, and the provisions in paragraph (b) of this section, the Secretary may fund up to 100 percent of the allowable costs in an approved grantee's proposed project.

(b) An award amount may not exceed the difference between—

(1) The cost of the proposed project; and

(2) The amount the grantee has available or will have available for this purpose from other sources, including local, State, and other Federal funds.

(Authority: 20 U.S.C. 7707(b))

§ 222.192 What local funds may be considered as available for this project?

To determine the amount of local funds that an LEA has available under § 222.191(b)(2) for a project under this program, the Secretary will consider as available all LEA funds that may be used for capital expenditures except $100,000 or 10 percent of the average annual capital expenditures of the applicant for the three previous fiscal years, whichever is greater. The Secretary will not consider capital funds that an LEA can demonstrate have been committed through signed contracts or other written binding agreements but have not yet been expended.

(Authority: 20 U.S.C. 7707(b))

§ 222.193 What other limitations on grant amounts apply?

(a) Except as provided in paragraph (b) of this section and § 222.191, the amount of funds provided under an emergency grant or a modernization grant awarded to an eligible LEA is subject to the following limitations:

(1) The award amount may not be more than 50 percent of the total cost of an approved project.

(2) The total amount of grant funds may not exceed four million dollars during any four-year period.

Example: An LEA that is awarded four million dollars in the first year may not receive any additional funds for the following three years.

(b) Emergency or modernization grants to LEAs with no practical capacity to issue bonds as defined in § 222.176 are not subject to the award limitations described in paragraph (a) of this section.

(Authority: 20 U.S.C. 7707(b))

§ 222.194 Are "in-kind" contributions permissible?

(a) LEAs that are subject to the applicable matching requirement described in § 222.193(a) may use allowable third party in-kind contributions as defined below to meet the requirements.

(b) Third party in-kind contributions mean property or services that benefit this grant program and are contributed by non-Federal third parties without charge to the grantee or by a cost-type contractor under the grant agreement.

(c) Subject to the limitations of 34 CFR 75.564(c)(2) regarding indirect costs, the provisions of 2 CFR 200.306 govern the allowability and valuation of in-kind contributions, except that it is permissible for a third party to contribute real property to a grantee for a project under this program, so long as no Federal funds are spent for the acquisition of real property.

(Authority: 20 U.S.C. 7707(b))

[69 FR 12235, Mar. 15, 2004, as amended at 79 FR 70695, Dec. 19, 2014]

CONDITIONS AND REQUIREMENTS GRANTEES MUST MEET

§ 222.195 How does the Secretary make funds available to grantees?

The Secretary makes funds available to a grantee during a project period using the following procedure:

(a) Upon final approval of the grant proposal, the Secretary authorizes a project period of up to 60 months based upon the nature of the grant proposal and the time needed to complete the project.

(b) The Secretary then initially makes available to the grantee 10 percent of the total award amount.

(c) After the grantee submits a copy of the emergency or modernization contract approved by the grantee's governing board, the Secretary makes available 80 percent of the total award amount to a grantee.

(d) The Secretary makes available up to the remaining 10 percent of the total award amount to the grantee after the grantee submits a statement that—

(1) Details any earnings, savings, or interest;

(2) Certifies that—

(i) The project is fully completed; and

(ii) All the awarded funds have been spent for grant purposes; and

(3) Is signed by the—

(i) Chairperson of the governing board;

(ii) Superintendent of schools; and

(iii) Architect of the project.

(Authority: 20 U.S.C. 7707(b))

§ 222.196 What additional construction and legal requirements apply?

(a) Except as provided in paragraph (b) of this section, a grantee under this program must comply with—

(1) The general construction legal requirements identified in the grant application assurances;

(2) The prevailing wage standards in the grantee's locality that are established by the Secretary of Labor in accordance with the Davis-Bacon Act (40 U.S.C. 276a, *et seq.*); and

(3) All relevant Federal, State, and local environmental laws and regulations.

(b) A grantee that qualifies for a grant because it enrolls a high proportion of federally connected children who reside on Indian lands is considered to receive a grant award primarily for the benefit of Indians and must therefore comply with the Indian preference requirements of section 7(b) of the Indian Self-Determination Act.

(Authority: 20 U.S.C. 7707(b) and 1221e–3)

PART 225—CREDIT ENHANCEMENT FOR CHARTER SCHOOL FACILITIES PROGRAM

Subpart A—General

Sec.
225.1 What is the Credit Enhancement for Charter School Facilities Program?
225.2 Who is eligible to receive a grant?
225.3 What regulations apply to the Credit Enhancement for Charter School Facilities Program?
225.4 What definitions apply to the Credit Enhancement for Charter School Facilities Program?

Subpart B—How Does the Secretary Award a Grant?

225.10 How does the Secretary evaluate an application?
225.11 What selection criteria does the Secretary use in evaluating an application for a Credit Enhancement for Charter Schools Facilities grant?
225.12 What funding priority may the Secretary use in making a grant award?

Subpart C—What Conditions Must Be Met by a Grantee?

225.20 When may a grantee draw down funds?
225.21 What are some examples of impermissible uses of reserve account funds?

AUTHORITY: 20 U.S.C. 1221e–3, 1232, and 7221c.

SOURCE: 70 FR 15003, Mar. 24, 2005, unless otherwise noted.

Subpart A—General

§ 225.1 What is the Credit Enhancement for Charter School Facilities Program?

(a) The Credit Enhancement for Charter School Facilities Program provides grants to eligible entities to assist charter schools in obtaining facilities.

(b) Grantees use these grants to do the following:

(1) Assist charter schools in obtaining loans, bonds, and other debt instruments for the purpose of obtaining, constructing, and renovating facilities.

(2) Assist charter schools in obtaining leases of facilities.

(3) Assist charter schools with the predevelopment costs required to assess sites for the purpose of acquiring

(by purchase, lease, donation, or otherwise) an interest (including an interest held by a third party for the benefit of a charter school) in improved or unimproved real property or constructing new facilities, or renovating, repairing, or altering existing facilities, and that are necessary to commence or continue the operation of a charter school.

(c) Grantees may demonstrate innovative credit enhancement initiatives while meeting the program purposes under paragraph (b) of this section.

(d) For the purposes of these regulations, the Credit Enhancement for Charter School Facilities Program includes grants made under the Charter School Facilities Financing Demonstration Grant Program.

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

§ 225.2 Who is eligible to receive a grant?

The following are eligible to receive a grant under this part:

(a) A public entity, such as a State or local governmental entity;

(b) A private nonprofit entity; or

(c) A consortium of entities described in paragraphs (a) and (b) of this section.

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

§ 225.3 What regulations apply to the Credit Enhancement for Charter School Facilities Program?

The following regulations apply to the Credit Enhancement for Charter School Facilities Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) [Reserved]

(2) 34 CFR part 75 (Direct Grant Programs).

(3) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) [Reserved]

(6) 34 CFR part 81 (General Educational Provisions Act—Enforcement).

(7) 34 CFR part 82 (New Restrictions on Lobbying).

(8) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Grants)).

(9) [Reserved]

(10) 34 CFR part 97 (Protection of Human Subjects).

(11) 34 CFR part 98 (Student Rights in Research, Experimental Programs, and Testing).

(12) 34 CFR part 99 (Family Educational Rights and Privacy).

(b) The regulations in this part 225.

(c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted in 2 CFR part 3474 and OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted in 2 CFR part 3485.

[70 FR 15003, Mar. 24, 2005, as amended at 79 FR 76095, Dec. 19, 2014; 84 FR 25998, June 5, 2019]

§ 225.4 What definitions apply to the Credit Enhancement for Charter School Facilities Program?

(a) *Definitions in the Act.* The following term used in this part is defined in section 4310(2) of the Elementary andSecondary Education Act of 1965, as amended by the EveryStudent Succeeds Act:

Charter school

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Acquisition
Applicant
Application
Award
Department
EDGAR
Facilities
Grant
Grantee
Nonprofit
Private
Project
Public
Secretary

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

Subpart B—How Does the Secretary Award a Grant?

§ 225.10 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in § 225.11.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

§ 225.11 What selection criteria does the Secretary use in evaluating an application for a Credit Enhancement for Charter School Facilities grant?

The Secretary uses the following criteria to evaluate an application for a Credit Enhancement for Charter School Facilities grant:

(a) *Quality of project design and significance.* (35 points) In determining the quality of project design and significance, the Secretary considers—

(1) The extent to which the grant proposal would provide financing to charter schools at better rates and terms than they can receive absent assistance through the program;

(2) The extent to which the project goals, objectives, and timeline are clearly specified, measurable, and appropriate for the purpose of the program;

(3) The extent to which the project implementation plan and activities, including the partnerships established, are likely to achieve measurable objectives that further the purposes of the program;

(4) The extent to which the project is likely to produce results that are replicable;

(5) The extent to which the project will use appropriate criteria for selecting charter schools for assistance and for determining the type and amount of assistance to be given;

(6) The extent to which the proposed activities will leverage private or public-sector funding and increase the number and variety of charter schools assisted in meeting their facilities needs more than would be accomplished absent the program;

(7) The extent to which the project will serve charter schools in States with strong charter laws, consistent with the criteria for such laws in section 4303(g)(2) of the Elementary and Secondary Education Act of 1965; and

(8) The extent to which the requested grant amount and the project costs are reasonable in relation to the objectives, design, and potential significance of the project.

(b) *Quality of project services.* (15 points) In determining the quality of the project services, the Secretary considers—

(1) The extent to which the services to be provided by the project reflect the identified needs of the charter schools to be served;

(2) The extent to which charter schools and chartering agencies were involved in the design of, and demonstrate support for, the project;

(3) The extent to which the technical assistance and other services to be provided by the proposed grant project involve the use of cost-effective strategies for increasing charter schools' access to facilities financing, including the reasonableness of fees and lending terms; and

(4) The extent to which the services to be provided by the proposed grant project are focused on assisting charter schools with a likelihood of success and the greatest demonstrated need for assistance under the program.

(c) *Capacity.* (35 points) In determining an applicant's business and organizational capacity to carry out the project, the Secretary considers—

(1) The amount and quality of experience of the applicant in carrying out the activities it proposes to undertake in its application, such as enhancing the credit on debt issuances, guaranteeing leases, and facilitating financing;

(2) The applicant's financial stability;

(3) The ability of the applicant to protect against unwarranted risk in its loan underwriting, portfolio monitoring, and financial management;

(4) The applicant's expertise in education to evaluate the likelihood of success of a charter school;

(5) The ability of the applicant to prevent conflicts of interest, including conflicts of interest by employees and members of the board of directors in a decision-making role;

(6) If the applicant has co-applicants (consortium members), partners, or other grant project participants, the specific resources to be contributed by each co-applicant (consortium member), partner, or other grant project participant to the implementation and success of the grant project;

(7) For State governmental entities, the extent to which steps have been or will be taken to ensure that charter schools within the State receive the funding needed to obtain adequate facilities; and

(8) For previous grantees under the charter school facilities programs, their performance in implementing these grants.

(d) *Quality of project personnel.* (15 points) In determining the quality of project personnel, the Secretary considers—

(1) The qualifications of project personnel, including relevant training and experience, of the project manager and other members of the project team, including consultants or subcontractors; and

(2) The staffing plan for the grant project.

(Approved by the Office of Management and Budget under control number 1855–0007)

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

§ 225.12 What funding priority may the Secretary use in making a grant award?

(a) The Secretary may award up to 15 additional points under a competitive priority related to the capacity of charter schools to offer public school choice in those communities with the greatest need for this choice based on—

(1) The extent to which the applicant would target services to geographic areas in which a large proportion or number of public schools have been identified for comprehensive support and improvement or targeted support and improvement under the ESEA, as amended by the Every Student Succeeds Act;

(2) The extent to which the applicant would target services to geographic areas in which a large proportion of students perform below proficient on State academic assessments; and

(3) The extent to which the applicant would target services to communities with large proportions of students from low-income families.

(b) The Secretary may elect to—

(1) Use this competitive priority only in certain years; and

(2) Consider the points awarded under this priority only for proposals that exhibit sufficient quality to warrant funding under the selection criteria in § 225.11.

(Approved by the Office of Management and Budget under control number 1855–0007)

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

Subpart C—What Conditions Must Be Met by a Grantee?

§ 225.20 When may a grantee draw down funds?

(a) A grantee may draw down funds after it has signed a performance agreement acceptable to the Department of Education and the grantee.

(b) A grantee may draw down and spend a limited amount of funds prior to reaching an acceptable performance agreement provided that the grantee requests to draw down and spend a specific amount of funds and the Department of Education approves the request in writing.

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

§ 225.21 What are some examples of impermissible uses of reserve account funds?

(a) Grantees must not use reserve account funds to—

(1) Directly pay for a charter school's construction, renovation, repair, or acquisition; or

(2) Provide a down payment on facilities in order to secure loans for charter schools. A grantee may, however, use funds to guarantee a loan for the portion of the loan that would otherwise have to be funded with a down payment.

(b) In the event of a default of payment to lenders or contractors by a charter school whose loan or lease is guaranteed by reserve account funds, a grantee may use these funds to cover defaulted payments that are referenced under paragraph (a)(1) of this section.

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

PART 226—STATE CHARTER SCHOOL FACILITIES INCENTIVE PROGRAM

Subpart A—General

Sec.
226.1 What is the State Charter School Facilities Incentive program?
226.2 Who is eligible to receive a grant?
226.3 What regulations apply to the State Charter School Facilities Incentive program?
226.4 What definitions apply to the State Charter School Facilities Incentive program?

Subpart B—How Does the Secretary Award a Grant?

226.11 How does the Secretary evaluate an application?
226.12 What selection criteria does the Secretary use in evaluating an application for a State Charter School Facilities Incentive program grant?
226.13 [Reserved]
226.14 What funding priorities may the Secretary use in making a grant award?

Subpart C—What Conditions Must Be Met by a Grantee?

226.21 How may charter schools use these funds?
226.22 May grantees use grant funds for administrative costs?
226.23 May charter schools use grant funds for administrative costs?

AUTHORITY: 20 U.S.C. 1221e–3; 7221d(b), unless otherwise noted.

SOURCE: 70 FR 75909, Dec. 21, 2005, unless otherwise noted.

Subpart A—General

§ 226.1 What is the State Charter School Facilities Incentive program?

(a) The State Charter School Facilities Incentive program provides grants to States to help charter schools pay for facilities.

