DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1840–AB84

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the Student Assistance General Provisions regulations by adding a new Subpart J. These regulations govern the approval and administration of tests that may be used to determine a student's eligibility for assistance under the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA programs), if that student does not have a high school diploma or its recognized equivalent. The regulations also provide for a passing score for each approved test. The regulations implement changes made to section 484(d) of the Higher Education Act of 1965 (HEA), as amended by the Higher Education Amendments of 1992, Public Law 102–325.

EFFECTIVE DATE: These regulations take effect on July 1, 1996 and apply to the 1996–97 and subsequent award years. However, affected parties do not have to comply with the information collection requirements in §§ 668.143, 668.144, 668.145, 668.146, 668.147, 668.148, 668.149, 668.150, 668.151, 668.152, 668.153, and 668.155 until the Department of Education publishes in the Federal Register the control numbers assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control numbers notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995. The incorporation by reference of the publication listed in the regulations is approved by the Director of the Federal Register as of July 1, 1996.

FOR FURTHER INFORMATION CONTACT: Lorraine Kennedy, U.S. Department of Education, 600 Independence Avenue, S.W., Regional Office Building 3, Room 3045, Washington, DC 20202–5451. Telephone: (202) 708–7888. Individuals that use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: These regulations implement section 484(d) of the HEA which provides that a student who does not have a high school diploma or its recognized equivalent is eligible to receive Title IV, HEA program funds only if—

- The student takes an independently administered examination and achieves a score specified by the Secretary, demonstrating that the student has the ability to benefit from the education or training being offered; or
- The student is determined to have the ability to benefit from the education or training being offered in accordance with a ''process'' prescribed by the State in which the institution the student is attending or plans on attending is located and that has been approved by the Secretary.

The Secretary estimates that each year there are approximately 150,000 individuals without a high school diploma or its recognized equivalent who take ability to benefit tests under section 484(d) of the HEA in order to become eligible to receive Title IV, HEA Program funds. There are also approximately another 150,000 individuals without a high school diploma or its recognized equivalent who enroll in postsecondary educational institutions who do not apply for Title IV, HEA Program funds or who enroll in educational programs that do not qualify as eligible programs under the Title IV, HEA programs. (In addition, there are many other people who take basic skills tests for reasons other than seeking Title IV, HEA program assistance.) However, these regulations apply only to the first group.

The Secretary published a notice of proposed rulemaking in the Federal Register on August 16, 1994, 52 FR 42134–42144. The NPRM included a discussion of the major issues involving the proposed regulations that will not be repeated here. The following list summarizes those issues and identifies the pages in the preamble to the NPRM on which a discussion of those issues can be found.

The Secretary proposed that students had to provide documentation to institutions that they had high school diplomas or the recognized equivalent (52 FR 42134–5);

The Secretary proposed that approved tests assess secondary school level basic verbal and quantitative skills and general learned abilities (52 FR 42136);

The Secretary proposed that students without a high school diploma or a GED should be eligible for Title IV, HEA program funds because they demonstrate on that test secondary school level basic verbal and quantitative skills and general learned abilities comparable to the range of scores of students who have a high school diploma or GED (52 FR 42136);

The Secretary proposed that the passing score on a test be one standard deviation below the mean for students with high school diplomas who have taken the test within three years before the date on which the test was submitted for approval (52 FR 42136);

The Secretary proposed a scheme for test administration that provided for tests being administered independent of the institutions that use the test (52 FR 42136–42137); and

The Secretary proposed to approve a State ''process'' based upon the ''success rate'' of students enrolled in that State process as compared to the success rate of high school graduates. (page 42137).

Substantive Changes to the NPRM

The following discussion reflects substantive changes made to the NPRM in the final regulations. The provisions are discussed in the order in which they appeared in the proposed rule.

Section 668.7 Eligible Student

In response to public comments, the Secretary has withdrawn the proposed requirement that institutions document that their students have high school diplomas or GEDs. Moreover, the Secretary is recodifying the provisions of § 668.7 in Subpart C of part 668 in another regulations package.

Section 668.143 Approval of State Tests or Assessments (No Comparable Provision in NPRM)

In response to public comments and the Secretary's proposal in the preamble, the Secretary has included an additional type of approved tests. Those approved tests are tests that have been developed by States to measure a student's skills and abilities for the purpose of determining whether the student has the skills and abilities the State expects of a high school graduate in that State. These tests will supplement rather than substitute for the other type tests discussed in this regulation.

Section 668.146 Criteria for Approving Tests (Section 668.145 in NPRM)

In response to public comment, the Secretary will approve tests that consist of a series of subtests. If a test publisher does not provide for a composite passing score for a series of basic verbal tests and a composite passing score for a series of basic quantitative tests, the test publisher must present evidence that allows the Secretary to prescribe a cut score for each subtest. To pass that test, a student must score at or above the cut score for each of the subtests.

Agreement Between the Secretary and a Test Publisher, and Agreement Between an Institution and a Certified Test Administrator (Sections 668.150 and 668.151 in NPRM)

In response to public comment, the Secretary eliminated the requirements that a test publisher enter into an agreement with a certified test administrator and that the certified test administrator also enter into an agreement with an institution whose students are to be tested. The sections that contained those requirements in the NPRM, §§ 668.150 and 668.151 were also eliminated.

The important aspects of those sections that related to the integrity and independence of test administration were incorporated into § 668.151 *Test administration.*

Section 668.152 Administration of Tests by Assessment Centers (No Comparable Provision in NPRM)

In response to public comment, a new section dealing with test administration at assessment centers was added.

Section 668.155 Transitional Rule for the 1996–97 Award Year (No Comparable Provision in NPRM)

The Secretary has added a rule to facilitate the transition from the old to the new system.

These regulations go into effect on July 1, 1996 and govern the determination of student eligibility for Title IV, HEA programs under section 484(d) of the HEA starting with the 1996–97 award year. The Secretary strongly encourages test publishers that wish to have their tests approved for use in the 1996–97 award year to submit an application that satisfies the requirements of this subpart as soon as possible. Upon receipt of such an application, the Secretary will evaluate it to determine if it meets the requirements of this subpart.

If the test meets the requirements of this subpart, the Secretary will notify the test publisher. The Secretary will also publish in the Federal Register the name of the test, the passing score for that test, and the name of the test publisher.

To allow for a smooth transition from the current practice to the new regulatory practice, the Secretary will permit institutions to continue to use the current system for making an ability-to-benefit determination for a student until 60 days after the Secretary publishes in the Federal Register the first approved test and passing score that is appropriate for that student. Therefore, an institution may continue to use a test and test score that was an approved test and test score as of June 30, 1996, the day before the new regulatory provisions go into effect, until 60 days after the Secretary publishes in the Federal Register the first test and passing score for each general category of test approved under these regulations. For example, if the Secretary approves a test in Spanish on August 1, 1996, an institution may continue to use a test in Spanish that was approved as of June 30, 1996 until October 1, 1996.

If an institution properly based a student eligibility determination under the current system, it does not have to redetermine the student's eligibility under the new system.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 142 parties submitted comments on the proposed regulations. An analysis of the comments and any changes made in the regulations in response to those comments follows.

Substantive issues are discussed under the regulations to which they pertain. If comments apply to more than one regulatory provision, they will be discussed under the first mentioned provision. Technical and other minor changes—and suggested changes that the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

General Comments

Comments: In the preamble to the NPRM, 59 FR 42134–42135, the Secretary solicited comments with regard to an alternative method of implementing section 484(d) of the HEA. This alternative method would link the ability-to-benefit (ATB) testing system to State educational practices under the Goals 2000: Educate America Act. The Secretary invited public comment on these alternatives. Three comments were received in support of this alternative approach.

Discussion: The Secretary agrees with these commenters that there is merit to an approach that links an ability-to-benefit testing system under section 484(d) of the HEA with State educational practices under the Goals 2000: Educate America Act and other State education reform initiatives. The Secretary believes, however, that such an approach should supplement rather than replace the testing system described in the NPRM.

Therefore, in developing the criteria for approved examinations and the passing scores for those examinations, the Secretary took cognizance of the focus and purpose of the Goals 2000: Educate America Act in raising the educational standards of the country. Accordingly, to the extent that States have developed educational standards that reflect the skills and abilities expected of a high school graduate in that State, and have developed tests or other assessments to measure whether a student meets those standards, the Secretary will approve those tests and assessments for purposes of the provisions of section 484(d) of the HEA as well as the passing scores on those tests and assessments.

Because each State is responsible for determining the educational standards that reflect the skills and abilities expected of a high school graduate in that State, State standards may differ. Moreover, States also may choose different tests or assessments to measure whether students meet those standards, and may also differ on the passing scores on those tests and assessments. Therefore, if the Secretary approves a State's tests and assessments and passing scores, that test or assessment, and the passing score on that test or assessment, may be used for purposes of section 484(d) of the HEA only for students who attend eligible institutions located in that State. In this way, the Secretary will not impose one State's standards on another State.