(b) Grantees must use these grants to—

(1) Establish new per-pupil facilities aid programs for charter schools;

(2) Enhance existing per-pupil facilities aid programs for charter schools; or

(3) Administer programs described under paragraphs (b)(1) and (2) of this section.

(Authority: 20 U.S.C. 7221d(b))

§ 226.2 Who is eligible to receive a grant?

States are eligible to receive grants under this program.

(Authority: 20 U.S.C. 7221(b))

§ 226.3 What regulations apply to the State Charter School Facilities Incentive program?

The following regulations apply to the State Charter School Facilities Incentive program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1)[Reserved]

(2) 34 CFR part 75 (Direct Grant Programs).

(3) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) [Reserved]

(6) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(7) 34 CFR part 82 (New Restrictions on Lobbying).

(8) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(9) [Reserved]

(10) 34 CFR part 97 (Protection of Human Subjects).

(11) 34 CFR part 98 (Student Rights in Research, Experimental Programs, and Testing).

(12) 34 CFR part 99 (Family Educational Rights and Privacy).

(b) The regulations in this part 226.

(c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted in 2 CFR part

3474 and the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted in 2 CFR part 3485.

(Authority: 20 U.S.C. 1221e–3; 7221d(b))

[70 FR 75909, Dec. 21, 2005, as amended at 79 FR 76096, Dec. 19, 2014]

§ 226.4 What definitions apply to the State Charter School Facilities Incentive program?

(a) *Definitions in the statute.* The following term used in this part is defined in section 4310 of the Elementary and Secondary Education Act of 1965, as amended (ESEA):

Charter school

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
Department
EDGAR
Facilities
Grant
Grantee
Project
Public
Secretary

(c) *Other definition.* The following definition also applies to this part:

Construction means—

(1) Preparing drawings and specifications for school facilities projects;

(2) Repairing, renovating, or altering school facilities;

(3) Extending school facilities;

(4) Erecting or building school facilities; and

(5) Inspections or supervision related to school facilities.

(Authority: 20 U.S.C. 7221d(b); 7221i(1))

[70 FR 15003, Mar. 24, 2005, as amended at 87 FR 3661, Jan. 25, 2022]

Subpart B—How Does the Secretary Award a Grant?

§ 226.11 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in § 226.12 and the competitive preference priorities in § 226.14.

(b) The Secretary informs applicants of the maximum possible score for each criterion and competitive preference priority in the application package or in a notice published in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 7221d(b))

[70 FR 15003, Mar. 24, 2005, as amended at 87 FR 3661, Jan. 25, 2022]

§ 226.12 What selection criteria does the Secretary use in evaluating an application for a State Charter School Facilities Incentive program grant?

The selection criteria for this program are as follows:

(a) *Need for facility funding.* (1) The need for per-pupil charter school facility funding in the State.

(2) The extent to which the proposal meets the need to fund charter school facilities on a per-pupil basis.

(b) *Quality of plan.* (1) The likelihood that the proposed grant project will result in the State either retaining a new per-pupil facilities aid program or continuing to enhance such a program without the total amount of assistance (State and Federal) declining over a five-year period.

(2) The flexibility charter schools have in their use of facility funds for the various authorized purposes.

(3) The quality of the plan for identifying charter schools and determining their eligibility to receive funds.

(4) The per-pupil facilities aid formula's ability to target resources to charter schools with the greatest need and the highest proportions of students in poverty.

(5) For projects that plan to reserve funds for evaluation, the quality of the applicant's plan to use grant funds for this purpose.

(6) For projects that plan to reserve funds for technical assistance, dissemination, or personnel, the quality of the applicant's plan to use grant funds for these purposes.

(c) *The grant project team.* (1) The qualifications, including relevant training and experience, of the project manager and other members of the grant project team, including employees not paid with grant funds, consultants, and subcontractors.

(2) The adequacy and appropriateness of the applicant's staffing plan for the grant project.

(d) *The budget.* (1) The extent to which the requested grant amount and the project costs are reasonable in relation to the objectives, design, and potential significance of the proposed grant project.

(2) The extent to which the costs are reasonable in relation to the number of students served and to the anticipated results and benefits.

(3) The extent to which the non-Federal share exceeds the minimum percentages (which are based on the percentages under section 4304(k)(2)(C) of the ESEA), particularly in the initial years of the program.

(e) *State experience.* The experience of the State in addressing the facility needs of charter schools through various means, including providing per-pupil aid and access to State loan or bonding pools.

(Approved by the Office of Management and Budget under control number 1855–0012)

(Authority: 20 U.S.C. 7221d(b))

[70 FR 15003, Mar. 24, 2005, as amended at 87 FR 3661, Jan. 25, 2022]

§ 226.13 [Reserved]

§ 226.14 What funding priorities may the Secretary use in making a grant award?

(a) The Secretary may award points to an application under a competitive preference priority regarding the capacity of charter schools to offer public school choice in those communities with the greatest need for this choice based on—

(1) The extent to which the applicant would target services to geographic areas in which a large proportion or number of public schools have been identified for comprehensive support and improvement or targeted support and improvement under the ESEA;

(2) The extent to which the applicant would target services to geographic areas in which a large proportion of students perform poorly on State academic assessments; and

(3) The extent to which the applicant would target services to communities with large proportions of low-income students.

(b) The Secretary may award points to an application under a competitive preference priority for applicants that have not previously received a grant under the program.

(c) The Secretary may elect to consider the points awarded under these priorities only for proposals that exhibit sufficient quality to warrant funding under the selection criteria in § 226.12 of this part.

(Approved by the Office of Management and Budget under control number 1855–0012)

(Authority: 20 U.S.C. 7221d(b))

[70 FR 15003, Mar. 24, 2005, as amended at 87 FR 3661, Jan. 25, 2022]

Subpart C—What Conditions Must Be Met by a Grantee?

§ 226.21 How may charter schools use these funds?

(a) Charter schools that receive grant funds through their State must use the funds for facilities. Except as provided in paragraph (b) of this section, allowable expenditures include:

(1) Rent.

(2) Purchase of building or land.

(3) Construction.

(4) Renovation of an existing school facility.

(5) Leasehold improvements.

(6) Debt service on a school facility.

(b) Charter schools may not use these grant funds for purchasing land when they have no immediate plans to construct a building on that land.

(Authority: 20 U.S.C. 7221d(b))

§ 226.22 May grantees use grant funds for administrative costs?

State grantees may use up to five percent of their grant award for administrative expenses that include: indirect costs, evaluation, technical assistance, dissemination, personnel costs, and any other costs involved in administering the State's per-pupil facilities aid program.

(Authority: 20 U.S.C. 7221d(b))

§ 226.23 May charter schools use grant funds for administrative costs?

(a) Except as provided in paragraph (b) of this section, charter school subgrantees may use grant funds for administrative costs that are necessary and reasonable for the proper and efficient performance and administration of this Federal grant. This use of funds, as well as indirect costs and rates, must comply with EDGAR and the Office of Management and Budget Circular A–87 (Cost Principles for State, Local, and Indian Tribal Governments).

(b) Consistent with the requirements in 34 CFR 75.564(c)(2), any charter school subgrantees that use grant funds for construction activities may not be reimbursed for indirect costs for those activities.

(Authority: 20 U.S.C. 1221e–3; 7221d(b))

PART 237 [RESERVED]

PART 263—INDIAN EDUCATION DISCRETIONARY GRANT PROGRAMS

Subpart A—Professional Development Program

Sec.

263.1 What is the Professional Development Program?
263.2 Who is eligible to apply under the Professional Development program?
263.3 What definitions apply to the Professional Development program?
263.4 What costs may a Professional Development program include?
263.5 What are the application requirements?
263.6 What priority is given to certain projects and applicants?
263.7 How does the Secretary evaluate applications for the Professional Development program?
263.8 What are the requirements for a leave of absence?
263.9 What are the payback requirements?
263.10 What are the requirements for payback deferral?
263.11 What are the participant payback reporting requirements?
263.12 What are the grantee post-award requirements?
263.13 What are the program-specific requirements for continuation awards?

Subpart B—Demonstration Grants for Indian Children and Youth Program

263.20 What definitions apply to the Demonstration Grants for Indian Children and Youth program?
263.21 What priority is given to certain projects and applicants?
263.22 What are the application requirements for these grants?
263.23 What is the Federal requirement for Indian hiring preference that applies to these grants?
263.24 How does the Secretary evaluate applications for the Demonstration Grants for Indian Children and Youth grants program?
263.25 What are the program requirements when the Secretary uses the priority in § 263.21(c)(7)?

AUTHORITY: 20 U.S.C. 7441, unless otherwise noted.

SOURCE: 80 FR 22412, Apr. 22, 2015, unless otherwise noted.

Subpart A—Professional Development Program

AUTHORITY: 20 U.S.C. 7442, unless otherwise noted.

§ 263.1 What is the Professional Development program?

(a) The Professional Development program provides grants to eligible entities to—

(1) Increase the number of qualified Indian individuals in professions that serve Indian students;

(2) Provide pre- and in-service training and support to qualified Indian individuals to become effective teachers, principals, other school leaders, administrators, teacher aides, paraprofessionals, counselors, social workers, and specialized instructional support personnel;

(3) Improve the skills of qualified Indian individuals who serve in the education field; and

(4) Develop and implement initiatives to promote retention of effective teachers, principals, and school leaders who have a record of success in helping low-achieving Indian students improve their academic achievement, outcomes, and preparation for postsecondary education or employment.

(b) The Professional Development program requires individuals who receive training to—

(1) Perform work related to the training received under the program and that benefits Indian students in an LEA that serves a high proportion of Indian students, or to repay all or a prorated part of the assistance received under the program; and

(2) Periodically report to the Secretary on the individual's compliance with the work requirement until work-related payback is complete or the individual has been referred for cash payback.

[80 FR 22412, Apr. 22, 2015, as amended at 85 FR 41376, July 10, 2020]

§ 263.2 Who is eligible to apply under the Professional Development program?

(a) In order to be eligible for either pre-service or in-service training programs, an applicant must be an eligible entity which means—

(1) An institution of higher education, or a TCU;

(2) A State educational agency in consortium with an institution of higher education or a TCU;

(3) A local educational agency (LEA) in consortium with an institution of higher education or a TCU;

(4) An Indian tribe or Indian organization in consortium with an institution of higher education or a TCU; or

(5) A BIE-funded school in consortium with at least one TCU, where feasible.

(b) BIE-funded schools are eligible applicants for—

(1) An in-service training program; and

(2) A pre-service training program when the BIE-funded school applies in consortium with an institution of higher education that meets the requirements in paragraph (c) of this section.

(c) Eligibility of an applicant that is an institution of higher education or a TCU, or an applicant requiring a consortium with any institution of higher education or TCU, requires that the institution of higher education or TCU be accredited to provide the coursework and level of degree or Native American language certificate required by the project.

[80 FR 22412, Apr. 22, 2015, as amended at 85 FR 41377, July 10, 2020]

§ 263.3 What definitions apply to the Professional Development program?

The following definitions apply to the Professional Development program:

BIE-funded school means a Bureau of Indian Education school, a contract or grant school, or a school for which assistance is provided under the Tribally Controlled Schools Act of 1988.

Department means the U.S. Department of Education.

Dependent allowance means costs for the care of minor children under the age of 18 who reside with the training participant and for whom the participant has responsibility. The term does not include financial obligations for payment of child support required of the participant.

Full course load means the number of credit hours that the institution requires of a full-time student.

Full-time student means a student who—

(1) Is a candidate for a baccalaureate degree, graduate degree, or Native American language certificate, as appropriate for the project;

(2) Carries a full course load; and

(3) Is not employed for more than 20 hours a week.

Good standing means a cumulative grade point average of at least 2.0 on a 4.0 grade point scale in which failing grades are computed as part of the average, or another appropriate standard established by the institution.

Graduate degree means a post-baccalaureate degree awarded by an institution of higher education.

Indian means an individual who is—

(1) A member of an Indian tribe or band, as membership is defined by the Indian tribe or band, including any tribe or band terminated since 1940, and any tribe or band recognized by the State in which the tribe or band resides;

(2) A descendant of a parent or grandparent who meets the requirements of paragraph (1) of this definition;

(3) Considered by the Secretary of the Interior to be an Indian for any purpose;

(4) An Eskimo, Aleut, or other Alaska Native; or

(5) A member of an organized Indian group that received a grant under the Indian Education Act of 1988 as it was in effect on October 19, 1994.

Indian organization means an organization that—

(1) Is legally established—

(i) By tribal or inter-tribal charter or in accordance with State or tribal law; and

(ii) With appropriate constitution, by-laws, or articles of incorporation;

(2) Includes in its purposes the promotion of the education of Indians;

(3) Is controlled by a governing board, the majority of which is Indian;

(4) If located on an Indian reservation, operates with the sanction or by charter of the governing body of that reservation;

(5) Is neither an organization or subdivision of, nor under the direct control of, any institution of higher education or TCU; and

(6) Is not an agency of State or local government.

Induction services means services provided—

(1)(i) By educators, local traditional leaders, or cultural experts;

(ii) For the one, two, or three years of qualifying employment, as designated by the Department in the notice inviting applications; and

(iii) In LEAs that serve a high proportion of Indian students;

(2) To support and improve participants' professional performance and promote their retention in the field of education and teaching, and that include, at a minimum, these activities:

(i) High-quality mentoring, coaching, and consultation services for the participant to improve performance.

(ii) Access to research materials and information on teaching and learning.

(iii) Assisting new teachers with use of technology in the classroom and use of data, particularly student achievement data, for classroom instruction.

(iv) Clear, timely, and useful feedback on performance, provided in coordination with the participant's supervisor.

(v) Periodic meetings or seminars for participants to enhance collaboration, feedback, and peer networking and support.

In-service training means activities and opportunities designed to enhance the skills and abilities of individuals in their current areas of employment.

Institution of higher education (IHE) has the meaning given that term in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).

Local educational agency (LEA) that serves a high proportion of Indian students means—

(1) An LEA, including a BIE-funded school, that serves a high proportion of Indian students in the LEA as compared to other LEAs in the State; or

(2) An LEA, including a BIE-funded school, that serves a high proportion of Indian students in the school in which the participant works compared to other LEAs in the State, even if the LEA as a whole in which the participant works does not have a high proportion of Indian students compared to other LEAs in the State.

Native American means ''Indian'' as defined in section 6151(3) of the Elementary and Secondary Education Act, as amended, which includes Alaska Native and members of federally-recognized or State-recognized Tribes; Native Hawaiian; and Native American Pacific Islander.

Native American language means the historical, traditional languages spoken by Native Americans.

Participant means an Indian individual who is being trained under the Professional Development program.

Payback means work-related service or cash reimbursement to the Department of Education for the training received under the Professional Development program.

Pre-service training means training to Indian individuals to prepare them to meet the requirements for licensing or certification in a professional field requiring at least a baccalaureate degree, or licensing or certification in the field of Native American language instruction.

Professional development activities means pre-service or in-service training offered to enhance the skills and abilities of individual participants.

Qualifying employment means employment in an LEA that serves a high proportion of Indian students.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Stipend means that portion of an award that is used for room, board, and personal living expenses for full-time participants who are living at or near the institution providing the training.

Tribal college or university (TCU) has the meaning given that term in section 316(b) of the Higher Education Act of 1965 (20 U.S.C. 1059c(b)).

Tribal educational agency (TEA) means the agency, department, or instrumentality of an Indian Tribe that is primarily responsible for supporting Tribal students' elementary and secondary education.

(Authority: 20 U.S.C. 7442 and 7491)

[80 FR 22412, Apr. 22, 2015, as amended at 85 FR 41377, July 10, 2020]

§ 263.4 What costs may a Professional Development program include?

(a) A Professional Development program may include, as training costs, assistance to—

(1) Fully finance a student's educational expenses including tuition, books, and required fees; health insurance required by the institution of higher education; stipend; dependent allowance; technology costs; program required travel; and instructional supplies; or

(2) Supplement other financial aid, including Federal funding other than loans, for meeting a student's educational expenses.

(b) The Secretary announces the expected maximum amounts for stipends and dependent allowance in the annual notice inviting applications published in the FEDERAL REGISTER.

(c) Other costs that a Professional Development program may include, but that must not be included as training costs, include costs for—

(1) Collaborating with prospective employers within the grantees' local service area to create a pool of potentially available qualifying employment opportunities;

(2) In-service training activities such as providing mentorships linking experienced teachers at job placement sites with program participants;

(3) Assisting participants in identifying and securing qualifying employment opportunities in their field of study following completion of the program; and

(4) Teacher mentoring programs, professional guidance, and instructional support provided by educators, local traditional leaders, or cultural experts, as appropriate for teachers for up to their first three years of employment as teachers; and

(5) Programs designed to train traditional leaders and cultural experts to assist participants with relevant Native language and cultural mentoring, guidance, and support.

[80 FR 22412, Apr. 22, 2015, as amended at 85 FR 41377, July 10, 2020]

§ 263.5 What are the application requirements?

An applicant must—

(a) Describe how it will—

(1) Recruit qualified Indian individuals, such as students who may not be of traditional college age, to become teachers, principals, or school leaders;

(2) Use funds made available under the grant to support the recruitment, preparation, and professional development of Indian teachers or principals in LEAs that serve a high proportion of Indian students; and

(3) Assist participants in meeting the payback requirements under § 263.9(b);

(b) Submit one or more letters of support from LEAs that serve a high proportion of Indian students. Each letter must include—

(1) A statement that the LEA agrees to consider program graduates for employment;

(2) Evidence that the LEA meets the definition of ''LEA that serves a high proportion of Indian students''; and

(3) The signature of an authorized representative of the LEA;

(c) If applying as an Indian organization, demonstrate that the entity meets the definition of ''Indian organization'';

(d) If it is an affected LEA that is subject to the requirements of section 8538 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), consult with appropriate officials from Tribe(s) or Tribal organizations approved by the Tribes located in

the area served by the LEA prior to its submission of an application, as required under ESEA section 8538; and

(e) Comply with any other requirements in the application package.

[85 FR 41378, June 10, 2020]

§ 263.6 What priority is given to certain projects and applicants?

(a) The Secretary gives competitive preference priority to—

(1) *Tribal Applicants.* An application submitted by an Indian tribe, Indian organization, or an TCU that is eligible to participate in the Professional Development program. A consortium application of eligible entities that meets the requirements of 34 CFR 75.127 through 75.129 and includes an Indian tribe, Indian organization, or TCU will be considered eligible to receive preference under this priority only if the lead applicant for the consortium is the Indian tribe, Indian organization, or TCU. In order to be considered a consortium application, the application must include the consortium agreement, signed by all parties; or

(2) *Consortium Applicants, Non-Tribal Lead.* A consortium application of eligible entities that—

(i) Meets the requirements of 34 CFR 75.127 through 75.129 and includes an Indian tribe, Indian organization, or TCU; and

(ii) Is not eligible to receive a preference under paragraph (a)(1) of this section.

(b) The Secretary may annually establish as a priority any of the priorities listed in this paragraph. When inviting applications for a competition under the Professional Development program, the Secretary designates the type of each priority as absolute, competitive preference, or invitational through a notice in the FEDERAL REGISTER. The effect of each type of priority is described in 34 CFR 75.105.

(1) *Pre-Service training for teachers.* The Secretary establishes a priority for projects that—

(i) Provide support and training to Indian individuals to complete a preservice education program before the end of the award period that enables the individuals to meet the requirements for full State certification or licensure as a teacher through—

(A) Training that leads to a degree in education;

(B) For States allowing a degree in a specific subject area, training that leads to a degree in the subject area;

(C) Training in a current or new specialized teaching assignment that requires a degree and in which a documented teacher shortage exists; or

(D) Training in the field of Native American language instruction;

(ii) Provide induction services, during the award period, to participants after graduation, certification, or licensure, for the period of time designated by the Department in the notice inviting applications, while participants are completing their work-related payback in schools in LEAs that serve a high proportion of Indian students; and

(iii) Include goals for the—

(A) Number of participants to be recruited each year;

(B) Number of participants to continue in the project each year;

(C) Number of participants to graduate each year; and

(D) Number of participants to find qualifying employment within twelve months of completion.

(2) *Pre-service administrator training.* The Secretary establishes a priority for projects that—

(i) Provide support and training to Indian individuals to complete a graduate degree in education administration that is provided before the end of the award period and that allows participants to meet the requirements for State certification or licensure as an education administrator;

(ii) Provide induction services, during the award period, to participants after graduation, certification, or licensure, for the period of time designated by the Department in the notice inviting applications, while participants are completing their work-related payback in schools in LEAs that serve a high proportion of Indian students; and

(iii) Include goals for the—

(A) Number of participants to be recruited each year;

(B) Number of participants to continue in the project each year;

(C) Number of participants to graduate each year; and

(D) Number of participants to find qualifying employment within twelve months of completion.

(3) *Pre-service administrator training for work in Tribal educational agencies.* The Secretary establishes a priority for projects that—

(i) Meet the requirements of the pre-service administrator training priority in paragraph (b)(2) of this section;

(ii) Include training on working for a TEA, and opportunities for participants to work with or for TEAs during the training period; and

(iii) Include efforts by the applicant to place participants in administrator jobs in TEAs following program completion.

(4) *Pre-service administrator training for school start-ups.* The Secretary establishes a priority for projects that—

(i) Meet the requirements of the pre-service administrator training priority in paragraph (b)(2) of this section;

(ii) Include training to support the capacity of school leaders to start new schools that serve Indian students, such as charter schools or schools transitioning from BIE-operated to Tribally controlled; and

(iii) Include efforts by the applicant to place participants in administrator jobs with entities planning to start or transition a school to serve Indian students.

(Authority: 20 U.S.C. 7442 and 7473)

[80 FR 22412, Apr. 22, 2015. Redesignated and amended at 85 FR 41378, July 10, 2020]

§ 263.7 How does the Secretary evaluate applications for the Professional Development program?

The Secretary uses the procedures for establishing selection criteria and factors in 34 CFR 75.200 through 75.210 to establish the criteria and factors used to evaluate applications submitted in a grant competition for the Professional Development program. The Secretary may also consider one or more of the criteria and factors listed in paragraphs (a) through (e) of this section to evaluate applications.

(a) *Need for project.* In determining the need for the proposed project, the Secretary considers one or more of the following:

(1) The extent to which the proposed project will prepare personnel in specific fields in which shortages have been demonstrated through a job market analysis.

(2) The extent to which LEAs with qualifying employment opportunities exist in the project's service area, as demonstrated through a job market analysis, and have provided a letter of support for the project.

(b) *Significance.* In determining the significance of the proposed project, the Secretary considers one or more of the following:

(1) The potential of the proposed project to develop effective strategies for teaching Indian students and improving Indian student achievement, as demonstrated by a plan to share findings gained from the proposed project with parties who could benefit from such findings, such as other institutions of higher education who are training teachers and administrators who will be serving Indian students.

(2) The likelihood that the proposed project will build local capacity to provide, improve, or expand services that address the specific needs of Indian students.

(c) *Quality of the project design.* The Secretary considers one or more of the following factors in determining the quality of the design of the proposed project:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are ambitious but also attainable and address—

(i) The number of participants expected to be recruited in the project each year;

(ii) The number of participants expected to continue in the project each year;

(iii) The number of participants expected to graduate; and

(iv) The number of participants expected to find qualifying employment within twelve months of completion.

(2) The extent to which the proposed project has a plan for recruiting and selecting participants, including students who may not be of traditional college age, that ensures that program participants are likely to complete the program.

(3) The extent to which the proposed project will incorporate the needs of potential employers, as identified by a

job market analysis, by establishing partnerships and relationships with LEAs that serve a high proportion of Indian students and developing programs that meet their employment needs.

(d) *Quality of project services*. The Secretary considers one or more of the following factors in determining the quality of project services:

(1) The likelihood that the proposed project will provide participants with learning experiences that develop needed skills for successful teaching and/or administration in LEAs that serve a high proportion of Indian students.

(2) The extent to which the proposed project prepares participants to adapt teaching and/or administrative practices to meet the breadth of Indian student needs.

(3) The extent to which the applicant will provide job placement activities that reflect the findings of a job market analysis and needs of potential employers and that offer qualifying employment opportunities.

(4) The extent to which the applicant will offer induction services that reflect the latest research on effective delivery of such services.

(5) The extent to which the applicant will assist participants in meeting the service obligation requirements.

(e) *Quality of project personnel*. The Secretary considers one or more of the following factors when determining the quality of the personnel who will carry out the proposed project:

(1) The qualifications, including relevant training, experience, and cultural competence, of the project director and the amount of time this individual will spend directly involved in the project.

(2) The qualifications, including relevant training, experience, and cultural competence, of key project personnel and the amount of time to be spent on the project and direct interactions with participants.

(Approved by the Office of Management and Budget under control number 1810–0580)

[80 FR 22412, Apr. 22, 2015. Redesignated and amended at 85 FR 41378, July 10, 2020]

§ 263.8 What are the requirements for a leave of absence?

(a) A participant must submit a written request for a leave of absence to the project director not less than 30 days prior to withdrawal or completion of a grading period, unless an emergency situation has occurred and the project director chooses to waive the prior notification requirement.

(b) The project director may approve a leave of absence, for a period not longer than 12 months, provided the participant has completed a minimum of 50 percent of the training in the project and is in good standing at the time of request.

(c) The project director permits a leave of absence only if the institution of higher education certifies that the training participant is eligible to resume his or her course of study at the end of the leave of absence.

(d) A participant who is granted a leave of absence and does not return to his or her course of study by the end of the grant project period will be considered not to have completed the course of study for the purpose of project performance reporting.

[80 FR 22412, Apr. 22, 2015. Redesignated and amended at 85 FR 41379, July 10, 2020]

§ 263.9 What are the payback requirements?

(a) *General*. All participants must—

(1) Either perform work-related payback or provide cash reimbursement to the Department for the training received. It is the preference of the Department for participants to complete a work-related payback;

(2) Sign an agreement, at the time of selection for training, that sets forth the payback requirements; and

(3) Report employment verification in a manner specified by the Department or its designee.

(b) *Work-related payback*. (1) Participants qualify for work-related payback if the work they are performing is in their field of study under the Professional Development program and benefits Indian students. Employment in a LEA that serves a high proportion of Indian students qualifies as work that benefits Indian students.

(2) The period of time required for a work-related payback is equivalent to

the total period of time for which preservice or in-service training was actually received on a month-for-month basis under the Professional Development program.

(3) Work-related payback is credited for the actual time the participant works, not for how the participant is paid (*e.g.*, for work completed over 9 months but paid over 12 months, the payback credit is 9 months).

(4) For participants that initiate, but cannot complete, a work-related payback, the payback converts to a cash payback that is prorated based upon the amount of work-related payback completed.

(c) *Cash payback.* (1) Participants who do not submit employment verification within twelve months of program exit or completion, or have not submitted employment verification for a twelve-month period during a work-related payback, will automatically be referred for a cash payback unless the participant qualifies for a deferral as described in § 263.9.

(2) The cash payback required shall be equivalent to the total amount of funds received and expended for training received under this program and may be prorated based on any approved work-related service the participant performs.

(3) Participants who are referred to cash payback may incur non-refundable penalty and administrative fees in addition to their total training costs and will incur interest charges starting the day of referral.

(4) The cash payback obligation may only be discharged through bankruptcy if repaying the loan would cause the participant undue hardship as defined in 11 U.S.C. 523(a)(8).

(5) Notwithstanding paragraph (c)(1) of this section, participants who exit or complete a grant-funded training program in Federal fiscal year 2020 (October 1, 2019–September 30, 2020) who do not submit employment verification within 24 months of program exit or completion, and participants with qualifying employment during Federal fiscal year 2020 who do not submit employment verification for a 24-month period, will automatically be referred for a cash payback unless the participant qualifies for a deferral as described in § 263.9.

Note to § 263.9: For grants that provide administrator training, a participant who has received administrator training and subsequently works for a Tribal educational agency that provides administrative control or direction of public schools (*e.g.*, BIE-funded schools or charter schools) satisfies the requirements of paragraph (b)(1) of this section.

[80 FR 22412, Apr. 22, 2015, as amended at 85 FR 38079, June 25, 2020. Redesignated and amended at 85 FR 41379, July 10, 2020]

§ 263.10 What are the requirements for payback deferral?

(a) *Education deferral.* If a participant completes or exits the Professional Development program, but plans to continue his or her education as a full-time student without interruption, in a program leading to a degree at an accredited institution of higher education, the Secretary may defer the payback requirement until the participant has completed his or her educational program.