If the Secretary approves a State's tests or assessments and the passing scores for those tests or assessments, a student must obtain a passing score on each required test or assessment in order to qualify for Title IV, HEA program funds under section 484(d) of the HEA.

Moreover, the educational standards that a State develops, and the tests or assessments that a State establishes to measure those standards, apply to all students in the State. Therefore, the tests that the Secretary approves to measure whether a student meets those standards for Title IV, HEA programs purposes do not include tests that are used solely for admission to a State public postsecondary institution or for admission to an institution that is part of a State system of public postsecondary institutions.

Changes: Sections 668.143 to 668.149 were redesignated as §§ 668.144 to 668.150, respectively, and a new section, § 668.143, was added. That new section provides for the approval of State tests or other assessments submitted by a State that the State uses to determine whether a student has the skills and abilities the State expects of a high school graduate in that State. The new section also provides for the approval of the State's passing scores on

the State tests, and further provides that an approved State test may be used as an ability-to-benefit test for Title IV, HEA program purposes only by institutions located in that State.

Comments: In their introduction to comments on specific sections of the proposed rule, roughly one-third of the commenters stated that in their opinion the statutory phrase ''benefit from the education or training offered'' refers to specific educational or training programs and the relative cognitive demands of those programs. The commenters concluded that ability-to-benefit is dependent on existing cognitive demands of occupations, and must be measured and judged individually for each of the hundreds of occupation-specific training programs in postsecondary education, even if the current cognitive demands of an occupation are not ''postsecondary.''

Discussion: The Secretary disagrees with the commenters. The Secretary believes that there is a basic minimum competency that a student must achieve to benefit from any postsecondary education program. That basic competency is appropriately measured in terms of secondary school level basic skills and general learned abilities. Therefore, the Secretary requires approved tests to measure those skills and abilities. Further, as indicated in the preamble to the NPRM, the Secretary believes that earning a high school diploma or GED certificate should be the primary basis for qualifying to receive Title IV, HEA program assistance. The Secretary believes that students who do not have those credentials and qualify to receive such assistance by taking a test should demonstrate through that test a level of verbal and quantitative skills and general learned abilities at least comparable to those other categories of students.

Moreover, the Secretary objects to the position expressed by the commenters on the grounds that it is an approach that accustoms people to the lowest level of functioning in an occupation. It excuses institutions from critical aspects of instruction that will enable individuals to advance in their jobs or to change careers, and it falsely assumes that the nature of specific occupations will never change. The approach thus does not advance the quality of the nation's workforce. When the expenditure of Federal funds for education and training is at issue, the Secretary wishes to encourage more than a minimalist approach that only reinforces social and labor market stratification. The Secretary has encouraged generic academic competence in the School-to-Work transition programs, and is taking a consistent position here.

Changes: None.

Comments: Nearly half the commenters contended that the receipt of a high school diploma is no guarantee that a student possesses minimum basic skills necessary to pursue postsecondary education, and that the regulations make an assumption about achievement associated with a secondary school credential that is unfounded.

Discussion: The Secretary agrees with the commenters that a high school diploma may not necessarily indicate that the holder of that diploma has sufficient skills to successfully pursue postsecondary education. However, students with a high school diploma or its recognized equivalent are statutorily eligible to receive Title IV, HEA Program funds. The Secretary interprets section 484(d) of the HEA as requiring students who do not have a high school diploma or its equivalent to be comparable to those that do in order to be eligible to receive Title IV, HEA program funds. Therefore, the Secretary established the passing score on ATB tests to reflect the scores received by high school graduates.

Changes: None.

Section 668.7 Eligible Student

Comments: Many commenters argued that the paperwork requirement to document receipt of a high school diploma was onerous, particularly at institutions to which students apply while they are still in high school and at open door institutions that, under state law, are required to admit anyone. Two other commenters pointed to the difficulty older students sometimes have in obtaining copies of records, and two commenters asked why students who had attended secondary school in another country were required to provide affidavits in both their native language and English. With few exceptions, commenters questioned whether there was sufficient evidence that students improperly claimed to have a high school diploma or its equivalent to warrant a rule affecting all students in postsecondary education.

One commenter asserted that the requirements weaken current federal standards and advocated stricter provisions for documenting evidence of receipt of a high school diploma or its equivalent. Another commenter, indirectly concurring with this position, suggested that, if an applicant for Title IV, HEA Program funds graduated from a secondary school in the United States but was unable to secure a copy of his or her diploma or transcript, a statement from the state or local education agency confirming that the records were unavailable should be required.

Discussion: The Secretary is persuaded by the commenters that the added burden of documenting a student's declaration that he or she has a high school diploma or its recognized equivalent outweighs the benefit of requiring institutions to document that claim and has, therefore, decided not to require documentation of a high school diploma at this time. However, the Secretary will continue to investigate any alleged abuses in this area and, after consulting with the postsecondary education community and others, may pursue alternative means of ensuring that this student eligibility requirement is being enforced.

Changes: The Secretary has deleted the requirements relating to the documentation of a student's claim that he or she has a high school diploma. Moreover, the Secretary is recodifying the provisions of § 668.7 in Subpart C of part 668 in another regulations package.

Comments: Two commenters took opposite positions on the requirement that a student could use a passing score on an approved ATB test for 12 months. One commenter recommended a shorter period on the grounds that the most current score is the most valid measure. The other commenter recommended that a passing score should be used indefinitely since a test score on a valid ATB test reflects a permanent level of verbal and quantitative skills. Another commenter asserted that the NPRM fails to incorporate changes made to the definition of a ''recognized equivalent of a high school diploma'' in § 600.2 of the Institutional Eligibility regulations, 34 CFR 600.2.

Discussion: The Secretary believes that a passing score should not be used indefinitely because psychometric research demonstrates that the ''current status'' of knowledge is a more reliable predictor of imminent performance than previous status of such knowledge. However, such research also indicates that a period shorter than a year does not measurably increase the predictive power of a test.

The commenter is correct in the observation that proposed § 668.7 did not take into account the change in the definition of ''recognized equivalent of a high school diploma'' in § 600.2 of the Institutional Eligibility regulations, 34 CFR 600.2. However, since the Secretary is deleting the requirements for documenting a student's claim to have a high school diploma or its equivalent, the Secretary is not amending § 668.7 in this regulation package.

Changes: Changes to § 668.7 have been deleted from these final regulations.

Section 668.142 Special Definitions

Comments: One commenter suggested that the definition of the term ''assessment center'' be changed so that the location of an assessment center be at a neutral site rather than at an educational site. Another commenter suggested that ''assessment centers'' be located only at public institutions because public governing authorities would serve as an additional guarantee of integrity.

Discussion: The Secretary's definition of the term ''assessment center'' describes an organizational unit at an eligible institution that offers two-year or four-year degrees or qualifies as an eligible public vocational institution, *i.e.* a postsecondary vocational institution. The Secretary believes that the integrity of tests given at assessment centers will not be compromised by the geographical location of the center, or if they are given at private institutions that offer a two year or four year degree, given the long-term nature of those programs.

Changes: None.

Section 668.144 Application for Test Approval (Section 668.143 in NPRM)

Comments: Some commenters requested the Secretary's approval of placement examinations already used by their institutions. One commenter requested that the requirements for the populations participating in norming studies explicitly exclude students from schools at which the test publisher has received notice that improper test administrations have taken place.

Discussion: The Secretary will approve placement examinations used by an institution if the institution using that test submits an acceptable application and the examination satisfies all the regulatory requirements for test approval. In such a case, the institution would be considered the test publisher.

The Secretary believes that test publishers will be careful when selecting a norming sample to avoid invalidating the results of that sample. Therefore, the Secretary believes that the commenter's suggestion is not needed to obtain valid norming studies.

Changes: None.

Comments: One commenter requested that the Secretary clarify the requirement that an approved test be ''validated,'' and pointed out that a test is validated with respect to a criterion, not a population.

Discussion: The Secretary acknowledges a confusion in the grouping of requirements listed under the ''application for test approval,'' and has changed the verb, ''validated'' to ''normed'' in describing the contents of the technical manual in § 668.144(c)(11)(iv). In a narrow sense, validation is the process of determining the accuracy of inferences made from a test score, *e.g.,* if a student scores above a given percentage, the more likely he or she is to complete a subsequent course. In a broader sense, validation is the process of determining the soundness of all interpretations made of the test. The Secretary notes that there are many kinds of validity, and all of them are at stake in the review of tests submitted under § 668.144.

Changes: Section 668.144(c)(11)(iv) is amended to change ''validated'' to ''normed.''

Section 668.145 Test Approval Procedures (Section 668.144 in NPRM)

Comments: One commenter suggested that when the Secretary chooses experts to evaluate tests, the Secretary only choose experts who have substantial experience in psychometrics, familiarity with the *Standards for Educational and Psychological Testing* (Standards) prepared by a joint committee of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education, and membership in one of those three organizations. This commenter also recommended that if a test did not satisfy the criteria for test approval and the test publisher appealed that decision, the test publisher would have to submit only those sections of a test subject to question and that a different group of experts be assembled to judge the appeal. The commenter further suggested that any appeal by a test publisher of the disapproval of a test be subject to the provisions of the Administrative Procedure Act.