(1) A request for a deferral must be submitted to the Secretary within 30 days of completing or exiting the Professional Development program and must provide the following information—

(i) The name of the accredited institution the student will be attending;

(ii) A copy of the letter of admission from the institution;

(iii) The degree being sought; and

(iv) The projected date of completion.

(2) If the Secretary approves the deferral of the payback requirement on the basis that a participant is continuing as a full-time student, the participant must submit to the Secretary a status report from an academic advisor or other authorized representative of the institution of higher education, showing verification of enrollment and status, after every grading period.

(b) *Military deferral.* If a participant exits the Professional Development program because he or she is called or ordered to active duty status in connection with a war, military operation, or national emergency for more than 30 days as a member of a reserve component of the Armed Forces named in 10

U.S.C. 10101, or as a member of the National Guard on full-time National Guard duty, as defined in 10 U.S.C. 101(d)(5), the Secretary may defer the payback requirement until the participant has completed his or her military service, for a period not to exceed 36 months. Requests for deferral must be submitted to the Secretary within 30 days of the earlier of receiving the call to military service or completing or exiting the Professional Development program, and must provide—

(1) A written statement from the participant's commanding or personnel officer certifying—

(i) That the participant is on active duty in the Armed Forces of the United States;

(ii) The date on which the participant's service began; and

(iii) The date on which the participant's service is expected to end; or

(2)(i) A true certified copy of the participant's official military orders; and

(ii) A copy of the participant's military identification.

[80 FR 22412, Apr. 22, 2015. Redesignated at 85 FR 41378, July 10, 2020]

§ 263.11 What are the participant payback reporting requirements?

(a) *Notice of intent*. Participants must submit to the Secretary, within 30 days of completion of, or exit from, as applicable, their training program, a notice of intent to complete a work-related or cash payback, or to continue in a degree program as a full-time student.

(b) *Work-related payback*. (1) Starting within six months after exit from or completion of the program, participants must submit to the Secretary employment information, which includes information explaining how the employment is related to the training received and benefits Indian students in an LEA that serves a high proportion of Indian students.

(2) Participants must submit an employment status report every six months beginning from the date the work-related service is to begin until the payback obligation has been fulfilled.

(c) *Cash payback*. If a cash payback is to be made, the Department contacts the participant to establish an appropriate schedule for payments.

(Approved by the Office of Management and Budget under control number 1810–0698)

[80 FR 22412, Apr. 22, 2015. Redesignated and amended at 85 FR 41379, July 10, 2020]

§ 263.12 What are the grantee post-award requirements?

(a) Prior to providing funds or services to a participant, the grantee must conduct a payback meeting with the participant to explain the costs of training and payback responsibilities following training.

(b) The grantee must report to the Secretary all participant training and payback information in a manner specified by the Department or its designee.

(c)(1) Grantees must obtain a signed payback agreement from each participant before the participant begins training. The agreement must include—

(i) The estimated total training costs;

(ii) The estimated length of training;

(iii) A statement explaining that work must be in an ''LEA that serves a high proportion of Indian students,'' and the regulatory definition of that phrase; and

(iv) Information documenting that the grantee held a payback meeting with the participant that meets the requirements of this section.

(2) Grantees must submit a signed payback agreement to the Department within thirty days of signing the payback agreement.

(d) Grantees must conduct activities to assist participants in identifying and securing qualifying employment opportunities following completion of the program.

(e)(1) Awards that are primarily for the benefit of Indians are subject to the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638). That section requires that, to the greatest extent feasible, a grantee—

(i) Give to Indians preferences and opportunities for training and employment in connection with the administration of the grant; and

(ii) Give to Indian organizations and to Indian-owned economic enterprises,

as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452(e)), preference in the award of contracts in connection with the administration of the grant.

(2) For the purposes of paragraph (e), an Indian is a member of any federally recognized Indian tribe.

(Authority: 20 U.S.C. 7442, 25 U.S.C. 5304, 5307)

(Approved by the Office of Management and Budget under control number 1810–0698)

[80 FR 22412, Apr. 22, 2015. Redesignated and amended at 85 FR 41379, July 10, 2020]

§ 263.13 What are the program-specific requirements for continuation awards?

(a) In making continuation awards, in addition to applying the criteria in 34 CFR 75.253, the Secretary considers the extent to which a grantee has achieved its project goals to recruit, retain, graduate, and place in qualifying employment program participants.

(b) The Secretary may reduce continuation awards, including the portion of awards that may be used for administrative costs, as well as student training costs, based on a grantee's failure to achieve its project goals specified in paragraph (a) of this section.

Subpart B—Demonstration Grants for Indian Children and Youth Program

AUTHORITY: 20 U.S.C. 7441, unless otherwise noted.

§ 263.20 What definitions apply to the Demonstration Grants for Indian Children and Youth program?

The following definitions apply to the Demonstration Grants for Indian Children program:

Federally supported elementary or secondary school for Indian students means an elementary or secondary school that is operated or funded, through a contract or grant, by the Bureau of Indian Education.

Indian means an individual who is—

(1) A member of an Indian tribe or band, as membership is defined by the Indian tribe or band, including any tribe or band terminated since 1940, and any tribe or band recognized by the State in which the tribe or band resides;

(2) A descendant of a parent or grandparent who meets the requirements described in paragraph (1) of this definition;

(3) Considered by the Secretary of the Interior to be an Indian for any purpose;

(4) An Eskimo, Aleut, or other Alaska Native; or

(5) A member of an organized Indian group that received a grant under the Indian Education Act of 1988 as it was in effect on October 19, 1994.

Indian organization means an organization that—

(1) Is legally established—

(i) By tribal or inter-tribal charter or in accordance with State or tribal law; and

(ii) With appropriate constitution, by-laws, or articles of incorporation;

(2) Includes in its purposes the promotion of the education of Indians;

(3) Is controlled by a governing board, the majority of which is Indian;

(4) If located on an Indian reservation, operates with the sanction of or by charter from the governing body of that reservation;

(5) Is neither an organization or subdivision of, nor under the direct control of, any institution of higher education or TCU; and

(6) Is not an agency of State or local government.

Native youth community project means a project that is—

(1) Focused on a defined local geographic area;

(2) Centered on the goal of ensuring that Indian students are prepared for college and careers;

(3) Informed by evidence, which could be either a needs assessment conducted within the last three years or other data analysis, on—

(i) The greatest barriers, both in and out of school, to the readiness of local Indian students for college and careers;

(ii) Opportunities in the local community to support Indian students; and

(iii) Existing local policies, programs, practices, service providers, and funding sources;

(4) Focused on one or more barriers or opportunities with a community-based strategy or strategies and measurable objectives;

(5) Designed and implemented through a partnership of various entities, which—

(i) Must include—

(A) One or more tribes or their tribal education agencies; and

(B) One or more BIE-funded schools, one or more local educational agencies, or both; and

(ii) May include other optional entities, including community-based organizations, national nonprofit organizations, and Alaska regional corporations; and

(6) Led by an entity that—

(i) Is eligible for a grant under the Demonstration Grants for Indian Children and Youth program; and

(ii) Demonstrates, or partners with an entity that demonstrates, the capacity to improve outcomes that are relevant to the project focus through experience with programs funded through other sources.

Parent includes a legal guardian or other person standing in loco parentis (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare).

Professional development activities means in-service training offered to enhance the skills and abilities of individuals that may be part of, but not exclusively, the activities provided in a Demonstration Grants for Indian Children and Youth program.

Tribal College or University (TCU) means an accredited college or university within the United States cited in section 532 of the Equity in Educational Land-Grant Status Act of 1994, any other institution that qualifies for funding under the Tribally Controlled College or University Assistance Act of 1978, and the Navajo Community College, authorized in the Navajo Community College Assistance Act of 1978.

[80 FR 22412, Apr. 22, 2015, as amended at 85 FR 43450, July 17, 2020]

§ 263.21 What priority is given to certain projects and applicants?

(a) The Secretary gives priority to an application that presents a plan for combining two or more of the activities described in section 6121(c) of the Elementary and Secondary Education Act of 1965, as amended (ESEA), over a period of more than one year.

(b) The Secretary gives a competitive preference priority to—

(1) *Tribal lead applicants.* An application submitted by an Indian Tribe, Indian organization, BIE-funded school, or TCU that is eligible to participate in the Demonstration Grants for Indian Children and Youth program. A group application submitted by a consortium that meets the requirements of 34 CFR 75.127 through 75.129 or submitted by a partnership is eligible to receive the preference only if the lead applicant is an Indian Tribe, Indian organization, BIE-funded school, or TCU; or

(2) *Tribal partnership.* A group application submitted by a consortium of eligible entities that meets the requirements of 34 CFR 75.127 through 75.129 or submitted by a partnership if the consortium or partnership—

(i) Includes an Indian Tribe, Indian organization, BIE-funded school, or TCU; and

(ii) Is not eligible to receive the preference in paragraph (b)(1) of this section.

(c) The Secretary may give priority to an application that meets any of the priorities listed in this paragraph. When inviting applications for a competition under the Demonstration Grants program, the Secretary designates the type of each priority as absolute, competitive preference, or invitational through a notice inviting applications published in the FEDERAL REGISTER. The effect of each type of priority is described in 34 CFR 75.105.

(1) *Native youth community projects.* Native youth community projects, as defined in this subpart.

(2) *Experienced applicants.* Projects in which the applicant or one of its partners has received a grant in the last four years under a Federal program selected by the Secretary and announced in a notice inviting applications published in the FEDERAL REGISTER.

(3) *Consolidated funding.* Projects in which the applicant has Department approval to consolidate funding

through a plan that complies with section 6116 of the ESEA or other authority designated by the Secretary.

(4) *Statutorily authorized activities.* Projects that focus on a specific activity authorized in section 6116(c) of the ESEA as designated by the Secretary in the notice inviting applications.

(5) *Rural applicants.* Projects that include either—

(i) An LEA that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under title VI, part B of the ESEA; or

(ii) A BIE-funded school that is located in an area designated with locale code of either 41, 42, or 43 as designated by the National Center for Education Statistics.

(6) *Non-rural applicants.* Non-rural projects that do not meet the priority in paragraph (c)(5) of this section. This priority can only be used in competitions where the priority in paragraph (c)(5) of this section is also used.

(7) *Accessing choices in education.* Projects to expand educational choice by enabling a Tribe, or the grantee and its Tribal partner, to select a project focus that meets the needs of their students and enabling parents of Indian students, or the students, to choose education services by selecting the specific service and provider desired.

[85 FR 43450, July 17, 2020]

§ 263.22 What are the application requirements for these grants?

(a) Each application must contain—

(1) A description of how Indian Tribes and parents and families of Indian children and youth have been, and will be, involved in developing and implementing the proposed activities;

(2) Assurances that the applicant will participate, at the request of the Secretary, in any national evaluation of this program;

(3) Information demonstrating that the proposed project is evidence-based, where applicable, or is based on an existing evidence-based program that has been modified to be culturally appropriate for Indian students;

(4) A description of how the applicant will continue the proposed activities once the grant period is over; and

(5) Other assurances and information as the Secretary may reasonably require.

(b) The Secretary may require an applicant to satisfy any of the requirements in this paragraph. When inviting applications for a competition under the Demonstration Grants program, the Secretary establishes the application requirements through a notice inviting applications published in the FEDERAL REGISTER. If specified in the notice inviting applications, an applicant must submit—

(1) Evidence, which could be either a needs assessment conducted within the last three years or other data analysis, of—

(i) The greatest barriers, both in and out of school, to the readiness of local Indian students for college and careers;

(ii) Opportunities in the local community to support Indian students; and

(iii) Existing local policies, programs, practices, service providers, and funding sources.

(2) A copy of an agreement signed by the partners in the proposed project, identifying the responsibilities of each partner in the project. The agreement can be either—

(i) A consortium agreement that meets the requirements of 34 CFR 75.128, if each of the entities are eligible entities under this program; or

(ii) Another form of partnership agreement, such as a memorandum of understanding or a memorandum of agreement, if not all the partners are eligible entities under this program.

(3) A plan, which includes measurable objectives, to evaluate reaching the project goal or goals.

(4) A plan for how the applicant will oversee service providers and ensure that students receive high-quality services under the project.

(5)(i) For an applicant that is not a Tribe, if 50 percent or more of the total student population of the schools to be served by the project consists of members of one Tribe, documentation that that Tribe is a partner for the proposed project.

(ii) For an applicant that is an LEA or SEA and is not required by paragraph (i) of this section to partner with a specific Tribe, documentation that at

least one Tribe or Indian organization is a partner for the proposed project.

(6) An assurance that—

(i) Services will be supplemental to the education program provided by local schools attended by the students to be served;

(ii) Funding will be supplemental to existing sources, such as Johnson O'Malley funding; and

(iii) The availability of funds for supplemental special education and related services (*i.e.*, services that are not part of the special education and related services, supplementary aids and services, and program modifications or supports for school personnel that are required to make a free appropriate public education (FAPE) available under Part B of the Individuals with Disabilities Education Act (IDEA) to a child with a disability in conformity with the child's IEP or the regular or special education and related aids and services required to make FAPE available under a Section 504 plan, if any) does not affect the right of the child to receive FAPE under Part B of the IDEA or Section 504, and the respective implementing regulations.

(7) For an applicant that does not propose a planning period—

(i) A description of the service selection method required in § 263.25(d).

(ii) A description of the parent involvement and feedback process required in § 263.25(e).

(iii) A sample of the written agreement required in § 263.25(f).

(iv) A description of the process to choose students to be served, as required in § 263.25(g).

[80 FR 22412, Apr. 22, 2015, as amended at 85 FR 43450, July 17, 2020]

§ 263.23 What is the Federal requirement for Indian hiring preference that applies to these grants?

(a) Awards that are primarily for the benefit of Indians are subject to the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638). That section requires that, to the greatest extent feasible, a grantee—

(1) Give to Indians preferences and opportunities for training and employment in connection with the administration of the grant; and

(2) Give to Indian organizations and to Indian-owned economic enterprises, as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452(e)), preference in the award of contracts in connection with the administration of the grant.

(b) For purposes of this section, an Indian is a member of any federally recognized Indian tribe.

(Authority: 25 U.S.C. 5304, 5307)

[80 FR 22412, Apr. 22, 2015, as amended at 85 FR 43451, July 17, 2020]

§ 263.24 How does the Secretary evaluate applications for the Demonstration Grants for Indian Children and Youth grants program?

(a) *In general.* The Secretary uses the procedures in 34 CFR 75.200 through 75.210 to establish the selection criteria and factors used to evaluate applications submitted in a grant competition for the Demonstration Grants for Indian Children and Youth program. The Secretary may also consider one or more of the criteria and factors in this section to evaluate applications.

(b) *Quality of project services.* The Secretary may consider one or more of the following factors in determining the quality of project services:

(1) The extent to which the project would offer high-quality choices of services, including culturally relevant services, and providers, for parents and students to select.

(2) The extent to which the services to be offered would meet the needs of the local population, as demonstrated by an analysis of community-level data, including direct input from parents and families of Indian children and youth.

(3) The quality of the plan to ensure that the services to be offered are evidence-based, where applicable, or are based on existing evidence-based programs that have been modified to be culturally appropriate for Indian students.

(c) *Quality of the project design.* The Secretary may consider one or more of the following factors in determining the quality of the project design:

(1) The extent to which the project is designed to improve student and parent satisfaction with the student's overall

education experience, as measured by pre- and post-project data.

(2) The extent to which the applicant proposes a fair and neutral process of selecting service providers that will result in high-quality options from which parents and students can select services.

(3) The quality of the proposed plan to inform parents and students about available service choices under the project, and about the timeline for termination of the project.

(4) The quality of the applicant's plan to oversee service providers and ensure that students receive high-quality services under the project.

(d) *Reasonableness of budget*. The Secretary may consider one or more of the following factors in determining the reasonableness of the project budget:

(1) The extent to which the budget reflects the number of students to be served and a per-pupil amount for services, based only on direct costs for student services, that is reasonable in relation to the project objectives.

(2) The extent to which the per-pupil costs of specific services and per-pupil funds available are transparent to parents and other stakeholders.

[85 FR 43451, July 17, 2020]

§ 263.25 What are the program requirements when the Secretary uses the priority in § 263.21(c)(7)?

In any year in which the Secretary uses the priority in § 263.21(c)(7) for a competition, each project must—

(a) Include the following, which are chosen by the grantee, or for LEAs and SEAs, the grantee and its partnering Tribe or Indian organization:

(1) A project focus and specific services that are based on the needs of the local community; and

(2) Service providers;

(b) Include more than one education option from which parents and students may choose, which may include—

(1) Native language, history, or culture courses;

(2) Advanced, remedial, or elective courses, which may be online;

(3) Apprenticeships or training programs that lead to industry certifications;

(4) Concurrent and dual enrollment;

(5) Tuition for private school or home education expenses;

(6) Special education and related services that supplement, and are not part of, the special education and related services, supplementary aids and services, and program modifications or supports for school personnel required to make available a free appropriate public education (FAPE) under Part B of the IDEA to a child with a disability in conformity with the child's individualized education program (IEP) or the regular or special education and related aids and services required to ensure FAPE under Section 504 of the Rehabilitation Act of 1973 (Section 504);

(7) Books, materials, or education technology, including learning software or hardware, that are accessible to all children;

(8) Tutoring;

(9) Summer or afterschool education programs, and student transportation needed for those specific programs. Such programs could include instruction in the arts, music, or sports, to the extent that the applicant can demonstrate that such services are culturally related or are supported by evidence that suggests the services may have a positive effect on relevant education outcomes;

(10) Testing preparation and application fees, including for private school and graduating students;

(11) Supplemental counseling services, not to include psychiatric or medical services; or

(12) Other education-related services that are reasonable and necessary for the project;

(c) Provide a method to enable parents and students to select services. Such a method must—

(1) Ensure that funds will be transferred directly from the grantee to the selected service provider; and

(2) Include service providers other than the applicant, although the applicant may be one of the service providers;

(d) Include a parent involvement and feedback process that—

(1) Describes a way for parents to request services or providers that are not currently offered and provide input on services provided through the project,

and describes how the grantee will provide parents with written responses within 30 days; and

(2) May include a parent liaison to support the grantee in outreach to parents, inform parents and students of the timeline for the termination of the project, and assist parents and the grantee with the process by which a parent can request services or providers not already specified by the grantee;

(e) Include a written agreement between the grantee and each service provider under the project. Each agreement must include—

(1) A nondiscrimination clause that—

(i) Requires the provider to abide by all applicable non-discrimination laws with regard to students to be served, *e.g.*, on the basis of race, color, national origin, religion, sex, or disability; and

(ii) Prohibits the provider from discriminating among students who are eligible for services under this program, *i.e.*, that meet the definition of ''Indian'' in section 6151 of the ESEA, on the basis of affiliation with a particular Tribe;

(2) A description of how the grantee will oversee the service provider and hold the provider accountable for—

(i) The terms of the written agreement; and

(ii) The use of funds, including compliance with generally accepted accounting procedures and Federal cost principles;

(3) A description of how students' progress will be measured; and

(4) A provision for the termination of the agreement if the provider is unable to meet the terms of the agreement;

(f) Include a fair and documented process to choose students to be served, such as a lottery or other transparent criteria (*e.g.*, based on particular types of need), in the event that the number of requests from parents of eligible students or from students for services under the project exceeds the available capacity, with regard to the number or intensity of services offered;

(g) Ensure that—

(1) At least 80 percent of grant funds are used for direct services to eligible students, provided that, if a grantee requests and receives approval for a planning period, not to exceed 12 months, the 80 percent requirement does not apply to that planning period;

(2) Not more than 15 percent of grant funds are used on the service selection method described in paragraph (d) of this section or the parent involvement and feedback process described in paragraph (e) of this section, except in an authorized planning period; and

(3) No grant funds are used to establish or develop the capacity of entities or individuals that are or may become service providers under this project;

(h) For a grantee that receives approval for a planning period, not to exceed 12 months, submit to the Department prior to the end of that period the following documents:

(1) A description of the operational service selection process that meets the requirements of paragraph (c) of this section.

(2) A description of the operational parent involvement and feedback process that meets the requirements of paragraph (d) of this section.

(3) A sample of the written agreement that meets the requirements of paragraph (e) of this section, and a list of providers with whom the grantee has signed written agreements.

(4) A description of the process that will be used to choose students to be served in the event that the demand for services exceeds the available capacity, as described in paragraph (f) of this section.

[85 FR 43451, July 17, 2020]

PART 270—EQUITY ASSISTANCE CENTER PROGRAM

Subpart A—General

Sec.

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270.3 Who may receive assistance under this program?
270.4 What types of projects are authorized under this program?
270.5 What geographic regions do the EACs serve?
270.6 What regulations apply to this program?
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Subpart B [Reserved]

Subpart C—How Does the Secretary Award a Grant?

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270.31 What stipends and related reimbursements are authorized under this program?
270.32 What limitation is imposed on providing Equity Assistance under this program?

AUTHORITY: 42 U.S.C. 2000c—2000c–2, 2000c–5, unless otherwise noted.

SOURCE: 81 FR 46815, July 18, 2016 unless otherwise noted.

Subpart A—General

§ 270.1 What is the Equity Assistance Center Program?

This program provides financial assistance to operate regional Equity Assistance Centers (EACs), to enable them to provide technical assistance (including training) at the request of school boards and other responsible governmental agencies in the preparation, adoption, and implementation of plans for the desegregation of public schools, and in the development of effective methods of coping with special educational problems occasioned by desegregation.

§ 270.2 Who is eligible to receive a grant under this program?

A public agency (other than a State educational agency or a school board) or private, nonprofit organization is eligible to receive a grant under this program.

§ 270.3 Who may receive assistance under this program?

(a) The recipient of a grant under this part may provide assistance only if requested by school boards or other responsible governmental agencies located in its geographic region.

(b) The recipient may provide assistance only to the following persons:

(1) Public school personnel.

(2) Students enrolled in public schools, parents of those students, community organizations and other community members.

§ 270.4 What types of projects are authorized under this program?

(a) The Secretary may award funds to EACs for projects offering technical assistance (including training) to school boards and other responsible governmental agencies, at their request, for assistance in the preparation, adoption, and implementation of plans for the desegregation of public schools.

(b) A project must provide technical assistance in all four of the desegregation assistance areas, as defined in 34 CFR 270.7.

(c) Desegregation assistance may include, among other activities:

(1) Dissemination of information regarding effective methods of coping with special educational problems occasioned by desegregation;

(2) Assistance and advice in coping with these problems; and

(3) Training designed to improve the ability of teachers, supervisors, counselors, parents, community members, community organizations, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation.

§ 270.5 What geographic regions do the EACs serve?

(a) The Secretary awards a grant to provide race, sex, national origin, and religion desegregation assistance under this program to regional EACs serving designated geographic regions.

(b) The Secretary announces in the FEDERAL REGISTER the number of centers and geographic regions for each competition.

(c) The Secretary determines the number and boundaries of each geographic region for each competition on the basis of one or more of the following:

(1) Size and diversity of the student population;

(2) The number of LEAs;

(3) The composition of urban, city, and rural LEAs;

(4) The history and frequency of the EAC and other Department technical assistance activities;

(5) Geographic proximity of the States within each region; and

(6) The amount of funding available for the competition.

§ 270.6 What regulations apply to this program?

The following regulations apply to this program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR part 75 (Direct Grant Programs), part 77 (Definitions That Apply to Department Regulations), part 79 (Intergovernmental Review of Department of Education Programs and Activities), and part 81 (General Education Provisions Act—Enforcement), except that 34 CFR 75.232 (relating to the cost analysis) does not apply to grants under this program.

(b) The regulations in this part.

(c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted in 2 CFR part 3474 and the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted in 2 CFR part 3485.

§ 270.7 What definitions apply to this program?

In addition to the definitions in 34 CFR 77.1, the following definitions apply to the regulations in this part:

Desegregation assistance means the provision of technical assistance (including training) in the areas of race, sex, national origin, and religion desegregation of public elementary and secondary schools.

Desegregation assistance areas means the areas of race, sex, national origin, and religion desegregation.

English learner has the same meaning under this part as the same term defined in section 8101(20) of the Elementary and Secondary Education Act, as amended.

(Authority: Section 8101(20) of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, Pub. L. 114–95 (2015) (ESSA))

Equity Assistance Center means a regional desegregation technical assistance and training center funded under this part.

National origin desegregation means the assignment of students to public schools and within those schools without regard to their national origin, including providing students such as those who are English learners with a full opportunity for participation in all educational programs regardless of their national origin.

Public school means any elementary or secondary educational institution operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from governmental sources.

Public school personnel means school board members and persons who are employed by or who work in the schools of a responsible governmental agency, as that term is defined in this section.

Race desegregation means the assignment of students to public schools and within those schools without regard to their race, including providing students with a full opportunity for participation in all educational programs regardless of their race. ''Race desegregation'' does not mean the assignment of students to public schools to correct conditions of racial separation that are not the result of State or local law or official action.

Religion desegregation means the assignment of students to public schools and within those schools without regard to their religion, including providing students with a full opportunity for participation in all educational programs regardless of their religion.

Responsible governmental agency means any school board, State, municipality, LEA, or other governmental unit legally responsible for operating a public school or schools.

School board means any agency or agencies that administer a system of one or more public schools and any other agency that is responsible for the assignment of students to or within that system.

Sex desegregation means the assignment of students to public schools and within those schools without regard to their sex (including transgender status; gender identity; sex stereotypes, such as treating a person differently because he or she does not conform to sex-role expectations because he or she is attracted to or is in a relationship with a person of the same sex; and pregnancy and related conditions), including providing students with a full opportunity for participation in all educational programs regardless of their sex.

Special educational problems occasioned by desegregation means those issues that arise in classrooms, schools, and communities in the course of desegregation efforts based on race, national origin, sex, or religion. The phrase does not refer to the provision of special education and related services for students with disabilities as defined under the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*)

Subpart B [Reserved]

Subpart C—How Does the Secretary Award a Grant?

§ 270.20 How does the Secretary evaluate an application for a grant?

(a) The Secretary evaluates the application on the basis of the criteria in 34 CFR 75.210.

(b) The Secretary selects the highest ranking application for each geographic region to receive a grant.

§ 270.21 How does the Secretary determine the amount of a grant?

The Secretary determines the amount of a grant on the basis of:

(a) The amount of funds available for all grants under this part;

(b) A cost analysis of the project (that shows whether the applicant will achieve the objectives of the project with reasonable efficiency and economy under the budget in the application), by which the Secretary:

(1) Verifies the cost data in the detailed budget for the project;

(2) Evaluates specific elements of costs; and

(3) Examines costs to determine if they are necessary, reasonable, and allowable under applicable statutes and regulations;

(c) Evidence supporting the magnitude of the need of the responsible governmental agencies for desegregation assistance in the geographic region and the cost of providing that assistance to meet those needs, as compared with the evidence supporting the magnitude of the needs for desegregation assistance, and the cost of providing it, in all geographic regions for which applications are approved for funding;

(d) The size and the racial, ethnic, or religious diversity of the student population of the geographic region for which the EAC will provide services; and

(e) Any other information concerning desegregation problems and proposed activities that the Secretary finds relevant in the applicant's geographic region.

Subpart D—What Conditions Must I Meet after I Receive a Grant?

§ 270.30 What conditions must be met by a recipient of a grant?

(a) A recipient of a grant under this part must:

(1) Operate an EAC in the geographic region to be served; and

(2) Have a full-time project director.

(b) A recipient of a grant under this part must coordinate assistance in its geographic region with appropriate SEAs, Comprehensive Centers, Regional Educational Laboratories, and other Federal technical assistance centers. As part of this coordination, the recipient shall seek to prevent duplication of assistance where an SEA, Comprehensive Center, Regional Educational Laboratory, or other Federal technical assistance center may have already provided assistance to the responsible governmental agency.

(c) A recipient of a grant under this part must communicate and coordinate with the most recent EAC grant recipient(s) in its region, as needed, to ensure a smooth transition for ongoing technical assistance under the EAC program.

§ 270.31 What stipends and related reimbursements are authorized under this program?

(a) The recipient of an award under this program may pay:

(1) Stipends to public school personnel who participate in technical assistance or training activities funded under this part for the period of their attendance, if the person to whom the stipend is paid receives no other compensation for that period; or

(2) Reimbursement to a responsible governmental agency that pays substitutes for public school personnel who:

(i) Participate in technical assistance or training activities funded under this part; and

(ii) Are being compensated by that responsible governmental agency for the period of their attendance.