Discussion: The Secretary agrees that professional credentials and experience are important criteria in selecting reviewers of tests, and will select experts who have substantial experience in psychometrics and familiarity with the *Standards*. The Secretary assumes that anyone who holds a graduate degree in psychometrics or evidences substantial experience in test development is familiar with the *Standards*. The Secretary believes that membership in a specific organization should not be a prerequisite to being selected as a test evaluator.

If a test is disapproved for specific discrete reasons applicable to a particular portion of a test and the test publisher appeals that result, the appeal would be based on the portion of the test that caused the disapproval. Therefore, the test publisher would presumably limit its appeal to that portion of its test, and if the appeal was successful the entire test would be approved without the need for reapplication.

The Secretary believes that the review of a test and any appeal of that review should not be conducted, and is not required to be conducted, in an adversarial, formal, or legalistic setting. Therefore, the Secretary will not subject those processes to the provisions of the Administrative Procedure Act. Moreover, the Secretary believes it is unnecessary to select another panel of experts to advise the Secretary when a test publisher appeals an adverse decision regarding its test. The Secretary makes a decision in response to an appeal, and wishes to retain the discretion to seek the advice of experts the Secretary considers appropriate to analyze the test publisher's arguments on appeal.

In most instances, the Secretary will seek the advice of the original panel of experts regarding those arguments. In reviewing over 100 tests since January 1991, the Secretary has found that when the original panel of experts reviewed an appeal, they focused on only those issues that were not satisfactorily addressed in the original submission and provided fair and valuable advice with regard to those issues.

Changes: None.

Section 668.146 Criteria for Approving Tests (Section 668.145 in NPRM)

Comments: Many commenters from community colleges objected that approved tests must measure ''knowledge of high school curricula,'' claiming that this was inappropriate.

Discussion: The Secretary disagrees with the commenters' interpretation of the questioned regulatory provision. The provision does not state that approved tests are based on ''knowledge of high school curricula.'' Rather, the provision states that the tests will assess basic verbal and quantitative skills and general learned abilities at the secondary school level. These skills and general learned abilities can be acquired anywhere. The tests will not be equivalent to final exams in specific high school subject areas, such as Algebra 1, Chemistry, or Civics.

Changes: The term knowledge has been deleted as redundant.

Comments: Some test publishers asked whether a reading test would suffice to cover the assessment of secondary school level verbal skills, or whether tests of usage and, particularly, writing samples must also be included. Some of the publishers of tests that provide subtest scores, but not composite scores, objected to the use of a single composite score for verbal skills and quantitative skills.

A few commenters addressed the point of reference of the passing score, namely, the performance of high school graduates on a specific test, and pointed out that the educational background of test-takers is not always known, particularly in norming studies that may have been conducted prior to changes in the law. One commenter expressed a similar concern with respect to ESL test-takers since the normed students must be ESL test-takers who have entered high school equivalency programs. The commenter pointed out that this latter group was very small, and the mean scores for them would not be very reliable.

Discussion: Verbal skills, such as usage, mechanics, and comprehension, must be assessed. If, however, a test measured only one language skill, such as punctuation or word recognition, that test would not be appropriate. A reading test is appropriate because it is highly correlated with other verbal skills and is a fundamental measurement of verbal ability. Writing is highly related to reading comprehension and to other verbal skills, and would, therefore, be redundant for this purpose. Therefore, an approved test does not have to have a writing sample.

The Secretary will approve a test that consists of a series of subtests. However, if the test publisher does not establish a composite verbal score and a composite quantitative score, the test publisher must present evidence that allows the Secretary to prescribe a cut score for each subtest. To pass that test, a student must score at or above the cut score for each of the subtests.

Based on existing evidence from a number of major testing programs, the Secretary believes that all test publishers can gather information on the educational background of test-takers in the ordinary course of test administration, *e.g.*, on the cover sheet of an examination. More critically, for data necessary for setting a passing score, the educational background of participants in a norming sample can easily be ascertained, and in the case of tests requiring new norming studies, there has been ample time since the law was passed to conduct such studies.

The Secretary is persuaded by data on ESL test-takers to enlarge the reference group beyond those who have entered high school equivalency programs, but believes that entrance into some kind of formal education or training program is an important criterion with which to define this group for purposes of setting a passing score.

Changes: Section 668.146(c)(5) has been changed. The Secretary will continue to approve a test that consists of a series of subtests. However, if the test publisher does not establish a composite verbal score and a composite quantitative score, the test publisher must present evidence that allows the Secretary to prescribe a cut score for each subtest.

The Secretary has also amended § 668.148(b)(2) to enlarge the reference population for setting the passing score on ESL tests by including not only ESL test-takers who have entered high school equivalency programs, but also ESL test-takers who have entered other education or training programs, including bilingual vocational programs.

The Secretary has also modified the wording of § 668.148(a)(2)(v)(A) so that, in cases where the test is in Spanish, the test publisher provides tables of distributions of test scores with a clear indication of the mean score and standard deviation for Spanish-speaking students with high school diplomas so that the Secretary will be able to indicate the passing score. The reference to the most recent three-year period is changed to a five-year period to allow a sample of sufficient size.

Comments: Several commenters expressed confusion with regard to the establishment of a passing score in proposed § 668.145(c)(3).

Discussion: The Secretary acknowledges a misprint, hence an understandable confusion, in the proposed § 668.145(c)(3). This section should have read, and is corrected in § 668.146(c)(3) of the final regulation to read, as follows:

> Except as indicated in §§ 668.148 and 668.149, provide tables of distributions of test scores that clearly indicate the mean score and standard deviation for high school graduates who have taken the test within three years before the date on which the test is submitted to the Secretary for approval;

The misprint led to a more general confusion as to who has the responsibility for designating the passing score on tests used for ability-to-benefit determinations and communicating those scores to the public. For the general population of test-takers for whom § 668.147 is applicable, the Secretary determines the passing score for which the publisher has provided the data. For special populations and special types of administration such as those described in §§ 668.148 and 668.149, the Secretary requests the publisher to ''recommend'' a passing score based on the publisher's experience with the special population and/or type of administration. The Secretary reviews the recommendation, and either certifies it or, if necessary, requests clarifications prior to certification. The Secretary recognizes that this procedure needs to be modified in the case of tests given in Spanish.

The Secretary will publish the approved passing scores in the Federal Register.

Changes: Section 668.145(c)(1) has been amended to indicate that the Secretary will publish in the Federal Register the names of approved tests and the passing scores on those tests.

Section 668.147 Passing Score (Section 668.146 in NPRM)

Comments: The majority of comments received from commenters on the passing score formula took five positions. The first position was that the proposed score was too low and inconsistent with the standards included in Title IV of the Goals 2000: Educate America Act and in the School-to-Work Opportunities Act. The second position was that the proposed score was too high. The third was that the proposed score was right. The fourth position was that the proposed score should vary by program of study. The fifth position was that the proposed score should be determined by predictive validity studies using program completion as a criterion.

Two commenters also advocated using the performance of students with GEDs as the reference point for the passing score on the grounds that these people have passed a de facto national high school equivalency examination. Their performance is thus more public than that of high school graduates, hence it offers a more reliable point of comparison. And one commenter presented a plan for a ''documented qualification process'' that would allow institutional variations on passing scores.

Discussion: As noted earlier, the Secretary believes that there is a basic minimum competency that a student must achieve to benefit from any postsecondary education program. That basic competency is measured in terms of secondary school level basic skills and general learned abilities. Further, the Secretary believes that under section 484(d) of the HEA, in order for a person without a high school diploma or its

recognized equivalent to receive Title IV, HEA Program funds, that person should enter postsecondary education with roughly the same comparable secondary school level basic skills and general learned abilities as those of the typical range of high school graduates.

The Secretary established the passing score on approved tests as the score that represents one standard deviation below the mean for students with high school diplomas who took the test. The score means theoretically that 84 percent of the high school graduates who took the test passed the test. The Secretary established this score based upon a recognition that the secondary school level basic skills and general learned abilities of high school graduates in the United States vary widely.

As noted earlier in the general comments, the Secretary disagrees with the commenters who contended that passing scores should be established on a program-by-program basis. The Secretary also disagrees with those commenters who contended that the passing score was either too high or too low, or was inconsistent with the Goals 2000: Educate America Act and the School-to-Work Opportunity Act. The Secretary believes it is difficult to make definitive judgments regarding whether a passing score is too high or too low until tests are approved and test-takers take the test. Moreover, until performance standards are set for ''Certificate of Initial Mastery'' under school-to-work models, it is premature to contend that the Secretary's passing score is inconsistent with those standards. When that information is forthcoming, the Secretary may revisit the question of the appropriate passing score for these ATB tests.

The Secretary acknowledges the commenters' point that there is a logic to using the performance of students with GEDs as the reference point for the passing score. However, the Secretary chose not to use that group as a reference because the GED population that subsequently takes the types of examinations used for ability-to-benefit determinations is small and not representative of the general postsecondary school population in the United States. As for the suggestion to adopt institutional variations on the passing score for institutions that provide sufficient remediation and instructional resources for ATB students, the Secretary suggests that this approach is better suited for the ''state process'' as described in § 668.156.

Finally, the Secretary agrees that the fifth position, basing the passing score on predictive validity studies using program completion as the criterion, is theoretically the best approach to take in establishing a passing score. However, the Secretary chose not to use that approach because it was impossible to administer, given the small size of the ATB population, the cost of predictive validity studies, and the additional time that would be necessary to review and approve that approach. Moreover, adopting that suggestion would further delay the publication of these regulations implementing section 484(d) of the HEA.

Changes: None.

Section 668.148 Additional Criteria for the Approval of Performance-Based Tests, Tests for Non-Native Speakers of English, Modified Tests for Persons With Disabilities, and Computer-Based Tests and Tests for ESL Programs (Section 668.47 in NPRM)

Comments: One commenter suggested that performance assessments, as described in proposed § 668.147, not be included in the potential pool of approved tests, because the commenter asserted that these tests ''are still in a developmental stage, with substantial false negative and false positive reports.'' Another commenter recommended additional security measures, including the requirement that a student show a photo identification for computer-based tests.

Discussion: The validity and reliability of any assessment tests will be based upon the evidence provided by the test publisher, and the Secretary will not rule, *a priori,* that any category of tests is inappropriate. The Secretary will rely on the security requirements of test publishers with regard to the use of photo identification for computer-based tests.

Changes: None.

Section 668.150 Agreement Between the Secretary and a Test Publisher (Section 668.149 in NPRM)

Comments: Two commenters saw no necessity for this or any of the agreements specified in proposed §§ 668.149, 668.150, and 668.151 on the grounds that the practices specified in these agreements and the abuses they are designed to address are already accounted for in normal industry practice.

Discussion: In the Secretary's opinion, test publishers are key to the integrity of the ability-to-benefit testing process, and the agreement between the Secretary and the test publisher is designed to assure that the tests are being independently administered in a proper and impartial manner. Past practice has indicated that integrity in the administration of ability-to-benefit tests is not uniform throughout the industry, and that this agreement is necessary to protect both students and the public interest.

However, the Secretary agrees with the commenters that formal agreements between a test publisher and a test administrator and between a test administrator and an institution are not necessary to the integrity of test administration. Therefore, the Secretary has eliminated those two agreements although key provisions in those agreements have been incorporated in the section dealing with test administration, § 668.151.

Changes: The Secretary has deleted the requirement that a test publisher enter into an agreement with a test administrator and that the test administrator also enter into an agreement with an institution. In fact, the Secretary has deleted the proposed regulatory sections in which those requirements were contained, proposed §§ 668.150 and 668.151.

Comments: One commenter asked that language be added to ensure that test publishers exercise equal employment opportunity principles in certifying test administrators. Another commenter suggested language be inserted to require the publisher to decertify a test administrator if he or she is found to have compromised the integrity of the testing process. Another commenter asked whether decertified test administrators could appeal and whether they could subsequently be recertified.

Discussion: The Secretary believes that it would be inappropriate to include a provision in the agreement regarding the test publisher's employment practices because it is not within his legal jurisdiction to do so.

The proposed rule included a provision for decertifying a test administrator for violating the integrity of the test. The Secretary has revised this provision to indicate that the decertification would coincide with the period for which the test publisher's test was approved. During this period, the test administrator could not be recertified. No appeal is provided for a test publisher's decision to decertify a test administrator.

Changes: Section 668.150(b)(3) is revised to provide that if a test publisher decertifies a test administrator, the decertification coincide with the period for which the test publisher's test was approved.

Comments: Half the commenters suggested that institutions should be allowed to score the ATB test at the educational location, rather than send the test to the publisher for scoring.

These commenters cited the extra time and costs associated with test-publisher scoring.

Discussion: The purpose of the regulatory scheme regarding test administration is to remove institutions from giving or scoring tests. In return, the Secretary will not hold institutions financially responsible if they award Title IV, HEA Program funds to an ability-to-benefit students who present evidence that they passed approved tests as long as the institutions did not interfere with the independence of the testing process and were not involved in the testing process. Therefore, the Secretary strongly disagrees with the commenter's suggestion that an institution should be able to score a test. Moreover, the Secretary anticipates that there will be little delay between the time a student takes a test and the time the institution and the student receive the test results.

Changes: None.

Comments: Test publishers objected to the Secretary's requirement that an analysis of scoring patterns be performed every two years to determine irregularities. One commenter asked that the agreement between the Secretary and a test publisher explicitly forbid the publisher from requiring institutions to administer instruments in addition to those required and approved by the Secretary.

Discussion: The Secretary believes that quality control is a critical aspect of test administration, and an analysis of scoring patterns of tests is useful tool for that purpose. However, to reduce burden, the Secretary is requiring that an analysis of scoring patterns of tests be performed every three years.

The Secretary is not including in the agreement between the Secretary and a test publisher a provision that precludes the publisher from requiring institutions to administer tests in addition to those approved by the Secretary because he believes that such a provision is beyond the scope of his authority. Moreover, the Secretary notes that when faced with such a test publisher, an institution can simply choose another test and another test publisher.

Changes: The Secretary is requiring that an analysis of scoring patterns of tests be performed every three years.

Proposed Section 668.150 Agreement Between a Test Publisher and a Test Administrator

Comments: One commenter recommended that test publishers, and not educational institutions, retain the power to hire and dismiss on-site test administrators. The commenter also suggested that test publishers be responsible for training test administrators. Another commenter suggested that the test publisher make an agreement with the institution and independent test administrators under which the institution would agree to respect the security and integrity of test administration by selling the administrators an annual license. The commenter believes that the purchase of a license will ensure proper administration of the test.

Discussion: The Secretary believes that an institution should have the option of selecting a test administrator that has been certified by a test publisher to give its students an approved ATB test. Therefore, the Secretary disagrees with the suggestion made by the first commenter.

Since a test publisher certifies test administrators to give its tests, a test publisher would presumably provide whatever training it felt necessary to obtain a sufficient number of certified test administrators for its test.

Finally, the Secretary does not see the need to have test publishers sell licenses to test administrators.

Changes: The Secretary has deleted this section, but the provisions discussed by the commenters have been incorporated into § 668.151(a) dealing with test administration.

Comments: Many commenters expressed confusion about the role of an assessment center in the test administration process. Commenters requested clarification regarding the rights and responsibilities of assessment centers. At least one commenter representing a test publisher requested the right to enter into agreements with an assessment center as a condition for the assessment center to give its test.

Discussion: The Secretary agrees with the commenters that the role of an assessment center was not sharply defined in the proposed regulations. The Secretary envisions that an assessment center may give tests to ATB students without threatening the integrity and independence of the test. An assessment center may give an approved test to students without necessarily entering into an agreement with the test publisher. However, the Secretary agrees with the suggestion of the commenter that the test publisher should have the right to control the use of its test by allowing an assessment center to give its test only if the assessment center enters into an agreement with the test publisher.

If a student takes a test at an assessment center, the test administrator must be certified by the test publisher whose test is being given. The test administrator must also give the test only in accordance with the test publisher's instructions, must make the test available only to a test taker during a regularly scheduled test, must collect the test from the test taker after the test is given, and must secure the test against disclosure or release.

An assessment center may, however, score the test and notify the institution and the test taker of the test results instead of forwarding the test to the publisher for scoring and notification. If the assessment center scores tests, it must provide a copy of the test takers' performances and test scores to the test publisher on at least an annual basis.

Changes: A new section, § 668.152, has been added to describe the role and responsibilities of an assessment center.

Proposed § 668.151 Agreement Between the Institution and a Certified Test Administrator

Comments: One commenter recommended that, as part of this agreement, the institution must keep complete records of all testing activity conducted by a test administrator on its behalf, including situations in which testing was not completed.

Discussion: The purpose of the regulatory scheme regarding test administration is to remove institutions from giving or scoring tests. Therefore, the Secretary disagrees with the commenter's recommendation.

Changes: The agreement between an institution and a test administrator in § 668.151 has been deleted, as has the section dealing with this relationship. However, the important aspects of this section relating to the integrity and independence of test administration were incorporated into § 668.151 *Test administration.*

Section 668.151 Administration of Tests (Section 668.152 in the NPRM)

Comments: A number of commenters objected to the proposed procedures for scoring tests by the test publishers in those cases in which ''assessment centers'' are not available. Those who objected claimed that the process was inequitable and would result in considerable delays in determining student eligibility. One commenter objected to the policy that allows repeated taking of tests on the grounds that repetition compromises the validity of the tests. Two commenters requested clarification about the roles of assessment centers with respect to recordkeeping, reporting of scores and background information on test takers to test publishers, and whether agreements between assessment centers and institutions that wish to use their services are required.