(b) A recipient may pay the stipends and reimbursements described in this section only if it demonstrates that the payment of these costs is necessary to the success of the technical assistance or training activity, and will not exceed 20 percent of the total award.

(c) If a recipient is authorized by the Secretary to pay stipends or reimbursements (or any combination of these payments), the recipient shall determine the conditions and rates for these payments in accordance with appropriate State policies, or in the absence of State policies, in accordance with local policies.

(d) A recipient of a grant under this part may pay a travel allowance only to a person who participates in a technical assistance or training activity under this part.

(e) If the participant does not complete the entire scheduled activity, the recipient may pay the participant's transportation to his or her residence or place of employment only if the participant left the training activity because of circumstances not reasonably within his or her control.

§ 270.32 What limitation is imposed on providing Equity Assistance under this program?

A recipient of a grant under this program may not use funds to assist in the development or implementation of activities or the development of curriculum materials for the direct instruction of students to improve their academic and vocational achievement levels.

PARTS 271–272 [RESERVED]

PART 280—MAGNET SCHOOLS ASSISTANCE PROGRAM

Subpart A—General

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280.1 What is the Magnet Schools Assistance Program?
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Subpart B—What Types of Projects Does the Secretary Assist Under This Program?

280.10 What types of projects does the Secretary assist?

Subpart C—How Does One Apply for a Grant?

280.20 How does one apply for a grant?

Subpart D—How Does the Secretary Make a Grant?

280.30 How does the Secretary evaluate an application?
280.31 What selection criteria does the Secretary use?
280.32 How is priority given to applicants?
280.33 How does the Secretary select applications for new grants with funds appropriated in excess of $75 million?

Subpart E—What Conditions Must Be Met by a Grantee?

280.40 What costs are allowable?
280.41 What are the limitations on allowable costs?

AUTHORITY: 20 U.S.C. 7231–7231j, unless otherwise noted.

Subpart A—General

§ 280.1 What is the Magnet Schools Assistance Program?

The Magnet Schools Assistance Program provides grants to eligible local educational agencies (LEAs) or consortia of LEAs for use in magnet schools that are part of an approved desegregation plan and that are designed

to bring students from different social, economic, ethnic and racial backgrounds together. The purposes of the program are to support, through financial assistance to eligible LEAs or consortia of LEAs—

(a) The elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial portions of minority students, which shall include assisting in the efforts of the United States to achieve voluntary desegregation in public schools;

(b) The development and implementation of magnet school projects that will assist LEAs in achieving systemic reforms and providing all students the opportunity to meet challenging State academic content standards and student academic achievement standards;

(c) The development and design of innovative educational methods and practices that promote diversity and increase choices in public elementary schools and public secondary schools and public educational programs;

(d) Courses of instruction within magnet schools that will substantially strengthen the knowledge of academic subjects and the attainment of tangible and marketable vocational, technological, and professional skills of students attending such schools;

(e) Improvement of the capacity of LEAs, including through professional development, to continue operating magnet schools at a high performance level after Federal funding for the magnet schools is terminated; and

(f) Ensuring that all students enrolled in the magnet school programs have equitable access to high quality education that will enable the students to succeed academically and continue with postsecondary education or productive employment.

(Authority: 20 U.S.C. 7231)

[51 FR 20414, June 4, 1986, as amended at 60 FR 14865, Mar. 20, 1995; 69 FR 4996, Feb. 2, 2004]

§ 280.2 Who is eligible to apply for a grant?

(a) An LEA or consortia of LEAs is eligible to receive assistance under this part if the LEA or consortia of LEAs meets any of the following requirements:

(1) The LEA or consortia of LEAs is implementing a plan undertaken pursuant to a final order of a court of the United States, or a court of any State, or any other State agency or official of competent jurisdiction, and the order requires the desegregation of minority group segregated children or faculty in the elementary and secondary schools of that agency or those agencies.

(2) The LEA or consortia of LEAs adopted and is implementing on either a voluntary basis or as required under title VI of the Civil Rights Act of 1964—or will adopt and implement if assistance is made available under this part—a plan that has been approved by the Secretary as adequate under title VI.

(b) The Secretary approves a voluntary plan under paragraph (a)(2) of this section only if he determines that for each magnet school for which funding is sought, the magnet school will reduce, eliminate, or prevent minority group isolation within the period of the grant award, either in the magnet school or in a feeder school, as appropriate.

(Authority: 20 U.S.C. 7231c)

[50 FR 21191, May 22, 1985, as amended at 54 FR 19508, May 5, 1989; 57 FR 61508, Dec. 24, 1992; 60 FR 14865, Mar. 20, 1995; 69 FR 4996, Feb. 2, 2004; 75 FR 9780, Mar. 4, 2010]

§ 280.3 What regulations apply to this program?

The following regulations apply to the Magnet Schools Assistance Program:

(a) The Education Department General Administrative Regulations (EDGAR), 34 CFR parts 75 (Direct Grant Programs), 77 (Definitions that Apply to Department Regulations), 79 (Intergovernmental Review of Department of Education Programs and Activities) and 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(b) The regulations in this part.

(c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted in 2 CFR part 3474 and OMB Guidelines to Agencies on Governmentwide Debarment and

Suspension (Nonprocurement) in 2 CFR part 180, as adopted in part 3485.

(Authority: 20 U.S.C. 7231–7231j)

[50 FR 21191, May 22, 1985, as amended at 54 FR 19508, May 5, 1989; 69 FR 4996, Feb. 2, 2004; 79 FR 76096, Dec. 19, 2014]

§ 280.4 What definitions apply to this program?

(a) *Definitions in EDGAR*. The following terms used in this part are defined in 34 CFR part 77:

Applicant
Application
Budget
EDGAR
Elementary school
Equipment
Facilities
Fiscal year
Local educational agency
Project
Secondary school
Secretary
State

(b) *Definitions that apply to this program*. The following definitions also apply to this part:

Act means the Elementary and Secondary Education Act of 1965 as amended by title V, Part C of the No Child Left Behind Act of 2001, Pub. L. 107–110 (20 U.S.C. 7231–7231j).

Desegregation, in reference to a plan, means a plan for the reassignment of children or faculty to remedy the illegal separation of minority group children or faculty in the schools of an LEA or a plan for the reduction, elimination, or prevention of minority group isolation in one or more of the schools of an LEA.

Feeder school means a school from which students are drawn to attend a magnet school.

Magnet school means a public elementary school, public secondary school, public elementary education center, or public secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds.

Minority group means the following:

(1) *American Indian or Alaskan Native*. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

(2) *Asian of Pacific Islander*. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

(3) *Black (Not of Hispanic Origin)*. A person having origins in any of the black racial groups of Africa.

(4) *Hispanic*. A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

Special curriculum means a course of study embracing subject matter or a teaching methodology that is not generally offered to students of the same age or grade level in the same LEA or consortium of LEAs, as the students to whom the special curriculum is offered in the magnet schools. This term does not include:

(1) A course of study or a part of a course of study designed solely to provide basic educational services to handicapped students or to students of limited English-speaking ability;

(2) A course of study or a part of a course of study in which any student is unable to participate because of his or her limited English-speaking ability;

(3) A course of study or a part of a course of study in which any student is unable to participate because of his or her limited financial resources; or

(4) A course of study or a part of a course of study that fails to provide for a participating student's meeting the requirements for completion of elementary or secondary education in the same period as other students enrolled in the applicant's schools.

(Authority: 20 U.S.C. 7231–7231j)

[50 FR 21191, May 22, 1985, as amended at 51 FR 20414, June 4, 1986; 54 FR 19508, 19509, May 5, 1989; 57 FR 61509, Dec. 24, 1992; 60 FR 14865, Mar. 20, 1995; 69 FR 4996, Feb. 2, 2004; 75 FR 9780, Mar. 4, 2010]

Subpart B—What Types of Projects Does the Secretary Assist Under This Program?

§ 280.10 What types of projects does the Secretary assist?

(a) The Secretary funds applications proposing projects in magnet schools

that are part of an approved desegregation plan and that are designed to bring students from different social, economic, ethnic, and racial backgrounds together.

(b) For the purposes of this part, an approved desegregation plan is a desegregation plan described in § 280.2 (a) or (b).

(c) In the case of a desegregation plan described in § 280.2(a)(1), any modification to that plan must be approved by the court, agency, or official that approved the plan.

(Authority: 20 U.S.C. 7203)

[50 FR 21191, May 22, 1985, as amended at 51 FR 20414, June 4, 1986; 54 FR 19508, 19509, May 5, 1989]

Subpart C—How Does One Apply for a Grant?

§ 280.20 How does one apply for a grant?

(a) Each eligible LEA or consortium of LEAs that desires to receive assistance under this part shall submit an annual application to the Secretary.

(b) In its application, the LEA or consortium of LEAs shall provide assurances that it—

(1) Will use funds made available under this part for the purposes specified in section 5301(b) of the Act;

(2) Will employ highly qualified teachers in the courses of instruction assisted under this part;

(3) Will not engage in discrimination based upon race, religion, color, national origin, sex, or disability in the hiring, promotion, or assignment of employees of the agency or other personnel for whom the agency has any administrative responsibility;

(4) Will not engage in discrimination based upon race, religion, color, national origin, sex, or disability in the assignment of students to schools or to courses of instruction within schools of the agency, except to carry out the approved desegregation plan;

(5) Will not engage in discrimination based upon race, religion, color, national origin, sex, or disability in designing or operating extracurricular activities for students;

(6) Will carry out a high-quality education program that will encourage greater parental decisionmaking and involvement; and

(7) Will give students residing in the local attendance area of the proposed magnet school program equitable consideration for placement in the program, consistent with desegregation guidelines and the capacity of the applicant to accommodate students.

(c) In addition to the assurances listed in paragraph (b) of this section, the LEA or consortium of LEAs shall provide such other assurances as the Secretary determines necessary to carry out the provisions of this part.

(d) Upon request, the LEA or consortium of LEAs shall submit any information that is necessary for the Assistant Secretary for Civil Rights to determine whether the assurances required in paragraphs (b) (3), (4), and (5) of this section will be met.

(e) An LEA or consortium of LEAs that has an approved desegregation plan shall submit each of the following with its application:

(1) A copy of the plan.

(2) An assurance that the plan is being implemented as approved.

(f) An LEA or consortium of LEAs that does not have an approved desegregation plan shall submit each of the following with its application:

(1) A copy of the plan the LEA or consortium of LEAs is submitting for approval.

(2) A copy of a school board resolution or other evidence of final official action adopting and implementing the plan, or agreeing to adopt and implement it upon the award of assistance under this part.

(3) Evidence that the plan is a desegregation plan as defined in § 280.4(b).

(4) For an LEA or consortium of LEAs that seeks assistance for existing magnet schools—

(i) Enrollment numbers and percentages, for minority and non-minority group students, for each magnet school for which funding is sought and each feeder school—

(A) For the school year prior to the creation of each magnet school;

(B) For the school year in which the application is submitted; and

(C) For each of the school years of the proposed grant cycle (i.e., projected enrollment figures); and

(ii) Districtwide enrollment numbers and percentages for minority group students in the LEA's or consortium of LEAs' schools, for grade levels involved in the applicant's magnet schools (e.g., K–6, 7–9, 10–12)—

(A) For the school year prior to the creation of each magnet school;

(B) For the school year in which the application is submitted; and

(C) For each of the school years of the proposed grant cycle (i.e., projected enrollment figures).

(5) For an LEA or consortium of LEAs that seeks assistance for new magnet schools—

(i) Enrollment numbers and percentages, for minority and non-minority group students, for each magnet school for which funding is sought and for each feeder school—

(A) For the school year in which the application is submitted; and

(B) For each of the school years of the proposed grant cycle (i.e., projected enrollment figures); and

(ii) Districtwide numbers and percentages of minority group students in the LEA's or consortium of LEAs' schools, for the grade levels involved in the applicant's magnet schools (e.g., K–6, 7–9, 10–12)—

(A) For the school year in which the application is submitted; and

(B) For each of the school years of the proposed grant cycle (i.e., projected enrollment figures).

(g) An applicant that does not have an approved desegregation plan, and demonstrates that it cannot provide some portion of the information requested under paragraphs (f)(4) and (5) of this section, may provide other information (in lieu of that portion of the information not provided in response to paragraphs (f)(4) and (5) of this section) to demonstrate that the creation or operation of its proposed magnet school would reduce, eliminate, or prevent minority group isolation in the applicant's schools.

(h) After reviewing the information provided in response to paragraph (f)(4) or (5) of this section, or as provided under paragraph (g) of this section, the Secretary may request other information, if necessary (e.g., demographic data concerning the attendance areas in which the magnet schools are or will be located), to determine whether to approve an LEA's or consortium of LEAs' plan.

(i) In addition to including the assurances required by this section, an LEA or consortium of LEAs shall describe in its application—

(1) How the applicant will use assistance made available under this part to promote desegregation, including how the proposed magnet school programs will increase interaction among students of different social, economic, ethnic, and racial backgrounds;

(2) How and to what extent the assistance will increase student academic achievement in instructional areas offered;

(3) How the LEA or consortium of LEAs will continue the magnet schools program after assistance under this part is no longer available, including, if applicable, why magnet schools previously established or supported with Magnet Schools Assistance Program grant funds cannot be continued without the use of funds under this part;

(4) How assistance will be used to—

(i) Improve student academic achievement for all students attending the magnet school programs; and

(ii) Implement services and activities that are consistent with other programs under the Act and other statutes, as appropriate; and

(5) What criteria will be used in selecting students to attend the proposed magnet schools program.

(Approved by the Office of Management and Budget under control number 1855–0011)

(Authority: 20 U.S.C. 7231d)

[50 FR 21191, May 22, 1985, as amended at 54 FR 19508, May 5, 1989; 57 FR 61509, Dec. 24, 1992; 60 FR 14865, Mar. 20, 1995; 69 FR 4997, Feb. 2, 2004; 75 FR 9780, Mar. 4, 2010]

Subpart D—How Does the Secretary Make a Grant?

§ 280.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application under the procedures in 34 CFR part 75 and this part.

(b) To evaluate an application for a new grant the Secretary may use—

(1) Selection criteria established under 34 CFR 75.209;

(2) Selection criteria in § 280.31;

(3) Selection criteria established under 34 CFR 75.210; or

(4) Any combination of criteria from paragraphs (b)(1), (b)(2), and (b)(3) of this section.