Discussion: The Secretary believes that it is not inequitable to require test publishers to score tests and that considerable delays will not be the result of such a requirement. A test administrator must send the test publisher the test taker's examination within two days of administration of the test, and the test publisher must ''immediately'' generate a test score and ''promptly'' notify the test taker and the institution of the test results. If the test is a computer-based test, the test taker and the institution will receive the test results even more quickly. With regard to the retaking of tests, the Secretary points out that many people retake major national examinations and licensing examinations every year without compromising the validity of those tests. However, the Secretary recognizes that the practice of retesting can be abused, and that the criteria for test approval in proposed § 668.145 were not explicit in the matter of acceptable retesting procedures.

Changes: The Secretary has modified § 668.146(b) to add the requirement that the publishers have guidelines for retesting, including time between test-taking, and that such guidelines be based on empirical analyses.

Section 668.154 Institutional Accountability

Comments: One commenter suggested that those professionals who abuse the system be accountable for their actions, and institutions without a history of abuse should be permitted to continue their practices of local administration and scoring of ATB tests. Another commenter felt that the institutional accountability section was too lenient, and suggested strengthening the language so that students would not be liable for repayment of fraudulently disbursed funds unless the student knowingly caused the erroneous determination.

Discussion: As indicated earlier, the Secretary has developed a regulatory scheme that eliminates institutions from test administration. In return, the Secretary will not make institutions financially responsible if an institution awards Title IV, HEA Program funds to a student who presents evidence that he or she passed an approved test, if the institution does not interfere with the independence of the testing process. Therefore, the Secretary strongly disagrees with the commenters' suggestion that an institution should be able to administer and score a test.

Changes: None.

Section 668.156 Approved State Process (Section 668.155 in NPRM)

Comments: All commenters from community colleges and several other commenters objected to the 95% ''success rate'' criterion as both arbitrary and too high and suggested that the Secretary use an 85% ''success rate'' as an alternative. Some commenters added that this requirement does not reflect the statutory mandate that the judgment of success take into account the diversity of the populations served by participating institutions. Nearly all commenters from community colleges requested consistency of calculation of ''success rate'' with that of the Student Right-to-Know Act. A few commenters also interpreted the ''State process'' provisions as excluding students at for-profit institutions. One commenter pointed out that the data required for such a calculation were not immediately available, and that State agencies submitting applications for approval of a ''State process'' should be allowed three years to assemble the data necessary to support their case.

Discussion: In the NPRM provisions governing the ''State process'' alternative to ATB testing, the Secretary proposed that the ''success rate'' for students without a high school diploma or its equivalent must, in effect, be equal to the success rate for students who possess a high school diploma. ''Success'' was defined as the sum of program completion and continued enrollment, although this definition was not explicit in including successful transfers in the category of continued enrollment. The 95% rate was chosen since it represents an equivalency minus a theoretical standard error of measurement. The Secretary wishes to make sure that institutions participating in a State process are truly serious and not casual in their execution of responsibilities to ATB students. If a special State process for students without high school diplomas is truly effective, the success rate of the students it services should at least equal the success rate of students with high school diplomas who did not receive the special services under the process. To account for variances in the measurement of this outcome, the Secretary chose a standard rule of chance that 1 out of 20 results might be attributable to faulty measurement. One out of 20 is 5%. An equivalency minus 5% is 95%.

The commenters who objected to the 95 percent rate claimed that such a rate was too high and arbitrary and suggested that the rate be reduced to 85%. However, those commenters provided no justification for that lower percentage.

The Secretary disagrees with the commenters who contended that the regulation does not take into account the diversity of the population served by institutions included in the State process. The regulations give States maximum flexibility to design their processes under which States are free to choose how to respond to the needs of the diverse group of students served by the process. The Secretary measures whether the process is successful in satisfying the needs of these students by evaluating whether the success rate of these students, and all the others in the State process, are equal to the success rate of high school graduates.

As for the calculation of the ''success rate'' in terms similar to those required under the Student Right-to-Know Act, the Secretary proposed a simple ''success rate'' to avoid the complexities necessitated by implementing that Act.

The Secretary is not requiring any condition or limitation with regard to the type of institutions that may or must participate in a State process. Therefore, the type of institutions that may or must participate will be determined by the State.

Finally, the Secretary believes that a State does not need three years to collect data to support the approval of its State process. The Secretary believes that when this regulation goes into effect on July 1, 1996, the States will have had adequate lead-time to assemble data to support the approval of their State processes. States may, of course, wait a longer period of time before applying to the Secretary for approval of their State process.

Changes: The Secretary amends § 668.157(h)(1) to provide that the transfer of a student who remains enrolled in another institution at the end of that award year can be included in the ''success rate'' for the institution from which the student transferred.

Executive Order 12866

These regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering this program effectively and efficiently. Burdens specifically associated with information collection requirements, if any, are identified and explained

elsewhere in this preamble under the heading

Paperwork Reduction Act of 1995

In assessing the potential costs and benefits—both quantitative and qualitative—of these regulations, the Secretary has determined that the benefits of the regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

The potential costs and benefits of these final regulations are discussed elsewhere in this preamble under the following heading: *Analysis of Comments and Changes.*

Paperwork Reduction Act of 1995

Sections 668.143, 668.144, 668.145, 668.146, 668.147, 668.148, 668.149, 668.150, 668.151, 668.152, 668.153, and 668,155 contain information collection requirements.

Collection of information: Student Assistance General Provisions—

These regulations contain records that would affect test publishers, postsecondary institutions, and students that do not have high school diplomas or recognized equivalents and that wish to apply for Title IV, HEA programs.

The collection activity associated with the State Process is incorporated in various sections throughout these final regulations. All other burden associated with the maintenance of records of the student's ability-to-benefit is already cleared under the individual programs of Federal financial assistance for which these students may be applying.

Institutions are to collect this information annually. An estimate of the total annual reporting and recordkeeping burden that will result from the collection of the information is 0.5 hours per response for 158,180 respondents, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The total annual recordkeeping and reporting burden equals 79,090 hours.

The Department considers comments by the public on these proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have a practical use;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

The Department request comments concerning the collection of information contained in these final regulations by January 30, 1996.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to Patrick Sherrill, U.S. Department of Education, 600 Independence Avenue, S.W., Room 5624, ROB–3, Washington, D.C. 20202.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs-education, Incorporation by reference, Loan programs-education, Reporting and recordkeeping requirements, Student aid.

(Catalog of Federal Domestic Assistance Number: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Family Educational Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 Federal State Student Incentive Grant Program.)

Dated: November 24, 1995.

Richard W. Riley,

Secretary of Education.

The Secretary amends Part 668 of Title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

1. The authority citation for Part 668 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099c, and 1141, unless otherwise noted.

2. Part 668 is amended by adding a new Subpart J to read as follows:

Subpart J—Approval of Independently Administered Tests; Specification of Passing Score; Approval of State Process

Sec.

668.141 Scope.
668.142 Special definitions.
668.143 Approval of State tests or assessments.
668.144 Application for test approval.
668.145 Test approval procedures.
668.146 Criteria for approving tests.
668.147 Passing score.
668.148 Additional criteria for the approval of certain tests.
668.149 Special provisions for the approval of assessment procedures for special populations for whom no tests are reasonably available.
668.150 Agreement between the Secretary and a test publisher.
668.151 Administration of tests.
668.152 Administration of tests by assessment centers.
668.153 Administration of tests for students whose native language is not English or for persons with disabilities.
668.154 Institutional accountability.
668.155 Transitional rule for the 1996–97 award year.
668.156 Approved State process.

Subpart J—Approval of Independently Administered Tests; Specification of Passing Score; Approval of State Process

§ 668.141 Scope.

(a) This subpart sets forth the provisions under which a student who has neither a high school diploma nor its recognized equivalent may become eligible to receive Title IV, HEA program funds by—

(1) Achieving a passing score, specified by the Secretary, on an independently administered test approved by the Secretary under this subpart; or

(2) Being enrolled in an eligible institution that participates in a State process approved by the Secretary under this subpart.

(b) Under this subpart, the Secretary sets forth—

(1) The procedures and criteria the Secretary uses to approve tests;

(2) The basis on which the Secretary specifies a passing score on each approved test;

(3) The procedures and conditions under which the Secretary determines that an approved test is independently administered; and

(4) The procedures and conditions under which the Secretary determines that a State process demonstrates that students in the process have the ability to benefit from the education and training being offered to them.

(Authority: 20 U.S.C. 1091(d))

§ 668.142 Special definitions.

The following definitions apply to this subpart:

Assessment center: A center that—

(1) Is located at an eligible institution that provides two-year or four-year degrees, or qualifies as an eligible public vocational institution, *i.e.* a ''postsecondary vocational institution;''

(2) Is responsible for gathering and evaluating information about individual students for multiple purposes, including appropriate course placement;

(3) Is independent of the admissions and financial aid processes at the institution at which it is located;

(4) Is staffed by professionally trained personnel; and

(5) Does not have as its primary purpose the administration of ability-to-benefit tests.

Computer-based test: A test taken by a student on a computer and scored by a computer.

Disabled student: A student 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.

General learned abilities: Cognitive operations, such as deductive reasoning, reading comprehension, or translation from graphic to numerical representation, that may be learned in both school and non-school environments.

Non-native speaker of English: A person whose first language is not English and who is not fluent in English.

Secondary school level: As applied to ''content,'' ''curricula,'' or ''basic verbal and quantitative skills,'' refers to basic knowledge or skills generally learned in the 9th through 12th grades in United States secondary schools.

Test administrator: An individual who may give tests under this subpart.

Test item: A question on a test.

Test publisher: An individual, organization, or agency that owns a registered copyright of a test, or is licensed by the copyright holder to sell or distribute a test.

(Authority: 20 U.S.C. 1091(d))

§ 668.143. Approval of State tests or assessments.

(a) The Secretary approves tests or other assessments submitted by a State that the State uses to measure a student's skills and abilities for the purpose of determining whether the student has the skills and abilities the State expects of a high school graduate in that State.

(b) The Secretary approves passing scores or other methods of evaluation established by the State for each test or assessment described in paragraph (a) of this section.

(c) If the Secretary approves a State's tests and assessments and the passing scores on those tests and assessments under paragraphs (a) and (b) of this section, that test or assessment may be used, for purposes of section 484(d) of the HEA, only for students who attend eligible institutions located in that State.

(d) If a State wishes to have the Secretary approve its tests or assessments under this section, the State shall—

(1) Submit to the Secretary those tests and assessments, its passing scores on those tests and assessments, and the educational standards those tests and assessments measure at such time and in such manner as the Secretary may prescribe;

(2) Provide the Secretary with an explanation of how the tests, assessments, and passing scores are appropriate in light of the State's educational standards; and

(3) Provide the Secretary with an assurance that the tests and assessments will be administered in an independent, fair, and secure manner.

(Authority: 20 U.S.C. 1091(d))

§ 668.144 Application for test approval.

Except as provided in § 668.143—

(a) The Secretary only reviews tests under this subpart that are submitted by the publisher of that test;

(b) A test publisher that wishes to have its test approved by the Secretary under this subpart must submit an application to the Secretary at such time and in such manner as the Secretary may prescribe. The application shall contain all the information necessary for the Secretary to approve the test under this subpart, including but not limited to, the information contained in this section; and

(c) A test publisher shall include with its application—

(1) A summary of the precise editions, forms, levels, and (if applicable) sub-tests and abbreviated tests for which approval is being sought;

(2) The name, address, and telephone number of a contact person to whom the Secretary may address inquiries;

(3) Each edition and form of the test for which the publisher requests approval;

(4) The distribution of test scores for each edition, form, level, sub-test, or partial battery, for which approval is sought, that allows the Secretary to prescribe the passing score for each test in accordance with § 668.147;

(5) Documentation of test development, including a history of the test's use;

(6) Norming data and other evidence used in determining the distribution of test scores;

(7) Material that defines the content domains addressed by the test;

(8) For tests first published five years or more before the date submitted to the Secretary for review and approval, documentation of periodic reviews of the content and specifications of the test to ensure that the test continues to reflect secondary school level verbal and quantitative skills;

(9) If a test has been revised from the most recent edition approved by the Secretary, an analysis of the revisions, including the reasons for the revisions, the implications of the revisions for the comparability of scores on the current test to scores on the previous test, and data from validity studies of the test undertaken subsequent to the revisions;

(10) A description of the manner in which test-taking time was determined in relation to the content representativeness requirements in § 668.146(b)(2), and an analysis of the effects of time on performance;

(11) A technical manual that includes—

(i) An explanation of the methodology and procedures for measuring the reliability of the test;

(ii) Evidence that different forms of the test, including, if applicable, short forms, are comparable in reliability;

(iii) Other evidence demonstrating that the test permits consistent assessment of individual skill and ability;

(iv) Evidence that the test was normed using—

(A) Groups that were of sufficient size to produce defensible standard errors of the mean and were not disproportionately composed of any race or gender; and

(B) A contemporary population representative of persons who are beyond the usual age of compulsory school attendance in the United States;

(v) Documentation of the level of difficulty of the test;

(vi) Unambiguous scales and scale values so that standard errors of measurement can be used to determine statistically significant differences in performance; and

(vii) Additional guidance on the interpretation of scores resulting from any modifications of the tests for persons with documented disabilities.

(12) The manual provided to test administrators containing procedures and instructions for test security and administration, and the forwarding of tests to the test publisher;

(13) An analysis of the item-content of each edition, form, level, and (if applicable) sub-test to demonstrate compliance with the required secondary school level criterion specified in § 668.146(b);

(14) For performance-based tests or tests containing performance-based sections, a description of the training or certification required of test administrators and scorers by the test publisher;

(15) A description of retesting procedures and the analysis upon which the criteria for retesting are based; and

(16) Other evidence establishing the test's compliance with the criteria for approval of tests as provided in § 668.146.

(Authority: 20 U.S.C. 1091(d))

§ 668.145 Test approval procedures.

Except as provided in § 668.143—

(a)(1) When the Secretary receives a complete application from a test publisher, the Secretary selects experts in the field of educational testing and assessment, who possess appropriate advanced degrees and experience in test development or psychometric research, to determine whether the test meets the requirements for test approval contained in §§ 668.146, 668.147, 668.148, or 668.149, as appropriate, and to advise the Secretary of their determinations;

(2) If the test involves a language other than English, the Secretary selects at least one individual described in paragraph (a)(1) of this section who is fluent in the language in which the test is written to advise the Secretary on whether the test meets the additional criteria, provisions, and conditions for test approval contained in §§ 668.148 and 668.149;

(b) The Secretary determines whether the test publisher's test meets the criteria and requirements for approval after taking the advice of the experts into account;

(c)(1) If the Secretary determines that a test satisfies the criteria and requirements for test approval, the Secretary notifies the test publisher of the Secretary's decision, and publishes the name of the test and the passing scores in the Federal Register.

(2) If the Secretary determines that a test does not satisfy the criteria and requirements for test approval, the Secretary notifies the test publisher of the Secretary's decision, and the reasons why the test did not meet those criteria and requirements.

(3) The test publisher may request that the Secretary reevaluate the Secretary's decision. Such a request must be accompanied by—

(i) Documentation and information that address the reasons for the non-approval of the test; and

(ii) An analysis of why the information and documentation submitted meet the criteria and requirements for test approval notwithstanding the Secretary's earlier decision to the contrary.

(d)(1) The Secretary approves a test for a period not to exceed five years from the date of the Secretary's written notice to the test publisher.

(2) The Secretary extends the approval period of a test to include the period of review if the test publisher re-submits the test for review and approval under § 668.144 at least six months before the date on which the test approval is scheduled to expire;

(e) The approval of a test may be withdrawn if the Secretary determines that the publisher violated any terms of the agreement described in § 668.150, or that the information the publisher submitted as a basis for approval of the test was inaccurate;

(f) If the Secretary revokes approval of a previously approved test, the Secretary publishes a notice of that revocation in the Federal Register. The revocation becomes effective 120 days from the date the notice of revocation is published in the Federal Register; and

(g) For test batteries that contain multiple sub-tests measuring content domains other than verbal and quantitative domains, the Secretary reviews only those subtests covering verbal and quantitative domains.

(Authority: 20 U.S.C. 1091(d))

§ 668.146 Criteria for approving tests.

Except as provided in § 668.143—

(a) Except as provided in § 668.148, the Secretary approves a test under this subpart if the test meets the criteria set forth in paragraph (b) of this section and the test publisher satisfies the requirements set forth in paragraph (c) of this section;

(b) To be approved under this subpart, a test shall—

(1) Assess secondary school level basic verbal and quantitative skills and general learned abilities;

(2) Sample the major content domains of secondary school level verbal and quantitative skills with sufficient numbers of questions to—

(i) Adequately represent each domain; and

(ii) Permit meaningful analyses of item-level performance by students who are representative of the contemporary population beyond the age of compulsory school attendance and have earned a high school diploma;

(3) Require appropriate test-taking time to permit adequate sampling of the major content domains described in paragraph (a)(2) of this section;

(4) Have all forms (including short forms) comparable in reliability;

(5) If the test is revised, have new scales, scale values, and scores that are demonstrably comparable to the old scales, scale values, and scores; and

(6) Meet all primary and applicable conditional and secondary standards for test construction provided in the 1985 edition of the *Standards for Educational and Psychological Testing*, with amendments dated June 2, 1989, prepared by a joint committee of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education incorporated by reference in this section. Incorporation by reference of this document 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, Office of Postsecondary Education, Room 4318, ROB–3, 600 Independence Avenue, S.W., Washington, D.C. 20202 and at the Office of the Federal Register, 800 North Capitol Street, N.W., Suite 700, Washington, DC. The standards may be obtained from the American Psychological Association, Inc., 750 First Street, N.W., Washington, DC 20026.