(c) The Secretary indicates in the application notice published in the FEDERAL REGISTER the specific criteria that the Secretary will use and how points for the selection criteria will be distributed.

(d) The Secretary evaluates an application submitted under this part on the basis of criteria described in paragraph (c) of this section and the priority factors in § 280.32.

(e) The Secretary awards up to 100 points for the extent to which an application meets the criteria described in paragraph (c) of this section.

(f) The Secretary then awards up to 30 additional points based upon the priority factors in § 280.32.

(Approved by the Office of Management and Budget under control number 1855–0011)

(Authority: 20 U.S.C. 7231–7231j)

[72 FR 10607, Mar. 9, 2007]

§ 280.31 What selection criteria does the Secretary use?

The Secretary may use the following selection criteria in evaluating each application:

(a) *Plan of operation.* (1) The Secretary reviews each application to determine the quality of the plan of operation for the project.

(2) The Secretary determines the extent to which the applicant demonstrates—

(i) The effectiveness of its management plan to ensure proper and efficient administration of the project;

(ii) The effectiveness of its plan to attain specific outcomes that—

(A) Will accomplish the purposes of the program;

(B) Are attainable within the project period;

(C) Are measurable and quantifiable; and

(D) For multi-year projects, can be used to determine the project's progress in meeting its intended outcomes;

(iii) The effectiveness of its plan for utilizing its resources and personnel to achieve the objectives of the project, including how well it utilizes key personnel to complete tasks and achieve the objectives of the project;

(iv) How it will ensure equal access and treatment for eligible project participants who have been traditionally underrepresented in courses or activities offered as part of the magnet school, e.g., women and girls in mathematics, science or technology courses, and disabled students; and

(v) The effectiveness of its plan to recruit students from different social, economic, ethnic, and racial backgrounds into the magnet schools.

(b) *Quality of personnel.* (1) The Secretary reviews each application to determine the qualifications of the personnel the applicant plans to use on the project.

(2) The Secretary determines the extent to which—

(i) The project director (if one is used) is qualified to manage the project;

(ii) Other key personnel are qualified to manage the project;

(iii) Teachers who will provide instruction in participating magnet schools are qualified to implement the special curriculum of the magnet schools; and

(iv) The applicant, as part of its nondiscriminatory employment practices will ensure that its personnel are selected for employment without regard to race, religion, color, national origin, sex, age, or disability.

(3) To determine personnel qualifications the Secretary considers experience and training in fields related to the objectives of the project, including the key personnel's knowledge of and experience in curriculum development and desegregation strategies.

(c) *Quality of project design.* (1) The Secretary reviews each application to determine the quality of the project design.

(2) The Secretary determines the extent to which each magnet school for which funding is sought will—

(i) Foster interaction among students of different social, economic, ethnic, and racial backgrounds in classroom activities, extracurricular activities, or other activities in the magnet schools (or, if appropriate, in the

schools in which the magnet school programs operate);

(ii) Address the educational needs of the students who will be enrolled in the magnet schools;

(iii) Carry out a high quality educational program that will substantially strengthen students' reading skills or knowledge of mathematics, science, history, geography, English, foreign languages, art, music, or vocational, technological, and professional skills;

(iv) Encourage greater parental decisionmaking and involvement; and

(v) Improve the racial balance of students in the applicant's schools by reducing, eliminating, or preventing minority group isolation in its schools.

(d) *Budget and resources.* The Secretary reviews each application to determine the adequacy of the resources and the cost-effectiveness of the budget for the project, including—

(1) The adequacy of the facilities that the applicant plans to use;

(2) The adequacy of the equipment and supplies that the applicant plans to use; and

(3) The adequacy and reasonableness of the budget for the project in relation to the objectives of the project.

(e) *Evaluation plan.* The Secretary determines the extent to which the evaluation plan for the project—

(1) Includes methods that are appropriate for the project;

(2) Will determine how successful the project is in meeting its intended outcomes, including its goals for desegregating its students and increasing student achievement; and

(3) Includes methods that are objective and that will produce data that are quantifiable.

(f) *Commitment and capacity.* (1) The Secretary reviews each application to determine whether the applicant is likely to continue the magnet school activities after assistance under this part is no longer available.

(2) The Secretary determines the extent to which the applicant—

(i) Is committed to the magnet schools project; and

(ii) Has identified other resources to continue support for the magnet school activities when assistance under this program is no longer available.

(Approved by the Office of Management and Budget under control number 1855–0011)

(Authority: 20 U.S.C. 7231–7231j)

[57 FR 61509, Dec. 24, 1992, as amended at 60 FR 14866, Mar. 20, 1995; 69 FR 4997, Feb. 2, 2004; 72 FR 10607, Mar. 9, 2007]

§ 280.32 How is priority given to applicants?

(a) *How priority is given.* In addition to the points awarded under § 280.31, the Secretary gives priority to the factors listed in paragraphs (b) through (d) of this section by awarding additional points for these factors. The Secretary indicates in the application notice published in the FEDERAL REGISTER how these additional points will be distributed.

(b) *Need for assistance.* The Secretary evaluates the applicant's need for assistance under this part, by considering—

(1) The costs of fully implementing the magnet schools project as proposed;

(2) The resources available to the applicant to carry out the project if funds under the program were not provided;

(3) The extent to which the costs of the project exceed the applicant's resources; and

(4) The difficulty of effectively carrying out the approved plan and the project for which assistance is sought, including consideration of how the design of the magnet school project—e.g., the type of program proposed, the location of the magnet school within the LEA—impacts on the applicant's ability to successfully carry out the approved plan.

(c) *New or revised magnet schools projects.* The Secretary determines the extent to which the applicant proposes to carry out new magnet schools projects or significantly revise existing magnet schools projects.

(d) *Selection of students.* The Secretary determines the extent to which the applicant proposes to select students to attend magnet schools by

methods such as lottery, rather than through academic examination.

(Authority: 20 U.S.C. 7231e))

[57 FR 61510, Dec. 24, 1992, as amended at 60 FR 14866, Mar. 20, 1995; 63 FR 8020, Feb. 17, 1998; 69 FR 4997, Feb. 2, 2004]

§ 280.33 How does the Secretary select applications for new grants with funds appropriated in excess of $75 million?

(a) In selecting among applicants for funds appropriated for this program in excess of $75 million, the Secretary first identifies those remaining applicants that did not receive funds under this program in the last fiscal year of the previous funding cycle.

(b) The Secretary then awards ten additional points to each applicant identified under paragraph (a) of this section.

(Authority: 20 U.S.C. 7231j)

[54 FR 19509, May 5, 1989, as amended at 69 FR 4997, Feb. 2, 2004]

Subpart E—What Conditions Must Be Met by a Grantee?

§ 280.40 What costs are allowable?

An LEA or consortium of LEAs may use funds received under this part for the following activities:

(a) Planning and promotional activities directly related to the development, expansion, continuation, or enhancement of academic programs and services offered at magnet schools, though planning activities are subject to the restrictions in § 280.41(a) and do not include activities described under paragraph (f) of this section.

(b) The acquisition of books, materials, and equipment (including computers) and the maintenance and operation of materials, equipment and computers. Any books, materials or equipment purchased with grant funds must be:

(1) Necessary for the conduct of programs in magnet schools; and

(2) Directly related to improving student academic achievement based on the State's challenging academic content standards and student academic achievement standards or directly related to improving student reading skills or knowledge of mathematics, science, history, geography, English, foreign languages, art, or music, or to improving vocational, technological, or professional skills.

(c) The payment or subsidization of the compensation of elementary and secondary school teachers:

(1) Who are highly qualified;

(2) Who are necessary to conduct programs in magnet schools; and

(3) Whose employment is directly related to improving student academic achievement based on the State's challenging academic content standards and student academic achievement standards or directly related to improving student reading skills or knowledge of mathematics, science, history, geography, English, foreign languages, art, or music, or to improving vocational, technological, or professional skills.

(d) The payment or subsidization of the compensation of instructional staff, where applicable, who satisfy the requirements of paragraphs (c)(2) and (3) of this section.

(e) With respect to a magnet school program offered to less than the entire school population, for instructional activities that—

(1) Are designed to make available the special curriculum of the magnet school program to students enrolled in the school, but not in the magnet school program; and

(2) Further the purposes of the program.

(f) Activities, which may include professional development, that will build the recipient's capacity to operate magnet school programs once the grant period has ended.

(g) Activities to enable the LEA or consortium of LEAs to have more flexibility in the administration of a magnet school program in order to serve students attending a school who are not enrolled in a magnet school program.

(h) Activities to enable the LEA or consortium of LEAs to have flexibility in designing magnet schools for students in all grades.

(Authority: 20 U.S.C. 7231f)

[51 FR 20414, June 4, 1986, as amended at 54 FR 19509, May 5, 1989; 60 FR 14866, Mar. 20, 1995; 69 FR 4997, Feb. 2, 2004]

§ 280.41 What are the limitations on allowable costs?

An LEA or consortium of LEAs that receives assistance under this part may not—

(a) Expend for planning more than 50 percent of the funds received for the first fiscal year, and 15 percent of the funds received for the second or the third fiscal year;

(b) Use funds for transportation; or

(c) Use funds for any activity that does not augment academic improvement.

(Authority: 20 U.S.C. 7231g, 7231h(b))

[60 FR 14866, Mar. 20, 1995, as amended at 69 FR 4997, Feb. 2, 2004]

PART 299—GENERAL PROVISIONS

Subpart A—Purpose and Applicability

Sec.

299.1 What are the purpose and scope of the regulations in this part?
299.2 What general administrative regulations apply to ESEA programs?

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299.6 What are the responsibilities of a recipient of funds for providing services to children and teachers in private schools?
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Subpart F—Complaint Procedures

299.10 Ombudsman.
299.11 What complaint procedures shall an SEA adopt?
299.12 What items are included in the complaint procedures?
299.13 How does an organization or individual file a complaint?

AUTHORITY: 20 U.S.C. 1221e–3, unless otherwise noted.

Section 299.1 also issued under 20 U.S.C. 1221e–3.

Section 299.2 also issued under 20 U.S.C. 1221e–3.

Section 299.4 also issued under 20 U.S.C. 7821 and 7823.

Section 299.5 also issued under 20 U.S.C. 7428(c), 7801(11), 7901.

Section 299.6 also issued under 20 U.S.C. 7881.

Section 299.7 also issued under 20 U.S.C. 7881.

Section 299.8 also issued under 20 U.S.C. 7881.

Section 299.9 also issued under 20 U.S.C. 7881.

Section 299.10 also issued under 20 U.S.C. 7881(a)(3)(B).

Section 299.11 also issued under 20 U.S.C. 1221e–3, 7844(a)(3)(C), 7883.

Section 299.12 also issued under 20 U.S.C. 1221e–3, 7844(a)(3)(C), 7883.

Section 299.13 also issued under 20 U.S.C. 1221e–3, 7844(a)(3)(C), 7883.

SOURCE: 62 FR 28252, May 22, 1997, unless otherwise noted.

Subpart A—Purpose and Applicability

§ 299.1 What are the purpose and scope of the regulations in this part?

(a) This part establishes uniform administrative rules for programs in titles I through VII of the Elementary and Secondary Education Act of 1965, as amended (ESEA). As indicated in particular sections of this part, certain provisions apply only to a specific group of programs.

(b) If an ESEA program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent applicable, title VIII of the ESEA, the General Education Provisions Act, the regulations in this part, EDGAR (34 CFR parts 75 through 99), and 2 CFR parts 180, as adopted at 2 CFR part 3485, and 200, as adopted at 2 CFR part 3474, that are not inconsistent with specific statutory provisions of the ESEA.

[84 FR 31678, July 2, 2019]

§ 299.2 What general administrative regulations apply to ESEA programs?

Title 2 of the CFR, part 200, as adopted at 2 CFR part 3474, applies to all ESEA programs except for title VII programs (Impact Aid) (in addition to any other specific implementing regulations).

NOTE 1 TO § 299.2: 34 CFR 222.19 indicates which EDGAR provisions apply to title VII programs (Impact Aid).

[84 FR 31678, July 2, 2019]

Subpart B [Reserved]

Subpart C—Consolidation of State and Local Administrative Funds

§ 299.4 What requirements apply to the consolidation of State and local administrative funds?

An SEA may adopt and use its own reasonable standards in determining whether—

(a) The majority of its resources for administrative purposes comes from non-Federal sources to permit the consolidation of State administrative funds in accordance with section 8201 of the ESEA; and

(b) To approve an LEA's consolidation of its administrative funds in accordance with section 8203 of the ESEA.

[84 FR 31678, July 2, 2019]

Subpart D—Fiscal Requirements

§ 299.5 What maintenance of effort requirements apply to ESEA programs?

(a) *General.* An LEA receiving funds under an applicable program listed in paragraph (b) of this section may receive its full allocation of funds only if the SEA finds that either the combined fiscal effort per student or the aggregate expenditures of State and local funds with respect to the provision of free public education in the LEA for the preceding fiscal year was not less than 90 percent of the combined fiscal effort per student or the aggregate expenditures for the second preceding fiscal year.

(b) *Applicable programs.* This subpart is applicable to the following programs:

(1) Part A of title I (Improving Basic Programs Operated by Local Educational Agencies).

(2) Part D of title I (Prevention and Intervention Programs for Children and Youth Who Are Neglected, Delinquent, or At Risk).

(3) Part A of title II (Supporting Effective Instruction).

(4) Part A, subpart 1 of title III (English Language Acquisition, Language Enhancement, and Academic Achievement), except for section 3112.

(5) Part A of title IV (Student Support and Academic Enrichment Grants).

(6) Part B of title IV (21st Century Community Learning Centers).

(7) Part B, subpart 2 of title V (Rural and Low-Income School Program).

(8) Part A, subpart 1 of title VI (Indian Education Formula Grants to Local Educational Agencies).

(c) *Meaning of ''preceding fiscal year''.* For purposes of determining if the requirement of paragraph (a) of this section is met, the ''preceding fiscal year'' means the Federal fiscal year, or the 12-month fiscal period most commonly used in a State for official reporting purposes, prior to the beginning of the Federal fiscal year in which funds are available for obligation by the Department.