(7) Have publisher's guidelines for retesting, including time between test-taking, be based on empirical analyses that are part of the studies of test reliability; and

(c) In order for a test to be approved under this subpart, a test publisher shall—

(1) Include in the test booklet or package—

(i) Clear, specific, and complete instructions for test administration, including information for test takers on

the purpose, timing, and scoring of the test; and

(ii) Sample questions representative of the content and average difficulty of the test;

(2) Have two or more secure, equated, alternate forms of the test;

(3) Except as provided in §§ 668.148 and 668.149, provide tables of distributions of test scores which clearly indicate the mean score and standard deviation for high school graduates who have taken the test within three years prior to the date on that the test is submitted to the Secretary for approval under § 668.144;

(4) Norm the test with—

(i) Groups that were of sufficient size to produce defensible standard errors of the mean and were not disproportionately composed of any race or gender; and

(ii) A contemporary population representative of persons who are beyond the usual age of compulsory school attendance in the United States; and

(5) If test batteries include sub-tests assessing different verbal and/or quantitative skills, a distribution of test scores as described in paragraph (c)(3) of this section that allows the Secretary to prescribe either—

(i) A passing score for each sub-test; or

(ii) One composite passing score for verbal skills and one composite passing score for quantitative skills.

(Authority: 20 U.S.C. 1091(d))

§ 668.147 Passing scores.

Except as provided in §§ 668.143, 668.148 and 668.149, to demonstrate that a test taker has the ability to benefit from the education and training offered, the Secretary specifies that the passing score on each approved test is one standard deviation below the mean for students with high school diplomas who have taken the test within three years before the date on which the test is submitted to the Secretary for approval.

(Authority; 20 U.S.C. 1091(d))

§ 668.148 Additional criteria for the approval of certain tests.

Except as provided in § 668.143—

(a) In addition to satisfying the criteria in § 668.146, to be approved by the Secretary, a test or a test publisher must meet the following criteria, if applicable:

(1) In the case of a test that is performance-based, or includes performance-based sections, for measuring writing, speaking, listening, or quantitative problem-solving skills, the test publisher must provide—

(i) A minimum of four parallel forms of the test; and

(ii) A description of the training provided to test administrators, and the criteria under which trained individuals are certified to administer and score the test.

(2) In the case of a test developed for a non-native speaker of English who is enrolled in a program that is taught in his or her native language, the test must be—

(i) Linguistically accurate and culturally sensitive to the population for which the test is designed, regardless of the language in which the test is written;

(ii) Supported by documentation detailing the development of normative data;

(iii) If translated from an English version, supported by documentation of procedures to determine its reliability and validity with reference to the population for which the translated test was designed;

(iv) Developed in accordance with guidelines provided in the 1985 edition of the ''Testing Linguistic Minorities'' section of the *Standards for Educational and Psychological Testing,* with amendments dated June 2, 1989, prepared by a joint committee of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education incorporated by reference in this section. Incorporation by reference of this document 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, Office of Postsecondary Education, Room 4318, ROB–3, 600 Independence Avenue, S.W., Washington, D.C. 20202 and at the Office of the Federal Register, 800 North Capitol Street, N.W., Suite 700, Washington, DC. The standards may be obtained from the American Psychological Association, Inc., 750 First Street, N.W., Washington, DC 20026; and

(v)(A) If the test is in Spanish, accompanied by a distribution of test scores that clearly indicates the mean score and standard deviation for Spanish-speaking students with high school diplomas who have taken the test within 5 years before the date on which the test is submitted to the Secretary for approval; and

(B) If the test is in a language other than Spanish, accompanied by a recommendation for a provisional passing score based upon performance of a sample of test takers representative of the intended population and large enough to produce stable norms.

(3) In the case of a test that is modified for use for persons with disabilities, the test publisher must—

(i) Follow guidelines provided in the ''Testing People Who Have Handicapping Conditions'' section of the *Standards for Educational and Psychological Testing;*

(ii) Provide documentation of the appropriateness and feasibility of the modifications relevant to test performance; and

(iii) Recommend passing score(s) based on the previous performance of test-takers.

(4) In the case of a computer-based test, the test publisher must—

(i) Provide documentation to the Secretary that the test complies with the basic principles of test construction and standards of reliability and validity as promulgated in the *Standards for Educational and Psychological Testing,* as well as specific guidelines set forth in the American Psychological Association's *Guidelines for Computer-based Tests and Interpretations* (1986);

(ii) Provide test administrators with instructions for familiarizing test takers with computer hardware prior to test-taking; and

(iii) Provide two or more parallel, equated forms of the test, or, if parallel forms are generated from an item pool, provide documentation of the methods of item selection for alternate forms; and

(b) If a test is designed solely to measure the English language competence of non-native speakers of English—

(1) The test must meet the criteria set forth in § 668.146(b)(6), and § 668.146 (c)(1), (c)(2), and (c)(4); and

(2) The test publisher must recommend a passing score based on the mean score of test takers beyond the age of compulsory school attendance who entered U.S. high school equivalency programs, formal training programs, or bilingual vocational programs.

(Authority: 20 U.S.C. 1091(d))

§ 668.149 Special provisions for the approval of assessment procedures for special populations for whom no tests are reasonably available.

If no test is reasonably available for persons with disabilities or students whose native language is not English and who are not fluent in English, so that no test can be approved under §§ 668.146 or 668.148 for these students, the following procedures apply:

(a) *Persons with disabilities.* (1) The Secretary considers a modified test or testing procedure, or instrument that

has been scientifically developed specifically for the purpose of evaluating the ability to benefit from postsecondary training or education of disabled students to be an approved test for purposes of this subpart provided that the testing procedure or instrument measures both basic verbal and quantitative skills at the secondary school level.

(2) The Secretary considers the passing scores for these testing procedures or instruments to be those recommended by the test developer, provided that the test administrator—

(i) Uses those procedures or instruments;

(ii) Maintains appropriate documentation, including a description of the procedures or instruments, their content domains, technical properties, and scoring procedures; and

(iii) Observes recommended passing scores.

(b) *Students whose native language is not English.* The Secretary considers a test in a student's native language for a student whose native language is not English to be an approved test under this subpart if—

(1) The Secretary has not approved any test in that native language;

(2) The test was not previously rejected for approval by the Secretary;

(3) The test measures both basic verbal and quantitative skills at the secondary school level; and

(4) The passing scores and the methods for determining the passing scores are fully documented.

(Authority: 20 U.S.C. 1091(d))

§ 668.150 Agreement between the Secretary and a test publisher.

(a) If the Secretary approves a test under this subpart, the test publisher must enter into an agreement with the Secretary that contains the provisions set forth in paragraph (b) of this section before an institution may use the test to determine a student's eligibility for Title IV, HEA program funds.

(b) The agreement between a test publisher and the Secretary provides that the test publisher shall—

(1) Allow only test administrators that it certifies to give its test;

(2) Certify test administrators who have—

(i) The necessary training, knowledge, and skill to test students in accordance with the test publisher's testing requirements; and

(ii) The ability and facilities to keep its test secure against disclosure or release;

(3) Decertify a test administrator for a period that coincides with the period for which the publisher's test is approved if the test publisher finds that the test administrator—

(i) Has repeatedly failed to give its test in accordance with the publisher's instructions;

(ii) Has not kept the test secure;

(iii) Has compromised the integrity of the testing process; or

(iv) Has given the test in violation of the provisions contained in § 668.151;

(4) Score a test answer sheet that it receives from a test administrator;

(5) If a computer-based test, provide the test administrator with software that will:

(i) Immediately generate a score report for each test taker;

(ii) Allow the test administrator to send to the test publisher a secure write-protected diskette copy of the test taker's performance on each test item and the test taker's test scores; and

(iii) Prohibit any changes in test taker responses or test scores.

(6) Promptly send to the student and the institution the student indicated he or she is attending or scheduled to attend a notice stating the student's score for the test and whether or not the student passed the test;

(7) Keep for a period of three years each test answer sheet or electronic record forwarded for scoring and all other documents forwarded by the test administrator with regard to the test;

(8) Three years after the date the Secretary approves the test and for each subsequent three-year period, analyze the test scores of students to determine whether the test scores produce any irregular pattern that raises an inference that the tests were not being properly administered, and provide the Secretary with a copy of this analysis; and

(9) Upon request, give the Secretary, a guaranty agency, or an accrediting agency access to test records or other documents related to an audit, investigation, or program review of the institution, test publisher, or test administrator.

(c)(1) The Secretary may terminate an agreement with a test publisher if the test publisher fails to carry out the terms of the agreement described in paragraph (b) of this section.

(2) Before terminating the agreement, the Secretary gives the test publisher the opportunity to show that it has not failed to carry out the terms of its agreement.

(3) If the Secretary terminates an agreement with a test publisher under this section, the Secretary notifies institutions through publication in the Federal Register when they may no longer use the publisher's test(s) for purposes of determining a student's eligibility for Title IV, HEA program funds.

(Authority: 20 U.S.C. 1091(d))

§ 668.151 Administration of tests.

(a)(1) To establish a student's eligibility for Title IV, HEA program funds under this subpart, if a student has not passed an approved state test, under § 668.143, an institution must select a certified test administrator to give an approved test.

(2) An institution may use the results of an approved test to determine a student's eligibility to receive Title IV, HEA programs funds if the test was independently administered and properly administered.