(1) *Example.* For fiscal year 2018 funds that are first made available on July 1, 2018, if a State is using the Federal fiscal year, the ''preceding fiscal year'' is Federal fiscal year 2017 (which began on October 1, 2016 and ended September 30, 2017) and the ''second preceding fiscal year'' is Federal fiscal year 2016 (which began on October 1, 2015). If a State is using a fiscal year that begins on July 1, 2018, the ''preceding fiscal year'' is the 12-month period ending on June 30, 2017, and the ''second preceding fiscal year'' is the period ending on June 30, 2016.

(2) [Reserved]

(d) *Expenditures.* (1) In determining an LEA's compliance with paragraph (a) of this section, the SEA shall consider only the LEA's expenditures from State and local funds for free public education. These include expenditures

for administration, instruction, attendance and health services, pupil transportation services, operation and maintenance of plant, fixed charges, and net expenditures to cover deficits for food services and student body activities.

(2) The SEA may not consider the following expenditures in determining an LEA's compliance with the requirements in paragraph (a) of this section:

(i) Any expenditures for community services, capital outlay, debt service or supplemental expenses made as a result of a Presidentially declared disaster.

(ii) Any expenditures made from funds provided by the Federal Government.

[62 FR 28252, May 22, 1997, as amended at 84 FR 31678, July 2, 2019]

Subpart E—Services to Private School Students and Teachers

§ 299.6 What are the responsibilities of a recipient of funds for providing services to children and teachers in private schools?

(a) *General.* An agency, consortium, or entity receiving funds under an applicable program listed in paragraph (b) of this section, after timely and meaningful consultation with appropriate private school officials (in accordance with the statute), shall provide special educational services or other benefits under this subpart on an equitable basis to eligible children who are enrolled in private elementary and secondary schools, and to their teachers and other educational personnel.

(b) *Applicable programs.* This subpart is applicable to the following programs:

(1) Part C of title I (Migrant Education).

(2) Part A of title II (Supporting Effective Instruction).

(3) Part A of title III (English Acquisition, Language Enhancement, and Academic Achievement).

(4) Part A of title IV (Student Support and Academic Enrichment Grants).

(5) Part B of title IV (21st Century Community Learning Centers).

(6) Section 4631 (Project SERV).

(c) *Provisions not applicable.* Sections 75.650 and 76.650 through 76.662 of title 34 of the Code of Federal Regulations (participation of students enrolled in private schools) do not apply to programs listed in paragraph (b) of this section.

[62 FR 28252, May 22, 1997, as amended at 84 FR 31679, July 2, 2019]

§ 299.7 What are the factors for determining equitable participation of children and teachers in private schools?

(a) *Equal expenditures.* (1) Expenditures of funds made by an agency, consortium, or entity under a program listed in § 299.6 (b) for services for eligible private school children and their teachers and other educational personnel must be equal on a per-pupil basis to the amount of funds expended for participating public school children and their teachers and other educational personnel, taking into account the number and educational needs of those children and their teachers and other educational personnel.

(2) Before determining equal expenditures under paragraph (a)(1) of this section, an agency, consortium, or entity shall pay for the reasonable and necessary administrative costs of providing services to public and private school children and their teachers and other educational personnel from the agency's, consortium's, or entity's total allocation of funds under the applicable ESEA program.

(3) An agency, consortium, or entity must obligate funds allocated for educational services and other benefits for eligible private school children in the fiscal year for which the funds are received by the agency, consortium, or entity.

(4) An SEA must provide notice in a timely manner to appropriate private school officials in the State of the allocation of funds for educational services and other benefits that an agency, consortium, or entity has determined are available for eligible private school children and their teachers and other educational personnel.

(b) *Services on an equitable basis.* (1) The services that an agency, consortium, or entity provides to eligible private school children and their teachers and other educational personnel must also be equitable in comparison to the services and other benefits provided to

public school children and their teachers or other educational personnel participating in a program under this subpart.

(2) Services are equitable if the agency's, consortium's, or entity's—

(i) Addresses and assesses the specific needs and educational progress of eligible private school children and their teachers and other educational personnel on a comparable basis to public school children and their teachers and other educational personnel;

(ii) Determines the number of students and their teachers and other educational personnel to be served on an equitable basis;

(iii) Meets the equal expenditure requirements under paragraph (a) of this section; and

(iv) Provides private school children and their teachers and other educational personnel with an opportunity to participate that is equitable to the opportunity and benefits provided to public school children and their teachers and other educational personnel.

(3) The agency, consortium, or entity shall make the final decisions with respect to the services to be provided to eligible private school children and their teachers and the other educational personnel.

(c) If the needs of private school children, their teachers and other educational personnel are different from the needs of children, teachers and other educational personnel in the public schools, the agency, consortium, or entity shall provide program benefits for the private school children, teachers, and other educational personnel that are different from the benefits it provides for the public school children and their teachers and other educational personnel.

[62 FR 28252, May 22, 1997, as amended at 84 FR 31679, July 2, 2019]

§ 299.8 What are the requirements to ensure that funds do not benefit a private school?

(a) An agency, consortium, or entity shall use funds under a program listed in § 299.6(b) to provide services that supplement, and in no case supplant, the level of services that would, in the absence of services provided under that program, be available to participating children and their teachers and other educational personnel in private schools.

(b) An agency, consortium, or entity shall use funds under a program listed in § 299.6(b) to meet the special educational needs of participating children who attend a private school and their teachers and other educational personnel, but may not use those funds for—

(1) The needs of the private school; or

(2) The general needs of children and their teachers and other educational personnel in the private school.

[62 FR 28252, May 22, 1997, as amended at 84 FR 31679, July 2, 2019]

§ 299.9 What are the requirements concerning property, equipment, and supplies for the benefit of private school children and teachers?

(a) A agency, consortium, or entity must keep title to, and exercise continuing administrative control of, all property, equipment, and supplies that the agency, consortium, or entity acquires with funds under a program listed in § 299.6(b) for the benefit of eligible private school children and their teachers and other educational personnel.

(b) The agency, consortium, or entity may place equipment and supplies in a private school for the period of time needed for the program.

(c) The agency, consortium, or entity shall ensure that the equipment and supplies placed in a private school—

(1) Are used only for proper purposes of the program; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The agency, consortium, or entity must remove equipment and supplies from a private school if—

(1) The equipment and supplies are no longer needed for the purposes of the program; or

(2) Removal is necessary to avoid unauthorized use of the equipment or supplies for other than the purposes of the program.

(e) No funds may be used for repairs, minor remodeling, or construction of private school facilities.

[62 FR 28252, May 22, 1997, as amended at 84 FR 31679, July 2, 2019]

Subpart F—Complaint Procedures

§ 299.10 Ombudsman.

To help ensure equity for eligible private school children, teachers, and other educational personnel, an SEA must direct the ombudsman designated under section 1117 of the ESEA and § 200.68 to monitor and enforce the requirements in §§ 299.5 through 299.9.

[84 FR 31679, July 2, 2019]

§ 299.11 What complaint procedures shall an SEA adopt?

(a) *General.* An SEA shall adopt written procedures, consistent with State law, for—

(1) Receiving and resolving any complaint from an organization or individual that the SEA or an agency or consortium of agencies is violating a Federal statute or regulation that applies to an applicable program listed in paragraph (b) of this section;

(2) Reviewing an appeal from a decision of an agency or consortium of agencies with respect to a complaint; and

(3) Conducting an independent on-site investigation of a complaint if the SEA determines that an on-site investigation is necessary.

(b) *Applicable programs.* This subpart is applicable to the following programs:

(1) Part A of title I (Improving Basic Programs Operated by Local Educational Agencies).

(2) Part C of title I (Education of Migratory Children).

(3) Part D of title I (Prevention and Intervention Programs for Children and Youth Who Are Neglected, Delinquent, or At Risk).

(4) Part A of title II (Supporting Effective Instruction).

(5) Part A, subpart 1 of title III (English Language Acquisition, Language Enhancement, and Academic Achievement), except for section 3112.

(6) Part A of title IV (Student Support and Academic Enrichment Grants).

(7) Part B of title IV (21st Century Community Learning Centers).

(8) Part B, subpart 2 of title V (Rural and Low-Income School Program).

(9) Subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, Education for Homeless Children and Youth Program.

(Approved by the Office of Management and Budget under OMB control number 1810–0591)

[62 FR 28252, May 22, 1997. Redesignated and amended at 84 FR 31679, July 2, 2019]

§ 299.12 What items are included in the complaint procedures?

An SEA shall include the following in its complaint procedures:

(a)(1) Except as provided in paragraph (a)(2) of this section, a reasonable time limit after the SEA receives a complaint for resolving the complaint in writing, including a provision for carrying out an independent on-site investigation, if necessary.

(2) In matters involving violations of section 1117 or 8501 of the ESEA (participation of private school children), an SEA must resolve, in writing, a complaint within 45 days after receiving the complaint.

(b) An extension of the time limit under paragraph (a)(1) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c)(1) The right for the complainant to request the Secretary to review the final decision of the SEA, at the Secretary's discretion.

(2) In matters involving violations of section 1117 or 8501 of the ESEA (participation of private school children), the Secretary will follow the procedures in section 8503(b) of the ESEA.

(d) A requirement for LEAs to disseminate, free of charge, adequate information about the complaint procedures to parents of students, and appropriate private school officials or representatives.

(Approved by the Office of Management and Budget under OMB control number 1810–0591)

[62 FR 28252, May 22, 1997. Redesignated and amended at 84 FR 31679, July 2, 2019]

§ 299.13 How does an organization or individual file a complaint?

An organization or individual may file a written signed complaint with an SEA. The complaint must be in writing and signed by the complainant, and include—

(a) A statement that the SEA or an agency or consortium of agencies has violated a requirement of a Federal

statute or regulation that applies to an applicable program; and

(b) The facts on which the statement is based and the specific requirement allegedly violated.

(Approved by the Office of Management and Budget under OMB control number 1810–0591))

[62 FR 28252, May 22, 1997. Redesignated and amended at 84 FR 31679, July 2, 2019]

FINDING AIDS

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List of CFR Sections Affected

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For changes to this volume of the CFR prior to this listing, consult the annual edition of the monthly List of CFR Sections Affected (LSA). The LSA is available at *www.govinfo.gov*. For changes to this volume of the CFR prior to 2001, see the ''List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, and 1986–2000'' published in 11 separate volumes. The ''List of CFR Sections Affected 1986–2000'' is available at *www.govinfo.gov*.

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77.1 (c) amended 35449
77.2 Added 35450
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104.3 (j)(2)(i)(B) amended 31912
104 Appendix A amended 31912
105 Authority citation revised 31912
105.3 (1)(ii) amended 31912

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200.16 Regulation at 81 FR 86224 eff. date delayed to 3-21-17 8669
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200.24 Regulation at 81 FR 86234 eff. date delayed to 3-21-17 8669
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200.30 Regulation at 81 FR 86236 eff. date delayed to 3-21-17 8669
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200.54 Undesignated center heading following section revised 31706
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200.69 Undesignated center heading following section revised 31710
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77.1 (c) amended 18421
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200.55 Removed 44482
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200.60 Removed 42440
200.80 Removed 42440
200.81 (d), (f), (g), and (h) removed 42440
200.89 Heading amended; (a) removed 42440
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237 Removed 42440
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5.32 (b)(4) added 67868
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200.25 (a)(1), (b)(1)(ii) introductory text, (2), (c), (d), and (f) revised; (b)(1)(iii) added; authority citation removed 31672
200.26 (a)(1)(i) introductory text, (B), (ii), (b), (c)(1), (2), and (3) revised; authority citation removed 31673
200.29 (c)(2), (3)(iii), (iv), and (e) revised; authority citation removed 31673
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200.63 (a), (b)(6) and (7) revised; (b)(8) redesignated as (b)(12), new (b)(8) through (11) added; (e)(1) and (f) revised;authority citation removed 31674
200.64 (a) and (b)(2)(ii) revised; (b)(3)(ii)(A) amended; authority citation removed 31675
200.65 Revised 31675
200.68 Added 31675
200.73 (a)(4) amended; (e) added; authority citation removed 31675
200.77 (c), (d), and authority citation removed; (e) redesignated as new (c); (f) and (g) redesignated as new (e) and (f); (a)(1), (b), new (c), new (e), and new (f) revised; (a)(4) and (d) added 31675
200.78 (a)(1) and (2) revised 31676
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200.81 Introductory text, (a) and (c) revised; (f), (g), and (h) added; (k) and (l) revised; authority citation removed 31676
200.83 (a) introductory text, (b), and (c) revised; authority citation removed 31677
200.85 (f)(1) and (2) revised; authority citation removed 31677

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200.87 Authority citation removed; section amended 31677
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200.89 (b)(1)(i) introductory text, (b)(1)(iii)(C), and (c)(2) revised 31677
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200.103 (c) removed; (a) and (b) redesignated as paragraphs (b) and (c); (a) added; parenthetical authority citation removed 31678
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225.10 Authority citation removed 25998
225.11 (a)(7) amended; authority citation removed 25998
225.12 (a)(1) revised; authority citation removed 25998
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299.6 (a) amended; (b)(2) through (6) revised; authority citation removed 31679
299.7 amended; (a)(2) amended; (a)(3) and (4) added; (b)(2)(iv) revised; authority citation removed 31679

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299.8 Authority citation removed; section amended 31679
299.9 Amended; (f) and authority citation removed 31679
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299.11 Redesignated as 299.12; new section redesignated from 299.10; new (b) revised; new authority citation removed 31679
299.12 Redesignated as 299.13; new section redesignated from 299.11; new (a), new (b), and new (c) revised; new authority citation removed; new section amended 31679
299.13 Redesignated from 299.12; new authority citation removed 31679

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75 Appendix A revised 82128
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76.714 Revised 82130
76.784 Added 59980
76.784 Correction: amended 70975
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77.2 (a) amended; (b) revised 62612

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106.81—106.82 (Subpart G) Added; eff. 8-14-20 30579

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263.3 Amended 41377
263.4 (c)(2) and (3) amended; (c)(4) and (5) added 41377
263.5 Redesignated as 263.6; new section added 41378
263.6 Redesignated as 263.7; new section redesignated from 263.5; new (a)(1), new (2)(i), new (b)(1)(i)(B), new (C), new (iii)(D), and new (2)(iii)(D) amended; new (a)(1) heading, new (2) heading, new (b)(1)(i)(D), and new (4) added; new (b)(1)(ii), new (2)(ii), and new (3) revised 41378
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263.8 New (b) revised 41379
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