(b) The Secretary considers that a test is independently administered if the test is—

(1) Given at an assessment center by a test administrator who is an employee of the center; or

(2) Given by a test administrator who—

(i) Has no current or prior financial or ownership interest in the institution, its affiliates, or its parent corporation, other than the interest obtained through its agreement to administer the test, and has no controlling interest in any other educational institution;

(ii) Is not a current or former employee of or consultant to the institution, its affiliates, or its parent corporation, a person in control of another institution, or a member of the family of any of these individuals;

(iii) Is not a current or former member of the board of directors, a current or former employee of or a consultant to a member of the board of directors, chief executive officer, chief financial officer of the institution or its parent corporation or at any other institution, or a member of the family of any of the above individuals; and

(iv) Is not a current or former student of the institution.

(c) The Secretary considers that a test is not independently administered if an institution—

(1) Compromises test security or testing procedures;

(2) Pays a test administrator a bonus, commission, or any other incentive based upon the test scores or pass rates of its students who take the test;

(3) Otherwise interferes with the test administrator's independence or test administration.

(d) The Secretary considers that a test is properly administered if the test administrator—

(1) Is certified by the test publisher to give the publisher's test;

(2) Administers the test in accordance with instructions provided by the test publisher, and in a manner that ensures the integrity and security of the test;

(3) Makes the test available only to a test-taker, and then only during a regularly scheduled test;

(4) Secures the test against disclosure or release;

(5) Submits the completed test to the test publisher within two business days after test administration in accordance with the test publisher's instructions; and

(6) Upon request, gives the Secretary, guaranty agency, licensing agency, accrediting agency, and law enforcement agencies access to test records or other documents related to an audit, investigation, or program review of the institution, or test publisher.

(e) Except as provided in § 668.152, a certified test administrator may not score a test.

(f) A student who fails to pass a test approved under this subpart may not retake the same form of the test for the period prescribed by the test's publisher.

(g) An institution shall maintain a record for each student who took a test under this subpart of—

(1) The test taken by the student;

(2) The date of the test; and

(3) The student's scores as reported by the test publisher, assessment center, or State.

(Authority: U.S.C. 1091(d))

§ 668.152 Administration of tests by assessment centers.

(a)(1) If a test is given by an assessment center, the assessment center shall properly administer the test as described in § 668.151(d).

(b)(1) Unless an agreement between a test publisher and an assessment center indicates otherwise, an assessment center scores the tests it gives and promptly notifies the institution and the student of the student's score on the test and whether the student passed the test.

(2) If the assessment center scores the test, it must provide annually to the test publisher—

(i) All copies of completed tests; or

(ii) A report listing all test-takers' scores and institutions to which the scores were sent.

(Authority: U.S.C. 1091(d))

§ 668.153 Administration of tests for students whose native language is not English or for persons with disabilities.

Except as provided in § 668.143—

(a) *Students whose native language is not English.* For a student whose native language is not English and who is not fluent in English, the institution shall use the following tests, as applicable:

(1) If the student is enrolled in a program conducted entirely in his or her native language, the student must take a test approved under §§ 668.146 and 668.148(a)(2), or 668.149(b).

(2) If the student is enrolled in a program that is taught in English with an ESL component, and the student is enrolled in that program and the ESL component, the student must take either an ESL test approved under § 668.148(b), or a test in the student's native language approved under §§ 668.146, 668.148 or 668.149.

(3) If the student is enrolled in a program that is taught in English without an ESL component, or the student does not enroll in the ESL component if the institution offers such a component, the student must take a test in English approved under § 668.146.

(4) If the student enrolls in an ESL program, the student must take an ESL test approved under § 668.148(b); and

(b) *Persons with disabilities.* (1) An institution shall use a test described in § 668.148(a)(3) or 668.149(a) for a student with a documented impairment who has neither a high school diploma nor its equivalent and who is applying for Title IV, HEA program funds.

(2) The test must reflect the student's skills and general learned abilities rather than reflect the student's impairment.

(3) The institution shall document that a student is disabled and unable to be evaluated by the use of a conventional test from the list of tests approved by the Secretary.

(4) Documentation of a student's impairment may be satisfied by—

(i) A written determination, including a diagnosis and recommended testing accommodations, by a licensed psychologist or medical physician; or

(ii) A record of such a determination by an elementary or secondary school or a vocational rehabilitation agency, including a diagnosis and recommended testing accommodations.

(Authority: U.S.C. 1091(d))

§ 668.154 Institutional accountability.

An institution shall be liable for the Title IV, HEA program funds disbursed to a student whose eligibility is determined under this subpart only if the institution—

(a) Used a test administrator who was not independent of the institution at the time the test was given;

(b) Compromises the testing process in any way; or

(c) Is unable to document that the student received a passing score on an approved test.

(Authority: U.S.C. 1091(d))

§ 668.155 Transitional rule for the 1996–97 award year.

(a) Notwithstanding any other provision of this part, an institution may continue to base an eligibility determination under section 484(d) of the HEA for a student on a test that was an approved test as of June 30, 1996, and the passing score on that test, until 60 days after the Secretary publishes in the Federal Register the name of an approved test and the passing score on that test that is appropriate for that student.

(b) If an institution properly based a student's eligibility determination for purposes of section 484(d) of the HEA on a test and passing score that was in effect on June 30, 1996, the institution does not have to redetermine the student's eligibility based upon a test and passing score that was approved under §§ 668.143 through 668.149.

(Authority: U.S.C. 1091(d))

§ 668.156 Approved State process.

(a)(1) A State that wishes the Secretary to consider its State process as an alternative to achieving a passing score on an approved, independently administered test for the purpose of determining a student's eligibility for Title IV, HEA program funds must apply to the Secretary for approval of that process.

(2) To be an approved State process, the State process does not have to include all the institutions located in that State, but must indicate which institutions are included.

(b) The Secretary approves a State's process if—

(1) The State administering the process can demonstrate that the students it admits under that process without a high school diploma or its equivalent, who enroll in participating institutions have a success rate as determined under paragraph (h) of this section that is within 95 percent of the success rate of students with high school diplomas; and

(2) The State's process satisfies the requirements contained in paragraphs (c) and (d) of this section.

(c) A State process must require institutions participating in the process to provide each student they admit without a high school diploma or its recognized equivalent with the following services—

(1) Orientation regarding the institution's academic standards and requirements, and student rights;

(2) Assessment of each student's existing capabilities through means other than a single standardized test;

(3) Tutoring in basic verbal and quantitative skills, if appropriate;

(4) Assistance in developing educational goals;

(5) Counseling, including counseling regarding the appropriate class level for that student given the student's individual's capabilities; and

(6) Follow-up by teachers and counselors regarding the student's classroom performance and satisfactory progress toward program completion.

(d) A State process must—

(1) Monitor on an annual basis each participating institution's compliance with the requirements and standards contained in the State's process;

(2) Require corrective action if an institution is found to be in noncompliance with the State process requirements; and

(3) Terminate an institution from the State process if the institution refuses or fails to comply with the State process requirements.

(e)(1) The Secretary responds to a State's request for approval of its State's process within six months after the Secretary's receipt of that request. If the Secretary does not respond by the end of six months, the State's process becomes effective.

(2) An approved State process becomes effective for purposes of determining student eligibility for Title IV, HEA program funds under this subpart six months after the date on which the State submits the process to the Secretary for approval, if the Secretary approves, or does not disapprove, the process during that six month period.

(f) The Secretary approves a State process for a period not to exceed five years.

(g)(1) The Secretary withdraws approval of a State process if the Secretary determines that the State process violated any terms of this section or that the information that the State submitted as a basis for approval of the State process was inaccurate.

(2) The Secretary provides a State with the opportunity to contest a finding that the State process violated any terms of this section or that the information that the State submitted as a basis for approval of the State process was inaccurate.

(h) The State shall calculate the success rates as referenced in paragraph (b) of this section by—

(1) Determining the number of students with high school diplomas who, during the applicable award year described in paragraph (i) of this section, enrolled in participating institutions and—

(i) Successfully completed education or training programs;

(ii) Remained enrolled in education or training programs at the end of that award year; or

(iii) Successfully transferred to and remained enrolled in another institution at the end of that award year;

(2) Determining the number of students with high school diplomas who enrolled in education or training programs in participating institutions during that award year;

(3) Determining the number of students calculated in paragraph (h)(2) of this section who remained enrolled after subtracting the number of students who subsequently withdrew or were expelled from participating institutions and received a 100 percent refund of their tuition under the institutions' refund policies;

(4) Dividing the number of students determined in paragraph (h)(1) of this section by the number of students determined in paragraph (h)(3) of this section;

(5) Making the calculations described in paragraphs (h)(1) through (h)(4) of this section for students without a high school diploma or its recognized equivalent who enrolled in participating institutions.

(i) For purposes of paragraph (h) of this section, the applicable award year is the latest complete award year for which information is available that immediately precedes the date on which the State requests the Secretary to approve its State process, except that the award year selected must be one of the latest two completed award years preceding that application date.

(Authority: 20 U.S.C. 1091(d))

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